POKING A SLEEPING BEAR: CULTURAL LANDSCAPES IN THE 1906 ANTIQUITIES ACT

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ABSTRACT

The American Antiquities Act of 1906 permits a president to designate "objects of historic and scientific interest"—and the federal lands associated with them—as national monuments. The Act is foundational cultural heritage preservation legislation and has been used by presidents for over a century to protect everything from burial grounds to marine landscapes. Through an overview of the statute and its history, this Note argues that a proper reading of the Antiquities Act includes cultural landscapes, or networks of natural and constructed places that people interact with and add meaning to. Indigenous communities, archaeologists, and heritage professionals have long recognized cultural landscapes. I survey recent monument declarations that explicitly protect Indigenous cultural landscapes and provide for Indigenous co-management and argue that the Antiquities Act is a helpful tool for Tribes to protect culturally significant areas. One such cultural landscape is Bears Ears National

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Monument, located in Southeastern Utah. Bears Ears—and the Antiquities Act—is currently under fire from opponents that wish to limit the scope of the President's declaration authority. Given over a century of use of and challenge to the Act, I argue that Bears Ears is well within the purview of the Act and authority it grants.

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INTRODUCTION

In southeastern Utah, a bear's stone ears rise from the horizon. The twin mesas crown a pristine piece of land that suggests an "earlier eon."[1] Red sandstone spires soar to cloudless blue skies. The landscape is absent any man-made sound; at night, our galaxy illuminates near-absolute darkness. Canyons cut by the San Juan River trace the terrain. The area features distinct high desert and lowland microclimates, innumerable endemic species of flora and fauna, and some of the most robust geological and paleontological resources in North America, including one of the best

1. Proclamation No. 9558, 3 C.F.R. § 9558 (2017).

"continuous rock records of the Triassic-Jurassic transition" in the world.[2] This is Bears Ears National Monument: an extraordinary natural landscape in every way imaginable.

Bears Ears occupies an important place in the collective consciousness of the region's Indigenous communities. It is a landscape covered with pottery shards, rock art, burial sites, and stone dwellings built into the cliffsides, left by ancestral Puebloans, Fremont, and other "precursor societies" to—and ancestors of—the region's Indigenous peoples and modern Tribal communities.[3]

However, Bears Ears holds cultural value beyond these natural features or material objects: the landscape itself is directly connected to Native history and heritage. "It is not easy to explain the meaning of Bears Ears to non-Native people," explains Woody Lee, Executive Director of Utah Diné Bikéyah, an all-Native American nonprofit that developed a proposal to designate Bears Ears a national monument.[4] To Indigenous communities, "Bears Ears is a 'who,' not a 'what.' "[5] In the languages of all people who have ancestral connections to the land, she is known as "Bears Ears": Hoon'Naqvut, Shash Jáa, Kwiyagatu Nukavachi, and Ansh An Lashokdiwe.[6] Bears Ears is a place where "culture, language, and religion were born."[7] The area includes the place the Diné (Navajo) emerged from the earth, and where "epic battles and the fate of humankind [were] determined"[8]—lofty spires that touch the sky are Diné warriors turned to stone.[9] Cliffs scored by the San Juan River tell stories of creation and healing.[10] Cultural and spiritual traditions of many distinct communities continue at Bears Ears, as they have for millennia: Native peoples continue "hunting, fishing, gathering, and wood cutting;" collect "medicinal and ceremonial plants, edible herbs, and materials for crafting items like baskets and footwear;"[11] and conduct ceremony.[12] Bears Ears is a landscape of living cultural heritage that continues to shape Native history, identity, and expression, and tells the stories of ancestors. She is,

2. *Id.*
3. *Id.*
4. GAVIN NOYES, UTAH DINÉ BIKÉYAH: CELEBRATING THE TEN YEAR HEALING JOURNEY OF BEARS EARS 1 (2022), https://utahdinebikeyah.org/wp-content/uploads/2022/01/UDB-Celebrating-10-Years-EC.pdf [https://perma.cc/S927-QE2L].
5. *Id.*
6. 3 C.F.R. § 9558 (2017).
7. NOYES, *supra* note 4, at 1.
8. *Id.*
9. 3 C.F.R. § 9558.
10. *Id.*
11. *Id.*
12. NOYES, *supra* note 4.

therefore, not only a natural landscape, but also a cultural landscape.

In the early 2000s, mining and drilling activities were on the horizon in Southeastern Utah.[13] After the approval of a state public lands bill, Washington County disposed of previously protected lands for real estate development.[14] Then, in 2009, a bombshell hit San Juan County. Sixteen residents of the small town of Blanding were arrested for looting Native objects from nearby public lands, including Bears Ears, and selling them. A raid of their homes that followed—the result of a two-year sting operation—uncovered more than 40,000 archaeological objects.[15] In response, a coalition of sovereign Tribal nations, including the Navajo Nation, Hopi Tribe, Uintah and Ouray Ute Tribe, Ute Mountain Ute Tribe, and Pueblo of Zuni—the Bears Ears Inter-Tribal Coalition—joined together, petitioning President Obama and Congress to designate the landscape a national monument.[16] The Inter-Tribal Coalition's petition marked the first time that any Tribe, let alone five Tribes in a political alliance, had asked the federal government to designate a national monument.[17]

The concerns of environmentalists, to this day, regularly take the main stage when advocating for public lands protections, designations, and management strategies.[18] Environmentalism, however, is movement

13. *See* BEARS EARS INTER-TRIBAL COALITION, PROPOSAL TO PRESIDENT BARACK OBAMA FOR THE CREATION OF BEARS EARS NATIONAL MONUMENT 34–35 (2015) [hereinafter BEARS EARS PROPOSAL], https://www.bearsearscoalition.org/wp-content/uploads/2015/10/Bears-Ears-Inter-Tribal-Coalition-Proposal-10-15-15.pdf [https://perma.cc/4G8H-A4YU].

14. *Id.*; Suzanne Struglinski & Nancy Perkins, *Bennett Pushes Southern Utah Land Bill,* DESERET NEWS (July 12, 2006, 9:25 AM), https://www.deseret.com/2006/7/12/19963273/bennett-pushes-southern-utah-land-bill [https://perma.cc/VYB4-BM63].

15. Howard Berkes, *Artifacts Sting Stuns Utah Town*, NAT'L PUB. RADIO (July 1, 2009, 12:34 AM), https://www.npr.org/2009/07/01/106091937/artifacts-sting-stuns-utah-town [https://perma.cc/P7XQ-46ME]; Kyle Swenson, *Pilfered Artifacts, Three Suicides and the Struggle Over Federal Land in Utah,* WASH. POST (Dec. 5, 2017, 6:53 AM), https://www.washingtonpost.com/news/morning-mix/wp/2017/12/05/pilfered-artifacts-three-suicides-and-the-struggle-over-federal-land-in-utah [https://perma.cc/6LGU-K4MJ]; NOYES, *supra* note 4.

16. BEARS EARS PROPOSAL, *supra* note 13.

17. Press Release, Bears Ears Inter-Tribal Coalition, Five Tribes Formally Petition President Obama and Congress to Create Tribally Co-Managed Bears Ears National Monument in Utah (Oct. 15, 2015), bearsearscoalition.org/five-tribes-formally-petition-president-obama-and-congress-to-create-tribally-co-managed-bears-ears-national-monument-in-utah [https://perma.cc/W653-5QAQ].

18. *See* Jedediah Purdy, *Environmentalism's Racist History*, THE NEW YORKER (Aug. 13, 2015), newyorker.com/news/news-desk/environmentalisms-racist-history [https://perma.cc/QNX2-4EGJ]; Association for Environmental Studies and Sciences & Antioch University, *Race and the Environmental Movement: History and Legacies*, YOUTUBE (June 4, 2020), https://youtu.be/L8PIQVbJBE8 [https://perma.cc/42J8-CKB2]. Two mistaken assumptions should be avoided: (1) that individual, sovereign Tribes are a monolith with the same interests when Tribal political interests and cultures differ substantially and (2) that Tribal and "environmental" interests are one and the same, when they may align, but often conflict. *See* Lauren Sloss, *Clean Energy, Cherished Waters and a Sacred California Rock Caught in the Middle*, N.Y. TIMES (Oct. 24, 2023), https://www.nytimes.

historically fostered by white men who championed "untouched," exclusionary wilderness and frequently removed Native communities from their ancestral lands.[19] By contrast, Tribal concerns and the interests of Native peoples led the way for the protection of Bears Ears.

The efforts of the Bears Ears Inter-Tribal Coalition were successful. In December 2016, President Obama designated Bears Ears National Monument, exercising executive authority granted under the American Antiquities Act of 1906.[20] The Antiquities Act is foundational cultural heritage legislation in the United States, used 291 times by Presidents to establish, expand, and redesignate over 100 active national monuments that contain exemplary "objects of historic or scientific interest."[21] Unlike other legislation in the United States' cultural heritage preservation regime, the Antiquities Act protects not only antiquities themselves, but also reserves the lands around them, including historic sites, landmarks, and landscapes. The Bears Ears National Monument designation restricted opportunities for commercial activity on and under the parcel, including future mining and drilling, and established protections for its heritage sites and objects.[22] Among others, these protections provide for Tribal consultation and co-management; limit access to areas otherwise open to off-road vehicles; direct and designate foot traffic; and include funding for conservation efforts, enforcement, and visitor education.[23]

Protection of Bears Ears, however, did not last. One year later, she returned to the national rostrum. Protests erupted at the Utah State Capitol against then-President Trump's proposal to rescind the prior

com/2023/10/24/travel/chumash-marine-sanctuary-morro-bay-california.html [https://perma.cc/897P-DEKS] (providing an example of a Tribal-led collaborative land management model thrown off-course by a renewable energy project); Morgan Conley, *Tribe Says FERC Ignoring Dam Project's Cultural Site Impacts*, LAW360 (Aug. 13, 2021, 8:02 PM), https://www.law360.com/articles/1412713 [https://perma.cc/55V8-YTPE] (demonstrating how projects with environmental advantages may ignore cultural site impacts).

19. *See* Purdy, *supra* note 18; *see also* Ward v. Race Horse, 163 U.S. 504, 510 (1896) (stating that legislation establishing Yellowstone National Park was the legal foundation for efforts to keep Native peoples off public lands), *abrogated by* Herrera v. Wyoming, 139 S. Ct. 1686 (2019).

20. Proclamation No. 9558, 3 C.F.R. § 9558 (2017).

21. 54 U.S.C. § 320301. This figure does not reflect uses of the Act to diminish or reduce monuments or uses of the Act by Congress; in total, Antiquities Act authority has been utilized 291 times. This figure was last verified by author as of January 13, 2024. *National Monument Facts and Figures,* NAT'L PARK SERV. (Feb. 8, 2024) [hereinafter *Monument Data*], https://www.nps.gov/subjects/archeology/national-monument-facts-and-figures.htm [https://perma.cc/8JXL-KJ4K].

22. JOHN C. RUPLE, ROBERT B. KEITER & ANDREW OGNIBENE, NATIONAL MONUMENTS AND NATIONAL CONSERVATION AREAS: A COMPARISON IN LIGHT OF THE BEARS EARS PROPOSAL 12–13 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2836986 [https://perma.cc/EKJ4-WBFS]; Brent J. Hartman, *Extending the Scope of the Antiquities Act,* 32 PUB. LAND & RES. L. REV. 153, 161 (2011); *see* BEARS EARS PROPOSAL, *supra* note 13, at 34–35.

23. RUPLE ET AL., *supra* note 22, at 3, 12–13.

administration's reservation of both Bears Ears National Monument and her sister monument, Grand Staircase-Escalante National Monument,[24] designated by President Clinton in 1996.[25] In December 2017, President Trump slashed the acreage of Bears Ears by eighty-five percent and Grand Staircase-Escalante by fifty percent.[26] President Trump's cuts to the monument eliminated key cultural areas within the Bears Ears and broader Cedar Mesa region, reducing the area protected to separate, distinct, and "non-contiguous parcels."[27]

The Bears Ears National Monument size reduction triggered a chain of three lawsuits against the Trump Administration—led by the five Coalition Tribes, joined by environmental groups including the Natural Resources Defense Council, and supported as amici by professional archaeological organizations.[28] These federal lawsuits, later consolidated, challenged President Trump's use of the Antiquities Act to reduce national monument parcel reservations and revoke national monument status.[29]

On October 8, 2021, President Biden reestablished the Obama-era boundaries of Bears Ears and Grand Staircase-Escalante National Monuments by presidential proclamation, effectively ending the pending litigation.[30] This, however, was not the ultimate salvation of Bears Ears. In August 2022, the state of Utah, joined by Garfield and Kane counties, filed a lawsuit in Utah District Court, once again attempting to diminish protection of Bears Ears.[31] Dismissed by the Utah District Court, the case

24. Benjamin Wood, *Monument Supporters Rally Against Trump's Plans to Shrink Bear Ears, Grand Staircase-Escalante,* SALT LAKE TRIB. (Dec. 5, 2017, 4:16 PM), https://www.sltrib.com/news/2017/12/02/monument-supporters-rally-against-trumps-plans-to-shrink-bear-ears-grand-staircase-escalante [https://perma.cc/5VDU-QHLC].

25. Proclamation No. 6920, 3 C.F.R § 6920 (1997).

26. Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html [https://perma.cc/Z2EM-AFKA]; Proclamation No. 9681, 3 C.F.R § 9681 (2018).

27. 3 C.F.R § 9681; *see also* Archaeological Organizations' Brief as Amici Curiae in Support of Plaintiffs at 15, Hopi Tribe v. Trump, No. 17-cv-02590, 2019 U.S. Dist. LEXIS 106244 (D.D.C. Mar. 20, 2019) [hereinafter Archaeological Amicus Brief].

28. *See* Archaeological Amicus Brief, *supra* note 27.

29. Two lawsuits specifically challenging the modification of Grand Staircase-Escalante were also filed. Courtney Tanner, *Here's a Breakdown of the 5 Lawsuits Filed Against Trump That Challenge His Cuts to 2 Utah National Monuments*, SALT LAKE TRIB. (Dec. 10, 2017, 6:12 PM), https://www.sltrib.com/news/politics/2017/12/11/heres-a-breakdown-of-the-5-lawsuits-filed-against-trump-challenging-his-cuts-to-two-utah-national-monuments [https://perma.cc/Y5A7-CKLK]; Complaint for Injunctive & Declaratory Relief at 1, Hopi Tribe v. Trump, No. 17-cv-02590, 2019 U.S. Dist. LEXIS 106244 (D.D.C. Mar. 20, 2019); Complaint for Injunctive & Declaratory Relief at 3–4, Nat. Res. Def. Council v. Trump, No. 17-cv-02606 (D.D.C. Dec. 7, 2017).

30. Proclamation No. 10285, 3 C.F.R. § 10285 (2022). After a motion to stay in the lead case, the consolidated cases were administratively closed. Order, Hopi v. Trump, No 17-cv-2590 (D.D.C. Mar. 8, 2021).

31. Complaint for Declaratory & Injunctive Relief at 51, Garfield Cnty v. Biden, No. 22-cv-

is now on appeal before the Tenth Circuit and set for oral argument in September 2024.[32] Unlike prior litigation, in which the primary issue was executive authority to reduce a designated monument, the state of Utah presents a more fundamental challenge in the case at bar: the scope of the 1906 Antiquities Act itself, a President's authority to designate national monuments thereunder, and what "objects of historic and scientific interest" may be protected.[33] The state of Utah intends to undermine the Antiquities Act in its entirety, accepting Chief Justice Roberts's recent invitation to challenge the Antiquities Act on its merits in the Supreme Court.[34]

Much has been written about Bears Ears. The emphasis typically rests on conservation and environmental principles, separation of powers issues, and inherent executive authority.[35] What has been lost along the way is the purpose of the Antiquities Act—heritage preservation law. This Note proposes a more faithful interpretation of the language of the Antiquities Act: that the Act was intended to and has served to protect *cultural landscapes* such as Bears Ears. The Act should be characterized, as legislation intended, to encompass not only discrete objects and sites, but also the archaeological, natural, and cultural heritage landscapes that inform them. A reading of the statute in its entirety—historical context, ordinary meaning, drafting history, past practice, management obligations, and existing case law—support this interpretation and a conclusion that the scope and size of Bears Ears National Monument is proper and within the boundaries of executive authority granted by the Act. A cultural landscape-based interpretation of the Antiquities Act should be applied in the state of Utah's lawsuit and presents a unique opportunity for Tribes to utilize existing legislation to protect and manage culturally significant lands.

00059, 2023 U.S. Dist. LEXIS 142044 (D. Utah Aug. 11, 2023) [hereinafter Utah Complaint]. Garfield and Kane Counties are those adjacent to (to the west of) Bears Ears National Monument. Notably, the state of Utah was not joined by San Juan County, the county that encompasses Bears Ears. *Id.* at 1.

32. Cassidy Wixom, *Utah Leaders Appeal Dismissal of Bears Ears, Grand Staircase-Escalante Monuments Lawsuit*, KSL.COM (Nov. 1, 2023, 6:21 AM), https://www.ksl.com/article/50771434/utah-leaders-appeal-dismissal-of-bears-ears-grand-staircase-escalante-monuments-lawsuit [https://perma.cc/C8CG-X7DM].

33. Utah Complaint, *supra* note 31, at 51–52.

34. Statement of Chief Justice Roberts Respecting the Denial of Certiorari at 1, Mass. Lobstermen's Ass'n v. Raimondo, 141 S. Ct. 979 (Mar. 22, 2021); *see* Jeff Parrott & Jacob Scholl, *Federal Judge Tosses Utah Lawsuit Seeking to Shrink Bears Ears and Grand Staircase-Escalante Monuments*, SALT LAKE TRIB. (Aug. 11, 2023, 3:20 PM), https://www.sltrib.com/news/politics/2023/08/11/federal-judge-tosses-utah-lawsuit [https://perma.cc/SV3T-2LGF] (" 'We will appeal the dismissal in order to stand up against President Biden's egregious abuse of the Antiquities Act.' ").

35. Prior modifications and executive authority to revoke or modify national monuments are beyond the scope of this Note. *See generally* John C. Ruple, *The Trump Administration and Lessons Not Learned from Prior National Monument Modifications*, 43 HARV. ENV'T L. REV. 1 (2019).

Part I describes the purpose, fit, and distinct characteristics of the Antiquities Act, defining the term "cultural landscape" and discussing historical context, drafting considerations, and other heritage protection mechanisms in the United States.

Part II discusses past use of the Act and foundational, unsuccessful challenges in the more than 100 years since its enactment.

Part III applies a cultural landscape-based understanding of the Act and principles derived from the relevant case law to the state of Utah's pending lawsuit, demonstrating that Bears Ears National Monument—a fundamental example of a cultural landscape—is well within the confines of presidential proclamation authority.

Finally, Part IV explains how a cultural landscape perspective presents the Act as an attractive, feasible heritage protection mechanism for Tribes, and recent instances in which Tribes have, fittingly, made use of it.

I. HISTORY AND PURPOSE OF THE ANTIQUITIES ACT: THE DAWN OF MODERN ARCHAEOLOGY

A. HISTORICAL CONTEXT AND DRAFTING CONSIDERATIONS

The American Antiquities Act of 1906 was signed into law by President Theodore Roosevelt on June 8, 1906. In relevant part, it reads:

> [T]he President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.[36]

The Antiquities Act was conceived as cultural heritage legislation. It is widely known as the first United States law to provide legal protection for cultural resources on federal lands and has been described as "the nation's first archaeological preservation law."[37] The central motive for its enaction was the preservation of archaeological sites. In the late nineteenth and early twentieth centuries, movement to the Western United States and

36. 54 U.S.C. § 320301.

37. Archaeological Amicus Brief, *supra* note 27, at 12. *See generally* RONALD F. LEE, NAT'L PARK SERV., THE ANTIQUITIES ACT OF 1906 (1970), http://npshistory.com/publications/antiquities-act-1906.pdf [https://perma.cc/V2EN-K5SF] (describing the historical context of American archaeology and the efforts of the American Archaeological Association and Archaeological Institute of America, joined by the Smithsonian Institution, to draft and advocate for passage of the Antiquities Act).

general interest in the history and archeology of the Southwest—including a growing public mythos surrounding Indigenous communities—led to substantial demand for artifacts.[38] A resulting increase in vandalism of archeological sites and historic structures, in addition to looting of potsherds, arrowheads, and other archeological and cultural resources, began to concern the Archaeological Institute of America ("AIA"),[39] along with other archaeological societies that had begun exploring and recording the American Southwest in the 1880s.[40] The AIA is the oldest professional archeological organization in North America, founded in 1879 for the purpose of "furthering and directing archeological and artistic investigation and research."[41]

Archaeological practice itself underwent radical change in the late nineteenth century. "Gentlemen" tomb raiders had made way for a growing canon of archaeological practice that emphasized recording obligations, systematic scientific analysis and conclusions, and greater cultural context, including recognition of the ethics surrounding archaeological practice and its relationship with existing peoples.[42]

In 1899, the AIA and the American Association for the Advancement of Science formed a committee, intending to draft a bill to protect archaeological and historical objects.[43] The impetus for this action was not simply the preservation of "isolated structures or objects," but rather the "impacts that 'indiscriminate digging' and vandalism were having on the integrity of archaeological sites in the Southwest" as a whole.[44] Amateur excavators and thieves were damaging site context and disposing of items as they saw fit, which caused substantial, "irretrievable loss of scientific knowledge" about the peoples and history of the region.[45] Archaeologist T. Mitchell Prudden, in an article published shortly before the Act's passage, said,

38. Archaeological Amicus Brief, *supra* note 27, at 12.

39. *Id.*

40. *Id.*

41. *History: Our Story*, ARCHAEOLOGICAL INST. AM., https://www.archaeological.org/about/history [https://perma.cc/RM76-EYHX].

42. *See* DENNIS HARDING, REWRITING HISTORY: CHANGING PERCEPTIONS OF THE PAST 17 (2019). To this day, archaeologists work to repair the trust their predecessors broke and to further develop strong standards of archaeological ethics. *See* Lynn Meskell, *The Intersections of Identity and Politics in Archaeology*, 31 ANN. REV. ANTHROPOLOGY 279, 279 (2002) (discussing a growing recognition of the ethical role archaeology plays in nationalism and the importance of cultural heritage to contemporary communities).

43. Archaeological Amicus Brief, *supra* note 27, at 12.

44. *Id.*

45. *Id.*; Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 477–78 (2003).

> [I]t is now evident that to gather or exhume specimens—even though these be destined to grace a World's Fair or a noted museum—without at the same time carefully, systematically, and completely studying the ruins from which they are derived, with full records, measurements, and photographs, is to risk the permanent loss of much valuable data and to sacrifice science for the sake of plunder.[46]

Drafters of and advocates for the Act shared a desire to protect Indigenous American artefacts, sites, *and* the scientific information their context provides.[47] The AIA drafted several early competing iterations of the Antiquities Act, three of which were heavily debated in Congress.[48] Then-Secretary of the Interior Ethan Hitchcock was "dissatisfied with the bills as he believed them to be too narrow . . . [t]hey were either too limited in the permissible reservation area, or merely criminalized harming an aboriginal antiquity."[49] Hitchcock and allied proponents of the Act wished for broader landscapes to be included within its purview.[50] The resulting statute was brief, but serves two key purposes that reflect the desires of the Act's drafters. First, it gives the President authority to declare national monuments to protect "objects of historic or scientific interest."[51] Second, it allows the President to reserve "parcels of land as part of the national monuments"[52]—the surrounding area that informs and contextualizes these objects. In other words, "under the plain text of the Act, the objects and the

46. T. Mitchell Prudden, *The Prehistoric Ruins of the San Juan Watershed in Utah, Arizona, Colorado, and New Mexico*, 5 AM. ANTHROPOLOGIST 224, 288 (1903). The landscape Prudden describes includes Bears Ears and Grand Staircase-Escalante National Monuments. *See id.* Moreover, this trend of looting was devastating for, and continues to devastate, Indigenous communities: without context or knowledge about objects, many institutions cannot identify the communities to which they should return funerary objects and human remains subject to the Native American Graves Protection and Repatriation Act. Stolen ancestors continue to languish in collections without proper ceremony—and in some cases are removed from rest to be used as teaching tools. *See* Logan Jaffe, Mary Hudetz, Ash Ngu & Graham Lee Brewer, *America's Biggest Museums Fail to Return Native American Human Remains,* PROPUBLICA (Jan. 11, 2023, 5:00 AM), https://www.propublica.org/article/repatriation-nagpra-museums-human-remains [https://perma.cc/8PMR-XL22] ("[T]he American Museum of Natural History has not returned some human remains taken from the Southwest, arguing that they are too old to determine which tribes—among dozens in the region—would be the correct ones to repatriate to."); Mary Hudetz & Graham Lee Brewer, *A Top UC Berkeley Professor Taught with Remains That May Include Dozens of Native Americans*, PROPUBLICA (Mar. 5, 2023, 8:00 AM), https://www.propublica.org/article/berkeley-professor-taught-suspected-native-american-remains-repatriation [https://perma.cc/5PN7-NEBG].

47. Archaeological Amicus Brief, *supra* note 27, at 13.

48. Freddie Wolf, *Addressing the Deficiencies of the Antiquities Act: Can a President Modify or Revoke a Designated National Monument?*, 11 GEO. WASH. J. ENERGY & ENV'T L. 55, 56 (2020); ARCHAEOLOGICAL INST. AM., *supra* note 41.

49. Wolf, *supra* note 48 (footnote omitted).

50. Squillace, *supra* note 45, at 477.

51. 54 U.S.C. § 320301(a).

52. *Id.* § 320301(b).

surrounding reserved land *together* comprise a monument."[53]

B. CONTEXT IS CRUCIAL: ARCHAEOLOGICAL AND CULTURAL LANDSCAPES DEFINED

Both professional and avocational archaeologists recognize that preservation of both objects and the context associated with them is crucial to systematic, holistic, and scientific study of the archaeological record.[54] The archaeological significance of an object depends on careful recordkeeping and connections, including the "stratigraphic," or soil layers, where the object rests, the broader geological context, and a network of sites, other objects, historical information, and cultural associations.[55] The phrase that describes these relationships is the "archaeological landscape," or the bounded area of land in which human behavior and its relationship with the natural environment over space and time can be viewed and understood through the study of the interconnected networks of sites, artifacts, and natural features that exist within it.[56] "Landscape-level analysis" means that findings at discrete sites are deprived of meaning if not viewed in the context of the broader archaeological and environmental landscape. In other words,

> Artistic and utilitarian objects, faunal and floral remains, architectural features, human remains, and their original contextual relationship to each other are all equally essential in achieving an optimal understanding of the past. This full body of contextualized information is a destructible, nonrenewable cultural resource. Once it is destroyed, it cannot be regained.[57]

Moreover, since the professionalization of archaeology in the nineteenth century, even prior to the conception of the Antiquities Act, archaeologists working with Indigenous communities have recognized the value of "cultural landscapes," defined as "networks of natural and constructed places perceived and made meaningful by particular human communities," in shaping modern community identities and informing archaeological preservation and practice.[58] Cultural landscapes "are as

53. Archaeological Amicus Brief, *supra* note 27, at 13.

54. *Id.*; Catherine Sease, *Conservation and the Antiquities Trade*, 36 J. AM. INST. FOR CONSERVATION 49, 51–52 (1997) ("Context is extremely important to the archaeologist; . . . artifacts are only of scientific value when their context is known.").

55. Archaeological Amicus Brief, *supra* note 27, at 13–14.

56. Tim Denham, *Landscape Archaeology, in* ENCYCLOPEDIA OF GEOARCHAEOLOGY (Allan S. Gilbert ed., 2016), https://link.springer.com/referenceworkentry/10.1007/978-1-4020-4409-0_168 [https://perma.cc/Z8HZ-UGT5].

57. Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT'L L. 169, 171–72 (2007).

58. Severin Fowles, *The Southwest School of Landscape Archaeology*, 39 ANN. REV.

critical to archaeological meaning as singular built structures," discrete objects, and the adjacent findings and stratigraphic context that constitute the archaeological landscape.[59] They draw no line between the natural, tangible, and cultural resources of a place; these are inseparable.[60] Cultural landscapes are not passive, nor are they frozen in the past. They are active heritage areas—living landscapes that communities continue to interact with.

Cultural landscapes are professionally recognized by archaeologists and embraced by many Indigenous communities, including those of the Bears Ears Inter-Tribal Coalition,[61] acknowledged internationally by the United Nations Educational, Scientific and Cultural Organization ("UNESCO"), a United Nations agency which is recognized as a global cultural heritage authority,[62] and which informs the practice of United States federal agencies.[63] UNESCO defines cultural landscapes as "[c]ombined works of nature and humankind [that] express a long and intimate relationship between peoples and their natural environment."[64] UNESCO has specifically designated 121 properties as cultural landscapes on its World Heritage List.[65] These properties

> [O]ften reflect specific techniques of sustainable land-use, considering the characteristics and limits of the natural environment they are established in, and a specific spiritual relation to nature. Protection of cultural landscapes can contribute to modern techniques of sustainable land-use and can maintain or enhance natural values in the landscape.[66]

ANTHROPOLOGY 453, 455 (2010). As the AIA notes in its Amicus Brief in the prior Bears Ears National Monument litigation, "Fowles reviews the development of landscape archaeology in the American southwest, arguing that a 'rigorous investigation of past landscapes must also seek to understand the way in which they were perceived and experienced on the ground by culturally situated individuals.' " Archaeological Amicus Brief, *supra* note 27, at 15 n.43.

59. Archaeological Amicus Brief, *supra* note 27, at 15.

60. *See* BEARS EARS PROPOSAL, *supra* note 13, at 30.

61. *Id.*; *Cultural Resources from an Indigenous Perspective,* NAT'L OCEANIC & ATMOSPHERIC ADMIN.: NAT'L MARINE SANCTUARIES, https://sanctuaries.noaa.gov/tribal-landscapes/cultural-resources.html [https://perma.cc/45MA-TRBE].

62. *Cultural Landscapes*, UNESCO WORLD HERITAGE CONVENTION, https://whc.unesco.org/en/culturallandscape [https://perma.cc/ULT2-XTK4].

63. Federal agencies provide their own definitions of cultural landscapes and describe the value of a cultural landscape approach to integrated resource management. *Cultural Resources from an Indigenous Perspective,* NAT'L OCEANIC & ATMOSPHERIC ADMIN.: NAT'L MARINE SANCTUARIES, https://sanctuaries.noaa.gov/tribal-landscapes/cultural-resources.html [https://perma.cc/45MA-TRBE].

64. UNESCO WORLD HERITAGE CONVENTION, *supra* note 62.

65. In 1992, the World Heritage Convention "became the first international legal instrument to recognise and protect cultural landscapes." After this Convention, UNESCO began including cultural landscapes as part of the World Heritage List. *Id.*

66. *Id.*

Context and landscape have significant historic, natural, scientific, and cultural value. With this understanding in mind, the Antiquities Act is best understood as cultural heritage legislation intended to protect cultural landscapes. The Act was developed by archaeologists for the benefit of long-term archaeological practice and cultural preservation. It would have been neither drafted nor passed without the influence of American archaeological societies that helped raise awareness of the looting and destruction of American cultural heritage, especially in the Southwest, to the national stage and assisted Congress in developing the legislation. Preserving cultural landscapes, which includes preserving access for descendant communities, helps us better understand layers of human meaning and value in a specific place, today and throughout history and prehistory. With them, we can develop a historical, scientific, and cultural understanding of peoples and places that the objects alone, removed from their broader context, could not share. This is what the framers of the Antiquities Act had in mind.

C. A PERFECT FIT: CHARACTERISTICS OF NATIONAL MONUMENTS AND THE PRACTICAL IMPACT OF NATIONAL MONUMENT STATUS AS A FEDERAL LAND USE DESIGNATION

Given the drafting context of the Antiquities Act, the Act was clearly intended to protect cultural landscapes. Indeed, it is well-tailored to do so. As discussed above, the Act intentionally protects not only objects, but also the areas of land that surround them, as necessary for the "proper care and management" of the objects.[67] Moreover, the Act's designation criteria, including its wording, specific protections and prohibitions, and flexible management structures, demonstrate that cultural landscapes are, and have in practice been, the key purview of the Antiquities Act.

National monuments are distinct from national parks, which require Congressional authorization under the Organic Act, by contrast to sole presidential authorization.[68] National parks are areas "set apart by Congress for the use of the people of the United States generally," typically because of an outstanding "scenic feature or natural phenomen[on]."[69] Under current National Park Service policies, parks must be "sufficiently large to yield to effective administration and broad use."[70] Qualities considered for

67. 54 U.S.C. § 320301(b).

68. *NPS Organic Act*, U.S. DEP'T INTERIOR, https://doi.gov/ocl/nps-organic-act [https://perma.cc/D7N8-MGBD].

69. ROBERT STERLING YARD, THE NATIONAL PARKS PORTFOLIO 4 (Isabelle F. Story ed., 6th ed. 1931).

70. *Id.*

national park designation are the "inspirational, educational, and recreational"[71] values of the area, by contrast to national monument criteria, which include "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest."[72] National parks and national monuments, therefore, were intended to serve different purposes, and do so in practice.[73] National parks are defined as lands emphasizing educational and recreational interests; national monuments are areas set aside specifically for historic and scientific preservation.

Both the President and Congress may exercise authority to designate a national monument pursuant to the Antiquities Act.[74] Congress has rarely exercised its independent authority to designate national monuments.[75] It did so primarily in the mid-1940s to 1960s, when Presidents were abstaining from use of the Act in the wake of President Franklin D. Roosevelt's designation of Jackson Hole National Monument and the subsequent national outcry.[76] Additionally, Congress may modify national monuments and, in some cases, has abolished them or converted them into different protective designations.[77] National monument designations under the Act apply to lands owned or controlled by the federal government.[78]

71. *Id.*

72. 54 U.S.C. § 320301(a).

73. Hartman, *supra* note 22, at 160–61.

74. *See* CAROL HARDY VINCENT, CONG. RSCH. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 4 (2024), https://sgp.fas.org/crs/misc/R41330.pdf [https://perma.cc/3SNQ-RKYD].

75. *See id.*

76. *See id.* at 2; *The Proclamation of National Monuments Under the Antiquities Act, 1906-1970*, NAT'L PARK SERV. (Mar. 6, 2023) [hereinafter *Proclamation of Monuments*], https://www.nps.gov/articles/lee-story-proclamation.htm [https://perma.cc/SD95-KX24]. For a complete dataset of uses of the Antiquities Act, including which designations were made under executive by contrast to congressional authority, see *Monument Data*, *supra* note 21. Current monuments and their proclamation authority are also listed at 54 U.S.C. § 320301. Congress may also narrow the reach of the President and the Antiquities Act. *See* VINCENT, *supra* note 74. In several cases, however, Congress has done the opposite, leaving the Antiquities Act untouched in pushes to modify it and, in some cases, intentionally reaffirming and preserving presidential authority. *See The Antiquities Act and America's National Monuments: A Timeline of Milestones*, PEW (Mar. 8, 2019), https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2019/03/the-antiquities-act-and-americas-national-monuments [https://perma.cc/4V85-XT2D]. For example, in 1976, Congress passed the Federal Land Policy and Management Act, or FLPMA, which repealed the executive branch's public lands withdrawal authority and prohibited the Secretary of the Interior from modifying or revoking any monuments created by executive action under the Antiquities Act. *Id.*

77. VINCENT, *supra* note 74. Recognizing the different values of environmental and recreation law compared with cultural heritage preservation law and following the 1916 passage of the Organic Act, Congress has abolished some monuments to redesignate them as national parks. *See id.* at 2–3. Even if the use of national monument and national park status in practice has been blurred, the legislative purposes of their enacting statutes are unquestionably distinct. Hartman, *supra* note 22, at 160–161.

78. VINCENT, *supra* note 74, at 6. The Antiquities Act also provides that if "objects" are on privately owned lands, the property "may be relinquished to the Federal Government." 54 U.S.C. § 320301(c). There is no case law that elucidates whether nonfederal lands must be relinquished

The Antiquities Act does not specifically cap the size of monument designations. Language proposed to cap monument size, found in the legislative history of the Act, was removed, though it was clear that land should be reserved "only so much . . . as may be absolutely necessary,"[79] ultimately, confined to the "smallest area compatible with the proper care and management of the objects to be protected."[80] The acceptance of a more ambiguous act that included vague definitions and did not include specific size limits suggests that Congress intended the Act to have a broad purview. The President has discretion to determine the acreage necessary to ensure protection of the objects in question, which "can be a particular archaeological site or larger features or resources."[81] The Grand Canyon, for example, initially had national monument status, protecting an area of nearly one million acres.[82] President Theodore Roosevelt, the first executive to employ the Act, determined that this size was necessary to protect the "object" in question: the canyon itself.[83]

Though typically managed by the National Park Service, monuments may be managed by any federal agency, including the Bureau of Land Management ("BLM"), United States Forest Service ("Forest Service"), Department of Fish and Wildlife Service, and National Oceanic and Atmospheric Administration.[84] Most monuments remain under the authority of the agency that managed the area prior to its new designation.[85] Bears Ears National Monument, for example, is jointly managed by the BLM and Forest Service.[86] Tribal guidance is provided by a Bears Ears Commission of the five Inter-Tribal Coalition Tribes; volunteers represent other stakeholders, including local and environmental interests, on the Bears Ears Monument Advisory Committee.[87] After President Biden's redesignation of Bears Ears, the BLM, Forest Service, and five Inter-Tribal Coalition Tribes signed a first-of-its-kind Inter-Governmental Cooperative Agreement for coordinated land use planning and implementation, long-term resource management, and programmatic goal development, including

voluntarily (donated, purchased, or exchanged) or whether the President may convert private property to federal property; no President has yet converted private property, though some monuments include donated lands. VINCENT, *supra* note 74, at 6–7.

79. H.R. REP. NO. 59-2224, at 1 (1906).

80. 54 U.S.C. § 320301(b).

81. VINCENT, *supra* note 74, at 5.

82. *Id.*

83. *Id.*

84. *Id.* at 7–8.

85. *Id.*

86. *Bears Ears National Monument Management*, U.S. DEP'T INTERIOR: BUREAU LAND MGMT. [hereinafter *Bears Ears Management*], https://www.blm.gov/programs/national-conservation-lands/utah/bears-ears-national-monument [https://perma.cc/2LK9-VAFP].

87. *Id.*

Tribal outreach efforts, at Bears Ears.[88] More recently, the Bears Ears Commission collaborated with the Bureau of Land Management and Forest Service to draft a Resource Management Plan for Bears Ears, another unprecedented example of tribal participation in co-management.[89] This is one example of the flexible, sovereign-to-sovereign, and creative management authority a national monument designation can provide.

Permitted uses of lands with national park or national monument status are also distinct. Monuments managed by the National Park Service are subject to the same use limitations as national parks.[90] Permitted uses for monuments outside the park system vary, depending on both the supervising agency and management objectives specified in the proclamation.[91] The overriding goal, however, is to protect the objects described in each proclamation.[92] Existing uses of the land not specifically precluded by the proclamation may continue, but the proclamation becomes the "dominant" reservation status when lands were previously reserved for other purposes.[93] All national monuments prohibit new mineral leases and permanent development activities.[94] At Bears Ears, no mining and drilling is permitted, but the Department of the Interior may continue issuing cattle grazing leases.[95]

The Antiquities Act is elastic—by design—to provide broad designation authority, flexible management priorities and structures, and to

88. Inter-Governmental Cooperative Agreement for the Cooperative Management of the Federal Lands and Resources of the Bears Ears National Monument, Bears Ears Commission-U.S. Department of the Interior, Bureau of Land Management and U.S. Department of Agriculture, Forest Service, June 18, 2022 [hereinafter Inter-Governmental Agreement], https://www.blm.gov/sites/default/files/docs/2022-06/BearsEarsNationalMonumentInter-GovernmentalAgreement2022.pdf [https://perma.cc/4RAB-UPMQ]; Amy Joi O'Donoghue, *'One of a Kind' Deal Means 5 Tribes Will Help Manage Bears Ears Area*, DESERET NEWS (June 21, 2022, 4:18 PM), https://www.deseret.com/utah/2022/6/21/23176953/bears-ears-national-monument-utah-biden-trump-native-american-tribes-public-lands-west-politics [https://perma.cc/4BCC-2TUL].

89. U.S. Dep't Interior: Bureau Land Mgmt., *Bears Ears National Monument Draft Resource Management Plan and Environmental Impact Statement* (2024), https://eplanning.blm.gov/public_projects/2020347/200531796/20105487/251005487/BENM_DraftRMP-EIS_Vol1_508.pdf [https://perma.cc/C7M5-VBL2].

90. Hartman, *supra* note 22.

91. *Id.* A "primary objection" to national monument designations is that the new status of the land would change management of the area and restrict or muddle various previously permitted uses, including development, off-road activity, and timber cutting. VINCENT, *supra* note 74, at 9–10.

92. VINCENT, *supra* note 74, at 9–10.

93. *Id.*; Squillace, *supra* note 45, at 515.

94. *See id.* at 516–17; Hartman, *supra* note 22.

95. Turkewitz, *supra* note 26.

limit uses as necessary to steward objects in situ and the land that encompasses them, or the cultural landscape. Each new monument has distinct requirements because the objects and landscapes it protects are different.

The Antiquities Act is the only United States cultural heritage legislation that serves, in intent and in practice, the goal of protecting cultural landscapes writ large. Dominant federal statutes protecting cultural materials, themselves limited in number and authority,[96] include: (1) the National Historic Preservation Act, emphasizing protection of historic sites and landmarks and creating the National Register of Historic Places, the list of National Historic Landmarks, and State and Tribal Historic Preservation Offices, in addition to implementing a required federal review procedure, known as Section 106 review, that requires federal agencies to consider the effects of projects they "carry out, approve, or fund" on historic properties included in, or eligible to be included in, the National Register;[97] (2) the Archaeological Resources Protection Act, governing the excavation of archaeological sites on federal and Tribal lands, and the removal and disposition of objects from those sites;[98] and (3) the Native American Graves Protection and Repatriation Act, providing for the repatriation of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony from federal agencies and institutions that receive federal funds.[99] Notably, these other cultural heritage laws, younger than the Antiquities Act by more than fifty years,[100] intend to protect sites, buildings, objects, or their excavation, but never *all* of these or the context that surrounds them.

96. The United States does not conceptualize cultural patrimony according to the national ownership model used in many European countries. Our cultural heritage protection options are therefore more limited and present unique challenges. For discussion, see generally William R. Ognibene, *Lost to the Ages: International Patrimony and the Problem Faced by Foreign States in Establishing Ownership of Looted Antiquities*, 84 BROOK. L. REV. 605 (2019).

97. ADVISORY COUNCIL ON HISTORIC PRES., PROTECTING HISTORIC PROPERTIES: A CITIZEN'S GUIDE TO SECTION 106 REVIEW 4 https://www.achp.gov/sites/default/files/documents/2017-01/CitizenGuide.pdf [https://perma.cc/TP3M-ZFB3].

98. Marina F. Rothberg, *Indiana Jones and the Illicit Excavation and Trafficking of Antiquities: Refining Federal Statutes to Strengthen Cultural Heritage Protections*, 63 B.C. L. REV. 1555, 1564–67 (2022).

99. *Native American Graves Protection and Repatriation Act*, U.S. DEP'T INTERIOR: INDIAN AFFS., https://www.bia.gov/service/nagpra [https://perma.cc/37BK-FV2Y]. In December 2023, new implementation rules for NAGPRA were announced, including several substantial changes. For more, see *Interior Department Announces Final Rule for Implementation of the Native American Graves Protection and Repatriation Act*, U.S. DEP'T OF THE INTERIOR (Dec. 6, 2023), https://www.doi.gov/pressreleases/interior-department-announces-final-rule-implementation-native-american-graves [https://perma.cc/5SRQ-EFCT].

100. Rothberg, *supra* note 98, at 1564–67.

Moreover, given its goals and the ramifications of its use, including, for example, prohibitions on renewable energy development in addition to more extractive natural resource projects, the Antiquities Act is not in purpose or effect similar to environmental conservation laws or other public land designation statutes. Many of these statutes are exceptionally long, well-defined, and heavily regulated,[101] by contrast to the brevity and ambiguous language that the Antiquities Act employs.[102] The Antiquities Act is not environmental or wilderness legislation; it is cultural preservation law, allowing Presidents to tailor protection of cultural landscapes to the specific needs of each monument.

II. BROAD DISCRETION OVER A CENTURY OF USE AND CHALLENGE

From its ideation to its drafting to its results, the Antiquities Act has been understood as a cultural heritage preservation law intended to broadly encompass cultural landscapes, or distinct objects and their surrounding context. President Theodore Roosevelt was the first President to utilize the Act. Roosevelt proclaimed eighteen national monuments, including areas now part of Grand Canyon, Lassen Volcanic, Olympic, and Petrified Forest National Parks.[103] Eighteen of the twenty-one Presidents serving in office since the Act came into effect—including President Trump—have proclaimed a total of 163 monuments and utilized the Act's grant of authority 291 times to establish, modify, and expand national monuments.[104]

National monuments range in size from 0.34 acres (Belmont-Paul Women's Equality National Monument)[105] to approximately 372 million acres (Papahānaumokuākea Marine National Monument);[106] the latter more than three hundred times the size of Bears Ears, where current boundaries under President Biden's redesignation total 1.36 million acres.[107] While it is true that many of the larger monuments were created over the past half century, there are several examples of monument proclamations greater than one million acres in size throughout the history of the Antiquities Act,

101. *See generally* SELECTED ENVIRONMENTAL LAW STATUTES: 2022-2023 EDUCATIONAL EDITION (2022) (compiled by Robin Kundis Craig). The Clean Air Act, as one example, is longer than the United States Tax Code. 42 U.S.C. §§ 7401–7671q.

102. RUPLE ET AL., *supra* note 22, at 2–3.

103. *Monument Data*, *supra* note 21.

104. *Id.*; VINCENT, *supra* note 74, at 7–8, 16.

105. Proclamation No. 9423, 81 Fed. Reg. 22505 (Apr. 12, 2016).

106. *Papahānaumokuākea Marine National Monument,* NOAA FISHERIES (Sept. 25, 2018) https://www.fisheries.noaa.gov/pacific-islands/habitat-conservation/papahanaumokuakea-marine-national-monument [https://perma.cc/4KUM-N63S].

107. *Bears Ears Management*, *supra* note 86.

including Katmai National Monument, established in 1918 with 1.1 million acres, Glacier Bay National Monument, proclaimed in 1925 as 1.4 million acres, and Wrangell-St. Elias National Monument, designated in 1978 with 10.95 million acres.[108] Of the 163 national monuments designated, burial grounds, individual houses, geological features, marine and continental landscapes, forts, cave systems, and battlegrounds are represented.[109] Historical precedent reveals broad use of the Act to proclaim a great variety of monuments that differ in size by several volumes of magnitude, consistent with an intent to protect individual cultural landscapes, with different boundaries, that inform the monuments' various "objects" and their management needs.

The Act has enjoyed over a century of use by nearly all Presidents, all of whom had substantially different policy objectives. When the Act has found itself in a courtroom, the President has been given latitude: broad discretion to use the Act has always been upheld. Not once has the Act's breadth been proscribed, rather than expanded, by federal court mandate. Every test to date has been unsuccessful.

The first challenge to the Antiquities Act came shortly after President Theodore Roosevelt's designation of Grand Canyon National Monument, nearly one million acres in size, in 1908, only two years after the Act became law. In *Cameron v. United States*, the plaintiff, owner of a lode mining claim that Roosevelt's proclamation removed from the "operation of the public land laws and . . . of the mineral land law," challenged the monument proclamation, arguing that there was "no authority for its creation" under the Antiquities Act.[110] On appeal from the Ninth Circuit, the United States Supreme Court—whose discussion of this issue lasted no more than a short paragraph—held that the Grand Canyon itself was an "object" of unusual scientific interest.[111] In making this finding, the Court wrote that the Grand Canyon

> [I]s the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.[112]

These exemplary characteristics were sufficient to defer to the President's authority, as empowered by the Act, to define an "object of

108. VINCENT, *supra* note 74, at 4–5.
109. *Id.* at 16–24.
110. Cameron v. United States, 252 U.S. 450, 454–55 (1920).
111. *Id.* at 455–56.
112. *Id.* at 456.

historic or scientific interest."[113] Not only was a landscape as a "container" for objects consistent with the Act, but a landscape, too, could itself be an object protected by a monument.

The Antiquities Act was next impugned in the mid-twentieth century, following President Franklin D. Roosevelt's proclamation of Jackson Hole National Monument in Wyoming. The proclamation sparked "tremendous and bitter opposition" in Wyoming, national outcry, and vehement debate in Congress;[114] in the resulting lawsuit, the Wyoming District Court went so far as to assert that "propaganda [had] been circulated in forums and through the press of the Nation."[115] Opponents characterized the proclamation as executive overreach that designated a wilderness with no historic sites, landmarks, or archaeological resources as a national monument.[116] The plaintiff in *State v. Franke*, sought a construction of the Antiquities Act, under the Federal Declaratory Judgement Act, that would void Roosevelt's proclamation, arguing that

> The segregated area, by virtue of the Proclamation over which the defendant threatens management and control, is outside the scope and purpose of the Antiquities Act under which the Proclamation was issued in that such area contains *no objects of an historic or scientific interest required by the Act*; that the Proclamation is void and of no effect in that it is *not confined to the smallest area compatible with the proper care and management* of a National Monument; that by said Proclamation an attempt has been made to *substitute, through the Antiquities Act, a National Monument for a National Park*, the creation of which is within the sole province of the Congress, thereby becoming an evasion of the law governing the segregation of such areas . . . .[117]

The court, reluctantly, found that it had "limited jurisdiction to investigate and determine whether or not [Roosevelt's] Proclamation [was] an arbitrary and capricious exercise of power under the Antiquities Act so as to be outside of the scope and purpose of that Act."[118] The plaintiff and the defendant presented conflicting evidence regarding the presence or absence of "objects of historic or scientific interest."[119] However, the court held, the President acted on evidence "of a substantial character" and therefore properly availed himself of the discretion duly granted to him by

113. *See id.* at 455–56.
114. *Proclamation of Monuments*, *supra* note 76.
115. State v. Franke, 58 F. Supp. 890, 896 (D. Wyo. 1945).
116. *See id.* at 895.
117. *Id.* at 892 (emphasis added). Note that this is the first case challenging the Act not solely on the grounds that it contains no qualifying "objects" of historic and scientific interest, but also specifically on the grounds that the size of the monument designation was too expansive.
118. *Id.* at 894.
119. *Id.* at 895.

Congress through the Antiquities Act.[120] The court distinguished between a "bare stretch of sage-brush prairie" that could contain no objects of historic and scientific interest, in which case the presidential monument proclamation would be arbitrary and capricious, and the monument at issue, for which experts provided some "substantial" evidence of such objects, including "trails and historic spots in connection with the early trapping and hunting of animals formulating the early fur industry of the West, structures of glacial formation and peculiar mineral deposits and plant life indigenous to the particular area."[121] Though it did not agree that testimony would support the President's claim regarding the presence of objects of historic and scientific interest in Jackson Hole under a preponderance rule, the court was bound by his exercise of discretion.[122]

Decades passed before the Antiquities Act was contested again. In the cases that followed *Franke*, federal courts continued to recognize a President's discretion and support interpretations of the Act that confirmed its substantial scope and latitude regarding both objects to be preserved and the size of parcels proclaimed. In *Tulare County v. Bush*, challenging President George W. Bush's proclamation of Giant Sequoia National Monument, the D.C. Circuit Court of Appeals held that ecosystems and scenic vistas were appropriate "objects" for protection under the Act, which is "not limited to protecting *only* archeological sites."[123] This case further cements the conclusion that biodiversity, ecosystems, and scenery are part and parcel of what the Act was intended to protect—archeological, scientific, and historic resources together with the natural and cultural context that informs them.

This trend continued in *Utah Association of Counties v. Bush*, an earlier challenge by the state of Utah to national monument designations within its borders.[124] This was the first time that Bears Ears' sister monument, Grand Staircase-Escalante National Monument, was on the chopping block. The Utah District Court rejected plaintiff counties' claims that Grand Staircase-Escalante, 1.87 million acres, exceeded the "smallest area compatible" with the protection of the objects at issue, holding that President Clinton lawfully exercised his discretion pursuant to the

120. *Id.* at 895–96.

121. *Id.* at 895. Following the ruling, while Jackson Hole's monument designation was upheld, Congress limited the President's authority by "requiring congressional authorization for extensions or establishment of monuments in Wyoming, and by making withdrawals in Alaska exceeding 5,000 acres subject to congressional approval." VINCENT, *supra* note 74, at 1 (footnote omitted).

122. State v. Franke, 58 F. Supp. 890, 896 (D. Wyo. 1945).

123. Tulare Cnty. v. Bush, 306 F.3d 1138, 1142 (2002) (emphasis added); *see also* Cappaert v. United States, 426 U.S. 128, 142 (1976).

124. Utah Ass'n of Cntys. v. Bush, 316 F. Supp. 2d 1172 (D. Utah 2004).

Antiquities Act as to both the nature of "objects" to be protected and the size of the parcel reserved.[125] The court found it significant that the proclamations discussed in detail both the monument's natural and archaeological resources, and why the designated area was the smallest consistent with the protection of those specific resources: this "clearly indicate[d] that the President considered the principles that Congress required him to consider."[126] Again, this exercise of discretion was not subject to judicial review.[127] The court engaged in two other notable discussions: its conclusion that the Antiquities Act was not intended to limit protection to man-made objects, which appeared so obvious to the court that it was observed only in a footnote,[128] and a constitutional nondelegation argument.[129] The court settled the latter issue, holding that

> The Antiquities Act sets forth clear standards and limitations. The Act describes the types of objects that can be included in national monuments and a limitation on the size of monuments. Although the standards are general, "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors."[130]

The most recent challenge to the Antiquities Act—other than the present challenge—is *Massachusetts Lobstermen's Association v. Ross*, a 2019 D.C. Circuit Court of Appeals case dismissed for failure to state a claim that contested the designation of Northeast Canyons and Seamounts Marine National Monument.[131] On the fishermen's argument that the monument was not limited to the smallest area compatible with the care and preservation of the objects at issue, the court wrote

> [The Fishermen] allege only that the Monument reserves large areas of submerged land beyond the canyons and seamounts. Although those allegations "might well have been sufficient if the President had identified only [the canyons and seamounts] for protection, . . . he did not." Instead, the Monument protects not only "the canyons and seamounts themselves," but also "the natural resources and ecosystems *in and around them*."[132]

125. *Id.* at 1183. The court also characterized the overriding purpose of the Antiquities Act as "identify[ing] and protect[ing] important scientific and historic objects and [] set[ting] aside the necessary surrounding land to insure their continued protection." *Id*. at 1192.

126. *Id.* at 1186.

127. *Id.* at 1172.

128. *Id.* at 1186 n.8.

129. *Id.* at 1190–91.

130. *Id.* at 1191 (citation omitted).

131. Mass. Lobstermen's Ass'n v. Ross, 945 F.3d 535, 545 (D.C. Cir. 2019).

132. *Id.* at 544 (emphasis added) (quoting Tulare Cnty. v. Bush, 317 F.3d 227, 227 (D.C. Cir. 2003) (per curiam)).

It was incumbent on the fishermen to allege that some part of the monument did not contain natural resources that the President sought to protect. They failed to do so.

Over nearly one hundred years of the Antiquities Act's use, every test has come up short, despite substantive challenges to large monuments and courts that clearly expressed reluctance to uphold proclamations. Courts have not only considered the history and purpose of the Act and chosen, given this history, to interpret its brief language broadly,[133] but have also substantially deferred to the President's proclamations, refused to submit them as arbitrary and capricious,[134] and declined to engage in judicial review of discretion Congress properly granted—with clear standards.[135] What followed *Massachusetts Lobstermen's*, however, was plaintiffs' petition for a writ of certiorari to the United States Supreme Court. Chief Justice Roberts's statements in his order denying certiorari serve as the cornerstone of the state of Utah's current lawsuit. Chief Justice Roberts invites challenges to the Antiquities Act, making it clear that his denial of certiorari is on procedural grounds alone and indicating that the Supreme Court readies itself to reconsider the scope of the Antiquities Act on its merits:

> While the Executive enjoys far greater flexibility in setting aside a monument under the Antiquities Act, that flexibility, as mentioned, carries with it a unique constraint: Any land reserved under the Act must be limited to the smallest area compatible with the care and management of the objects to be protected. Somewhere along the line, however, this restriction has ceased to pose any meaningful restraint . . . [and the Presidential power granted by the Act] has been transformed into a power without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea. . . . We have never considered how a monument of these proportions . . . can be justified under the Antiquities Act . . . [and] we have not explained how the Act's corresponding "smallest area compatible" limitation interacts with the protection of such an imprecisely demarcated concept as an ecosystem . . . . Despite these concerns, this petition does not satisfy our usual criteria for granting certiorari. . . . We may be presented with other and better opportunities to consider this issue without the artificial constraint of the pleadings in this case.[136]

133. *See* Utah Ass'n of Cntys. v. Bush, 316 F. Supp. 2d 1172, 1186 n.8. (D. Utah 2004).
134. *See* State v. Franke, 58 F. Supp. 890, 896 (D. Wyo. 1945).
135. *Utah Ass'n of Cntys.*, 316 F. Supp. 2d at 1183.
136. Statement of Chief Justice Roberts Respecting the Denial of Certiorari, *supra* note 34, at 3–4 (citation omitted).

III. UTAH POKES THE SLEEPING BEAR: THE PRESENT CHALLENGE TO THE ANTIQUITIES ACT

One might conclude that, given this precedent, the broad purview of the Antiquities Act and its protection of objects and the natural and cultural landscapes that encompass them have been put to bed. Following Chief Justice Roberts' invitation, however, Utah decided to poke the sleeping bear. Joined by Garfield and Kane counties and, in a companion suit, the BlueRibbon coalition,[137] the state filed suit against the Biden Administration in Utah District Court in late 2022, objecting to President Biden's redesignation of Bears Ears National Monument. Tribes, including the Navajo Nation and Hopi Tribe, later followed by the Ute Mountain Ute Tribe and Pueblo of Zuni, quickly sought to intervene; their motions were granted.[138]

In a challenge nearly identical to those that have come before, relying heavily on Chief Justice Roberts' statement and concerns about the size of the monument, Utah argues that "[t]he Act does not authorize the president to draw boundaries around an enormous land area and then stitch together hundreds of items and features within those boundaries to try to reverse engineer a landscape-scale national monument."[139] In their desire to exclude "landscape-scale" areas from the scope of the Antiquities Act, opponents of the Act and of Bears Ears National Monument misconstrue the term "landscape." They miss the true meaning and intention of the Antiquities Act. A landscape is not simply an environment, microclimate, or collection of flora and fauna, but rather a collective set of sites, objects, geological features, natural elements, and the living things that interact with them. This web of understanding—this cultural landscape—is essential to historic and scientific study. It was clearly recognized by both the

137. The BlueRibbon Coalition is a nonprofit organization that advocates on behalf of recreationalists and those seeking motorized access to public lands. *About: History of the BlueRibbon Coalition/Sharetrails*, BLUERIBBON COAL., https://www.sharetrails.org/about [https://perma.cc/WDB2-H43B].

138. Proposed Intervenors' Second Amended Rule 24 Motion to Intervene, Garfield Cnty. v. Biden, No. 22-cv-00059, 2023 U.S. Dist. LEXIS 142044 (D. Utah Aug. 11, 2023); Order Granting Movants Hopi Tribe, Navajo Nation, Pueblo of Zuni, & Ute Mountain Ute Tribe's Amended Motion to Intervene, Garfield Cnty. v. Biden, No. 22-cv-00059, 2023 U.S. Dist. LEXIS 142044 (D. Utah Aug. 11, 2023). Similarly, in December 2022, a collection of professional archaeological societies, including the AIA, submitted a motion to intervene in the lawsuit (in the interest of disclosure, the Author was a declarant for this motion). Though their motion was denied, their motion speaks to the gravity of the lawsuit and an understanding that the Antiquities Act is law written by archaeologists for the purposes of historic and cultural preservation. Motion to Intervene as Defendants & Memorandum in Support, Garfield Cnty. v. Biden, No. 22-cv-00059, 2023 U.S. Dist. LEXIS 142044 (D. Utah Aug. 11, 2023); Memorandum Decision & Order on Proposed Intervenors' Motions to Intervene, Garfield Cnty. v. Biden, No. 22-cv-00059, 2023 U.S. Dist. LEXIS 142044 (D. Utah Aug. 11, 2023).

139. Complaint for Declaratory & Injunctive Relief at 2, Garfield Cnty. v. Biden, No. 22-cv-00059, 2023 U.S. Dist. LEXIS 142044 (D. Utah Aug. 11, 2023) .

proponents of the Antiquities Act and by Congress, and the President is granted broad discretion to determine what objects are protected and the size of the area necessary for their care.

Bears Ears National Monument is a quintessential example of a cultural landscape given meaning by the peoples of the Colorado Plateau. Her objects epitomize relationships between ancient and modern Native peoples and the natural world: rock art from both ancestral peoples and modern Tribal communities, "[t]he remains of single family dwellings, granaries, kivas, towers, and large villages and roads linking them together[, which] reveal a complex cultural history."[140] "Moki steps," or hand and toe holds carved into the walls used to access cliff dwellings that Native people still climb today.[141] Flora and fauna are still used for subsistence, medicinal, and religious traditions.[142] Understanding her landscape itself as an object also illuminates these relationships. Ceremonial practices are conducted in situ. Seeing "cliff faces suitable for granaries and rock art, alcoves for habitation, floodplains for growing crops, etc.[] and viewsheds when such viewsheds are relevant to human subsistence (i.e., observation points along big game migration corridors)" help us understand interactions between people and place.[143] These are only some examples—of many.

President Obama's proclamation recognized the scientific, historical, and cultural objects and values included within the original borders of Bears Ears National Monument. The second sentence of the Bears Ears proclamation describes the area as "one of the densest and most significant cultural landscapes in the United States."[144] The term "landscape" appears a dozen times.[145] President Obama, and later President Biden, demonstrated careful research and presented "substantial" evidence in their proclamations that Bears Ears National Monument contains objects that the Act was intended to protect and that the area set aside, in its entirety, contains and informs these objects. To consider these "separate objects stitched together" is erroneous and simplistic. They are part of a whole.

BlueRibbon Coalition plaintiffs emphasize, more heavily than the state of Utah, an argument regarding the breadth of the term "object": "The proclamation[] also designate[s] as 'objects' a variety of 'imprecisely

140. Proclamation No. 9558, 3 C.F.R. § 9558 (2017).
141. *Id.*
142. *Id.*
143. Declaration of Jerry Spangler at 3 n.3, Garfield Cnty. v. Biden, No. 22-cv-00059, 2023 U.S. Dist. LEXIS 142044 (D. Utah Nov. 23, 2023).
144. *Id.*
145. Archaeological Amicus Brief, *supra* note 27.

demarcated concept[s]' scattered across those landscapes' country-sized boundaries. These so-called 'objects' include entire ecosystems, habitats, and even animal species . . . ."[146]

Setting aside the volumes of case law that defer to the President's discretion to define "object," determine that canyons and ecosystems themselves fit within this term, and recognize that the standards Congress provided were broad, but not impermissibly so, an interpretation of the Antiquities Act that acknowledges cultural landscapes allows for a definition of "objects" per the term's ordinary use: antiquities. Bears Ears unquestionably includes antiquities. Every acre is the context that necessarily informs them. Though we can, we need not say an ecosystem or habitat is an object. These do, however, comprise the cultural landscape necessary for the proper care and preservation of objects.

Moreover, preserving objects and their cultural landscapes, and thereby maintaining relationships to the living peoples around them, nurtures their historic and scientific value. Relationships between Indigenous people and the environment, "as personified and enriched by the Native experience at Bears Ears . . . ha[ve] every opportunity to lead to excellent public programs and outreach as well as outstanding opportunities for scientific, historical, and philosophical research by both Native and non-Native scholars and experts."[147] In other words,

> The traditional . . . knowledge amassed by the Native Americans whose ancestors inhabited this region, passed down from generation to generation, offers critical insight into the historic and scientific significance of the area. Such knowledge is, itself, a resource to be protected and used in understanding and managing this landscape sustainably for generations to come.[148]

As discussed, the objects protected are not "imprecisely demarcated concept[s]"—they are tangible. Nor is the land area set aside that encompasses the cultural landscape unbounded, infinite, or limitless. The breadth of a cultural landscape can be defined. UNESCO has done so, successfully, at 121 locations.[149] The Antiquities Act already limits its reach to federally-owned lands, and Presidents have demonstrated that they are loath to disturb the balance and test an open question regarding relinquishment of nonfederal lands.[150] Moreover, the Obama-era, and now

146. Complaint for Declaratory & Injunctive Relief at 2, Dalton v. Biden, No. 22-cv-00060 (D. Utah Aug. 25, 2022) (citation omitted).
147. BEARS EARS PROPOSAL, *supra* note 13, at 2.
148. 3 C.F.R. § 9558.
149. UNESCO WORLD HERITAGE CONVENTION, *supra* note 62.
150. VINCENT, *supra* note 74, at 6–7.

Biden-era, boundaries of Bears Ears National Monument were deliberately limited: the Inter-Tribal Coalition had proposed a far more expansive area of 1.9 million acres, not the 1.36 million acres that were ultimately designated.[151] This recognizes that the scope of a cultural landscape may be refined to allow for feasible care, management, and preservation activities.

Sites, landmarks, and "objects"—even if the term is understood as limited to its common meaning, despite the prior courts' analyses—*cannot be protected* under the Act absent consideration and preservation of the cultural landscape in the lands that surround them. This care would be improper. It would decimate their historic and scientific value, in direct opposition to the standards Congress set forth in the Antiquities Act.

One need only examine the Trump-era demarcation of Bears Ears to witness how boundaries affect cultural landscapes and their constituent archaeological and scientific value. The Trump proclamation emphasized distinct sites, reducing Bears Ears from a complete cultural landscape to "a series of separate and disconnected objects"[152] that divided the monument into "non-contiguous parcels of land."[153] Areas removed were left open for development, motorized vehicles, and other destructive activities with the potential to significantly affect the ecosystem, sites and objects, and cultural values encompassed in the landscape.[154] This fundamentally altered the nature of the monument: "Maintaining some sites . . . [did] not compensate for excluding other sites and fragmenting their associated cultural landscapes," placing them at "greater risk of damage or destruction."[155] Trump's boundaries were insufficient to be "compatible with the proper care and management" of the sites, landmarks, objects, and cultural heritage landscape that is Bears Ears.

The courts deferred to an exercise of presidential authority at Jackson Hole, a monument far less dense in archaeological and cultural history. They upheld Grand Staircase-Escalante's larger acreage as sufficiently "small." Bears Ears exemplifies the purpose of the Antiquities Act. She is not a replacement for a national park or solely an ecological resource. She is a distinct, definite, living cultural landscape. The Antiquities Act allows the President to proclaim areas that embody its purpose; the executive's exercise of discretion is unreviewable.

151. *See* BEARS EARS PROPOSAL, *supra* note 13, at 20; 3 C.F.R. § 9558.

152. Archaeological Amicus Brief, *supra* note 27.

153. Proclamation No. 9681, 3 C.F.R § 9681 (2018).

154. Kate Groetzinger, *Energy Developers and Uranium Miners Eye Land Near Bears Ears National Monument,* KUER 90.1 (June 1, 2021, 5:31 PM), https://www.kuer.org/health-science-environment/2021-06-01/energy-developers-and-uranium-miners-eye-land-near-bears-ears-national-monument [https://perma.cc/AVQ4-S2AQ].

155. Archaeological Amicus Brief, *supra* note 27.

In August 2023, the Utah District Court judge agreed: "President Biden's judgment in drafting and issuing the Proclamations as he sees fit is not an action reviewable by a district court."[156] Federal Defendants' and Tribal Nations' motions to dismiss were granted with prejudice.[157] Utah quickly expressed its intent to appeal "immediately"; as of April 2024 the case is on appeal before the Tenth Circuit and set for oral argument in September 2024. Utah Governor Spencer Cox intends to push the case to the Supreme Court, saying that the District Court's ruling "helps us get there even sooner."[158] Tribes quickly responded, emphasizing that "Bears Ears remains an essential landscape that members of Tribal Nations regularly visit to practice their spirituality and connect with their history."[159]

As before, courts are bound to respect the President's discretion. Even if, however, the Act was challenged on its merits, Bears Ears is a cultural landscape the Antiquities Act foresaw over a century ago. In the words of its Tribal advocates, "[a] region more worthy of protection under the Antiquities Act is hard to imagine."[160]

IV. NOT SO ANTIQUE: A USEFUL, MODERN TOOL FOR TRIBES

Indigenous communities have long recognized intangible relationships between people and landscape: "Native people always have, and do now, conceive of and relate to the natural world in a different way than does the larger society."[161] In Bears Ears, "[w]e can still hear the songs and prayers of our ancestors on every mesa and in every canyon," describes Malcolm Lehi of the Ute Mountain Ute.[162] Other members of the Coalition Tribes describe similar connections between their contemporary experiences in Bears Ears and her relationship to their history, traditions, and cultural identities.[163] The relationship between people, objects, and place is obvious—and precisely what the Antiquities Act was designed to and serves well to protect.

156. Memorandum Decision & Order Granting Motion to Dismiss at 28, Garfield Cnty. v. Biden, No. 22-cv-00059, 2023 U.S. Dist. LEXIS 142044 (D. Utah Aug. 11, 2023).

157. *Id.*; Parrott & Scholl, *supra* note 34.

158. Opening Brief of Plaintiffs-Appellants, Garfield Cnty. v. Biden, No. 23-4106 (10th Cir. Oct. 30, 2023); Wixom, *supra* note 32.

159. Hopi Tribe, Navajo Nation, Pueblo of Zuni, & Ute Mountain Ute Tribe Response Brief at 14, Garfield Cnty. v. Biden, No. 23-4106 (10th Cir. Jan. 9, 2024).

160. *Id.*

161. BEARS EARS PROPOSAL, *supra* note 13, at 2.

162. *Id.* at 3.

163. *See id.* at 3–4.

The Bears Ears Inter-Tribal Coalition was the first to recognize that the Antiquities Act could serve as a vehicle to protect Tribal cultural landscapes. In their petition, the Coalition wrote,

> Our discussion here is not intended to catalogue all the many ways that this area holds significant geological, paleontological, archaeological, historical, cultural, and biological "objects" within the meaning of the Antiquities Act . . . . [W]e offer this section to highlight some of the main considerations that justify monument status for Bears Ears. This includes . . . critically, *the multifaceted relationship between Native American people and this landscape that has developed over the course of eons*.[164]

It is no surprise that the Inter-Tribal Coalition's decision to petition for National Monument status—and their success—has sparked a movement of Tribes asking for national monument protections for sacred heritage landscapes.

In southern Nevada, Avi Kwa Ame, or Spirit Mountain, is the "mythical creation site for Yuman-speaking Tribes like the Fort Mojave, Cocopah, Quechan, and Hopi. Their stories place it "at the center of the universe."[165] All but one of the member Tribes in the Inter-Tribal Council of Nevada, and all the Tribes of the Inter-Tribal Association of Arizona, adopted resolutions endorsing a national monument.[166] In March 2023, President Biden proclaimed Avi Kwa Ame National Monument.[167] The proclamation explicitly recognizes the significance of landscape (mentioned thirty-seven times): including, for example, place-based traditional songs that connect to landmarks and enable Tribal members to "navigate across the diverse terrain, find essential resources, and perform healing, funeral, and other rituals."[168] The cultural landscape informs our understanding of the "people [that] have lived, traveled, and worked in [Avi Kwa Ame] for more than 10,000 years," as evidenced by projectile points, pictographs, potsherds, and other tangible archaeological objects illuminating Indigenous history.[169]

164. *Id.* at 4–5 (emphasis added).

165. Alex Schechter, *'The Place Where Shamans Dream': Safeguarding Spirit Mountain*, N.Y. TIMES (Jan. 24, 2023), https://www.nytimes.com/2023/01/24/travel/nevada-avi-kwa-ame-national-monument.html [https://perma.cc/G6DY-ZUTZ].

166. Dan Michalski, *Biden Commits to Honoring Tribes by Protecting Public Lands in Nevada*, WASH. POST (Nov. 30, 2022, 6:57 PM), https://www.washingtonpost.com/climate-environment/2022/11/30/avi-kwa-ame-monument-nevada [https://perma.cc/S7ZS-CXLN].

167. Proclamation No. 10533, 88 Fed. Reg. 17987 (Mar. 21, 2023).

168. *Id.*

169. *Id.*

In August 2023, decades after Tribes were forcibly removed from lands that later became Grand Canyon National Park, President Biden established the Baaj Nwaavjo I'tah Kukveni—Ancestral Footprints of the Grand Canyon National Monument,[170] another sacred cultural landscape. This, the Grand Canyon Tribal Coalition fought to protect.[171] Not only are features of the landscape sacred components of the origin and histories of many Tribes, but "Tribes note that their ancestors are buried here and refer to these areas as their eternal home, a place of healing, and a source of spiritual sustenance."[172] The "natural and cultural objects of the [Grand Canyon] lands" do indeed "have historic and scientific value that is unique, rich, and well-documented"[173]—they were documented, and upheld, in the first major challenge to the Antiquities Act, 115 years prior.[174]

Tribal Nations have seen success. Now, they have greater capacity to petition for monument status and more examples to draw from. Three national monuments that cover significant cultural landscapes were championed by Tribal advocates and incorporate Indigenous co-management.[175] Despite the ongoing challenge to Bears Ears and the fate of the Antiquities Act in limbo, and although the Antiquities Act does not reserve lands for the special or exclusive use of Tribes, it is nonetheless well-suited for one purpose: cultural heritage preservation. Tribes are choosing to utilize a law intended for cultural heritage, not environmental or recreational protection.[176] This is a natural and welcome outgrowth of the intent and flexibility of the Antiquities Act—areas that embody cultural and historic value are protected because of their connection to this nation's first peoples.

Proper care and management of objects, as mandated by the Act, requires Tribal consultation and continued access to cultural landscapes. Indigenous knowledge and robust Tribal consultation—for planning and decision making—can and should be prioritized. Consider the Inter-Governmental Cooperative Agreement at Bears Ears, a vast recognition of

170. Proclamation No. 10606, 88 Fed. Reg. 55331 (Aug. 8, 2023).

171. Bobby McEnaney, *At Long Last, the Vision of the Grand Canyon Tribal Coalition Is Realized*, NAT. RES. DEF. COUNCIL (Aug. 21, 2023), https://www.nrdc.org/bio/bobby-mcenaney/long-last-vision-grand-canyon-tribal-coalition-realized [https://perma.cc/5JUA-8VTJ].

172. 88 Fed. Reg. 55331.

173. *Id.*

174. *See* Cameron v. United States, 252 U.S. 450, 455 (1920).

175. McEnaney, *supra* note 171.

176. The designation of Avi Kwa Ame, in fact, clashed with a desire for renewable energy projects in the area, now off-limits. Prior to designation, the area comprising the monument was a wilderness area, which has substantially different prohibitions on development. Schechter, *supra* note 165. Again, the interests of Tribes, heritage protection advocates, and the environmental community are not always aligned.

the value of Tribal support and guidance in public lands management, especially for culturally significant landscapes.[177] In the words of Bears Ears Commission Co-Chair and Lieutenant Governor of Zuni Pueblo Carleton Bowekaty:

> [I]nstead of being removed from a landscape to make way for a public park, we are being invited back to our ancestral homelands to help repair them and plan for a resilient future. We are being asked to apply our traditional knowledge to both the natural and human-caused ecological challenges, drought, erosion, visitation, etc. . . . What can be a better avenue of restorative justice than giving tribes the opportunity to participate in the management of lands their ancestors were removed from?[178]

This manner of intergovernmental co-management is desirable for all parties. In addition to serving a restorative justice role, recognizing the resilience and continuing knowledge of Native communities, respecting a sovereign-to-sovereign relationship, and expiating hundreds of years of removal and genocide, it is well recognized that Indigenous traditional land management yields collective benefits in many regions of the world, including supporting biological diversity and conservation goals.[179]

Additionally, collective stewardship of public lands, preserved for future generations and contemplated by a land use designation like national monument status, is a better cultural fit for Native communities. Indigenous perspectives are often misaligned with the concept of private property and extractive use.[180] For culturally significant areas important to multiple sovereign nations, national monument status and the collective management models it allows may encourage cooperation. At the least, coming together to advocate for monument status encourages political alliances between Tribal Nations and identification of key sites and priorities for an area.

Tribal use of the Antiquities Act is not without its challenges or its faults. Too often, protecting Tribal cultural heritage requires sharing information about sensitive sacred sites. This is no different. Though Presidents can strategically word proclamations to limit information disclosed, while still including sufficient detail to ensure the right areas are

177. Inter-Governmental Agreement, *supra* note 88.

178. O'Donoghue, *supra* note 88.

179. Kevin K. Washburn, *Facilitating Tribal Co-Management of Federal Public Lands,* 2022 WIS. L. REV. 263 (2022); UNESCO WORLD HERITAGE CONVENTION, *supra* note 62.

180. Talia Boyd, *Native Perspectives: Land Ownership,* GRAND CANYON TR. (June 29, 2021), https://www.grandcanyontrust.org/blog/native-perspectives-land-ownership [https://perma.cc/BWQ8-VTQ7].

protected, this is a delicate balance to strike.[181] Moreover, public lands are *public* lands. They are not exclusively governed by Tribal Nations. Though Tribes in management roles can work to develop strategies that reduce impacts to key sites, preserve Native access for contemporary practice, and educate visitors, national monuments encourage tourism and result in greater visitation. This involves risk; there is always the question of whether the ends justify the means. However, for cases in which using the Act to preserve a landscape is "less a choice, and more a necessity,"[182] it is a feasible and effective solution.

CONCLUSION

In his denial of certiorari for *Massachusetts Lobstermen's*, Chief Justice Roberts states: "The Northeast Canyons and Seamounts Marine National Monument at issue in this case demonstrates how far we have come from indigenous pottery."[183] But in setting Indigenous pottery as the starting line, Chief Justice Roberts demonstrates a fundamental misunderstanding of the history, ends, and means of the 1906 Antiquities Act. The Act was intended by its advocates and drafters to capture not only potsherds—the status of which, Blanding's sting operation demonstrates, is still at risk—but also to secure the land around them, or the living cultural context that informs these objects.

The Act has served its purpose well in the more than one hundred years since its enactment. Only three of twenty-one Presidents since the signature of the Act have chosen not to use it. Legal challenges to the Act consistently fail, with federal courts interpreting its language broadly. Chief Justice Roberts decries that the "objects" to be protected might include "canyons and seamounts themselves." He fails to mention that the very first challenge to the Act, right after it was signed, held that the Grand Canyon was an "object." Historical context, statutory purpose, and past practice all support the conclusion that the President has broad authority to use the Antiquities Act to protect cultural landscapes at large, not just "objects" in the narrowest sense of the word.

The Act is not only unique in what it protects, but is also crucial to the fragile and limited American cultural heritage management scheme.

181. In the Avi Kwa Ame proclamation, this is explicitly recognized: "Some of the objects are also sacred to Tribal Nations; are sensitive, rare, or vulnerable to vandalism and theft; or are dangerous to visit and, therefore, revealing their specific names and locations could pose a danger to the objects or the public." Proclamation No. 10533, 88 Fed. Reg. 17987 (Mar. 21, 2023).

182. NOYES, *supra* note 4. A point is well-taken that monument designation depends entirely on how friendly a Presidential administration is toward tribal entities and public lands. Here, at least, there is no substantial barrier of Congressional approval.

183. Statement of Chief Justice Roberts Respecting the Denial of Certiorari, *supra* note 34, at 3.

Without it, archaeological and cultural resources on our public lands could face irreparable and irreversible harm, and communities who depend on cultural heritage for their economic survival through tourism revenue might lose care, education, and access.[184] The Indigenous communities to whom these landscapes matter most are not to be forgotten—they would be severely impacted by the desecration of their cultural practices and connections to their ancestors.

Curiously, even large national monuments designated around the same time as Bears Ears—such as Mojave Desert, of greater acreage, also designated in 2016 by President Obama[185]—have not faced the same wave of repeated challenges as Bears Ears. If opponents of Bears Ears can demonstrate that she does not fall within the scope of the Antiquities Act, *no* cultural landscape will. Bears Ears is a fundamental example of the meaning and importance of cultural landscapes. Those who target Bears Ears do so because if you can prove in this context—in the American Southwest, the cradle of and impetus for the Antiquities Act—that the Act is limited to structures and objects alone, and does not encompass cultural landscapes, you can do so anywhere.

The battle to preserve the cultural landscape that is Bears Ears National Monument continues. The Antiquities Act is not a piece of legislation that has been molded, bent out of shape, or expanded to include Hoon'Naqvut, Shash Jáa, Kwiyagatu Nukavachi, and Ansh An Lashokdiwe. It was born in this place and intended, from the beginning, to protect her.

184. *See* Nate Hegyi, *Tourism Worries and Few Takers as More Utah Land Offered for Drilling, Mining,* NAT'L PUB. RADIO (Feb. 9, 2020), https://www.npr.org/2020/02/09/804232481/tourism-worries-and-few-takers-as-more-utah-land-offered-for-drilling-mining [https://perma.cc/GVH6-DRTT].

185. Mojave Desert encompasses 1.6 million as compared with Bears Ears' 1.32 million acres. Proclamation No. 9395, 81 Fed. Reg. 8371 (Feb. 12, 2016).