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**Public Comment to the U.S. Department of the Interior on the Review of
Certain National Monuments Established Under the Antiquities Act of 1906**
Regarding Bears Ears National Monument

Docket ID: DOI-2017-0002

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Executive Order 13792 of April 26, 2017 (82 FR 20429, May 1, 2017), directed the Secretary of the Interior to review certain monuments designated or expanded under the Antiquities Act of 1906. On May 5, 2017, the Department of the Interior announced a formal comment period and asked members of the public to provide input on certain national monument designations made since 1996. As the Interior Secretary noted at the time, a formal public comment process provides a means for the public to weigh in on federal land management, a crucial subject given that the agency controls one-fifth of the nation's land.

The Property and Environment Research Center (PERC) is a nonprofit research institute dedicated to improving environmental quality through property rights and markets. Founded in 1980 in Bozeman, Montana, PERC staff and associates conduct original research that applies market principles to resolve environmental problems. Part of our track record includes researching public lands for more than three decades, including innovative solutions to the management and stewardship of federal lands.

INTRODUCTION

The December 28, 2016, designation of 1.35 million acres of federal land in southeastern Utah as the Bears Ears National Monument is highly controversial. Groups for and against the monument have tried and will continue to try to sway political process in their favor. Additionally, each side has felt both aggrieved and pleased with the political process, albeit at different times. Initially, monument advocates were pleased because the Obama administration agreed with their desire and designated the monument. Conversely, monument opponents felt their views were ignored by the administration. Now, with the Trump administration in power the political pendulum has swung, and the situation is reversed: monument advocates are furious that the administration is making overtures about reducing

the size of or even rescinding the monument, while monument opponents feel that their concerns are finally being taken seriously.

There are, however, two questions more fundamental than who wins the ongoing political battle:

- Is the national monument designation under the Antiquities Act still a necessary means for protecting antiquities, given that numerous federal laws, policies, and programs provide for the same protections?
- If heightened protection is necessary to protect antiquities on federal land, then could that protection be accomplished with less political rancor and greater effectiveness?

ARE NATIONAL MONUMENTS STILL NECESSARY?

There are a number of factors that call into question whether the national monument designation is still a necessary means to protect antiquities.

- 1) Historical and political changes over the past century raise questions about the Antiquity Act's modern relevance. When Congress passed the Act in 1906, concerns about so-called "pot hunters" looting Native American artifacts were well founded. At the time, huge swaths of the United States were sparsely populated and had minimal federal presence, making them susceptible to looting. Furthermore, in the Southwest, where easily accessible Native American antiquities, including pots, were especially prevalent, New Mexico and Arizona were still territories—and would not become states until 1912—so the federal presence was even less.

Fast-forward 100 years, and the situation is vastly different. The combination of a significantly larger population, including federal employees, means that there are many more "eyes on the ground" to prevent antiquities looting or pursue antiquities looters.

- 2) A large body of federal laws, policies, and programs now protects antiquities and archaeological sites.

Laws: There are a number of relevant laws, including four passed specifically to protect Native American antiquities, prehistoric sites, and places of religious significance:

- **Antiquities Act of 1906:** While much recent focus on the Antiquities Act has been on the President's ability to use the Act to declare National Monuments, the Act also makes it a crime "to appropriate, excavate, injure, or destroy" antiquities or prehistoric Native American ruins.¹ Violators of the Act face penalties of a fine up to \$500 and a maximum of 90 days in prison. In practice, the Antiquities Act was seldom used. According to the Antique Tribal Art Dealers Association, from 1906 to 1972 there were a total of 10 convictions under the Act.²
- **American Indian Religious Freedom Act of 1978:** The Act's main purposes are to reinforce Native Americans' right to access sacred

sites located on federal land, and to require that federal agencies not damage such sites.³

- **Archaeological Resources Protection Act (ARPA) of 1979:** Following two federal cases in the 1970s, which found portions of the Antiquities Act so vague as to be unconstitutional, Congress passed ARPA.⁴ The purpose of ARPA is to strengthen the Antiquities Act by providing more detailed prohibitions and heightened penalties for unauthorized removal of archaeological artifacts from federal land. For example, those convicted of a first-time violation of ARPA can be imprisoned for as much as a year and fined \$20,000, while a second violation can result in five years prison and a fine of \$100,000.⁵
- **Native American Graves Protection and Repatriation Act (NAGPRA) of 1990:** This Act has a number of provisions, including protecting burial sites (common targets of antiquities looters), requiring the Interior Secretary to establish a Review Committee to oversee and help carry out the NAGPRA, and providing a mechanism for the Secretary to make grants to help Native American Tribes and museums comply with the statute.⁶

In addition to these four Native American-specific statutes, there are several other statutes that deal more generally with conservation of archaeological artifacts:

- **Archaeological and Historic Preservation Act of 1960:** The Act requires federal agencies that fund, license, or are engaged in construction projects to ensure historical artifacts are preserved.⁷
- **National Historic Preservation Act of 1966:** This Act broadly sets federal policy regarding historic and prehistoric resources and artifacts. More specifically, it provides a means for partnerships between the federal government and Indian Tribes and states, creates two designation programs (National Historic Landmarks and National Register of Historic Places), requires all federal agencies to evaluate the impacts of projects that receive federal funds or permits on historic and prehistoric sites and resources, establishes an Advisory Council on Historic Preservation, and provides a mechanism for the Interior Secretary to make grants to qualified Indian Tribes, States, and local governments. Furthermore, the Act provides a mechanism for federally recognized Tribes to assume a portion or all of what would traditionally be a State's historic preservation responsibilities, including the designation of Tribal Historic Preservation Officers who are responsible for implementing the Act under a Tribal Historic Preservation Plan.⁸
- **National Environmental Policy Act (NEPA) of 1969:** NEPA requires that federal agencies include historic properties and resources in Environmental Assessments, Findings of No Significant Impact, and Environmental Impact Statement Records of Decision.⁹
- **Federal Lands Policy Management Act (FLPMA) of 1976:** The Act sets guidelines for management of the 261 million acres administered by the Bureau of Land Management, almost all in the western United

States. Part of the BLM's responsibility under FLPMA is to conserve cultural and archaeological resources.¹⁰

- **Department of Transportation Act Section 303 of 1966:** This section requires the Transportation Secretary to take particular effort to preserve historic and prehistoric sites on projects that involve federal highways or federal highway funding.¹¹

Policies and Programs: There is also a wide range of policies and programs that concern preservation of Native American sacred and archaeological sites:

- **Advisory Council on Historic Preservation, Office of Native American Affairs:** The Advisory Council is an independent federal agency established by the National Historic Preservation Act (NHPA) of 1966. The Office of Native American Affairs was established in 1998 to provide policy and regulatory guidance on issues pertaining to Native Americans, especially the Section 106 process of the 1992 amendments to the NHPA, which include provisions for Tribes to designate Tribal Historic Preservation Officers.¹²
- **National Park Service Office of Tribal Relations and American Cultures:** The Office has four programs and offices:
 - Cultural Anthropology Program, established in 1981 to facilitate and coordinate National Park Service cultural anthropologists' efforts to ensure people's cultures play a role in agency decisions.
 - Native American Graves Protection and Repatriation Act Program, established in 1990 to ensure compliance with the NAGPRA
 - Tribal Historic Preservation Program, established in 1990 to help Indian Tribes designate Tribal Historic Preservation Offices and acquire grant funding.
 - Cultural Resources Office of Interpretation and Education, which is broadly involved with American cultural and historic preservation, including that of Native Americans.
- **Executive Order 13007:** Signed on May 24, 1996, the Order directed federal agencies to provide to the extent practicable access for Native Americans to sacred sites on federal land and to avoid as much as possible "adversely affecting the physical integrity of such sacred sites."

- 3) There are many non-government groups, some with considerable financial resources, involved in antiquities conservation, including American Cultural Resources Association, National Alliance of Preservation Commissions, National Association of Tribal Historic Preservation Officers, National Conference of State Historic Preservation Officers, National Trust for Historic Preservation, Preservation Act, and Society for American Archaeology. In addition, there are many well-funded environmental pressure groups that advocated the creation of Bears Ears National Monument in part because of the need to preserve Native American antiquities. Such groups include Pew

Charitable Trusts, the Wilderness Society, Hewlett Foundation, Sierra Club, Packard Foundation, and National Parks & Conservation Association. In January 2017 five such foundations (Hewlett, Wyss, Leonardo DiCaprio, Packard, and Wilburforce) and one non-profit advocacy group (Grand Canyon Trust) pooled their resources to create the \$1.5 million Community Engagement Fund to support Native American involvement in managing Bears Ears.¹³

If these groups can create such a fund three weeks after the designation of Bears Ears National Monument, then these and other similar groups can surely raise additional funds of a similar magnitude in the future. In 2015, these five foundations made approximately \$720 million in grants, so ongoing funding for antiquities conservation in the Bears Ears region would seem to be well within their means. The considerable funds available from private sources would seem to reduce the need for federal funding to protect antiquities in the region, especially given that funding subject to the political process in Washington, D.C. can be unreliable.

- 4) Antiquities dealers appear increasingly unwilling to deal in artifacts they think have been pilfered, which seems to be driven in part by a change in social mores and in part by fear of breaking laws. For example, in 1988 several antique tribal art dealers formed the Antique Tribal Art Dealers Association (ATADA), which is “dedicated to establishing and maintaining the highest standards of ethics, integrity and responsible collecting practices.”¹⁴ Toward this end, ATADA’s bylaws have sections dedicated to “Trade Practices, Ethics, and Guarantees,” and “Due Diligence Guidelines”, as well a “Theft Alerts & Recovered Items” portion of its website. The reality of the artifact trade today diminishes the need for further national monument designations to protect antiquities.
- 5) Changing social mores also mean that ordinary people are probably more likely to view Native Americans with respect than they were in 1909, when the Antiquities Act was passed, which includes a decreased likelihood of looting and vandalizing Native American antiquities and archaeological sites.

A PATH FORWARD

While the rancor over the designation of Bears Ears National Monument is unfortunate, it provides an opportunity to come up with creative solutions that would fulfill the original purpose of the Antiquities Act and subsequent legislation: protect cherished antiquities. It’s therefore constructive to ask whether these aims can be accomplished more effectively and with less controversy. In addition, it’s likely that the National Park Service, the agency that administers national monuments, may struggle to find sufficient resources to adequately protect the antiquities of the Bears Ears region. The Park Service already has an \$11.3 billion backlog of deferred maintenance.¹⁵ “Cultural heritage resources that the parks are set aside to protect are also at risk,” according to PERC research fellow Holly Fretwell.¹⁶ “Only 40% of park historic structures are considered to be in ‘good’ or

better condition and they need continual maintenance to remain that way.”¹⁷ Even though the National Park Service aspires to protect antiquities and cultural resources, it ill-equipped to do so because it is already stretched too thin.

Stronger Role for Native Americans

At the heart of finding innovative solutions for Bears Ears is the standing of Native Americans because, after all, the issue revolves around the protection of their ancestors’ antiquities. The proclamation that created Bears Ears National Monument contains a provision for the creation of the Bears Ears Coalition, a group consisting of one member from each of five Indian Tribes that will provide input on the management of the monument.¹⁸ Yet the Coalition’s role is advisory only. The Secretaries of Agriculture and Interior, who have regulatory authority over Bears Ears, can accept, reject, or ignore the coalition’s recommendations.

Meaningful authority for Native Americans would give them legally binding management of or even property rights to the antiquities sites in the Bears Ears region, instead of the current situation, in which there is merely the appearance of substantive Native American rights. Such rights would most likely not confer actual ownership of antiquities sites, because transferring land from the federal government to another owner is an extremely time consuming and difficult process.

A more legally and politically feasible solution than outright ownership would be to give Native Americans in the Bears Ears region an exclusive franchise to manage the region’s antiquities on federal land. Such a franchise model is appealing because it would:

- Result in higher quality conservation of antiquities and archaeological sites
- Confer strong and durable rights to Native Americans
- Provide a transparent mechanism for governance and fund raising

A franchise model for Bears Ears would also ideally include the following actions:

- 1) Tailor the area protected to the actual antiquities sites, instead of throwing protection over 1.35 million acres, much of which does not contain antiquities.
- 2) Perform a thorough antiquities survey. Currently, there is not even good data on the quantity and nature of all antiquities sites in the Bears Ears region.
- 3) Empower Native Americans by allowing them to control access and retain 100 percent of income generated from visitors. This would ensure antiquities sites are not overrun with and damaged by tourists, and it would also provide a significant incentive for Native Americans to conduct a thorough survey of antiquities sites, monitor sites for damage from the elements, and protect sites from vandalism, theft, and inadvertent damage.
- 4) Allow for clear, transparent management, in the form of a non-profit organization. This would also provide a vehicle for foundations, corporations, and individuals to make tax-deductible donations to protect Bears Ears antiquities.
- 5) Hold the franchise to high standards. The granting of a franchise would be subject to rigorous standards established by the federal government, most

- likely the National Park Service, since the agency has the most experience with conservation of antiquities.
- 6) Provide training. Native Americans would work with the federal government, likely the National Park Service, to devise a training program in how to protect antiquities and conduct tours of sites. At the successful completion of such a program guides would receive joint certification from the Park Service and the Native American organization with franchise rights to Bears Ears.
 - 7) Confer clear recognition of Native Americans that have historical ties to the Bears Ears region.

Establishing Franchise Grantee(s)

A crucial part of creating a franchise for Bears Ears would involve identifying the Native Americans who would become franchisees. This could prove difficult based on current divisions between Native Americans who claim rights in or attachment to the Bears Ears region. Many Native Americans who live in San Juan County, Utah, in which the current National Monument is located, are strongly opposed to the monument.

- The Aneth Chapter of the Navajo Nation, which is located entirely in San Juan County, passed a resolution in November 2015 opposing the Navajo Nation's support of the proposed Bears Ears National Monument. (The Navajo Nation is organized into five Agencies, which are further subdivided into 110 chapters.)
- The Blue Mountain Dine Community, a recognized off-reservation extension of the Aneth Chapter of the Navajo Nation, passed a resolution in June 2016 in opposition to the proposed National Monument.
- Rebecca Benally, one of three San Juan County Commissioners and a member of the Navajo Nation, supported a unanimous resolution by the county commission in opposition to the proposed National Monument.

There is also reason to question some of the claimed support of certain Native American tribes for designation of the National Monument. Darren Parry, Vice Chairman of the Northwestern Band of the Shoshone Nation (which is located in northern Utah, hundreds of miles from Bears Ears) states that when a tribal councilman signed a statement in June 2016 in support of designating Bears Ears National Monument, he "did not have the blessing of the tribal Council, nor did he speak on behalf of the Council."¹⁹ Parry added: "The NW Band of Shoshone does not support the Bears Ears National Monument."²⁰ Despite this, the Inter-Tribal Coalition, which consists of five tribes in support of Bears Ears National Monument, claims the Northwest Band of Shoshone supports the monument.

Native American support for Bears Ears is centered on the Inter-Tribal Coalition, which consists of the Navajo Nation and four tribes: Hopi, Pueblo of Zuni, Ute Mountain Ute, and Ute Indian. The Inter-Tribal Coalition has received a great deal of recognition in the media as "the" voice of Native Americans on Bears Ears, but there are several issues that call into question the coalition's role. A salient one is that the official reservations of three of five the tribes are far from the Bears Ears region:

- Ute Indian Tribe is located in northwest Utah, more than 200 miles away
- Pueblo of Zuni is in New Mexico, more than 200 miles away
- Hopi Tribe is in Arizona, some 150 miles away

Two of these three tribes, Pueblo of Zuni and Hopi, are considered ancestors of the Anasazi, prehistoric Native Americans who lived in the Cedar Mesa region, the portion of southeastern Utah synonymous with Bears Ears. Claims by these two tribes to have some sort of rights to the Bears Ears region bring up the enormously difficult question of who are the rightful “heirs” of the area. The Anasazi abandoned southeastern Utah around the year 1200 AD and traveled south. Their descendants are considered to be the Puebloan peoples of the Southwest, which includes the Pueblo of Zuni and Hopi.²¹ Even though these two tribes currently feel strongly about their deep links to the Bears Ears region, they have not lived there for hundreds of years. Meanwhile, other Native Americans, such as those who constitute the Aneth Chapter of the Navajo, have lived in the region for the past several hundred years.

A separate issue is whether the Inter-Tribal Coalition is an independent organization or the creation of deep-pocketed environmental pressure groups.

In October 2014 the Conservation Lands Foundation, an environmental non-profit organization that champions expanding public lands, held a board meeting in San Francisco at which protection of the Cedar Mesa region—as Bears Ears was referred to at the time—was discussed at length. According to minutes of the meeting:

*[Board Chair] Ed Norton inquired about the dynamics of the tribes and how are they working together. There have been some bumps in the road, but progress is being made to gain support from multiple tribes for protection of the Cedar Mesa region.*²²

The minutes also state:

*Ed Norton asked if we were “hitching our success to the Navajo” and if so what happens if we separate from them or disagree with them. Without the support of the Navajo Nation, the White House probably would not act; currently we are relying on the success of our Navajo partners. Growing support from other tribes should also be helpful in empowering the White House to act.*²³

According to the meeting minutes, it appears that the campaign to protect Cedar Mesa originated with the Conservation Lands Foundation (CLF) and like-minded groups. The minutes reference comments made by Dick Moe, CLF board member and President of the National Trust for Historic Preservation from 1993 to 2009:

*Dick Moe stated that Cedar Mesa has the most unique cultural sites in the nation and are not protected. Dick is impressed with the work that the staff had done to gear up for this campaign, stating that CLF has considerable credibility and the next few months will “tell the tale”.*²⁴

By October 2014, the Conservation Lands Foundation was heavily involved in lobbying the Obama Administration, as the minutes referenced a meeting with Dick Moe and Brian O’Donnell, CLF’s Executive Director:

Upcoming meeting with the Administration to discuss Cedar Mesa: Dick Moe and Brian meeting with Mike Boots [Acting Director of the White

*House Council on Environmental Quality] next week. Ryan and Dick meeting With DOI Chief of Staff shortly thereafter. Brian will be meeting with Secretary Jewell in the near future.*²⁵

In January 2015, as first reported by Amy Joi O'Donoghue of the *Deseret News*, Josh Ewing, Executive Director of Friends of Cedar Mesa—an organization founded in 2010 to advocate for more stringent protection of federal lands in San Juan County, Utah—registered the domain name www.bearscoalition.org.²⁶ Ewing was listed then and is still listed as the domain name administrator.²⁷

As O'Donoghue later reported regarding the formation of the Bears Ears Inter-Tribal Coalition:

The coalition's formation, however, was written about months earlier in a rock climbing magazine, which listed Friends of Cedar Mesa, the Conservation Lands Foundation, the Grand Canyon Trust and Utah Dine' Bihayah as groups that had "banded together."

In July 2015 the Bears Ears Inter-Tribal Coalition was officially formed,²⁸ six months after Ewing registered the internet domain name that the then-non-existent group would later use. Enormous amounts of funding from major foundations also played an important role in galvanizing support for designating Bears Ears as a National Monument. The Hewlett and Packard foundations contributed \$20 million, and the Leonardo DiCaprio Foundation chipped in a portion of a \$15.6 million grant, according to reporting by O'Donoghue.²⁹

It is striking that Native Americans who live adjacent or in close proximity to Bears Ears have far more nuanced and less romantic views of the region than those who live farther away. This is likely due to the fact that local Native Americans rely on the lands contained within the national monument for their livelihoods and maintaining their ways of life, including grazing livestock, gathering firewood for heating homes, gathering food and hunting game, harvesting plants for medicinal and ceremonial purposes, and performing religious ceremonies. It is also striking that those Native Americans who live near Bears Ears appear far more likely to be against the national monument than Native Americans who live far away.

As the foregoing indicates, establishing which Native Americans would be the rightful franchisees for federally owned antiquities sites within the area is fraught with conflict, especially given that outside groups evidently had significant influence in the creation and composition of the Inter-Tribal Coalition that now has an advisory role in the management of Bears Ears National Monument. Therefore, some sort of fair and transparent process is necessary to sort out competing Native American claims to antiquities on federal land. The court system, whether civil or federal administrative, would not be a fitting venue because of the prospect of long-term litigation. A better way to establish franchisees would be through alternative dispute resolution, such as mediation or binding arbitration.

Once antiquities franchises were awarded, then a true “coalition of the willing” could be assembled. Deep-pocketed funders, such as those who backed the designation of the Bears Ears National Monument, as well as ordinary people, could channel their money directly to conservation through a Native American franchise organization, rather than pouring tens of millions of dollars into efforts to sway the

political system—and with uncertain results, since it looks possible that the pendulum is swinging in favor of opponents of the monument.

CONCLUSION

The designation of Bears Ears National Monument highlights the issue of how Native American antiquities and archaeological sites can best be protected in the 21st century. There is ample evidence that calls into question the need for the Antiquities Act, including when it comes to the designation of Bears Ears National Monument, given the multitude of newer statutes and policies that are clearer, better funded, more stringent, and more focused on protecting Native American sacred and archaeological sites. But should the monument remain in place, then an innovative franchise model would not only be the most appropriate way to protect specific sites with antiquities, but it would also give Native Americans significant authority in the endeavor. It's time to give Native Americans meaningful rights to protect antiquities on federal land in southeastern Utah and elsewhere.

¹ 16 U.S.C. 431-433.

² "A Summary of Kate Fitz Gibbon's notes for her Talk on Art and the Law," *ATADA News*, Vol. 19, No. 3, Fall 2009, p.21.

³ 42 U.S.C. § 1996.

⁴ Uri A. Jurist, "Wild Burros, Fences, and ARPA: Viewing the Archaeological Resources Protection Act as Property Clause Legislation," *Journal of Constitutional Law*, Vol. 5, No. 1 (2002), pp. 109-127.

⁵ 16 U.S.C. 470aa-470mm.

⁶ 25 U.S.C. 3001-3013.

⁷ 16 USC 469-469c-2.

⁸ 25 U.S.C. 3001-3013.

⁹ 36 CFR 800.8(a)(3).

¹⁰ Pub.L. 94-579.

¹¹ 49 U.S. Code § 303.

¹² Advisory Council on Historic Preservation, Office of Native American Affairs, <http://www.achp.gov/nap.html>. Visited May 24, 2017.

¹³ William and Flora Hewlett Foundation, "New Bears Ears Community Engagement Fund to Support Cultural Resource Protection and Community Partnerships," <http://www.hewlett.org/newsroom/new-bears-ears-community-engagement-fund-support-cultural-resource-protection-community-partnerships/>. Visited on May 24, 2017.

¹⁴ ATADA.org, "What is ATADA.org?" <https://www.atada.org/about-atada/>. Visited May 24, 2017.

¹⁵ "NPS Deferred Maintenance Reports, FY 2016." National Park Service, <https://www.nps.gov/subjects/plandesignconstruct/defermain.htm>. Visited May 24, 2017.

¹⁶ Holly Fretwell, "The NPS Franchise: A Better Way to Protect Our Heritage," *The George Wright Forum*, vol. 32, no. 2 (2015), p. 115.

¹⁷ Ibid.

¹⁸ Barack Obama, Establishment of the Bears Ears National Monument by President of the United States of America: A Proclamation, December 28, 2016.

¹⁹ Darren Parry, "Great American lie that all tribes are for Bears Ears NM," *San Juan Record*, May 2, 2017.

²⁰ Ibid.

²¹ Matson, R.G., William D. Lipe and William R. Haase, "Adaptational Continuities and Occupational Discontinuities: The Cedar Mesa Anasazi," *Journal of Field Archaeology* Vol. 15, Issue 3 (1988), pp. 245-263.

²² Conservation Lands Foundation, Board Meeting Minutes, San Francisco, October 24, 2014.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Amy Joi O'Donoghue, "Big money, environmentalists and the Bears Ears story," *Deseret News*, August 4, 2016.

²⁷ <http://websitepart.com/www/bearscoalition.org>

²⁸ Bears Ears Inter-Tribal Coalition, "Who We Are," <https://bearscoalition.org/about-the-coalition/>.

Visited on May 23, 2017.

²⁹ O'Donoghue, "Big money."