

Bears Ears National Monument: Politics, Controversy, and Potential Remedies

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ABSTRACT Bears Ears National Monument (BENM), a site with extraordinary cultural, scientific, and recreational values, was established by President Barack Obama of the United States in 2016. One year later, the monument's area was reduced by 85%. Due to backlash from stakeholders, such as the indigenous, scientific, and environmental communities, and multiple options have presented themselves to resolve the conflict. This paper provides a thorough but condensed knowledge of the ongoing and proposed efforts to maintain the original boundaries of the BENM.

INTRODUCTION

The truth is, the establishment of Bears Ears National Monument was a healing moment of historic importance. A unique agreement was reached between Indian tribes and the United States government for a collaborative approach to the management of Bears Ears. It was a clasp of hands across history.

—Terry Tempest Williams

Under the 1906 Antiquities Act, federal lands in the United States can be converted into National Monuments by presidential proclamation if they possess natural, cultural, or scientific characteristics that mandate their preservation. In December 2016, President Barack Obama designated Bears Ears National Monument (BENM) in the southeastern part of the state of Utah. Originally comprising 540,740 hectares, the land holds recreational, scientific, and cultural significances. Protected lands are popular with the American public, and Bears Ears is no exception. In 2016, 55% of Utahns supported the idea of this National Monument, especially as Utah is economically reliant on supporting recreation in public parks [1] (Figure 1).

In December 2017, President Trump and Department of the Interior Secretary Ryan Zinke (R-MT) reduced Bears Ears by 85%, to 80,750.4 hectares, the largest monument reduction in US history [2]. The shrinking of

Bears Ears comes as a victory for energy companies, who are now able to purchase and lease portions of the land for mining and extractive industries [3]. Reducing the monument's size has been protested both publicly and in the courts, with a range of actors coming forward against the change.

There are multiple policy options, which could restore Bears Ears to its original (2016) size. The three explored in this paper are (a) the designation of Bears Ears as a National Park; (b) use of the Public Land Initiative (HR 5780) to protect the original boundaries; and (c) litigation through federal courts to reverse the shrinking of the monument.

CASE EXAMINATION

Cultural, Scientific, and Recreational Features

The BENM takes its name from a landmark given the name "Bears Ears" in each of the local indigenous languages (Figure 2). The monument is home to more than 100,000 sacred Native American archeological and cultural sites, all ranging in age between 700 and 14,000 years [4]. Some of these sites include ancient roads, shrines, pit houses, cliff dwellings, pueblos, kivas, rock paintings, and petroglyphs and are visited frequently for ceremonies. These locations serve as ancestral connections, as well as a place for collecting herbs and medicines [5, 6]. Before the monument's designation, these sites were subject to vandalism and looting, and

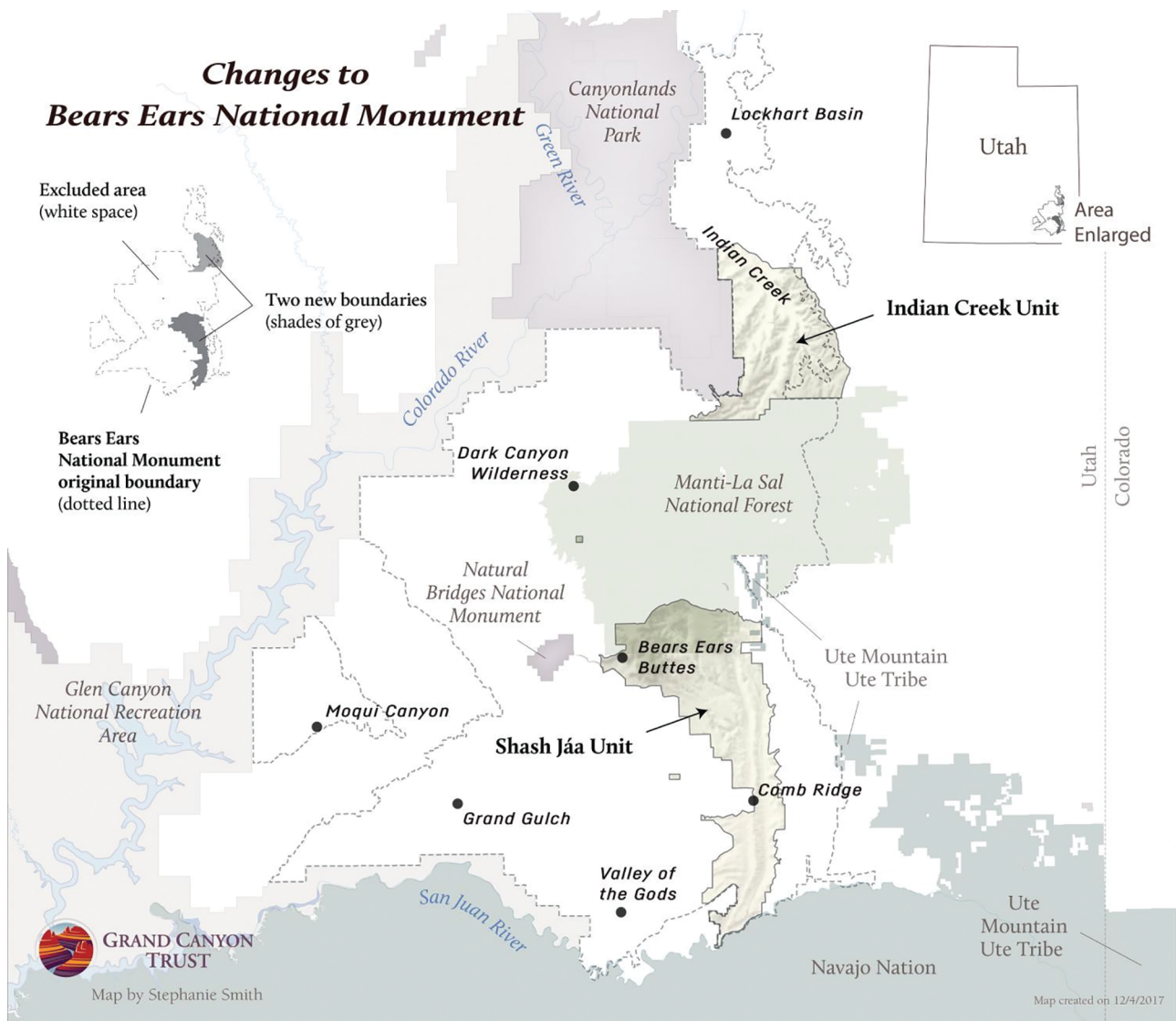


FIGURE 1. Map of Bears Ears National Monument, 2016 and 2018 boundaries. Map by Stephanie Smith of the Grand Canyon Trust.

under the current mandate will be vulnerable to these crimes once again [7]. The restructured boundaries exclude approximately 73% of the documented archeological sites from protection [2]. The cultural significance of these sites was a driving force for local Native American Tribes in calling for the monument's original creation [6].

Bears Ears also has scientific significance, with important ecological features. In comparison with seven other Western National Parks (Arches, Canyonlands, Glacier, Grand Canyon, Rocky Mountain, Yellowstone, and Yosemite), BENM provided some of the best examples of night sky darkness, ecological intactness, ecological

connectivity, mammal diversity, reptile diversity, rarity-weighted species richness, ecosystem-type rarity, and vegetation diversity [5, 8].

Prehistoric fossils abound in both the revised monument boundaries and the areas that were formerly part of the protected area. Considered "one of the richest troves of Triassic-period fossils in the nation," fossils of phytosaurs, a crocodile-like species, were unearthed in February 2018 and are considered some of the rarest fossils found in North America. Paleontologists believe that a large number of other vertebrate species could be unearthed there, and it presents scientists with a rich opportunity for further discovery [8].



FIGURE 2. The Bears Ears. Photograph by Bob Wick, Bureau of Land Management, Licensed under Creative Commons 2.0 via BLM Flickr Account.

Bears Ears is also a beloved spot among environmentalists and recreationists. Although the original monument proclamation by President Obama only briefly includes the mention of recreational significance, one of the monument's largest group of supporters is members of the recreational community [9, 10]. BENM provides opportunities for hiking, rafting, and climbing. Reduction in the monument's size will largely diminish access to climbing sites, the most popular outdoor activity. More than 80% of the river rafting miles will be excluded, in addition to the popular Dark Canyon wilderness area [10]. On behalf of outdoor enthusiasts, the recreational industry (including the support of retailers, such as Patagonia, North Face, and REI) pulled the semiannual Outdoor Retailer Show from Salt Lake City as an attempt to influence Utah lawmakers [11]. The recreational industry provides 110,000 jobs in Utah (more than double the mining and energy workforce combined), and an annual US\$12.3 billion in consumer spending, US\$3.9 billion in wages and salaries, and US\$737 million in state and local taxes [12, 13].

The Controversy

In April 2017, then-Interior Secretary Ryan Zinke was ordered to examine a list of 27 monuments and recommend which could be reduced. In response, he created a list of six monuments that would be reduced under the executive order. As a result, both BENM and Grand Staircase-Escalante National Monuments were scheduled for reduction, with BENM being more dramatically affected, and Grand Staircase left at just over half its original size [2]. The comment period for these 27 monuments received more than a million comments, 99% of which opposed revising boundaries and weakening protections [14].

Significantly, the newly decommissioned land becomes eligible for mineral, oil, and gas leases, which compounds the controversy. In addition to the environmental costs, extractive industries significantly discourage tourism [15]. As shown in Figure 3, the revised boundaries would allow nearly all uranium mining to resume, which may affect water quality for tribes downstream. Yet, these leases provide an important source of

resources to the state's public schools. Since 1896, Utah Public Schools Trust Lands system has bolstered its funding with "energy and mineral leases, rent, and royalties; real estate development and sales; and surface estate sales, leases and easements" which benefit significantly from the revised monument boundaries [16]. Internal documents and e-mail correspondence between State Senator Orrin Hatch and then-Secretary Zinke have been made public, suggesting that the boundary revision was made with fossil fuel development in mind. This correspondence specifically cites the Schools Trust Lands as a foundational argument for the decision [3].

Moreover, it was reported that Energy Fuels Resources, owners and operators of the only working uranium mill in the United States, sent lobbyists to meet with top Interior Department advisors regarding the future of uranium extraction within the monument [2]. Energy Fuels Resources also provided maps to Senator Orrin Hatch indicating which parts of the monument they wished to have removed.

Public lands are a contested issue within the American West, especially within the state of Utah, where 57.4% of land is owned by the Federal government [17, 18]. Indeed, there was significant support in the state of Utah for reducing the boundaries of BENM, with the state proposal advocating for a 90% reduction in size. Although the state insisted that the proposal would protect archeologically sensitive areas, Navajo tribal president Russell Begaye characterized it as a "failure to listen to the concerns of our people" [19]. Complicating the issue is the role of extractive industry leases and the Public School Trust Lands, as discussed earlier.

Despite the National Monument designation, many economically valuable land uses are still permitted. Within the monument, there is currently access for recreation activities such as hiking, climbing, camping, hunting, and fishing. Within limited boundaries of the monument, off highway vehicles (OHVs) are allowed but are strictly prohibited from wilderness areas under protection of the Wilderness Act. The Bureau of Land Management allows livestock grazing throughout most of the monument, including portions regulated by the US Forest Service (USFS) and intends to continue issuing such permits. In addition, the USFS continues timber management in their allotted portions of the monument for both for-profit logging and forest conservation [20]. Nonetheless, contestation of the federal designation

continues, an indicator of continuing debates over the role the federal government should play in the Western United States. Although the federal government reserves rights over land for conservation purposes, this is resisted by many locals who see federal land control as government overreach [18]. Utah State Assistant Attorney General Tony Rampton even argued that BENM existed in such a valuable state because it had effectively been ignored, and to designate it a National Monument would cause harm [19].

A Prestigious Title

The first possible solution to the BENM controversy would be transferring the land from "Monument" status to "Park" status through an act of Congress. The Secretary of the Interior is asked to advise annually on new additions to the system; these suggestions are counseled by the private citizens of the National Park System Advisory Board.

The title of National Park has traditionally been reserved for the most spectacular natural areas with a wide variety of features [21]. National Monuments have typically been smaller areas established primarily to protect historic, scientific, or natural features while containing fewer attractions likely to draw visitors to National Parks [22]. Yet, Great Smoky Mountains, North Cascades, Yosemite, Joshua Tree, Glacier, and Grand Canyon are all smaller than BENM's original size [23]. A National Park designation carries potential economic benefits as well. The importance of the landscape, and its cultural, recreational, and ecological attraction as a National Monument, could lead to a further increase in tourism to the region if cemented as a National Park. As mentioned previously, a large portion of Utah state economy comes from its tourism and outdoor recreation industry and increased investment in these industries could reinforce local economies significantly. There is a certain amount of ecological risk in the National Park designation due to increased visitor numbers on fragile landscapes, but the benefits of preservation may outweigh the costs.

Grand Canyon National Park experienced a similar process to the one suggested here for BENM. Designated a National Monument by President Theodore Roosevelt on January 11, 1908, the iconic National Park was officially deemed a park in 1919 during Woodrow Wilson's presidency [24]. However, a majority of Utah Republican legislators, and many other Republican state representatives, oppose

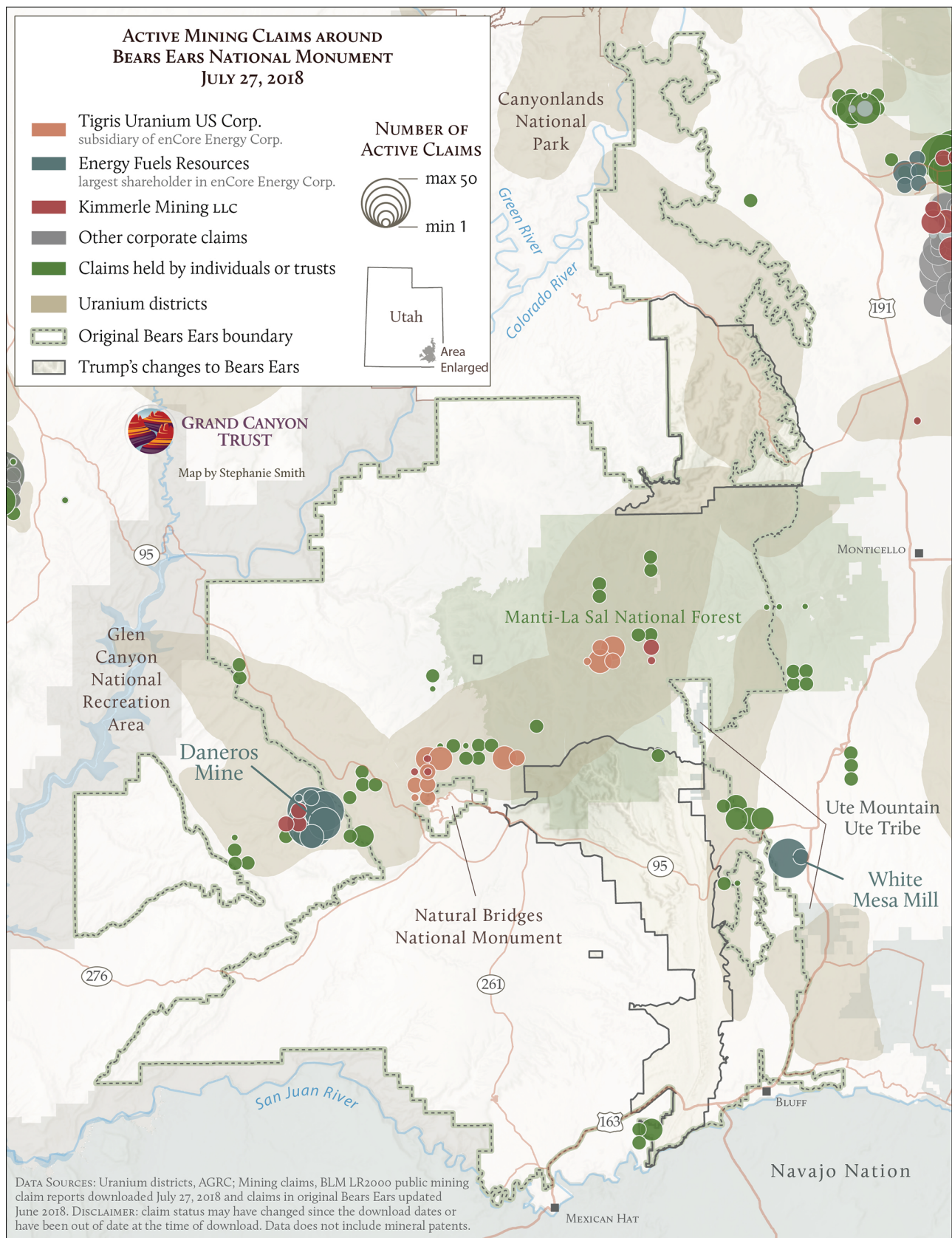


FIGURE 3. Map of active mining claims in and around Bears Ears National Monument, July 2018. Map by Stephanie Smith, Grand Canyon Trust.

the designation of BENM as a National Monument let alone a National Park [19, 25]. The transition is not a simple process and is rife with the potential for Congressional infighting.

A State-based Solution

In the months before BENM was announced, a memorandum was leaked identifying “Cedar Mesa”—which lies in the center of BENM—as a potential National Monument. The Utah State Legislature’s response to this idea was the Public Lands Initiative (PLI) [2]. Introduced to the State Congress on July 14, 2016 (as H.R. 5780) by Representative Robert Bishop and was cosponsored by former Representative Jason Chaffetz, the bill was intended to meet the requirements of both pro-BENM and anti-BENM groups by splitting the park up between the Bureau of Land Management, the National Park Service, and the USFS. So far, the effort has failed to gain support and as a result has only been introduced to the House [26].

The PLI aims to create a compromise vis-à-vis the land within BENM, by creating National Conservation Areas (NCAs), Watershed Management Areas, and Special Management Areas. It states the creation of 41 new wilderness areas, totaling more than 280,000 hectares including the expansion of the “wild and scenic” segments of the Colorado, Dolores, Green, and San Juan rivers. Although it carries fewer protections than the National Monument designation, the PLI establishes the Bears Ears NCA, the Bears Ears Tribal Commission, and the Bears Ears Advisory Committee [26, 27].

The portions of the bill meant to serve as compromises for environmental groups and which appear as pro-monument features are still far from meeting in the middle. The bill lost support of environmental actors because of these shortcomings. Other specifications of the bill would transfer 4,000 hectares of Utah’s Uncompahgre (Ute) Reservation to the state for fossil fuel development and only provides one seat in each of the multiple advisory boards for a representative from the Native American community [28]. It would continue to allow grazing within the monument limits and would also open previously restricted landscapes to further grazing [27]. The PLI Planning and Implementation Committee of 22 individuals only requires one representative from the conservation community as well, and “overall weighting favors representatives likely opposed to many conservation measures” [29]. The PLI retains support among some

lawmakers in Utah, but lacks national backing from democrats, environmentalists, and many of the other interest groups it was originally intended to accommodate.

Litigation

Reducing BENM is opposed by the local Native American, scientific, environmental, and recreational communities. The first few lawsuits among the pro-monument actors are *Inter-Tribal Coalition et al. (Navajo, Hopi, Uintah and Ouray Ute, Ute Mountain Ute, and Zuni) v. Trump et al.* and *Utah Dine Bikeyah v. Trump et al.* It was important for the tribes to be first in these lawsuits, making it not only a conservation issue but also one of justice for Native American stakeholders. A request was filed for the cases to be consolidated, so “that may balance the resources just a bit – increasing the odds that the tribes will restore Bears Ears to its original size” [30].

Earthjustice, the nation’s largest nonprofit environmental law organization, filed a suit representing a union of conservation groups including the Wilderness Society, the National Parks Conservation Association, the Sierra Club, the Grand Canyon Trust, Defenders of Wildlife, Great Old Broads for Wilderness, Western Watershed Project, WildEarth Guardians, and the Center for Biological Diversity [31]. Many of these groups are grassroots and civically supported nonprofits with potential for a much greater following through citizen support.

Many media outlets as well as conservation, environmental, and cultural preservation groups state that the President had no right to reduce national landmarks that were previously designated by former Presidents under the Antiquities Act. The Attorney General for the Navajo Nation states that, “there is nothing in the Antiquities Act that authorizes a president to modify a national monument once its been designated” (quoted in Siegler [32]). Legal experts disagree on the accuracy of this statement and whether the law allowing Presidents to create a monument also allows them to reduce one [33]. As an article by four law professors points out, the Antiquities Act itself is silent on the question of reducing monuments but the 1976 Federal Land Policy and Management Act was intended to reserve to Congress—and only to Congress—the right to rescind, restrict, or reduce monuments established under the Act [34].

The major downside to community action and litigation is the time it takes for legal processes to play

out. Court cases, especially federal cases, are a long and grueling process. Native and indigenous peoples have historically won only 29% of US Federal Court Cases which they pursued as a group and not individuals [30]. Government lawyers are “repeat players” and often have far more financial resources and courtroom experience than that of tribes [35]. Native American groups facing both state and federal governments in court are statistically unlikely to win, and in the case presiding over the fate of BENM, both the Utah and Federal governments are involved [36]. Furthermore, the local tribes are far from monolithic in their efforts to fight the monument’s reduction. Although the Inter-tribal Coalition bringing the suit unites a number of tribes, it is oversimplistic to assume that tribal politics might never be a stumbling block in the lawsuit and associate protests. Likewise, conflicts could emerge between groups within other coalitions, such as scientists and recreationists. Division between members in any of the coalitions threatens to undermine the legal fight to restore BENM’s original boundaries.

CONCLUSION

The larger message of Bears Ears is the popularity of land protection among the American people, the currently fraught atmosphere given an administration willing to ignore that popularity, and the wide range of policy options available to restore the monument (or potential National Park) to its original size.

Each of the proposed options in this paper—the National Park designation, use of the PLI, and litigation in court—is a practical solution to the problem. The original boundaries would be restored by either a National Park designation or litigation ruling in favor of the plaintiffs. The PLI falls short of a full restoration but does more for land protection than the current status quo and is palatable to conservative lawmakers who might otherwise oppose conservation.

Indeed, the political tide may be turning in favor of protection—in February 2019, San Juan County’s commissioners voted two to one in favor of restoring the original monument boundaries [37]. The resolution rescinds earlier statements supporting the smaller boundaries, and both commissioners supporting it are members of the Navajo tribe. This highlights the critical role played by the Native American community in the contest over Bears Ears, and the role they continue to play. Whichever option

is chosen, it must recognize and ensure the cultural claims of the local indigenous people. Environmental, conservation, and paleontological arguments aside, the original declaration from President Obama shows that the ultimate purpose of this monument was to protect, preserve, and value the archeological and cultural significance of the landscape.

CASE STUDY QUESTIONS

1. What role do extractive industries play in this case study? How do they influence the politics of the case?
2. In your opinion and using the information provided earlier, rank the following reasons for preserving BENM from most important to least: cultural, scientific, and recreational significance. Explain your motives.
3. In your opinion, which of the proposed solutions has the most potential to successfully conserve and protect Bears Ears? Why?
4. What role, if any, should states have in determining and running national parks and monuments? Do you agree with the Utah state legislators that the National Monument declaration is federal overreach? Why or why not?
5. Create your own definition for a National Park, do the same for a National Monument. Explain why you chose these definitions and what makes them different/similar.
6. What role should Native American communities have in the designation of public lands going forward? How might they be incorporated into decision-making at the local, state, and federal levels?

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COMPETING INTERESTS

The authors have declared that no competing interests exist.

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