Bears Ears National Monument: A Monument for the Locals
An Interdisciplinary Evaluation of Tribal Involvement in Public Land Planning

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Abstract

Bears Ears National Monument has been at the center of a debate on how federal public lands should be managed since 2016 when President Obama designated the area as a national monument. However, tribes in the Southwest had worked to protect the Bears Ears area for years before the area was designated. Tribes had attempted to participate in the Utah Public Lands Initiative, an initiative to provide a local management proposal for federal lands located in Southeast Utah, but they were excluded from the process. Following the designation, non-indigenous locals vocally protested Bears Ears National Monument. Based on many the non-indigenous locals’ concern over the designation of the Bears Ears National Monument, President Trump, in December of 2017 split Bears Ears National Monument in two significantly smaller monuments. As a result, the five tribes who campaigned for the Monument’s creation, along with other litigants, challenged President Trump’s ability to reduce the size of the Monument. This thesis uses the conflict surrounding Bears Ears National Monument as a case study to take an interdisciplinary examination of local stakeholders interests in public land management and show the inclusion of tribes in federal public land management will not mean the exclusion of other stakeholders.
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Chapter 1: Introduction

A drive along Utah Highway 261 on top of Cedar Mesa in southeastern Utah can be deceiving.\textsuperscript{1} To a traveler not in the know, the area might seem desolate, arid, and isolated, but to locals and the well-informed, the landscape is anything but. The canyons surrounding Highway 261 are winding and brimming with life. There are dramatic geological features, desert flora, wildlife and many archeological sites. This landscape is known as the Bears Ears area. To the indigenous people of the Four Corners area the dramatic landscape has deep cultural, historical and spiritual meaning.\textsuperscript{2} To the non-indigenous locals, whose families have ranched in southeastern Utah for generations, the landscape is not only a hidden secret but the source of their livelihood.\textsuperscript{3} And to the outdoor enthusiast, the area offers unapparelled opportunities to explore.\textsuperscript{4} Additionally, those in the natural resource industry view the area as an untapped resource for mineral extraction.\textsuperscript{5} All of these stakeholders value the landscape and feel they have a legitimate claim in how it is used.

Over the past several years, the management of the Bears Ears area has been surrounded in conflict.\textsuperscript{6} For years, tribes in the Southwest, in particular the Navajo Nation, the Hopi, the Zuni, the Northern Ute Tribe and the Ute Mountain Ute Tribe, have been concerned about the impacts of general land use on culturally sensitive sites in the area.\textsuperscript{7} Threats the tribes have identified to the area included: impacts from an increase in uneducated visitors to the area, unmonitored off-road vehicle use, increase in mining an energy development in the area, and looting and grave

\textsuperscript{1} Morgan Sjogren, The Best Bears Ears National Monument Hikes (Colorado Mountain Club Pack Guide eds., 2018).


\textsuperscript{3} \textit{Id.}

\textsuperscript{4} Sjogren, \textit{supra} note 1.

\textsuperscript{5} Bears Ears Tribal Coalition, \textit{Threats}, http://bearsearscoalition.org/threats.


\textsuperscript{7} Bears Ears Tribal Coalition, \textit{supra} note 5.
robbing. On the other hand, non-indigenous locals have felt the Bureau of Land Management (“BLM”) has prioritized conservation and protection of cultural sites over multiple land uses, which even led to a protest ATV ride through culturally sensitive sites. The wide range of concerns from stakeholders at seemingly opposite ends of the spectrum has created many challenges for the BLM and the United States Forest Service, the agencies responsible for managing these lands. Bears Ears National Monument illustrates these tensions.

In 2016, at the end of his presidency, President Barak Obama designated the Bears Ears area as a national monument under the authority of the Antiquities Act. Prior to President Obama designation, five tribes across the Four Corners formed ‘The Bears Ears Inter-Tribal Coalition’ and ultimately recommended the designation of the Bears Ears National Monument and involvement of the tribes in its ongoing management. President Obama, acting upon the tribes recommendation, designated the Bears Ears National Monument, he concurrently created a tribal commission to guide the BLM in the management of the new monument. Leading up to, and following the designation, some members of the non-indigenous gateway community, and many people at a national level, expressed their outraged of the designation because they believed the designation was on overstep by the federal government. In response to the outcries of concern over the designation, the Trump Administration split Bears Ears National Monument into two smaller monuments, Shash Jáa and Indian Creek National Monuments, and decreased the overall

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8 Id.


11 Bears Ears Inter-Tribal Coalition, Who We Are, BEARS EARS INTER-TRIBAL COALITION (2019), https://bearsearscoalition.org/about-the-coalition.

12 Bears Ears Inter-Tribal Coalition, Tribal Statements of Support, BEARS EARS INTER-TRIBAL COALITION (2019), https://bearsearscoalition.org/about-the-coalition/tribal-statements-of-support/

acres of protected land by 85% and replaced the tribal commission with a local stakeholder commission.¹⁴

The Trump Administration actions of shrinking the Monument brings up many issues, including issues of tribal sovereignty and rights in the context of public land management. A member of the 23rd Navajo Nation Tribe Counsel spoke on the issue: “Bears Ears is a cultural landscape filled with sacred sites important to all of our tribal members. Wouldn’t it be better to work with us to help steward these lands for the benefit of all people instead of working to threaten our sovereignty by undermining this Monument?”¹⁵ Statements such as this one illustrates the tensions surrounding tribal rights and public land management, but they also illustrate the potential for collaboration between the federal government and tribes in managing the public lands so many are investee in.

All too often tribes have been pushed to the fringes of decision-making process that inherently effect their way of life. The purpose of this thesis is to illustrate that tribal involvement in federal public land management does not mean other stakeholders will be excluded. This thesis takes an interdisciplinary approach drawing from law, political ecology, history, and geography, to approach to examine the tension between the tribes of the Bears Ears Inter-Tribal Coalition, the State of Utah and the Federal Government to explain the conflict surrounding Bears Ears National Monument.

In Chapter 2, this thesis provides the historical legal background of American Indian law and public land law, which created the environment the Bears Ears conflict developed in. Chapter 3 provides detail of the events leading up to the Monument designation, the actual designation of the Monument, the Trump Administration’s reduction of the Monument, and the legal battle that followed. Chapter 4 draws from political ecology, history and geography to examine the non-indigenous locals’ ties to the Bears Ears area, the federal government’s role under both the Obama Administration and the Trump Administration in the Bears Ears conflict, and how the struggle to


¹⁵ Bears Ears Inter-Tribal Coalition, Tribal Leaders Express Dismay Over Zinke’s Remarks on Bears Ears, BEARS EARS INTER-TRIBAL COALITION (2017), https://bearsearscoalition.org/tribal-leaders-express-dismay-over-zinkes-remarks-on-bears-ears/.
protect the Bears Ears area has contributed to how tribes value the land. Chapter 5 concludes the thesis by discussing the federal governments’ ability to value and address tribal concern in federal public land management, without excluding other stakeholders. There I will discuss the role that the role interdisciplinary research can play to deconstruct the perception that tribal involvement in federal public land management, non-indigenous locals’ participation is not mutually exclusive.

In order to have an in-depth and productive conversation about this difficult topic, it is important to define the terms and concepts I will use throughout this thesis. First, it is important to understand why I have decided to use the phrase “the tribes”, instead of “indigenous populations” or “Native Americans” throughout this paper. Defining the term “the tribes” is a complex exercise given the turbulent history between tribes and the U.S. For many Native American communities the term “tribe” means “the people” and shows a cultural and community connection. However, the federal government’s definition of the term “tribe” refers to “a group of native people with whom the federal government has established some kind of political relationship or recognition.” It is important to understand the term “tribe” does not accurately describe the complexity and variety of indigenous political systems. However, given the nature native communities interact with both state governments and the federal government, and how native communities organized and represented themselves throughout the controversy surrounding Bears Ears National Monument, I use the term “the tribes” in accordance with the federal definition.

Next, it is important to address the terms “settlers” and “settler communities.” As I will explain in depth in Chapter 4, “settler colonialism” refers to the process by which the western U.S. was settled and the cultural implications of westward expansion. Thus, the terms “settlers” and “settler communities” do not only refer to the historical communities who “won the west”, but also refers to the communities all over the western U.S. who have made the landscape their home and

16 See COHEN’S HANDBOOK § 3.02

17 Id.

18 Id. (internal quotations omitted).

19 Id.

think of themselves as locals. I also use the term “non-indigenous locals” throughout this thesis to describe members of the local community in San Juan County who are not affiliated with the tribes and do not have tribal membership.

Often times it is tempting to always take an “objective” position when examining charged topics, however academic scholars, such as Juanita Sundberg, have advocated for students to situate themselves in their work. 21 Sundberg argues researchers lose credibility when they claim to be “unbiased observers” because this status can never truly be achieved and it ignores important power dynamics which inform the researchers questions and interpretations.22 She argues if researchers recognize the goal of “unbiased observer” is unattainable and situate their conclusions in their biases and experiences, their work and conclusions are more creditable and maybe more objective.23 Given the racial and cultural influence of this thesis, and my status as a non-indigenous person, it is important I situate this thesis in my biases and life experiences.

While this thesis will argue for the increase control of the Bears Ears area to be given to the tribes, my experience and status as a non-indigenous person, and even a member of the settler community, effect how I view this issue. I have had experiences which have made me more aware of the inequity tribal communities face, such as growing up in Southwest Colorado on the edge to two American Indian reservations and working in San Juan County, Utah during the summer of 2017 when locals in the area where campaigning to rescind Bears Ears National Monument. However, I am not part of any tribal community and this impacts my evaluation of the settler colonial system I have benefited from my whole life, from the solutions I suggest, and the legitimacy I give to the federal government. The purpose of this thesis is not to fill a space where indigenous people’s voice should be heard, but to provide reflection of a legal system which has too highly prioritized the majority’s interest at the expense of indigenous interests in the context of public land management.


22 Id.

23 Id. at 118.
Chapter 2: The Legal Landscape

How federal public lands should be used is a hot topic today. Across the country there is heated debate over to what extent the country should preserve wilderness, what uses should be allowed on the 670 million acres of federal public lands, and what resources should be extracted and even whether control over public lands should be provided to the states. Controversy over federal public lands is nothing new and public land law has evolved over time to reflect how society values this country’s open space. As the nation’s outlook on public lands have changed, so has the nation’s American Indian Law policy. Examinations the development of both of these areas of law and policy are critical to analyzing and recognizing the settler colonialist notions impacting tribes’ efforts to participate in public land management decisions today. This section will provide a historical background of federal American Indian Law and federal public land law.

Indian Law

American Indian Law is a vastly complicated subject, that has impacted tribes’ relationship with land across the nation, and it is critical in understanding the critiques of scholars who have studied the marginalization of tribes in land matters. To provide a full picture, this section will first, give a brief background on the discovery doctrine, a doctrine which has informed American jurisprudence’s understanding of tribal sovereignty, and how the U.S. obtained title to lands, including public lands, from tribes. Next, this section will provide an overview on the Marshall Trilogy, a serious of three cases which are the foundation of American Indian law. Then, this section will provide an explanation of the development of tribal sovereignty, and the status of tribal sovereignty today. Last, this section will provide an overview on American Indian law policy that


impacted tribes’ relationships with their ancestral lands, in particular the tribes making up the Bears Ears Inter-Tribal Coalition. Each one of these areas, helps explain the relationship the Bears Ears Inter-Tribal Coalition has with the Bears Ears area and why the conflict surrounding the designation of the area unfolded the way it did.

The Discovery Doctrine

The keystone to understanding modern American Indian law is to understand how this area of the law has been influenced by the discovery doctrine. The discovery doctrine has its roots in the Crusades, based on medieval Catholic Church’s belief that “natural law” gave Christian nations the authority to invade and rule over non-Christian nations in the Middle East.26 As Europeans began to colonize other continents, this belief was applied to conquered indigenous societies.27 In essence, the discovery doctrine stood for the idea that the discovering European nation held title to the newly discovered land.28

While European nations used the discovery doctrine to lay claim to “new lands,” as early as the 14th century, scholars such as Franciscus de Victoria, pushed back against the doctrine.29 Franciscus de Victoria, who advised the Spanish Crown at the height of Spanish colonialism, believed lands could not be taken from indigenous societies because they did not follow the Christian faith.30 Instead, he argued that, while indigenous societies were the “true owners” of their ancestral lands, European nations:

owed a duty of guardianship under the Law of Nations, including bringing the message of Christianity to them, and that if "Indian princes" stood in the way of the message of


27 See Id. at 719.

28 See Id.

29 Id.

30 Id. at 720.
missionaries, Spaniards would be justified in "seizing the land and territory of the natives and . . . setting up new lords . . . with an intent directed more to the welfare of the aborigines than to their own gain."\textsuperscript{31}

Franciscus de Victoria’s position was officially adopted by Pope Paul III in 1537 and helped develop international indigenous law.\textsuperscript{32} Victoria’s assertion that indigenous societies owned the land and the presence of European foreign powers did not extinguish their title made its way into other European nations’ thinking.\textsuperscript{33} As a result, it was generally understood the discovery doctrine protected settling nations from other European nations’ claims to newly discovered land but did not extinguish aboriginal title.\textsuperscript{34} This reasoning continued during the time of the colonization of the U.S.

A critical aspect of the discovery doctrine was the recognition of tribal sovereignty. The acknowledgement of tribal sovereignty dates back to treaties from the 1600s when European countries and tribes first started to battle for land.\textsuperscript{35} Because it was understood that indigenous communities retained title to land, the English believed title had to be transferred voluntarily to them, meaning the act of conquering tribes was not enough to obtain title from the tribes.\textsuperscript{36} This was done by the practice of entering into treaties with tribes.\textsuperscript{37} While it is no secret that the circumstances treaties were entered into were less than fair, the practice of entering into treaties “reflected three important assumptions: (1) both parties were sovereigns; (2) the tribes had title to convey; and (3) the acquisition of Indian land was a governmental function.”\textsuperscript{38}

\textsuperscript{31} Id.
\textsuperscript{32} Id. at 721.
\textsuperscript{33} Id.
\textsuperscript{34} See Id.
\textsuperscript{36} Blumm, \textit{supra} note 26.
\textsuperscript{37} See Id.
\textsuperscript{38} Id. at 721.
The recognition of tribal sovereignty, through the practice of entering into treaties, was continued by the U.S. and created a complex legal landscape in the early 19th century. The impacts the discovery doctrine had on the U.S. can be seen in the three hallmark cases composing the Marshall Trilogy.

The Marshall Trilogy

While tribal sovereignty was recognized prior to the existence of the U.S., the implications of tribal sovereignty were not truly developed by the American legal system until the Marshall Trilogy. The Marshall Trilogy are American Indian law cases named for authoring Chief Justice John Marshall of the U.S. Supreme Court. Justice Marshall served on the Supreme Court from 1801 until 1835, and authored many cases which have provided the foundation for American jurisprudence, including the Marshall Trilogy. The first case in the Marshall Trilogy is *Johnson v McIntosh*, decided in 1823. The issue in *Johnson* was whether or not Indian chiefs had the authority to grant title of tribal lands on behalf of the tribes to the a group of non-indigenous plaintiffs. Marshall determined that because the U.S. had asserted control over the continent, the nation obtained the title to the land through the doctrine of discovery. Marshall used the doctrine of discovery, and tweaked the reasoning of Franciscus de Victoria, to assert that when the U.S., through the actions of Britain, acquired title over the lands of its territory and the rights remaining

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41 *Id.*


43 *Johnson v McIntosh*, 21 U.S. (8 Wheat) 543, 5 L.Ed 68.

44 *Id.*

45 *Id.* at 32.
to the tribes were rights of occupancy. Marshall further explained the assertion of power over the tribes did not diminish the sovereignty which was not in conflict with the power of Britain, and then the U.S.47

The next case of the Marshall Trilogy was *Cherokee Nation v Georgia*, decided in 1831.48 In *Cherokee Nation*, the issue was whether the State of Georgia could enforce its own laws on tribal land.49 To answer this question, Justice Marshall had to address the extent of tribal sovereignty.50 He conclude Indian tribes are “domestic dependent nations.”51 Justice Marshall reasoned the treaties entered into with Indian tribes necessarily made them a state, but they still needed the protection of the U.S. government.52 He stated “[t]heir relationship to the U.S. resembles that of a ward to his guardian.”53 Marshall further reasoned Indians tribes were not foreign nations because the tribes were distinguished from foreign nations in Article I of the Constitution.54 Justice Marshall held that because tribes were not “foreign nations”, the Court was not granted original jurisdiction under Article III of the Constitution and therefore did not answer the issue raised: whether state law applies within tribal lands.55 This meant, that as “domestic dependent nations,” could act as a sovereign would within their own boundaries beyond the preview of the courts. However, as a conquered entity that was not a foreign nation and dependent on the U.S.

46 Id.
47 Id.
49 Id. at 17.
50 Id.
51 Id.
52 Id.
53 Id.
54 Id.; USCS Const. Art. I, § 8, Cl 18 (To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. Id.).
government, to some extent, tribes did not enjoy the same degree of sovereignty as foreign nations would.\footnote{Id.} While \textit{Cherokee Nation v Georgia}, did not answer whether state law applied within the boundaries of tribal territory the next case of the Marshall Trilogy decided in 1832, \textit{Worcester v. Georgia}, did address the issue.\footnote{Id.} Specifically, the issue before the Court was the validity of a Georgia law which imposed 4 years of hard labor for “being a white persons, [who] residing within the limits of the Cherokee nation without a license, and without having taken the oath having taken the oath to support and defend the constitution and laws of the state of Georgia.”\footnote{Id.} In the process of holding the Georgia law unconstitutional, the Court turned to the Law of Nations to determine the nature of the Cherokee Nation’s sovereignty.\footnote{“Law of Nations “is defined “as rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern.” \textit{Doe I v. Nestle USA, Inc.}, 766 F.3d 1013, 1019 (9th Cir. 2014).} The Court held the Cherokee Nation was a “distinct community, occupying its own territory” and the nation retained some level of sovereignty.\footnote{\textit{Cherokee Nation, Georgia}, 8 L.Ed, 483.} Based on the Cherokee’s sovereignty, the Court held the Georgia law was unconstitutional because it was in conflict with treaties between the Cherokee Nation and the U.S. which guaranteed the Cherokee their boundaries.\footnote{Id.}

Even though the Marshall Trilogy dates back to the early 19\textsuperscript{th} century, the holdings of these cases have had lasting impacts on the relationship between the tribes, the federal government, and the law that governs this relationship. The Marshall Trilogy cases stand for the position that tribes are inherent sovereign entities, who are only limited in who they may transfer land to and their abilities to interact with foreign nations.\footnote{See \textit{Johnson v McIntosh} 21 U.S. (8 Wheat) 543, 5 L.Ed 68; \textit{Worcester v. Georgia} 30 U.S., 8.1  L.Ed. 25 at 17.; \textit{Cherokee Nation v Georgia} 31 US (6 pet.) 515, 8 L.Ed. 483; Canby supra note 39 at 78.} Under the precedent set by the Marshall Trilogy, the central question when determining if a tribe has the authority to take action as a sovereign is whether Congress has enacted any laws preventing the action, not whether the tribes are permitted
to take the action. This is due to tribes’ status as a conquered sovereign. The sovereign nature of tribes has allowed tribes to take action that a sovereignty entity would do, such as levying tax or establishing court systems, without the permission of the federal government, unlike state governments. The tribal sovereignty recognized by Justice Marshall seems powerful, but throughout the history of the U.S. this sovereignty has been chipped away.

Tribal Sovereignty

Despite tribal sovereignty being a well-developed legal doctrine, federal and state government have undermined tribal sovereignty as American Indian Law as developed further. Tribes are considered “domestic dependent nations.” This status has historically been thought as of granting tribes the power of a sovereign within the borders of tribal land, but in 1978 the Supreme Court in Oliphant v. Suquamish Indian Tribes, held tribes did not have criminal jurisdiction over non-members within tribal lands. In another example, Rice v Rehner, the Court held that the tribes lacked the authority to regulate the sale of liquor within reservation boundaries because “Congress authorized, rather than pre-empted, state regulation over Indian liquor transactions.” In Montana v United States, the Court further limited tribal sovereignty by holding that a tribe lacked the authority to regulate hunting and fishing by non-indigenous peoples on non-indigenous lands within their reservation borders, because the tribes made no showing that their interests had been affected. This holding, known has the Montana Rule has been applied in several cases which have chipped away at tribal sovereignty by requiring the tribes to show the actions they have taken.

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68 Montana v United States 450 U.S. 544 (1981); Canby, supra note 39, at 81.
as a sovereign entity relate to one of their interests. Instead of viewing tribal sovereignty has inherent, as required by the Marshall Trilogy, the Supreme Court has treated tribal authority as being granted by the U.S. government, thus departing from the precedent of the Marshall Trilogy.

A common theme in the way American Jurisprudence approaches tribes and their status as sovereigns is land. The focus of the discovery doctrine was how to transfer title of tribal land from tribes, who did not want to give up their lands, to European nations who viewed “New World” land as instrumental in solidifying their status as world powers. The Marshall Trilogy focused on tribes’ power as sovereigns within tribal land. Due to the central role land as played in the development of American Indian law, it is critical to understand how American Indian law as impacted tribes ability to maintain their ancestral lands.

**The Role of Reservations**

By the late 1800s the population was expanding West, and the U.S.’s settler society needed more territory. However, there was a problem: the open spaces of the West were already occupied by tribes. To solve this “Indian problem” the U.S. government began to remove tribes from their ancestral lands either by treaties or, sometimes, by military force. Regardless of how the U.S. government removed tribes, the policy throughout the nineteenth century was to “isolate and concertate Indians in places with few natural resources, far from contact with the developing U.S. economy and society.”

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69 See Atkinson Trading Co. v. Shirley, 532 U.S. 645 (holding tribes did not have the authority to tax non-indigenous hotel guests); Nevada v. Hicks, 533 U.S. 353 (2011) (holding a tribal court lacked jurisdiction to hear a tort action between a tribal member and a non-tribal member); Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 128 S. Ct. 2709 (2008) (holding a tribal court lacked jurisdiction to award damages in a bankruptcy case).

70 See Canby, supra note 39, at 91.

71 Blumm, supra note, 26.

72 See 30 U.S., 8.1 L.Ed. 25 at 17.; 30 U.S., 8.1 L.Ed. 25 at 17.; 31 US (6 pet.) 515, 8 L.Ed. 483.


74 Id. at 37-38.

75 Id. at 37.
As the “Indian problem” continued, the U.S. government shifted its policy by shifting from focusing on removal to assimilating tribes. The change in policy was due to pressure from the general population in the East who viewed the conditions on reservations as unacceptable. A critical aspect of the assimilation was the allotment legislation, known as the Dawes Act of 1887 or the Allotment Act. The Dawes Act granted registered tribal members parcels of land within reservations. The allotment policy was intended to address the living conditions on the reservations people back East viewed as “unacceptable and in need of immediate and drastic action.” However, the allotment program did not improve the lives of tribal members like it was intended to do so.

While these insights are helpful in understanding the general dynamics between tribes, settler communities, and land, it is also important to understand the tribes of the Bears Ears Inter-Tribal Coalition’s history regarding their ancestral lands, and their modern-day reservations.

The Zuni’s reservation, established in 1877, is 450,00 acres located in Arizona. While the Zuni Tribe is located in Arizona today, their ancestral lands extended across the Colorado Plateau before the tribe was removed and place on its reservation. The Zuni people lived in the “Seven Cities of Cibola” and it was rumored the cities were filled with gold. This brought the Zuni Tribe to the attention of Spaniards as early as 1500 looking for gold. The Spaniards didn’t find gold,

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76 Id. at 38.
77 Id.
78 Id.
80 Id.
81 See Id.
83 Id.
84 Id.
85 Id.
but by 1632 they were building settlements on the Zuni ancestral homeland.\textsuperscript{86} Throughout the nineteenth century, the Zuni tribes were also raided by other tribes, including the Navajo Nation.\textsuperscript{87}

The Hopi Tribe has a similar story to the Zuni Tribe. The Hopi’s culture is one of the oldest living cultures in the world, dating back to the Ancestral Puebloans who made their homes in what is now known as Mesa Verde National Park and the Bears Ears area.\textsuperscript{88} Today, the Hopi reservation, established in 1882, covers 2,532 miles in Northern Arizona and encompasses 12 traditional villages.\textsuperscript{89} The Hopi tribe also has had conflict with the Navajo Nation. The reservation is surrounded by the Navajo Nation’s reservation.\textsuperscript{90} This has led to conflict between the two tribes as to what the actual boundaries of the Hopi reservation were.\textsuperscript{91} It wasn’t until 1992 that the boundaries of the reservation were set to what they are today.\textsuperscript{92}

The Ute people were also impacted by the U.S. government’s reservation policy.\textsuperscript{93} The Ute people were a nomadic group and as such ancestral lands stretched across Colorado, Utah, New Mexico, Arizona and even Wyoming and Nevada.\textsuperscript{94} The Ute people organized themselves in “bands” which are “loose confederation of tribal units.”\textsuperscript{95} Today, these bands make up several modern day tribes: the Southern Ute Tribe, the Ute Mountain Ute Tribe, and the Northern Ute Tribe.\textsuperscript{96} Prior to Western European contact, Ute bands often raided both Pueblo communities, such as the Zuni and Hopi, and the Navajo.\textsuperscript{97} Just like the tribes they raided, the Ute Tribes found
themselves impacted by the flood of western settlers. As settler society hungrily moved West, the Utes and the U.S. government signed a “peace treaty” in 1849 which established a boundary between the government and the Utes. However, this boundary was rapidly encouraged on by the U.S. as the number of settlers moving West continued to increase. In 1868, the U.S. government and the Ute tribe signed a treaty which granted most of the Ute land in Colorado to the U.S. Even though the Treaty of 1868 reduced the Ute’s territory from 56 million acres to 18m million acres, the Utes’ tribal lands were again decreased when mineral deposits were discovered on Ute land. By 1873, the Utes’ tribal land was decreased by another 3.45 million acres.

For the purposes of understanding the Bears Ears conflict, the Southern Ute Tribe and the Ute Mountain Ute Tribe are the most relevant. In the face of the U.S.’s allotment program, the bands making up the Southern Ute Tribe and the Ute Mountain Ute tribe agreed to move on to reservations in an attempt to isolate themselves and project their traditions. The Southern Ute Tribe’s reservation is located near Ignacio, Colorado and the Ute Mountain Ute Tribe’s reservation is located in the very Southwest corner of Colorado near Cortez, Colorado and only a short drive from the Bears Ears area.

The Navajo Nation’s reservation is the largest in the country and in in three: Utah, Arizona and New Mexico, but the Navajo’ ancestral lands use to be much larger. Prior to European contact, the Navajo people lived in what is now known as Arizona, Colorado, New Mexico, and Utah.

98 See Id.
100 Id.
101 Id.
102 Id.
103 Id.
104 Id.
105 See Id.
107 Id.
However, the Navajo Nation was also impacted by settler societies expansion westward, when in 1846, the U.S. government, through its military forces, forced thousands of Navajo off their ancestral lands to relocated to Ft. Summer, New Mexico.\textsuperscript{108} This brutal removal became known as the “long walk.”\textsuperscript{109} To preserve their culture, Navajo leaders signed a treaty with the U.S. in 1868 which created the nation’s largest reservation.\textsuperscript{110}

\textbf{Public Lands}

The U.S.’ treatment of tribes through American Indian law is a substantial contributor to the Bears Ears conflict, however it is important to understand how federal public land law has contributed to the intricacies of the conflict. This section details the progression of federal public land law and policy, the legal authority of the federal government to manage public lands, and the mechanics of public land planning practices which directly impact tribes.

\textit{Public Land Policy Eras}

Just as American Indian policy has developed over time, so has federal public land law. Throughout the history of the U.S. public land law has been driven by overlapping, yet distinct, eras, of federal public land policy. These eras are generally understood as the Acquisition Era, the Disposition Era, the Conservation Era, and the Preservation Era.\textsuperscript{111} Each of these eras has shaped modern public land law and influenced the Bears Ears conflict.

\textit{The Acquisition Era}

An impactful stage of development of federal public land policy was the Acquisition Era, beginning with the establishment of the U.S. and ending with the final federal land purchase of

\textsuperscript{108} Id.

\textsuperscript{109} Id.

\textsuperscript{110} Id.

\textsuperscript{111} Robert L. Glicksman & George Cameron Coggin, \textit{Modern Public Land Law in a Nutshell} (3rd ed. 2006).
Alaska from Russia in 1846.\textsuperscript{112} During the Acquisition Era, and into the beginning of the Disposition Era the U.S. was just emerging out of the Revolutionary War and was looking to establish its place on the world stage and needed provide land for its expanding population.\textsuperscript{113} An effective way to do this was to increase the Nation’s territory.\textsuperscript{114}

When the U.S. first became a nation, it owned “roughly half of the land between the Atlantic Ocean and the Mississippi River.\textsuperscript{115} Overtime, the Nation increased its territory through huge purchases of land, such as the Louisiana Purchase of 1803, where President Jefferson bought territory west of the U.S. boundaries from France for 3 cents per 523 million acres, effectively doubling the size of the nation.\textsuperscript{116} Other purchases defining the Acquisition Era included the purchase of Florida from Spain in 1819, the establishment of the Canadian and U.S. border between 1818 and 1846, and the purchase of Alaska from Russia in 1846.\textsuperscript{117} While the U.S. purchased these lands from European nations, it is critical to remember that these lands were occupied by tribes long before European nations asserted title over them.\textsuperscript{118} The huge swaths of land the U.S. purchased throughout its history is a defining characteristic of the nation. However, how the nation obtained full fee title over the lands purchased from European nations is entangled with the U.S.’ relationship with tribes.\textsuperscript{119} The Acquisition Era policies allowed the U.S. to obtain land at the expense of tribes. While the policies of this Era allowed the U.S. to obtain the land which later became the public lands we know today, it is critical to remember these were not unoccupied lands.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{114} \textit{Id.}
\item \textsuperscript{115} Glicksman, \textit{supra}, note 112, at 14.
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} \textit{Id.}
\item \textsuperscript{118} Wolfe, \textit{supra} note 20, at 387-409
\item \textsuperscript{119} Glicksman, \textit{supra}, note 112, at 13.
\end{enumerate}
\end{footnotesize}
The Disposition Era

The next major era, the Disposition Era, is generally understood by legal scholars to have started in roughly in the 1780, with the birth of the U.S.’ government, and to have continued until 1934 with the enactment of the Taylor Grazing Act.\textsuperscript{120} The Disposition Era contributed to the modern understanding of public lands largely through the variety of land grants executed by Congress which allowed settler society to move West. As early as 1796, through the Land Act, the federal government began disposing of land in the public domain.\textsuperscript{121} These dispositions had a lasting effect on the West. Many families, seeking a better life in the idealized American West, acquired land of their own through land grants under acts such as the Homestead Act of 1862 and the Stock-Raising Homestead Act of 1916.\textsuperscript{122}

Land grants to settlers were not the only type of land grants the federal government engaged in during the Disposition Era. Congress also provided land grants to miners through the General Mining Law of 1872 and granted roughly 200 million acres to the railroads between 1850 and 1873.\textsuperscript{123} Yet another land grant program which has had lasting impacts on the nation was through the Reclamation Act of 1902.\textsuperscript{124} This Act authorized bringing irrigation to the West through the building of dams and water diversion projects, and provided land grants to individuals and entities who actually irrigated parcels.\textsuperscript{125}

While the acts of the Disposition Era provided opportunity for settler society to claim the West for their own, the territory the U.S. granted to its citizens was not unoccupied land. As such, the U.S.’s move West was at the expense of tribes.\textsuperscript{126} An example of the harm the Disposition Era

\textsuperscript{120} Id.

\textsuperscript{121} Id. at 20.

\textsuperscript{122} Id. at 21.

\textsuperscript{123} See Id. at 22- 23.

\textsuperscript{124} Id. at 23

\textsuperscript{125} Id. at 23-24.

did to the tribes are the many times the Utes’ treaty with the U.S. was amended to shrink Ute land, so the land would be open for homesteading and natural resource development.\textsuperscript{127}

The enacted of the Taylor Grazing Act in 1934\textsuperscript{128} is generally understood as the end of the Disposition Era. At the time, lands had been unregulated and as a result where over grazed and in poor condition.\textsuperscript{129} The Taylor Grazing Act authorized the Secretary of the Department of the Interior (DOI) to regulate the use of range land.\textsuperscript{130} To achieve this end, the DOI established the what is now known as Bureau of Land Management (BLM).\textsuperscript{131}

The Disposition Era had a lasting impact on the Nation today and shaped the environment which has led to the conflicts surrounding Bears Ears. While the Disposition Era led to the transfer of lands in federal public domain to the private domain, the federal government retained title of a vast amount of public lands in the West, that eventually became federal public lands.\textsuperscript{132} The thirteen original states, along with Kentucky, Tennessee, Vermont, Maine and Texas have never been impacted by federal public lands the same way other western states have because the federal government did not obtain, or retain, any significant lands within their borders.\textsuperscript{133} Instead, the majority of public lands are located in western states, such as Utah, while eastern states have significantly less federal public lands within their borders.\textsuperscript{134} Second, given the latitude in land grant programs, such as the Homestead Act, the majority of the land remaining in the public domain is arid and not ideal farm land because settlers claimed the most agriculturally productive lands first.\textsuperscript{135} The Disposition Era statutes also led to private land scattered all across the west.\textsuperscript{136}

\textsuperscript{127} Id.
\textsuperscript{128} 43 U.S.C cha. 8a §315 et. seq. (1934).
\textsuperscript{129} Glickersman, supra note 112, at 31.
\textsuperscript{130} 43 U.S.C cha. 8a §315
\textsuperscript{131} Glickersman, supra note 112, at 32.
\textsuperscript{132} See id. at 24.
\textsuperscript{133} Id. at 14.
\textsuperscript{134} See id. at 25.
\textsuperscript{135} Id. at 24.
\textsuperscript{136} Id. at 25
The legacy of transferring land from the public domain to private hands also has contributed to a misunderstanding by some that the federal retainment of public lands is unconstitutional.\textsuperscript{137} This attitude spurred movements such as the Sagebrush Rebellion of the 1970s, the revived Transfer of Federal Land Movement, seeking to transfer federal lands to the states and undermine the legitimacy of federal land management happening today, and most relevant, the movement opposing federal control over public lands in Utah.\textsuperscript{138} Further, Disposition Era policies motivated the federal government to remove tribes from their ancestral lands and isolated on reservations, which were a fraction of the size of their original land.\textsuperscript{139}

\textit{The Conservation Era}

While it was practice for the federal government to withdraw certain public lands for the creation of Indian reservation throughout the 1800s, the distinctive characteristic of the Conservation Era, starting in 1872 and continuing through the 20\textsuperscript{th} century, was the withdrawal and reservation of federal public lands for the purpose of conservation.\textsuperscript{140} During this Era, Congress created national parks, wilderness areas, national trails and designated wild and scenic rivers.\textsuperscript{141} While the Constitution vests Congress with the power over federal public lands under the Property Clause, during the Conservation Era Congress granted the Executive Branch with authority to conserve federal public lands.\textsuperscript{142} Examples include the powers granted by the Taylor Grazing Act, the 1891 Forest Reserve Amendment to the General Revision Act, and, most relevant in the context of the Bears Ears conflict, the Antiquities Act of 1906.\textsuperscript{143}

\textsuperscript{137} Id.

\textsuperscript{138} Id. at 14; John Leshy, \textit{DEBUNKING CREATION MYTHS ABOUT AMERICA’S PUBLIC LANDS}, 6-9, (2018)(while some strongly believe the existence of federal public lands is unconstitutional, this is simply incorrect. Article. VI, § 3, Clause 1 provides exclusive jurisdiction over federal property to Congress).

\textsuperscript{139} See Glickersman, \textit{supra} note 112, at 13;

\textsuperscript{140} Id.

\textsuperscript{141} Id. at 26.

\textsuperscript{142} Id.

\textsuperscript{143} Id. at 26.
Under the Antiquities Act, Congress granted the President with the authority to “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.”\(^\text{144}\) Early examples of national monument designations under the Antiquities Act include: Navajo National Monument, Oregon Caves National Monument and Preserve, Zion National Park, Spirit Mountain Cave (originally Shoshone Cavern), Salinas Pueblo Missions National Monument, Sitka National Historical Park, and the Colorado National Monument.\(^\text{145}\)

More recently, in 1996 President Clinton used the Antiquities Act to designate several national monuments, including Grand Staircase-Escalante National Monument, which is very close to the Bears Ears area.\(^\text{146}\) President Clinton, much like President Obama, designated the Grand Staircase- Escalante National Monument towards the end of his presidency.\(^\text{147}\) To date 157 national monuments have been designated.\(^\text{148}\)

Even though the Conservation Era has had lasting impacts on modern public land management, as seen with the continued use of the Antiquities Act, the Conservation Era’s legacy was often at the expense of the tribes. For example, in 1911 the federal government reduced the Ute Mountain Ute Reservation by 52,000 acres to designate the area as Mesa Verde National Park.\(^\text{149}\) As William Cronon noted in his famous essay, The Problem with Wilderness, “[t]hose who seek to preserve such “wilderness” from the activities of native peoples run the risk of reproducing the same tragedy—being [forcibly] removed from an ancient home—that befell American Indians.”\(^\text{150}\)

\(^{144}\) 54 U.S.C.A. § 320301 (West)


\(^{146}\) Glickersman, supra note 112, at 87.

\(^{147}\) Id. at 87-88.

\(^{148}\) Kame’enui, supra note 145.

\(^{149}\) Potter, supra note 100.

The Preservation Era

The Preservation Era is generally thought to have started with the passing of the Wilderness Act in 1964 and has continued to the present. The Wilderness Act created the National Wilderness Preservation System which has been used by Congress to designate over 100 million acres of wild land. Other notable legislation of this Era includes the Land and Water Conservation Fund Act of 1965, the National Wildlife Refuge Act of 1966, the Wild and Scenic Rivers Act of 1968 and the Alaska National Interest Conservation Act of 1980.

The Preservation Era focused on the management of public lands for the public use. A relevant example of this to the Bears Ears Conflict is the enactment of the Federal Land Policy and Management Act (FLPMA) in 1976. FLPMA is the primarily governing statute for the BLM and details the key agency guiding principles such as multiple use, sustainable yield. This concepts within FLPMA provided the foundation for the Multiple-Use, Sustained Yield Act (MUSYA) of 1960, a piece of legislation influenced by both conservation and Preservation Era policies. MUSYA requires that public lands be managed for “outdoor recreation, range, timber, watershed, and wildlife and fish purposes.”

The Intersection of Public Land Law and Tribal Rights

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151 Glickersman, supra note 112, at 13.

152 16 USC §§ 1131-1136; Glickersman, supra note 112, at 35.

153 16 USC §§ 1138,1139.

154 Glickersman, supra note 112, at 35.

155 43 USC § § 1701-17084; See Glickersman, supra note 112, at 34.

156 Glickersman, supra note 112, at 214-218.

157 16 USC §§ 528- 531.

158 Glickersman, supra note 112, at 214.
While many public land laws and policies generally impact tribal communities, there are sources of law which directly address the impacts on tribes head on. Examples include: the National Historic Preservation Act (NHPA), the Archaeological Resources Protection Act (ARPA), and the Native American Graves Protection and Reparation Act (NAGPRA).\textsuperscript{159}

The NHPA has been a key legislative avenue for tribes to protect religious and cultural sites that are located off reservations.\textsuperscript{160} Under NHPA, the National Parks Service manages a “National Register of Historic Places” and many of the “traditional cultural property” sites on the register are of cultural and religious tribal significance.\textsuperscript{161} Once a site is on the register, a planned federal agency action which might affect the site, must go through the section 106 review process.\textsuperscript{162} This is very similar to the review process under the National Environmental Protection Act (NEPA), known as a tribal consultation requirement.\textsuperscript{163} During this review process, the agency is required to consult with impacted tribes, or tribes who have asserted an interest in the site.\textsuperscript{164} The advantage of NHPA is that it provides a forum for tribes to be heard and engaged, however tribes have been critical of the act because they are mainly in a position of consultation, meaning there is no requirement to act on the tribes suggestions.\textsuperscript{165}

The ARPA, enacted in 1979, regulates the removal of archaeological artifacts from federal and Indian land.\textsuperscript{166} Under the Act, in order to excavate artifacts from public or Indian lands, a permit is required from the federal government, typically from the BLM.\textsuperscript{167} When the issuance of a permit “may result in harm to, or destruction of, any religious or cultural site, the federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural


\textsuperscript{160} Id.

\textsuperscript{161} 16 USC § 470: 1-20.

\textsuperscript{162} Id.

\textsuperscript{163} 42 USC §§ 4321- 4370; Id. at (3)(c).

\textsuperscript{164} Id. at (3)(e).

\textsuperscript{165} Id.

\textsuperscript{166} Id.

\textsuperscript{167} Id.
Regulating the removal of archeological resources from both federal and Indian is vital to protecting cultural and religious areas, but the ARPA only requires managing agencies to inform tribes of the action. It does not give tribes the ability to stop the permit from being issued. While tribal action is limited under the ARPA, if human remains are found in the area, the NAGRA may give a tribe more power.

NAGRA, unlike ARPA, gives tribes the ability to hold agencies and individuals accountable for the unlawful removal of their ancestors remains. NAGRA, enacted in 1990, gives tribes and Native Hawaiian organizations the right to “obtain repatriation of certain human remains, funerary objects, sacred objects, and objects of cultural patrimony from federal agencies and museums that are owned or funded by the federal government.” The Act further provides a “legal regime to protect items that are located on or within federal land or tribal land from unauthorized excavation or removal […] and] criminal prohibition on trafficking in Native American human remains and cultural items in violation of the statute.” The NAGPRA has made important achievements because its enactment established a process for important archeological object to be returned to tribes, the statute has waived DOI’s sovereign immunity in NAGRA making enforcement proceedings possible against the Department and requires consultation with the tribes about how artifacts should be kept.

American Indian law and public land law are complicated subjects that are intertwined. As discussed above, both American Indian law and federal public land law have their roots in the ancient doctrine of discovery, and because of this the very existence of public land was to the determinant of sovereign tribes. Over the years, both areas of law of developed and changed, but
historic polices still have an impact today. The development and legacy of these areas of law created the environment that developed the conflict surrounding the management of Bears Ears National Monument.

Chapter 3: A Landscape of Conflict

Understanding the legal landscape that American Indian law and federal public land law has created is a critical element of the Bears Ears conflict, but it is only one element. Another critical element of this conflict is how the tribes of the Bears Ears Inter-Tribal Coalition and the non-indigenous locals value the Bears Ears Area. This section details the tribal connection the Bears Ears area, the Bears Ears Inter-Tribal Coalition’s efforts to designate the area as a national monument, the non-indigenous local’s challenge to the designation, and the ultimate modification of Bears Ears National Monument. A careful examination of these stakeholders’ protectives provides the foundation to consider why non-indigenous locals believe the inclusion of tribal protectives in public land management will exclude their own prospective.

Tribal Connection to the Bears Ears Landscape

Each of the five tribes composing the Bears Ears Inter-Tribal Coalition have a deep connection to the Bears Ears area. For the Hopi and Zuni people, the ancient cliff dwellings, petroglyphs, pictographs and ancient trails spattering the canyons are evidence of how the tribes’ Ancient Puebloan ancestors lived 700 years ago.176 The kivas found in the area “from the Hisatsinom – the People of Long Ago - exemplify the important cultural and spiritual connection that specific objects within Bears Ears provides to the [the Tribe].”177 Octavius Seowtewa, a Zuni elder,


177 *Id.* at 22.
explained his people’s cultural connection to the Bears Ears landscape as “a link to our ancestors from long ago.”\textsuperscript{178}

\textit{Kiva located within the Monument}\textsuperscript{179}

The Ute people also share this cultural connection to the Bears Ears area. Ute ancestral lands spread across the Four-Corners area and encompass the Monument.\textsuperscript{180} As a result, the landscape holds great significance in the Utes tribes cultural and religious traditions.\textsuperscript{181} For example, the “Ute Bear Dance, which is a spring ceremony symbolic of nature’s awakening, is performed in many areas in and around Bears Ears.”\textsuperscript{182}

\textsuperscript{178} Id.\textsuperscript{179} Hopi v Trump, supra note 2, at 23.\textsuperscript{180} Id. at 29.\textsuperscript{181} Id. at 30.\textsuperscript{182} Id. at 31.
The Navajo Nation also has substantial connection to the Bears Ears landscape.\textsuperscript{183} For the Navajo people, the dramatic geological features in the area hold great cultural and religious significance.\textsuperscript{184} The Navajo believe Bears Ears Peak, the name sake of the National Monument, is the ancient Navajo Warrior, Changing Bear Woman.\textsuperscript{185}

\textit{The Bears Ears Formation}\textsuperscript{186}

The landscape also represents a place of resentment to the Navajo. In 1864, Colonel Kit Carson, forced 9,000 Navajo off their ancestral lands and forced them to march 350 miles to Fort Summer in New Mexico.\textsuperscript{187} In an act of resilience, many Navajo escaped the forced removal by hiding in White Canyon located in the in the Bears Ears area.\textsuperscript{188}

\begin{itemize}
\item \textsuperscript{184} \textit{Id.} at 26.
\item \textsuperscript{185} \textit{Id.}
\item \textsuperscript{186} \textit{Id.} at 19.
\item \textsuperscript{187} \textit{Id.} at 27.
\item \textsuperscript{188} \textit{Id.}
\end{itemize}
The Tribes historic connections to the Bears Ears landscape is undeniable, but their connection to the landscape continues into contemporary times as well.\(^{189}\) To the Hopi, the archeological sites their ancestors left behind were intentionally left “to mark the land as proof that the Hopi have fulfilled their Covenant [to protect the land] and as proof that the Hopi ancestors buried in the area continue to inhabit the land.”\(^{190}\) The Navajo maintain their connection to the landscape to today by camping, hunting and harvesting native plants within in the area.\(^{191}\) And, “Utes derive traditional knowledge from certain petroglyph panels within Bears Ears for their Bear Dances.”\(^{192}\)

In light of the cultural significance to the Tribes of the Bears Ears landscape, many found the impacts of current land use in the area concerning. Cultural resources have been looted by non-indigenous locals for artifacts and sold on the black market for decades.\(^{193}\) In addition, oil and gas companies have conducted oil explorations within Bears Ears and the Utah legislature were considering “calling for an energy zone that [would] cover much of the Bears Ears [area].”\(^{194}\) Tribes, having seen how potash and uranium mining impacted the lands surrounding Bears Ears, do not want to see the same impact within the area.\(^{195}\) Further, the Tribe noticed the impact visitors had on their ancestor lands, including the impact of off-road vehicles and the normal wear-and-tear hikers bring to trails.\(^{196}\) These impacts on Bears Ears led the tribes to act.

**The Bears Ears Inter-Tribal Coalition’s Efforts to Protect Bears Ears Area**

While the controversy surrounding the Bears Ears area is a hot topic today, discussion on ways the management of the area could be improved started eight years prior to the designation of the Monument.\(^{197}\) In 2010, the Utah Senator Rob Bennett developed the Utah Public Lands Initiative

\(^{189}\) See Id. .

\(^{190}\) Id. at 26. (internal quotations omitted).

\(^{191}\) Id. at 28-29.

\(^{192}\) Id. at 31.

\(^{194}\) Id.

\(^{195}\) Id.

\(^{196}\) Id. at 31.

\(^{197}\) Id. at 5.
The purpose of the initiative was to develop a collaborative process for future management of public lands in Utah. In the early stages various government entities and non-government entities were involved including San Juan County and the Utah Navajo. As part of the PLI Process and in light of land use the Navajo Nation viewed as a threat to the Bears Ears area, the Utah Navajo developed a draft management plan for the Bears Ears area with the help of Utah Dine Bikeyah (UDB), a Navajo non-profit organization. While the PLI stalled due to Senator Bennett’s loss in the 2010 election, the tribe continued to develop their management proposal.

By April of 2011, the Utah Navajo completed the “Navajo Lands of Interest Pre-Proposal Map” and began sharing it with leaders in Utah and Washington DC. The pre-proposal gained popularity in the Navajo Nation and the nation’s President began reaching out to leaders in Washington DC, including Secretary Salazar, asking for the Bears Ears area to be designated as a National Monument. That September the Navajo Nation Division of Natural Resources determine there was enough support to begin formal planning for the Bears Ears area. As part of developing a management plan, in 2012 the Navajo Nation and the UDB had various meetings with San Juan County in an attempt to collaborate in developing the proposal. Despite significant backlash from some of the county commissioners, the Navajo Nation and San Juan County agreed to participate in a “Joint Planning” process. In February of 2013, Utah House

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198 The Utah Diné Bikéyah, Exhibit One, A Timeline: The Relationship of the Public Lands Initiative with The Tribes and Their Members, at 3.

199 Id.

200 Id.

201 Id.

202 Id.

203 Id.

204 Id. at 4

205 Id.

206 Id.

207 Id.
Representative Rob, launched his own version of the PLI and invited San Juan County, the Navajo Nation, and the UDB to participate in the early stages of the project.²⁰⁸ Throughout 2013 the Navajo Nation and the UDB presented their public lands proposal at various PLI meeting but received little feedback from any level of government present at the meetings.²⁰⁹ Despite the lack of feedback, the Navajo Nation submitted their proposal to the PLI Board for the Bears Ears Area in July, a month prior to Representative Bishop’s deadline, but did not receive a response.²¹⁰ By September, the legislative deadline for the PLI had past but the Navajo Nation and San Juan County continued developing their proposals separate from the PLI process.²¹¹

In 2014, San Juan County Commissioner Phil Lyman, led the San Juan County Citizen Lands Committee as part of the continued PLI efforts.²¹² The San Juan County Citizen Lands Committee was developed to represent the concerns of locals in the area, and communicate these concerns during land planning processes.²¹³ Several months later, Commissioner Lyman led an ATV rally through Recapture Canyon located just outside of the Bears Ears area, to protest the BLM restricting off-road motor-vehicle access to the area.²¹⁴ Recapture Canyon had been closed to motorized access in 2007 due to the sensitive archeological sites located in the canyon.²¹⁵ Commissioner Lyman and many other San Juan County residents believed the BLM closure of the area was illegal because of an old mining road claim.²¹⁶ As a result of his planning of the ATV rally, Lyman was charged and convicted in federal district court of conspiracy and trespass.²¹⁷

²⁰⁸ Id.
²⁰⁹ Id.
²¹⁰ Id. at 5.
²¹¹ Id.
²¹² Id.
²¹³ Id.
²¹⁵ Id.
²¹⁶ Id.
²¹⁷ Id.
Despite his conviction, he remained a county commissioner and the chairman of the San Juan County Citizens Land Committee. 218

Throughout the rest of 2014, the relationship between the Navajo Nation and San Juan County deteriorated.219 The Navajo Nation made several attempts to receive feedback on its proposal from the San Juan County Citizens Land Committee and the San Juan Board of County Commissioners.220 However, the County told the tribe it would “engage with the Bears Ears proposal on their own timeline”.221 Because the tribes felt their concerns were not being heard during the comment period, the tribes felt they were still being excluded from the PLI process and voiced their concerns to the Utah representatives.222 The Utah representatives asked San Juan County to engage the Native American community in the PLI process, in an attempt to develop a united land management plan, and the county agreed to include the Navajo Nations proposal as an alternative during comment phase of its local PLI process.223 The Bears Ears proposal received the support of the majority of the county, but the commission adopted a proposal that received 1% of the support of the county, which.224

While the UDB continued to try to be part of the local PLI process, the UDB also reached out to other tribes in the region to involve them in the process.225 At this time, the other tribes expressed their support, and official named the proposal “Bears Ears”, as an exclusive name.226 The Navajo Nation and the UDB continued to lead efforts to develop a management proposal.


219 The Utah Diné Bikéyah, supr note 198, at 6.

220 Id.

221 Id.

222 Id.

223 Id.

224 Id. at 8.

225 Id.

226 Id. at 7.
In the beginning of 2015, various tribes officially adopted the Navajo Nation and the UDB Bears Ears proposal, and the tribes continued their attempts to engage San Juan County.\textsuperscript{227} During a 2015 meeting, Commissioner Lyman informed the Navajo Nation they had “no standing in San Juan County” and rejected UDB’s request to participate in the Citizen’s land counsel.\textsuperscript{228} That March, the state legislature was passed a resolution without consultation any tribes, which stated the official position of the State of Utah: that grazing in the Bears Ears area had been unlawfully restricted by the federal government and put grazing, and natural resource development was a top property use.\textsuperscript{229} This was in direct conflict with the tribes’ Bears Ears proposal.\textsuperscript{230} As a result, the Navajo Nation stopped efforts to be a part of the PLI process and sent copies of a resolution to Utah State representatives and the Obama Administration urging for the designation of Bears Ears National Monument.\textsuperscript{231}

In July of 2016, the Bears Ears Inter-Tribal Coalition was formed.\textsuperscript{232} Throughout the rest of the year the Coalition met with officials in Washington DC and continued to develop a proposal to designation the Bears Ears area as a National Monument.\textsuperscript{233} The Obama Administration took note of the tribal interests expressed by the Bears Ears Inter-Tribal Coalition and in July of 2016, then Secretary Jewels of the DOI came to San Juan County to talk with stakeholders about designating the Bears Ears area as a national monument.\textsuperscript{234} While some stakeholders expressed their opposition to the potential monument, the tribal governments in the area strongly expressed

\textsuperscript{227} \textit{Id.} at 8.
\textsuperscript{228} \textit{Id.}
\textsuperscript{229} \textit{Id.}
\textsuperscript{230} \textit{Id.} at 9.
\textsuperscript{231} \textit{Id.} at 9-10.
\textsuperscript{232} \textit{Id.} at 11.
\textsuperscript{233} \textit{Id.} at 11-12; and \textit{See} Complaint, \textit{Hopi Tribes v. Trump} (D.D.C. 2017) (Case 1:17-cv-02590).
their support of Monument designation. On October 18, 2016 President Obama designated the Bears Ears National Monument through Proclamation 9558.

The Short-Lived Existence of the Bears Ears National Monument

While the Tribes were supportive of the Monument, the local non-indigenous population and those in the extractive industry were not. In fact, when Secretary Jewel visited San Juan she was greeted by protestors who opposed any potential monument designation and were chanting “No national monument!” Once the Monument was designated, many locals referred to it as a “federal land grab”, despite the fact the Bears Ears area was already federal land. Organizations such as the Sutherland Institute, “a conservative public policy think tank committed to shaping Utah law and policy based on a core set of governing principles,” began a grass movement campaign for the rescinding of Bears Ears National Monument. The Sutherland Institute argued many Native Americans in San Juan County did not support the monument designation, many current uses within the boundaries of the Monument would no longer be permitted, the designation would harm San Juan County’s already poor economy, and the management scheme under the Obama Proclamation excluded local voices.

Many officials in Utah’s government were also concerned with negative impacts from the monument designation. For example, Utah Governor Gary Herbert called the monument “the poster child for federal overreach,” and warned the Monument would have a negative impact on

235 Id.

236 Hopi Complaint, supra note 183, at 17; Pro. 5998, supra note 10.


238 Piper, supra note 234.


241 Id.

242 Salt Lake Tribune, supra note 239.
local economies.\footnote{Thomas Burr, \textit{Trump Order Review of National Monuments, Says Bears Ears Should Never Have Happened}, Salt Lake Tribune (Apr. 27, 2017) https://archive.sltrib.com/article.php?id=5220807&itype=CMSID&page=2.} Studies from the Headwaters Economics and Utah State University disproved the local governments and non-indigenous local’s concerns when they found that the Monument would most likely not impact the local economics.\footnote{Salt Lake Tribune, \textit{supra} note 239.} Whether or not the critiques of Bears Ears national Monument were well founded, the Trump Administration paid attention to local concern over the designation.\footnote{Brian Maffly, \textit{Oil and Coal Drove Trump’s Call to Shrink Bears Ears and Grand Staircase, According to Insider Emails Released by Court Order}, Salt Lake Tribune (March, 03, 2019) https://www.sltrib.com/news/environment/2018/03/02/interior-department-emails-show-oil-and-coal-played-a-big-role-in-bears-ears-grand-staircase-monument-redraws/.}

In response to the non-indigenous local’s protest over Bears Ears National Monument, President Trump ordered then Interior Secretary Zinke to provide a recommendation on possible changes to the Bears Ears National Monument within 45 days and four months to provide a recommendation for 26 national monuments across the country.\footnote{Modification to Proclamation 9558, \textit{Presidential Proclamation Modifying the Bears Ears National Monument}, (Dec. 4, 2017) https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-bears-ears-national-monument/.} National Monument, another monument designated by President Obama located in Utah.\footnote{Maffly, \textit{supra} at note 245.} The DOI released documents it considered when reviewing Bears Ears National Monument.\footnote{Salt Lake Tribune, \textit{supra} note 239.} These documents include correspondence from March of 2017 between the DOI and Utah Senator Orrin Hatch, who provide a suggested boundary for a much smaller national monument.\footnote{Id.} The proposed boundaries excluded areas Utah State officials believed had valuable natural resource deposits.\footnote{Id.} After receiving Senator Hatch’s proposed boundaries, Secretary Zinke traveled to San Juan County to
meet with stakeholders in May of 2017. Secretary Zinke heard from the Utah delegation, the Utah governor, the San Juan County Board of Commissioners, and tribal members.

In December of 2017, President Trump modified the Bears Ears National Monument. The Monument was broken up into smaller monuments: Shash Jáa and Indian Creek National Monuments. These two monuments total 201,397 acres, which is 1.1 million acres less than the original Bears Ears Monument designation. The two new monuments’ boundaries followed Senator Hatch’s recommendations and excluded areas thought to have natural resource reserves.

In its press release the Trump Administration said that the boundaries of these two monuments “ensure that, in accordance with the Antiquities Act, [the Monument] is no larger than necessary for the proper care and management of the objects to be protected within the monument”. The Trump Administration explained this reduction as: “[t]he areas described above are the smallest compatible with the protection of the important objects identified in Proclamation 9558.” And that “the modification of the Bears Ears National Monument will maintain and protect those objects and preserve the area’s cultural, scientific, and historic legacy.” The same day President Trump signed the proclamation reducing Bears Ears, Utah House Representatives, led by Representative Curtis, introduced H.R. 4532, which essentially codified President Trump’s modification of Proclamation 9558 and showed Utah’s support of the modification.

Immediately following President Trump’ announcement of the modification of the Bears Ears National Monument, many parties filed law suits against the President and his administration,

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251 Id.
252 Id.
253 Modification to Proclamation 9558, supra note 246.
254 Id.
255 Hopi Complaint, supra note 10, at 3.
256 Maffly, supra note 245.
257 Id.
258 Id.
259 Id.
challenging his executive authority to reduce a monument under the Antiquities Act in the D.C. District Court. Among participating plaintiffs are the five tribes making up the Bears Ears Inter-Tribal Coalition, the UDB, Patagonia and a variety of environmental organizations. In their complaint, the Tribes argued President Trump’s reduction of the size of the Monument was outside his executive authority under the Antiquities Act, was a violation of the separation of powers under the Constitution, a violation of the Property Clause under the Constitution and the delays caused by the reduction were a violation of the Administrative Procedure Act because the delays were arbitrary and capricious. Parties who have supported the Trump Administration include the State of Utah, San Juan County, and several private interest groups. The Trump Administration and its supporters have filed a Change of Venue motion, in an attempt to get the proceedings moved to a Federal Utah District Court, but this was denied.

Proclamation 9558, along with establishing the original boundaries of Bears Ears National Monument, created the “Bears Ears Commission.” The Commission was to be composed of elected members of the five tribes who participated in the development of the monument and were to be “meaningfully engage[d]” by the Secretaries of DOI and DOA. The proclamation required the Secretaries to provide written explanation to the Commission if they did not implement the recommendations provided by Commission. This would have given the five tribes of the Bears Ears Inter-Tribal Coalition a voice in the management of Bears Ears area like never before.

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261 Hopi Complaint, supra note 10, at 3.

262 Id. at 3.

263 Id.

264 Federal Defendants’ Motion to Transfer Case to the District of Utah, Case, (D.D.C. 2018), No. 1:17-cv-02590 (TSC) (This motion was denied, and the rest of the litigation is pending.) Court Documents can be found at https://www.nrdc.org/resources/complaint-filed-against-trump-administration-block-action-bears-ears-national-monument.

265 Id.


267 Id. at 12.

268 Id. at 10.
In contrast to the Bears Ears Commission, the modification of Proclamation 9558 has put tribal interests on the back burner by creating an advisory commission puts non-indigenous locals’ interests in the forefront at the expense of the tribes’ interest. The modification created two national monuments, but Shash Jàa National Monument is the only monument with an entity that loosely resembles an advisory tribal management commission. Specifically, the Shash Jàa National Monument Commission includes tribal members along with and “elected officer of the San Juan County Commission representing District 3 acting in that officer’s official capacity.”

In April of 2019 the first Shash Jàa National Monument Commission members were appointed. The 15-member committee did not include any proponents of the original Bears Ears National Monument. Appointees of note include San Juan County Commissioner Bruce Adams, Ryan Benally, a Navajo Nation member who has vocally opposed Bears Ears National Monument, and two San Juan County ranchers: Gail Johnson and Zeb Dalton. Each of these appointees were instrumental in the campaign to modify the original monument, however the appointment of Ryan Benally illustrates the tribes’ critique of how the federal government has treated tribes in the context of public land management: that the management plan under the Trump Administration’s modification would ignore and undermine “the government-to-government relationship between the tribes and the federal government by treating tribes as mere interest groups.”

While H.R. 4532 never came to fruition, comments by tribal members about serious issues they saw with the bill are reverent in understanding the impact of the current commission due to the similarities between the bill and the modifications to the Monument. In January of 2018, Mr. Chappose, a Ute Mountain Ute tribal member, testified before a committee on tribal concerns with H.R. 4532. Mr. Chappose, stressed the importance of having tribal elected members provide

269 See Modification to Proclamation 9558, supra note 246.

270 Id.


272 Id.

273 Id.


275 Id.
tribal prospective on the Bears Ears area is critical because to do otherwise was an infringement on the tribes’ sovereign rights and a step backwards to 19th century Indian Policy. Further, the tribes viewed the action taken in the bill and by the President Trump’s modification of the Monument as a violation of their government to government relationship with the U.S., conflicting with self-determination policies, gives state and local actors inappropriate control over federal land and preventing Native American involvement in management of religious and cultural resources.

Chapter 4: The Bears Ears Monument Conflict Explained by a Landscape Interpretation

After examining the events leading to the designation of Bears Ears National Monument and the events leading to the modification of the Monument, it is clear both the tribes of the Bears Ears Inter-Tribal Coalition and non-indigenous locals who opposed the original Bears Ears National Monument have the same critique of the federal government: it was not properly considering their protective interests in the management of federal public lands they were invested in. So, why are these two groups so at odds when both groups want the same thing. American Indian law and policy and federal public land law and policy has systematically diminished tribal sovereignty by limiting tribal control over land and managed federal public lands at the expense of tribes. The Bears Ears conflict illustrates the struggle tribes have in participating in the management of federal lands, even when the land at issue is full of cultural significance, in the legal landscape created by these two areas of law. The conflict further illustrates, non-indigenous locals felt threatened by the tribes’ claimed interest in the Bears Area. An interdisciplinary prospective of the dynamics of the Bears Ears conflict provides insight to why the Bears Ears Inter-Tribal Coalition has experienced the strong opposition and obstacle to their involvement in federal public land management. Perhaps a deep understanding of the tension between the non-indigenous locals and the tribes will provide the foundation for these two stakeholder groups to see past their difference and participate in federal public land management decisions.

276 Id.
277 Id.
278 Id.
This chapter will examine non-indigenous locals native counter-claim to the Bears Ears using observations of settler colonialism, from Patrick Wolfe, a historian. Next, it will examine the federal government’s endorsement of the non-indigenous locals’ native counter claim in the context of political ecology, using observations of political ecologist, Bruce Willems-Braun and how Proclamation 9558 illustrated to the federal government’s capability to recognize tribal interests using. Then, this chapter will use the prospective of geographers, such as Michael Lynch, to understand how the tribes’ struggle to protect the Bears Ears area has contributed to how the tribes value the area.

**A Native Counter-Claim**

The non-indigenous locals have been far less organized than the tribes when it comes to communicating their prospective about the Bears Ears National Monument. However, the actions of the locals, through the San Juan County Board of Commissioners during the PLI process, specifically the exclusion of tribes from the process is insightful. In *Settler Colonialism and the Elimination of the Native*, historian Patrick Wolfe contemplates settler society’s value in land in explaining societies hostility to tribal communities: “primary motive for elimination is not race (or religion, ethnicity, grade of civilization, etc.) but access to territory. Territoriality is settler colonialism’s specific, irreducible element.”279 Wolfe then goes on to say: “Settler colonialism destroys to replace.”280 “[T]he process of replacement maintains the refractory imprint of the native counter-claim.”281 This interpretation of settler communities view of territory helps explains the PLI events.

In the early stage of the PLI process the Navajo Nation and UDB’s proposal received little feedback during meetings, includes from government officials present at the meetings.282 Later, when San Juan County through the San Juan County Citizen Lands Committee began to

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280 *Id.*

281 *Id.* at 389.

282 *Supra* Chapter 3.
facilitate the PLI process, County Commissioner Lyman led the Committee.\textsuperscript{283} The same person who led an ATV rally through culturally sensitive BLM land, and made statements such as: “Native Americans lost the war and shouldn’t be commenting on public land issues, much like he doesn’t tell the Scottish government what to do after his ancestors left Scotland”.\textsuperscript{284} The actions of officials during the PLI meetings supports Wolfe’s observation of settler societies. The PLI process came about after many in Southeastern Utah felt they were being excluded from important public land management decision.\textsuperscript{285} Having an active role in these decisions is particularly important for a settler community attempting to control territory, and the actions of officials suggests many members of the settler community involved in the process preserved tribes’ interests as a threat to their control over the Bears Area. Further, the ATV rally lead by then Commissioner Lyman is an example of an active act of replacement. The BLM had closed the area to ATVs due to cultural sites in the canyon. Commissioner Lyman, and others who participated in the rally, acted to replace the tribes connect to the public land with their own interest in using the land the way they see fit. In this way, the group asserted native counterclaim. This analysis illustrates many settlers’ view as their status as natives to Southeastern Utah.

\textit{The Role of the Government}

While the non-indigenous locals’ counter-claim as natives to the Bears Ears area is helpful in understanding the Bears Ears conflict, it is also very critical to understand the federal government’s role in legitimizing non-indigenous interests over tribal interests. When examining the Trump Administration’s action in the Bears Ears conflict it is easy to vilify the Administration’s conduct, however the Administration’s conduct is not at all unordinary. The federal government has been excluding tribes from their ancestral land for hundreds of years, in the name of progress and settling the West.\textsuperscript{286} While the Bears Ears conflict has come to a head

\begin{thebibliography}{9}
 \bibitem{283} Id.
 \bibitem{284} The Utah Diné Bikéyah, Exhibit One, \textit{A Timeline: The Relationship of the Public Lands Initiative with The Tribes and Their Members}.
 \bibitem{285} Id.
 \bibitem{286} Helen Oliff, \textit{Reservation Series: Hopi}, Partnership With Native Americans: Reservation Series (June 5, 2012), \url{http://blog.nativepartnership.org/reservation-series-hopi}; SOUTHERN UTE INDIAN TRIBE, \textit{History}, Southern
\end{thebibliography}
during the twenty-first century, the federal government is still the entity which prioritized settler interests over tribal interests. Political ecologist, Bruce Willems-Braun, has studied the impacts of postcolonialism throughout North America and has written about how postcolonial society conceptualizes nature.\(^{287}\) Willems-Braun’s observations are insightful in understanding the Trump Administration’s role in the Bears Ears conflict.\(^{288}\)

Willems-Braun observed that “the production of ‘nature in colonial discourse did not occur through a straightforward erasure of native presence.’\(^{289}\) Colonist society often acknowledged the presences of tribes, however in order to obtain control and order over new territory, tribal presence was distilled to “primitive culture: a culture that lay outside and had no place in, the unfolding history of the modern nation.”\(^{290}\) This can be seen in Justice Marshall’s categorization of tribes as “domestic dependent nations” in *Cherokee Nation v Georgia*.\(^{291}\) While it is true the Marshall Trilogy preserved tribal sovereignty to a certain extent, the phrase “domestic dependent nations” illustrates the colonialisits society’s classification of tribes as primitive cultures not capable of contributing to a productive modern nation.\(^{292}\) Further, the federal government’s practice of removing tribes from their ancestral lands because the land was agriculturally rich or contained valuable natural resource deposits illustrates the U.S.’s practice, as a colonial power, of ignoring the “existing territorializations, making the land appear as Eden.”\(^{293}\) The federal government’s ability to isolate tribes as “primitive cultures” and its ability to render tribes’ territorializations of

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\(^{288}\) *Id.*

\(^{289}\) *Id.* at 10

\(^{290}\) *Id.* at 16.

\(^{291}\) 30 U.S., 8.1 L.Ed. 25 at 17.

\(^{292}\) See Willems-Braun, *supra* note 290.

the land delegitimate, gave the Trump Administration, and the local government, the rhetoric and precedent to again ignore tribal interests in how the Bears Ears area is managed.\textsuperscript{294}

The settler community’s counter-claim to native status provides the Coalition’s campaign to have the Bears Ears area designated as a National Monument. As discussed in Chapter 3, when the Coalition requested President Obama to designate Bears Ears as a National Monument pursuant to the authority granted to the President by the Antiquities, he did.\textsuperscript{295} There is no doubt the designation of Bears Ears National Monument was free of politics, but it does show an instance in history where the federal government listened to tribes’ interests over the non-indigenous population. An examination of the Obama Proclamation, in the context of the counter native claim of those opposed to the Monument illustrates the federal government’s, and to a certain extent, the law’s ability to recognize values which are outside mainstream society.

The overwhelming view on conservation is that of non-indigenous people, and from that prospective the designation of Bears Ears was fueled by the goals of protecting the archeologic sites in the area and its unique physical traits.\textsuperscript{296} William Cronon, an environmental historian, has critiqued the mainstream views regarding conservation.\textsuperscript{297} Cronon argues the environmental movements desire to reserve special places untouched by civilization.\textsuperscript{298} This argument is born out of dualistic view which separates mankind and nature.\textsuperscript{299} While Bears Ears features archeologic remnants of the people who once inhabited the protected area, the mysticism Cronon identifies “of something profoundly unhuman, something profoundly other than yourself” still applies to the designation of the Monument.\textsuperscript{300}

Bears Ears does have a human element, but it is foreign to today’s society because it is evidence of a time when human existence was more connected to nature. The proclamation

\textsuperscript{294} Id.
\textsuperscript{296} Bears Ears Tribal Coalition, Threats, http://bearsearscoalition.org/threats.
\textsuperscript{297} Cronon, \textit{supra} note 150.
\textsuperscript{298} Id. at 17.
\textsuperscript{299} Id.
\textsuperscript{300} Id. at 8.
discusses the “extraordinary archeological and cultural record”, the petroglyphs, the “stunning geology”, the paleontological resources and it refers to the area as a “region unsurpassed in wonders.” In this way, Bears Ears reflects the dualistic view of the separation between how humans once interacted with the environment and how modern society interacts with the environment.

Even with the human element of Bears Ears, the idea that places untouched by man should be preserved is present in the proclamation adopted in the Navajo Nation’s resolution. “As one of the most intact and least roaded areas in the contiguous United State, Bears Ears has the rare and arresting quality of deafening silence.” The acknowledgement and the desire to protect this uniquely silent place is born out of the dualism in which nature and wilderness are viewed.

Under the Antiquities Act the executive authority to determine boundaries of a monument are limited to what is necessary to protect the objects being protected. From a Western perspective the area is being protected because it has captivating archeological sites, important ecologic and physical features, and its unique isolation from the outside world.

A concern among environmental justice scholars who focus on indigenous populations is the movement’s potential to fail in identifying environmental injustices of Native American peoples because they do not view environmental impacts the same way Western science does. This is evident in the Navajo Nation’s resolution adopting the Proclamation. The proclamation states: “Abundant rock art, ancient cliff dwellings, ceremonials sites and countless other artifacts provide an extraordinary archeological and cultural record that is important to us all, but most notably the land is profoundly sacred to many Native American tribes.” The statement recognizes the common view of what is being protected by the designation, the same cliff

302 Id. at 3.
303 54 U.S.C. Ch. 3203 §§ 320301 to 320303 (1915)
304 Supra, Note 301.
306 Supra, note 301.
dwellings that end up on postcards and calendars and captivate people all across the country, but this is only part of the equation for the tribes who pushed for the designation.

The Bears Ears land itself and the surrounding tribes’ ability to manage it is what the tribes were attempting to protect by advocating for monument status of Bears Ears. Indigenous people view land management decisions as effecting their “tribal access to sacred resources, effects on traditional actives … and decreased opportunities for cultural education such livelihood skills.” The proclamation recognizes this by noting the historic importance of the Bears Ears area to traditional indigenous practices and by designating a tribal commission to advise in the management of the monument.

A counter-argument to this analysis is it romanticizes what the Native American perspective should be, and this is a valid point. An important element of environmental justice in the context of Native Americans is not to confuse the unique characteristic of “tribal self-determination” with “a romanticized idea of Native American environmentalism.” This concept is thought of in the context of Native American agency to peruse environmentally harmful activity on indigenous lands, but the concept can easily be applied here. The Native American people surrounding Bears Ears are people and have separate identities from being Native American. The individuals’ opinions are valid and should be considered, however, the fact the Navajo Nation and other tribes’ official stance is the monument should be left as is because it protects areas sacred to their culture is still valid.

It can be argued that wanting to protect the Bears Ears area because of its archeological significance and because it is untouched is shared among both indigenous and non-indigenous people. The tribes composing the Bears Ears Inter-Tribal Coalition have acknowledged their desire to preserve the archeologic sites because of their historical significance and because of their cultural and sacred significance. Further, the reasons the tribes wish to protect the Bears Ears area from certain land uses are different too. For example, the proclamation discusses the Navajo

307 Vickery, supra note 308 at 38-39.
308 Supra, Note 301.
309 Vickery, supra note 308, at 4.
310 Supra, Note 301.
concept of “Nahodishigh” which means, “places to be left alone”.\textsuperscript{311} The idea of leaving a place alone is present in the U.S.’ dualistic views on conservation but, as Cronon points out, this is due to our desire to escape the civilization we have constructed and a feeling of nostalgia.\textsuperscript{312} In contrast, the Navajo reasoning for leaving these areas untouched comes from traditional understandings of the ecological significance of the area, such as how they affected watershed.\textsuperscript{313}

**The Lawsuit**

While the tribes have an undeniable historical connection to the Bears Ears area, the tribes’ pleadings in the litigation challenging Trump’s authority under the Antiquities Act to reduce the Monument provides awareness of how the tribes’ fight to protect the Bears Ears area has impacted how it values the land. Geography scholars, such as Michael Lynch and David Correa, who have discussed the role of courts while interpreting landscapes can provide insight to the Bears Ears conflict. Courts are a powerful tool for both those looking to maintain and looking to challenge the status quo. A careful analysis of the Hopi Compliant illustrates how the legal proceedings in this dispute reflect how the tribes view the landscape of the Bears Ears Area, and how the advocacy of their position as helped shaped this interpretation.

Along with legal arguments and factual background surrounding the designation and the reduction of the Monument, the Hopi Complaint, in the litigation against the Trump Administration’s reduction of Bears Ears National Monument, contains extensive oral history about the Bears Ears Area.\textsuperscript{314} The Hopi Complaint describes each Tribes’ connection to the Bears Ears Area and describes the harm the reduction will cause to them. These descriptions provide characterizations of how the Tribes view the place that is Bears Ears and how they interpret the non-indigenous population’s view of the area.\textsuperscript{315} In Achieves in Formation: Privileged Spaces, Popular Archives and Paper Trails, Lynch discusses the significance of what is allowed into court

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\textsuperscript{311} Id. at 8.

\textsuperscript{312} Cronon, supra note 150, at 13.

\textsuperscript{313} Supra, Note 301.

\textsuperscript{314} Hopi Complaint, supra note 10, at 19-41

\textsuperscript{315} Id.
proceedings and what is not.\textsuperscript{316} Lynch’s analysis of courts as archives applied to the Hopi Complaint is helpful in understanding the significance of the oral history in the complaint and how this reflects the struggle of shaping the Bears Ears landscape.

Lynch discusses how Courts are a form of archives, as reflected in what is allowed in court proceedings and what is not.\textsuperscript{317} Archives that are viewed as reliable are most often maintained by the those with power, the “archonist.”\textsuperscript{318} While archives are looked at as a reliable source of what has happened in the past, the archonist have used their power to decide what is included in the “public record” and what is not.\textsuperscript{319} The criteria by which archonists chose what is included in archives is not universal and important facts of history can be left out.\textsuperscript{320} Lynch concludes: “… we can appreciate that archives are as much products of historical struggle as they are primary sources for writing histories.”\textsuperscript{321} Lynch applied this idea to the O.J. Simpson trial when it came to what was admitted into evidence and what was not, but his thesis can be applied to other court proceedings.\textsuperscript{322}

As discussed above, the explanation provided by the Tribes of their connection to the Bears Ears area is uncharacteristically long for an Anglo court proceeding but is common in tribal court proceedings.\textsuperscript{323} As a result of the different criteria for what is relevant and what is not in legal contexts, U.S. Courts have often found tribal interests to be less than compelling.\textsuperscript{324} The history of Indian law in the context of Indian religious and culture proves this to be true, repeatedly.\textsuperscript{325} Courts


\textsuperscript{317} See id.

\textsuperscript{318} Id. at 67.

\textsuperscript{319} Id.

\textsuperscript{320} Id.

\textsuperscript{321} Id.

\textsuperscript{322} Id. at 77-83.

\textsuperscript{323} David H. Getches, supra note 40, at 465-473.

\textsuperscript{324} Id. at 771.

\textsuperscript{325} Id. at 765-808.
are a privileged spaces and have significant control over what is considered and what is not, but in an initial complaint the plaintiff gets the first word. The Tribes used the Hopi Complaint as an opportunity to define the values of the struggle surrounding Bears Ears by their standards. While it is too still early in the proceeding to see if the Court will accept the Tribes value regime, the tribes use of the Native American tradition of oral history was their method of combating the power of the Court discussed by Lynch.

If Lynch is correct that archives are “products of historical struggle” and Courts reflect this characteristic of archives, then how the Tribe have presented themselves in the Hopi Complaint reflects the courts role in the struggle of shaping the landscape of Bears Ears. Tribes have had a long struggle with protecting religious and cultural sites, such as Bears Ears.\textsuperscript{326} In fact, the Tribes have repeatedly stated their request to President Obama to designate the Monument was a direct result of the lack of protection for the culturally rich area and the lack of adequacy of acts, such as the Archeological Resources Protection Act, for tribal involvement.\textsuperscript{327} By writing the complaint to include the extensive oral history that it did, the Tribes are combatting a system they know is developed in a way that disadvantages them. This reflects the landscape of Bears Ears as one connected to Tribal rights and legitimacy. The style the Hopi Complaint was written provides insight on the Court’s role of shaping the landscape of Bears Ears, but the conflict of value regimes between the Tribes and the Anglo-court proceeding is also helpful. The use of ethnographic information and the detail of the complaint is a method to combat the U.S.’s dismissal of community property. While the Tribes have closely worked together to designate the Monument and in the disputes following the designation, the tribes have worked to maintain their independent sovereign identities. This can be seen in the individual sections of the Hopi Complaint that explaining each tribes’ interest in the Bears Ears Area.

The Hopi and Zuni Tribes have a shared history in the Bears Ears Area and presented a combined history in the complaint.\textsuperscript{328} The two tribes can trace their ancestors to the people who built the ruins in the cliffs that have brought many tourists to the area.\textsuperscript{329} Of particular importance

\begin{itemize}
  \item \textsuperscript{326} Id.
  \item \textsuperscript{327} Shash Jaa National Monument and Indian Creek National Monument: Hearing on H.R. 4532, supra note 237.
  \item \textsuperscript{328} Hopi Complaint, supra note 10, at 22-26.
  \item \textsuperscript{329} Id. at 22.
\end{itemize}
is a well preserved kiva in the Cedar Ridge area of the Monument. As detailed by the Hopi Complaint “because the Hopi and Zuni trace their origins to the Bears Ears region, their cultural affliction with the objects found there and the people that created them is longstanding and very much alive.” Along with the historical value of the area to the tribes, Bears Ears is still vital to the continued practice of “Traditional Knowledge.” For example, the Zuni still go to the area to collect items such as spring water for important religious ceremonies. Another example is the vital role the area plays in the Hopi Tribe’s oral history. “The Bears Ears landscape situates the Hopi people in time and space, provides a geographic conception of history and religion that connects the past, present and future.” These ties to the Bears Ears area provides important insight to how the Hopi and Zuni Tribes interpret the place that is Bears Ears.

While the Navajo do not have ancient connection to the area the Hopi and Zuni Tribes do, the Bears Ears area has played an important role in the Navajo’s history and religion that continues today. The Bears Ears area is known as “Valley of the Gods” to the Navajo, where many ancient Navajo warriors are frozen in stone, making up many of the geological features of the area. The twin buttes, giving the area the name Bears Ears, is the “Changing Bear Woman” in Navajo culture. The tribe also goes to the Bears Ears Area to collect minerals for religious ceremonies. Along with the religious significance of the area, Bears Ears represents resistance of the US government. In 1868, when Colonel Kit Carson forced many Navajo off their ancestral

330 Id.
331 Id. at 25.
332 Id. at 24.
333 Id.
334 Id. at 26.
335 Id.
336 Id.
337 Id. at 27.
338 Id.
lands to relocate to a reservation, many Navajo were able to escape in the White Canyon area of the Monument and avoid removal.\textsuperscript{339}

The Ute Indian Tribe and the Ute Mountain Ute Tribe also have a deep connection to the area, in particular an environmental one. The Ute Tribes refer to the area as the “Headwaters region” based on their understanding of the impact the area has on the water table in the area below.\textsuperscript{340} Bears Ears still serves as an important area for grazing and other traditional land uses the Tribes wish to continue into future generations.\textsuperscript{341} The tribes connection to the area was so important to them, the treaty creating their reservations run next to the present day Monument.\textsuperscript{342}

The tribes’ explanation of their connection to Bears Ears is a helpful reflection on their interpretation of the landscape of Bears Ears, has also been the subject of extensive scholarship. Power, Prayer and Protection: Comb Ridge as a Case Study in Navajo Thought, written by Robert McPherson provides a deeper explanation of the Navajo connection to Comb Ridge (now known as Bears Ears).\textsuperscript{343} Like the UDB, McPherson conducted ethnographic mapping of the area to write his article by interviewing elders of the Navajo Nation.\textsuperscript{344} “Boundaries separate sacred from profane space. Along with the religious elements of the landscape, McPherson’s article furthers the assertion the Navajo view the Bears Ears Landscape as a place of resistance. Elders explained that the Bear Ears area is viewed as a safe haven and separates Navajo Tradition form the outside world. “Boundaries separate sacred from profane space. The land, bounded on the south by the San Juan River, the north by Elk Ridge and the Bears Ears, the west by Navajo Blanket and Lime Ridge, and the east by Comb Ridge, holds tremendous meaning for the Navajo people.”\textsuperscript{345}

An in depth look at the connection the tribes have asserted to the Bears Ears area in their pleadings illustrates how the fight to protect their ancestral lands, in the past and today, has become

\begin{itemize}
\item \textsuperscript{339} \textit{Id.}
\item \textsuperscript{340} \textit{Id.} at 32
\item \textsuperscript{341} \textit{Id.}
\item \textsuperscript{342} \textit{Id.} at 33.
\item \textsuperscript{344} \textit{Id.} at 1-3
\item \textsuperscript{345} \textit{Id.} at 18.
\end{itemize}
part of the landscape. However, the courts are not the only forum where tribes have asserted their right to be heard in the discussion of how the Bears Ears area should be managed.

**Chapter 5: Looking Forward**

At first glance, the story surrounding Bears Ears National Monument, and what the story means for tribes seems like a story of defeat. The tribes of the Southwest have had a long history of being excluded from a landscape important to their communities, and that exclusion has continued into modern day. When the tribes saw the area being plundered by antiquities robbers, they chose to act and were exclude from the grassroots movement in San Juan County to develop a land plan which represented the interests of the locals. When the tribes continued their efforts and were able to see the Bears Ears area designated as a National Monument, their victory was short lived. Then, when President Trump decided to reduce the area of protected land, and restructure the committee established in the original proclamation, the President did so in way which revered back to Indian Law policy that undermined tribal sovereignty. While the tribes, and other entities, are fighting the reduction of the Monument, the fate of Bears Ears is still unknown. However, despite the challenges the Tribes have faces, the story of Bears Ears National Monument, that is still continuing, is an optimistic one.

The litigation over the Trump Administration’s reduction of Bears Ears has not gone very far, the ruling from the D.C. District Court have been favorable for the tribes. 346 In September of 2018, the D.C. District Court denied the State of Utah’s motion to move the case to Utah District Court. 347 Even more promising are the changes that have happened in San Juan County. For years, despite the majority of San Juan County residents were Navajo, the County Commission had been controlled by the non-indigenous residents of the county. 348 However, in January of 2019, a majority Navajo board was elected. 349 Since the new commissioners have taken office, the Board has voted to withdraw the County’s support of the Trump Administration in the litigation over


[347] Id.


[349] Id.
Bears Ears and voted to issue a resolution to support the Monument.\footnote{The Associated Press, *Democrat-controlled San Juan County Formally Withdraws From Bears Ears Court Case*, SALT LAKE TRIBUNE (Apr. 17, 2019) https://www.sltrib.com/news/2019/04/18/democratcontrolled-san/} Additionally, society is paying attention to the Bears Ears conflict. As mentioned above, major outdoor companies have used their platform to bring attention to what has happened surrounding the Monument.

Despite the recent victories for tribes’ in the fight to protect the Bears Ears area, there is still a great deal of work to be done in order for non-indigenous locals and tribes’ to see past their differences and work together to participate in federal public land management. For non-indigenous stake holders and tribes to see past the Bears Ears conflict to their shared goal, non-indigenous locals must face a hard truth: the foundation of their family ties to the Bears Ears area and their status as “locals” are the problematic colonialist policies which ignored tribes’ claim to the lands in order to prioritize the interests of settlers moving West. If non-indigenous locals recognize they are, quite literally, standing on stolen land and that the legal landscape of American Indian law and federal public land law has allowed them to do so, then maybe their prospective of how federal public lands should be managed might shift.

This thesis only scratches the surface of the dynamics at play in the Bears Ears conflict, and there is opportunity for scholars, from various disciplines, to study these dynamics. First, given the wide verity of stakeholders involved the Bears Ears conflict interview of both tribal members and non-indigenous locals is needed to truly understand how these groups understand the landscape that is the Bears Ears area. Second, future research in this area would greatly benefit from scholars from different disciplines working together to take a deep drive into the subtleties of the Bears Ears conflict.

The takeaway from the Bears Ears National Monument is one of reflection. The law governing the conflict has structural biases against tribes, and this is seen in the events surrounding Bears Ears National Monument. Non-indigenous locals have only known federal public land management in the context of laws which systematically exclude tribes from the conversation. As a result, they viewed tribal involvement in federal public land management as a threat to their own participation. The Trump Administration heard the fear of the non-indigenous locals and continued the federal government’s tradition of excluding tribes. However, it does not have to be this way. The Obama Proclamation illustrates the federal government’s capacity to recognize tribal interests
in the context of federal public land management. The existence of Bears Ears National Monument was short lived and the events surrounding the conflict illustrate a willingness by mainstream society to exclude marginalized communities, but it will not always be this way. This thesis has illustrated how American Indian law, and federal public land law, along with the legacy of the nation’s colonial roots, has created rhetoric which has led to the belief that tribal interests and settler society interests are mutually exclusive. However, rhetoric and social constructions can be deconstructed. This deconstruction can lead to the understanding that tribes can have a say in federal public land management without the excluding other protective.