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National Monuments and National Conservation Areas: A Comparison in Light of the Bears Ears Proposal

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At over 7,800 square-miles, San Juan County, Utah is the largest county in the state. The federal government is the largest landowner in the county, managing 61.4-percent of the land. Native Americans — primarily the Navajo Nation — control 25.2-percent of the land, with state, and private and local government controlling just 5.3- and 8.1-percent of the land, respectively.[1] San Juan County is both one of the least populous counties in the state, and the county with the lowest per-capita income.[2] The county's economic challenges are juxtaposed against invaluable natural resources. The county includes a rich and diverse landscape, rising 7,000 feet from the arid lands near the San Juan River up to the snowcapped Abajo Mountains. Blessed with historic, archaeological, and environmental resources, the region has tremendous significance to those who live there. A broad consensus has emerged favoring additional protection for the area, but the form that protection will take is a matter of intense debate.

As part of the Utah Public Lands Initiative (PLI), Congressmen Rob Bishop and Jason Chaffetz propose to protect the region via two adjacent National Conservation Areas (NCA): the Bears Ears NCA (857,603 acres), and the Indian Creek NCA (434,354 acres).[3] In contrast, the Bears Ears Intertribal Coalition, a group of five Native American tribes, urges President Obama to proclaim a Bears Ears National Monument spanning 1.9 million acres, which would include the land from the two NCAs noted above plus an additional 608,000 culturally-sensitive acres.[4]

This paper discusses both protective mechanisms: a congressional NCA designation, and a presidential national monument proclamation. Our aim is to compare the two as they relate to this common landscape, and to inform the public's understanding of each. While both mechanisms are sufficiently flexible to address the wide-ranging issues raised by various constituents, there are critical differences between the proposals regarding the size of the protected area and the management requirements that would apply.

We do not address the PLI in its entirety because, at 215 pages, the PLI tackles wide-ranging public land management issues across a much larger geographic area than can be analyzed fully here. Rather, our analysis focuses solely on the PLI's plans for the Bears Ears region. We also caution that neither proposal has been approved, and significant changes are likely to occur before protections are bestowed. Indeed, we encourage the decision makers to incorporate the best elements of both proposals into the final decision, whether that turns out to be an NCA or a national monument designation. Finally, we point out that an NCA or national monument designation would mark the beginning of a planning process, not the final resolution of all complex management questions. The managing agencies must flesh out many details in the plan(s), which will have at least as much impact on area management as the designation that is ultimately selected.

We begin by reviewing the Antiquities Act and the Obama administration's monument proclamations, and with an overview of existing NCAs and how they address management issues. We then discuss the monument proposal from the Inter-Tribal Coalition and the two NCA proposals from the PLI. Although this paper focuses heavily on Southeastern Utah, the lessons learned here apply across the country, as interest in designating new monuments and NCAs will almost certainly continue and the questions addressed here will arise again.

I. National Monuments

Congress enacted the Antiquities Act of 1906[5] in response to concerns over looting and desecration of Native American sites in the Southwestern United States.[6] In passing the Antiquities Act, Congress expressly delegated to the President of the United States[7] the unilateral and discretionary authority to:

> [D]eclare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments. .

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> . . The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.[8]

There are currently 122 national monuments spread across twenty-nine states, the District of Columbia, and several U.S Territories. Fifteen of the last nineteen Presidents, Republicans and Democrats alike, have utilized this authority. Some of our most iconic national parks began as national monuments, including the Grand Canyon, Arches, and Grand Teton.

Monument proclamations apply only to federal land.[9] As the proclamation for every recent national monument makes clear, monuments are established "subject to valid existing rights."[10] This includes existing water rights, which are not affected by a monument designation.[11] Judicial opinions upholding at least eight monument designations all affirm the President's discretion to determine what is suitably "historic" or "scientific."[12] Similarly, while the Act restricts presidential designations to the "smallest area compatible with [ ] proper care and management,"[13] the courts have uniformly refused to second guess a President's determination of appropriate monument size.[14] In a case involving the Grand Staircase-Escalante National Monument, the Utah Federal District Court ruled that its authority to review presidential monument proclamations is limited to ascertaining only whether the President invoked delegated powers under the Antiquities Act, and that the court cannot review the substance of that invocation.[15] Courts also reject contentions that Presidential authority is limited to rare and discrete man-made objects such as prehistoric ruins,[16] or that ecosystem conservation and environmentally-inspired protection exceeds the President's delegated authority.[17]

This breadth of authority granted by Congress and affirmed by the courts affords Presidents extraordinary latitude to incorporate place-specific language in national monument proclamations. President Obama, for example, recognized the importance of water to Westerners when, in creating the Basin and Range National Monument in Nevada, he stated that the monument neither created new federal water rights nor altered existing state-issued water rights.[18] In creating the Browns Canyon National Monument in Colorado, he expressly recognized state "jurisdiction and authority with respect to fish and wildlife management."[19] In creating the Río Grande Del Norte National Monument in New Mexico, he protected utility line rights-of-way within the monument.[20] Similarly, the proclamation for the Basin and Range National Monument states that, "nothing in this proclamation shall be deemed to affect authorizations for livestock grazing, or administration thereof, on federal lands within the monument. Livestock grazing within the monument shall continue to be governed by laws and regulations other than this proclamation."[21]

Recent national monument proclamations also invariably require managers to create a management plan in consultation with state, local, and tribal governments. For example, in his Berryessa Snow Mountain National Monument proclamation, President Obama directed monument managers to "provide for public involvement in the development of the management plan including, but not limited to, consultation with tribal, State, and local governments. In the development and implementation of the management plan, [federal agencies] shall maximize opportunities . . . for shared resources, operational efficiency, and cooperation."[22]

Questions regarding Native American access and use of a national monument are of particular importance in Southeastern Utah. Monument designations do not, as some have claimed, impose additional limits on American Indian access or use. To do so would conflict with the policy contained in the American Indian Religious Freedom Act, which declares that:

> [I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.[23]

Language specifically protecting Native Americans' rights to access and use national monuments is included in all Obama-era proclamations involving significant areas of public land. Indeed, nine of the most recent proclamations contain substantively identical language: "The Secretaries shall, to the maximum extent permitted by law and in consultation with Indian tribes, ensure the protection of Indian sacred sites and traditional cultural properties in the monument and provide access by members of Indian tribes for traditional cultural and customary uses."[24]

Recent monument proclamations also specifically address Native American use of forest products, firewood, and medicinal plants, where those issues have regional significance. The proclamation for the San Gabriel Mountains protects tribal members' access to the monument for "traditional cultural, spiritual, and tree and forest product-, food-, and medicine-gathering purposes."[25] The proclamation for the Río Grande Del Norte National Monument "ensure[s] the protection of religious and cultural sites in the monument and provide[s] access to the sites by members of Indian tribes for traditional cultural and customary uses." Furthermore, "[n]othing in this proclamation shall be construed to preclude the traditional collection of firewood and piñon nuts in the monument for personal non-commercial use consistent with the purposes of this proclamation."[26] The Chimney Rock National Monument proclamation states that the management plan "will protect and preserve access by tribal members for traditional cultural, spiritual, and food- and medicine-gathering purposes, consistent with the purposes of the monument, to the maximum extent permitted by law.[27]

In sum, in enacting the Antiquities Act, Congress expressly delegated to the President the power to designate new national monuments. Without exception, courts have upheld this power and have deferred to the President with respect to the management of newly created monuments. It is common for Presidents to include specific provisions addressing management challenges that are unique to the areas designated, and there is no evidence to suggest that any new monument designation would further restrict Native American access to or use of culturally significant resources. Indeed, recent monument proclamations evidence a clear trend towards expressly recognizing these rights.

II. National Conservation Areas

The power to designate an NCA resides exclusively with Congress. Congress created the first NCA in 1970, and today there are sixteen NCAs in eight states. Congress has even broader authority to address management concerns than is available to the President under the Antiquities Act. Congress may, for instance, incorporate wilderness areas or wild and scenic river designations into statutes creating an NCA, as the power to designate these protected areas resides exclusively with Congress and has not been delegated to the President.

Management direction for each NCA is set forth in the legislation establishing the area. While this gives Congress flexibility to tailor management to local needs, it also complicates efforts to identify themes in NCA management. However, just as we can look to national monument proclamations to identify how a new monument would likely be managed, we can also look to existing NCA legislation to identify trends in NCA management.

Legislation creating an NCA commonly states as its statutory purpose: "to conserve, protect, and enhance for the benefit and enjoyment of present and future generations the ecological, scenic, wildlife, recreational, cultural, historical, natural, educational, and scientific resources."[28] Minor variations may occur to reflect resources that are unique to each NCA.[29] The statutes creating NCAs also invariably include language regarding authorized uses. Early statutes creating NCAs were often more detailed and specific. The Kings Ranch NCA, for example, which was created in 1970, allows uses:

> [I]ncluding but not limited to . . . scenic enjoyment, hunting, fishing, hiking, riding, camping, picnicking, boating and swimming, all uses of water resources, watershed management, production of timber and other forest producers,

> grazing and other agricultural uses, fish and wildlife management, mining, preservation of ecological balance, scientific study, occupancy and access.[30]

Statutes creating newer NCAs typically state that federal land managers will allow only uses that "would further the purposes for which the Conservation Area is established,"[31] as determined by the Secretary of the managing agency. The treatment of water rights has also evolved under NCA designations. Although early NCAs did not explicitly address water rights,[32] or include a reservation of water sufficient to fulfill the purposes of the NCA,[33] two of the four most recent NCAs include provisions stating that the legislation does not create an express or implied water right,[34] while two others are silent on the issue.[35]

Congress, in designating NCAs, appears to be trending towards more specific protection. Early NCA legislation rarely included discussion of vehicle use, but recent NCAs commonly include statements that limit off-road motorized vehicle use to administrative or emergency response purposes.[36] Similarly, earlier NCA legislation often ignored livestock grazing, while more recent NCA legislation generally includes language addressing the practice. For instance, the 2009 Beaver Dam Wash NCA legislation provides that any grazing established prior to the day of the act could continue "subject to such reasonable regulations, policies, and practices as the Secretary considers necessary."[37]

Native American access and use has rarely been addressed in NCA legislation. The only mention comes from the El Malpais NCA bill, which states:

> [T]he Secretary shall assure nonexclusive access to the monument . . . by Indian people for traditional cultural and religious purposes, including the harvesting of pine nuts. Such access shall be consistent with the purpose and intent of the American Indian Religious Freedom Act. . . . [T]he Secretary, upon the request of an appropriate Indian tribe, may from time to time temporarily close to general public use one or more specific portions of the monument or the conservation area in order to protect the privacy of religious activities in such areas by Indian people.[38]

None of the statutes creating an NCA includes language regarding the use of firewood, apart from the El Malpais NCA, which prohibits the commercial sale of dead or green wood.[39]

Management cooperation requirements vary across legislation, but some common themes are noteworthy. Most NCAs either authorize federal land managers to "enter into cooperative management agreements with appropriate state and local agencies,"[40] or direct federal managers to consult with appropriate state, tribal, and local governmental entities, and members of the public.[41]

In sum, Congress has tremendous latitude to include provisions addressing local issues and concerns in legislation creating NCAs. As with National Monuments, provisions in the statutes creating NCAs tend to be somewhat general in tone, requiring more detailed management definition as part of subsequent planning documents.

III. Comparing the Two Proposals

The text that follows identifies and assesses key differences between the Inter-Tribal Coalition and PLI proposals. A more complete summary of the competing proposals is set forth in a Table at the end of this paper, and both proposals are depicted in Figure 1.

A. The Bears Ears National Monument Proposal

The Bears Ears Inter-Tribal Coalition is comprised of the Hopi Tribe, Navajo Nation, Ute Indian Tribe, Ute Mountain Ute Tribe, and Pueblo of Zuni. The Coalition has asked President Obama to designate a Bears Ears National Monument, as shown below.[42] Twenty-six additional

tribal governments support the coalition proposal.[43] Though there is no guarantee that the President will designate the monument, or that a designation would match the proposal, we anticipate that a National Monument would combine details from the proposal and many of the standard provisions discussed above.

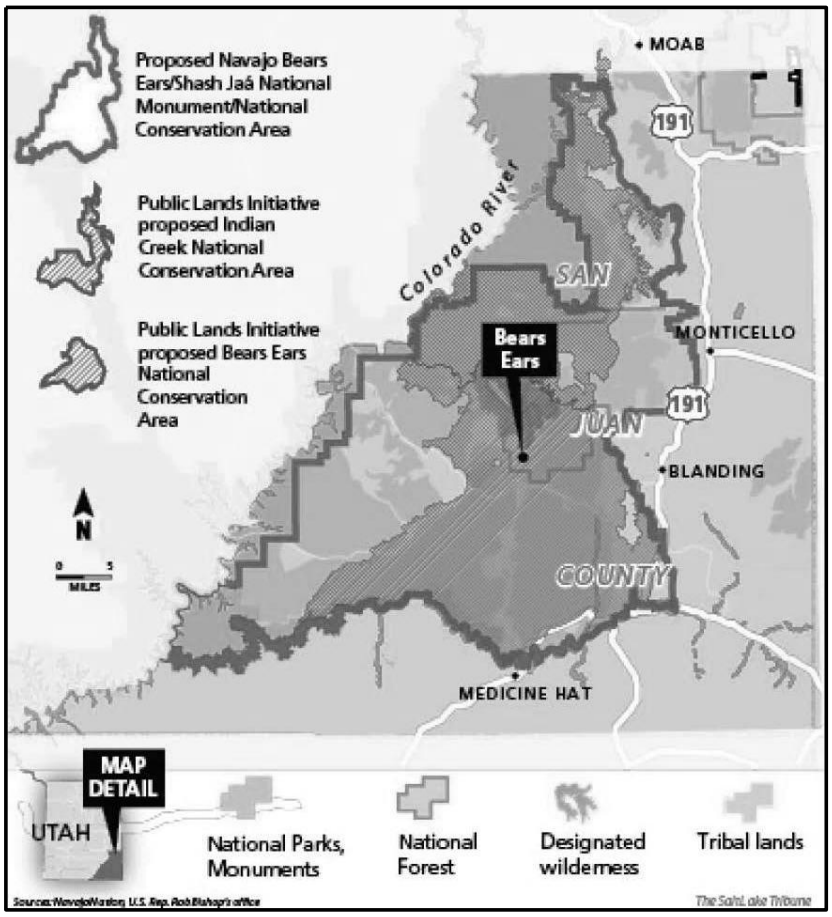

Figure 1 -- Monument & NCA Proposals

The Inter-Tribal Coalition's proposal advocates for greater tribal involvement in monument management.[44] As shown in Figure 2, the Coalition's proposal calls for an eight-member management commission comprised of one representative from each of the five coalition tribes, plus one representative from each federal agency that currently administers lands within the proposed monument: the Forest Service, the BLM, and the National Park Service. The commission would collaborate on all management decisions. If commission members fail to agree, the agencies and tribes would proceed to mediation; if mediation fails, final decision-making authority remains with either the Secretary of the Interior or the Secretary of Agriculture, depending on land ownership.[45] While the proposal calls for an unprecedented level of tribal involvement, the proposal also guarantees that no decision would be made over the objection of the Secretaries and that final decision-making authority would remain with the federal government. Notably, while the Intertribal Coalition's proposal creates a commission to address federal and tribal concerns, other stakeholders as well as state and local governments, lack comparable representation and must rely on public input processes enshrined in the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act

(FLPMA) existing laws.[46]

Under the Coalition proposal, key resource management issues within the monument would be addressed in the presidential proclamation, while subsequent planning documents would address implementation. The Coalition recommends that the following provisions be included in the proclamation itself:

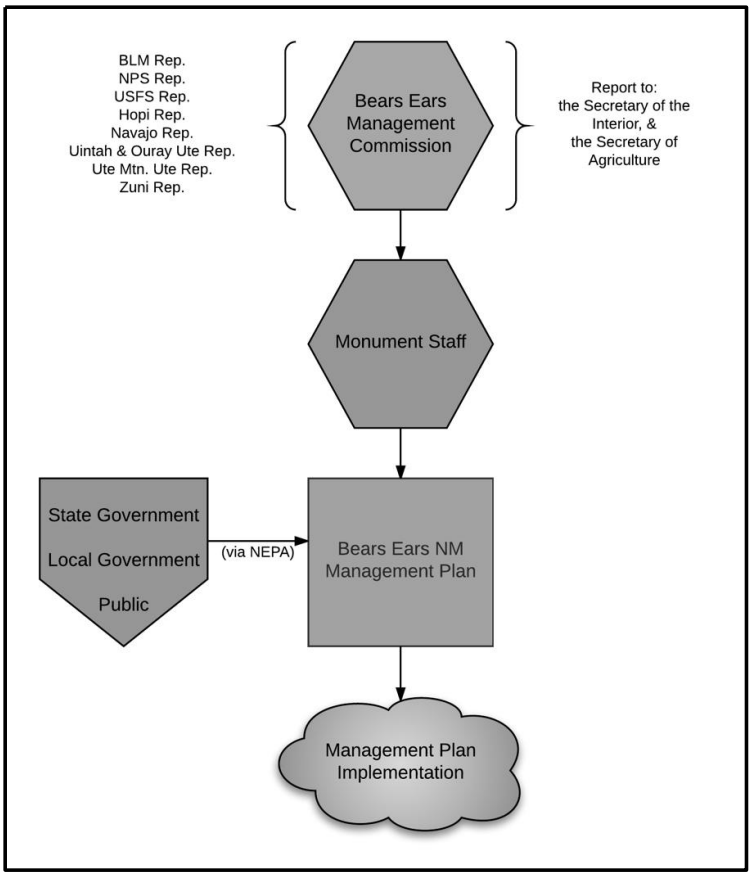

Figure 2 – Proposed National Monument Management

- A permanent mineral withdrawal for future location and leasing, of all lands within the monument.[47]
- A permanent withdrawal from all other forms of leasing, selection, sale, exchange, or disposition, other than those exchanges that further the purposes of the monument.
- The management plan should include a transportation plan designating the roads and trails available for motorized or non-motorized vehicle uses. Motorized and mechanized vehicle use should be permitted only on designated roads and trails consistent with the purposes of the monument.
- State of Utah and Ute Mountain Ute hunting and fishing laws should continue to apply within the monument.
- The Secretaries should be directed, upon request of the State of Utah, to negotiate with the state for an exchange of the state inholdings within the monument.
- The proclamation should provide for collaborative management.
- The management plan should, to the maximum extent permitted by law, ensure protection of Native American sacred and cultural sites and provide access to those sites by members of Indian tribes for traditional and cultural uses, including gathering of minerals, medicines, berries and other vegetation, forest products, and firewood.
- Grazing under existing permits or leases should continue under existing law.
- Firewood gathering should continue under current management prescriptions and then be subject to such provisions as adopted in the management plan.

The proposed monument would include approximately 157,000 acres of state lands,[48] and the Coalition proposes that the federal government negotiate an exchange of state lands within the monument for developable federal lands outside of the monument.[49] The Coalition also proposes standard proclamation provisions protecting valid existing rights, Tribal rights, the rights of inholders, and existing water rights.[50] Remaining issues, including the implementation

of these provisions, would be resolved during the monument planning process. With the exception of the proposed eight-member management commission and co-management, these provisions basically mirror the content contained in other Obama administration monument proclamations.

B. The Bears Ears and Indian Creek NCA Proposal

The PLI proposes two new NCAs in the Bears Ears area — an 857,603-acre Bears Ears NCA, and a 434,354-acre Indian Creek NCA. As seen in Figure 1, the proposed NCAs are contiguous but subject to different management requirements, and the NCAs overlap with much of the Inter-Tribal Coalition's proposed National Monument. The two proposed NCAs are addressed in turn, and summarized in Figure 3 as well as the table at the end of this paper.

Like the Inter-Tribal Coalition's proposal, the PLI recognizes that Utah has significant land holdings within areas that would be impacted by NCA designations, and like the Coalition's proposal, the PLI would allow the state to exchange inholdings for developable lands elsewhere in the state. Unlike the Coalition's proposal, which calls for a negotiated exchange, the PLI provides that if Utah offers to convey its inholdings to the U.S., the Secretary "shall," subject to certain conditions, "accept the offer," and "convey to the State all right, title, and interest" in statutorily specified federal lands to the state.[51] Negotiations and parcel value equalization are not required, and environmental and public review would be streamlined.[52]

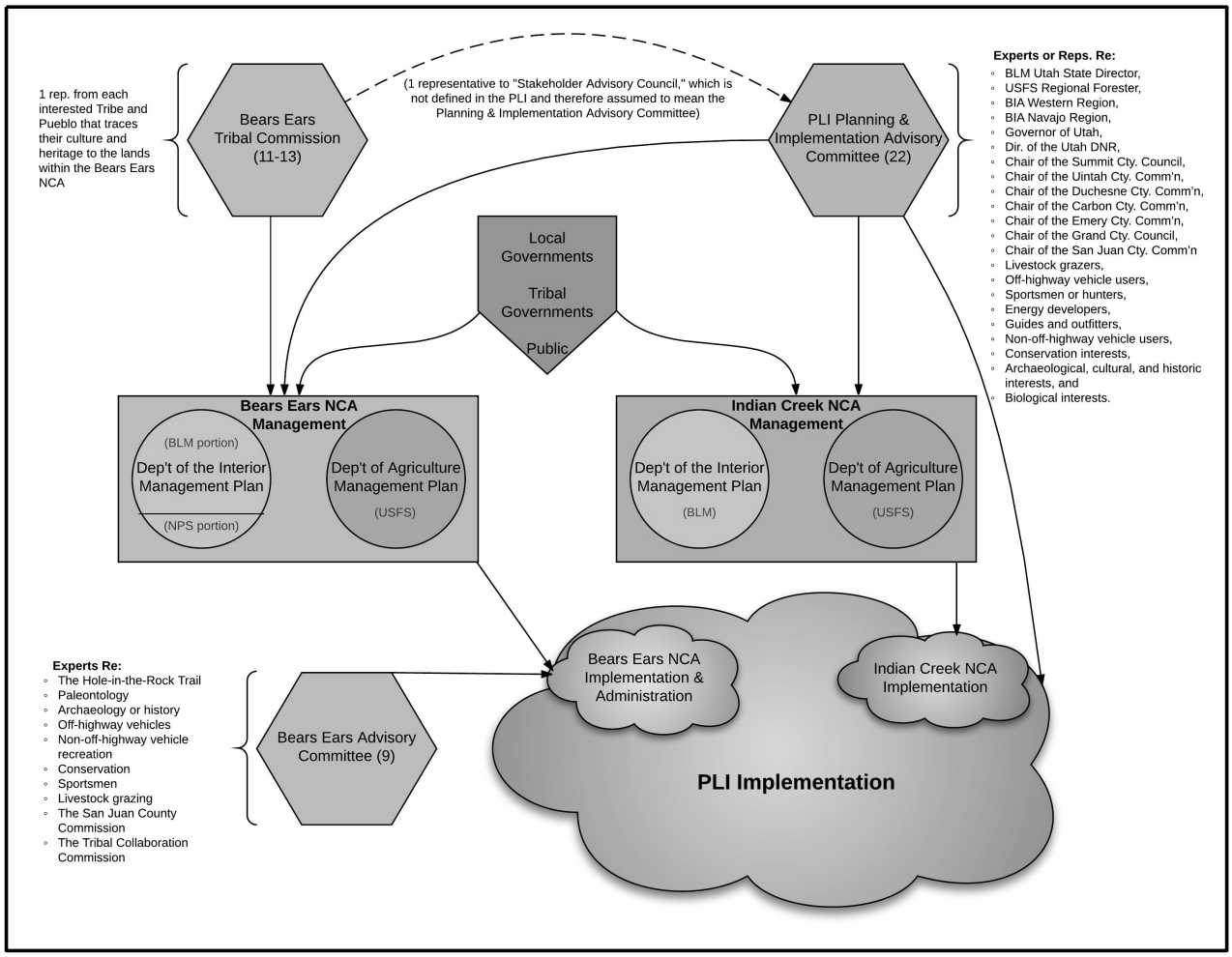

Figure 3 -- Proposed NCA Management

The PLI would also designate ten new or expanded wilderness areas that overlap portions of the two proposed NCAs. Narrow exceptions aside, roads, motorized vehicles, and mechanized equipment are all normally prohibited within wilderness areas.[53] Under the PLI, these prohibitions would remain in place, except that motorized access and road maintenance would be allowed as needed to guarantee the continued viability of water resource facilities that exist or which may be necessary in the future,[54] and as needed for firefighting and other purposes.[55] Most of the proposed wilderness areas reflect existing wilderness study areas, which are already subject to a statutory mandate not to impair their wilderness character.[56] All other proposed new wilderness areas on BLM lands are within areas inventoried as possessing wilderness character.[57] Two new wilderness areas would be designated within the Manti-La Sal National Forest. Additionally, under the PLI, approximately seventeen miles of the San Juan River would be protected under the Wild and Scenic Rivers Act.[58] This segment reflects a portion of the southern boundary of the proposed national monument.

The Bears Ears NCA Proposal

Under the PLI, the Bears Ears NCA would be managed in accordance with six objectives, which are:

- Protect, conserve, and enhance the unique and nationally important historic, cultural, scientific, scenic, recreational, archaeological, natural, and educational resources.
- Maintain and enhance cooperative and innovative management practices between resource managers, private landowners, and the public.
- Recognize and maintain historic uses.
- Provide for traditional access by indigenous persons for culturally significant subsistence, including but not limited to traditional gathering, wood cutting, hunting, and cultural and religious uses.
- Protect, preserve and minimize disturbance to Native American archaeological sites, including human remains, from permitted uses of Bears Ears consistent with the Native American Graves Repatriation and Protection Act, the National Historic Preservation Act, and the Utah State Antiquities Act.
- Integrate Native American traditional ecological knowledge; improve social, economic, and ecological sustainability in accordance with U.S. Forest Service planning regulations.[59]

Like national monument proclamations, the PLI requires preparation of an NCA management plan.[60] Within two years, "[t]he relevant Secretary shall prepare the management plan in consultation and coordination with local and tribal governments, the public, and the [PLI] Planning and Implementation Advisory Committee."[61] The proposed NCA includes land currently managed by the National Park Service and the BLM, both of which are agencies within the Department of the Interior, as well as lands managed by the U.S. Forest Service, which is part of the Department of Agriculture. It is not clear whether the Secretaries overseeing these two Departments would be required to integrate their planning efforts, as is the case under the Inter-Tribal Coalition proposal.

The PLI explicitly provides for tribal involvement in certain aspects of planning. Under the PLI, the Secretary of the Interior must designate as cooperating agencies for the purpose of completing the Environmental Impact Statement, which is an essential step in the creation of an NCA management plan, any "interested Tribes and Pueblos that trace their culture and heritage to the lands within the Bears Ears [NCA]."[62] As BLM regulations require preparation of a combined plan and plan environmental impact statement,[63] cooperating Tribes and Pueblos would presumably also have a role in plan development. However, cooperating agency status under the PLI applies only to the Department of the Interior, so Tribes and Pueblos may not be

statutorily entitled to cooperating agency status in planning for the portion of the NCA that would be administered by the U.S. Forest Service.

The PLI also creates an independent "Bears Ears Advisory Committee" to advise the Secretary of the Interior with respect to management plan implementation and NCA administration.[64] The committee would be made up of one representative with expertise in each of the following areas:

- The Hole-in-the-Rock Trail
- Paleontology
- Archaeology or history
- Off-highway vehicles
- Non-off-highway vehicle recreation
- Conservation
- Sportsmen
- Livestock grazing
- The San Juan County Commission
- The Tribal Collaboration Commission[65]

As this committee is only explicitly charged with advising the Department of the Interior, it is unclear whether the committee would also advise the Forest Service on planning matters.

Additionally, the PLI would create a "PLI Planning and Implementation Advisory Committee," to advise the Secretaries of the Interior and Agriculture on how to implement the PLI, and on "policies or programs that encourage coordination among the public, local elected officials, or public lands stakeholders, and the State, tribes, or the Federal Government."[66] There would be twenty-two members of the PLI Advisory Committee, which would be drawn from two groups. Thirteen individuals would represent government entities and agencies:

- The Utah State Director of the BLM,
- The Regional Forester of Region 4 of the United States Forest Service,
- A representative of the Bureau of Indian Affairs Western Region,
- A representative of the Bureau of Indian Affairs Navajo Region,
- The Governor of the State of Utah,
- The Director of the Utah Department of Natural Resources,
- The Chairperson of the Summit County Council,
- The Chairperson of the Uintah County Commission,
- The Chairperson of the Duchesne County Commission,
- The Chairperson of the Carbon County Commission,
- The Chairperson of the Emery County Commission,
- The Chairperson of the Grand County Council, and
- The Chairperson of the San Juan County Commission.[67]

Nine Utah residents would also be appointed to represent:

- Livestock grazers,
- Off-highway vehicle users,
- Sportsmen or hunters,
- Energy developers,
- Guides and outfitters,
- Non-off-highway vehicle users,
- Conservation interests,
- Archaeological, cultural, and historic interests,
- Biological interests.[68]

In sum, the PLI proposes to create three different advisory bodies, each of which would involve nine to twenty-two members, have overlapping responsibilities, and sometimes overlapping membership. This is far more complicated than the management structure envisioned under the Inter-Tribal Coalition proposal. Aside from the Bears Ears Tribal Commission, advisory bodies under the PLI also give far more authority to state and local governments than is true for the Inter-Tribal Coalition proposal, which makes no provision for state or local involvement.

The section of the PLI that would designate the Bears Ears NCA does not address mineral or land disposal withdrawals, livestock grazing, wildlife management, vehicle use, or water rights. Each of these issues is addressed under the Tribal Coalition's proposal and for the eleven other NCAs proposed under the PLI (including the proposed Indian Creek NCA discussed below). While this appears to be a drafting oversight, the omission could pose significant management challenges if not addressed through bill amendments.

The Indian Creek NCA Proposal

The proposed Indian Creek NCA is located north of and adjacent to the proposed Bears Ears NCA. While the PLI discusses the proposed Bears Ears NCA in a standalone section, the proposed Indian Creek NCA is identified in a section creating eleven new NCAs. The management directives listed in that section would apply to all eleven NCAs, and include to:

- Protect, conserve, and enhance the unique and nationally important historic, cultural, scientific, scenic, recreational, archaeological, natural, and educational resources of the NCA,
- Maintain and enhance cooperative and innovative management practices between resource managers, private landowners, and the public in the NCA, and
- Recognize and maintain historic uses of the NCA.[69]

Tribes and Pueblos would lack the substantive role in management plan development and implementation for the proposed Indian Creek NCA that they would have with respect to the proposed Bears Ears NCA. See Figure 3. The proposed Indian Creek NCA also lacks the explicit protection of Native American access and use that is included in the proposed Bears Ears NCA.

Furthermore, the PLI proposes that within the Indian Creek NCA, livestock grazing levels should be maintained at the "approximate stocking levels prescribed in the grazing permit that existed on January 1, 2016."[70] This potentially limits the ability to reduce grazing in response to wildfire, drought, or wildlife needs. No such requirements are found in the proposed Bears Ears NCA or the Inter-Tribal Coalition's National Monument proposal. And while the PLI recognizes continued state primacy with respect to wildlife and water rights management within the proposed Indian Creek NCA,[71] no such provision applies to the proposed Bears Ears NCA.

However, the proposed Indian Creek NCA is more protective of certain resources and uses than the proposed Bears Ears NCA. The Indian Creek NCA would be withdrawn from mineral development and disposal under applicable public lands laws.[72] No such withdrawal applies with respect to the Bears Ears NCA. Vehicle use within the Indian Creek NCA would be limited to designated routes.[73] Again, the Bears Ears NCA is not subject to similar protections.

Some of these differences may reflect drafting oversights. The Bears Ears NCA is proposed in Division G, Title I of the PLI, while the eleven other NCAs are proposed together in Division A, Title II of the bill. The bill's drafters may have simply neglected to extend intended protections to lands in the later section. It is also possible that the PLI's drafters assumed that these substantive issues could be resolved, with greater Tribal input, through the management plan development process applicable to the proposed Bears Ears NCA. Either way, the striking difference in approach would benefit from clarification.

V. Conclusion

By enacting the Antiquities Act of 1906, Congress expressly granted the President the discretionary authority to set aside certain scientifically and historically important lands. Given this authority, national monument proclamations provide the flexibility to address issues unique to each landscape. Having evolved over time, today monument proclamations typically include both an express recognition of valid existing rights and state jurisdiction over water and wildlife,

and an express recognition of Native Americans' rights to access and utilize the landscape. They also include procedural direction requiring federal land managers to collaborate with state, tribal, and local governments as well as specific direction regarding resource protection. In light of these evolutionary changes, monument designations today often look quite different from those of a century ago. Congressional authority to designate and design National Conservation Areas is even broader than that available to the President under the Antiquities Act, and sufficiently flexible to address the unique challenges of a particular landscape. Thus, the critical distinction between an NCA and a national monument, aside from which branch of government undertakes the designation, involves the content they choose to instill in that designation.

In this case, the protections proposed under the PLI and by the Bears Ears Inter-Tribal Coalition differ noticeably. The Inter-Tribal Coalition's proposal is considerably larger, protecting upwards of 608,000 additional acres. While both proposals would require development of a detailed management plan and create opportunities for stakeholder involvement, they would do so in very different ways. The Inter-Tribal Coalition's proposal involves an eight-member federal-tribal management commission that would oversee management of a single management unit. Other stakeholders as well as state and local government would need to rely on consultation and cooperation requirements contained in other laws. In contrast, the PLI proposes to create two separate management units and three advisory bodies, involving up to forty-four total members.[74] Each of these entities would assume different roles and responsibilities, and each would engage in different manners and at different times during the planning or implementation process. And while the Intertribal-Coalition's proposal emphasizes tribal input, the PLI weighs heavily in favor of state and local government involvement. Further complicating matters under the PLI, it does not appear that the three federal agencies managing lands within the proposed NCA would be required to integrate management planning or administration. With three separate groups and up to forty-four representatives advising three federal agencies on wide-ranging issues, the PLI's management process has the potential to become unwieldy.

In terms of management, the Inter-Tribal Coalition's proposal would limit disposal and mineral development while protecting existing uses and state authority over water and wildlife. Under the PLI, Native Americans would have a heightened voice in managing the Bears Ears NCA, but no comparable role with respect to the Indian Creek NCA. The Indian Creek NCA would be subject to more protections like those contained in the Inter-Tribal Coalition proposal, but those protections would not extend to the Bears Ears NCA. Whether that reflects a drafting oversight or a decision to defer protections to management plan development is unclear.

Critically, both proposals recognize that any federal designation would capture thousands of acres of state trust lands, and that those lands should be exchanged for federal lands that are appropriate for development outside of the Bears Ears region. Where the Inter-Tribal Coalition's proposal calls for a post-designation negotiated exchange, the PLI dictates which lands would be exchanged. Although the PLI process may be more expedient, it would leave little room for public input and lacks a requirement, implicit in the Intertribal-Coalition proposal, that the parcels exchanged be of even approximately comparable value.

In sum, there are striking differences between the Inter-Tribal Coalition National Monument proposal and the pending PLI bill — and there are features to be lauded in both. Given the legal authority available to both the President and Congress, both mechanisms could produce comparable protections, and the best elements of the competing proposals should be incorporated into the final designation, whatever form that takes. While their visions may diverge, we must remember that both Native Americans and San Juan County residents have strong ties to the public lands at issue, and that all agree on the need for increased protection for this important landscape. Whatever the mechanism, these key stakeholders' concerns should be heard when defining the future of a landscape that helps define them.

	Bears Ears National Monument	*Bears Ears National Conservation Area*	*Indian Creek National Conservation Area*
Land Protected	1,900,000 acres	857,603 acres	434,354 acres
Management Objectives	"To assure that the Bears Ears area will be managed forever with the greatest environmental sensitivity and healing of the land to make it fully a place where we can be among our ancestors and their songs and wisdom and our deepest values, where the traumas of the past can be alleviated, where we can connect with the land and be healed; To make this National Monument the most deeply and truly "Native" of all federal public land units by honoring the historical and contemporary relationship between Native Americans and the natural world of Bears Ears; To protect and preserve, for future generations of all Americans, the natural features, beauty, and inspiration found in the extraordinary Bears Ears landscape; To bring to light, through research, public outreach, and actual practice, the many aspects and values of Indigenous Traditional Knowledge in its fullest sense as a philosophy, a cultural tradition, and a useful tool for enriching modern land management."	Protect, conserve, and enhance unique and nationally important historic, cultural, scientific, scenic, recreational, archaeological, natural, and educational resources; maintain and enhance cooperative and innovative management practices between resource managers, private landowners, and the public; recognize and maintain historic uses; provide for traditional access by indigenous persons for culturally significant subsistence, including but not limited to traditional gathering, wood cutting, hunting, and cultural and religious uses; protects and preserves and minimizes disturbance to Native American archaeological sites, including human remains; and Integrate Native American traditional ecological knowledge to improve social, economic, and ecological sustainability.	Protect, conserve, and enhance the unique and nationally important historic, cultural, scientific, scenic, recreational, archaeological, natural, and educational resources of the NCA; maintain and enhance cooperative and innovative management practices between resource managers, private landowners, and the public in the NCA; and recognize and maintain historic uses of the NCA.
Management Plan Development	"This key document… would be developed by Monument staff, with the Commission providing specific direction to staff regarding plan design and content, as well as review throughout the process of plan development. Members of the public and other key stakeholders would have ample opportunity to contribute to the development of the plan through normal NEPA processes."	"Prepare management plan in consultation and coordination with local and tribal governments, the public, and the [PLI] Planning and Implementation Advisory Committee." *The NCA includes BLM, USFS, and NPS managed lands – it is unclear whether the Department of the Interior and the Department of Agriculture will need to create separate plans or coordinate planning.* "In preparing the management plan . . ., the Secretary of the Interior shall create a Commission consisting of one representative from each Tribe or Pueblo that enters into cooperating agency status. . . . The Secretary shall actively seek advice and carefully and fully consider the views of the Commission." *It is unclear if this commission would have a role in planning for USFS lands. It is also unclear whether this Commission would have a role in planning, as "cooperating agency" status applies to NEPA analysis of planning proposals rather than planning.* The [PLI] Planning and Implementation Advisory Committee will include 22 members, 13 of which will represent federal, state and local governments; 9 of which will represent community interests.	"The relevant Secretary shall prepare the management plan in consultation and coordination with local and tribal governments, the public, and the [PLI] Planning and Implementation Advisory Committee." *The NCA includes BLM, USFS, and NPS managed lands – it is unclear whether the Department of the Interior and the Department of Agriculture will need to create separate plans or coordinate planning.* The Public Lands Initiative Planning and Implementation Advisory Committee will include 22 members, 13 of which will represent federal, state and local governments; 9 of which will represent community interests. Members are appointed jointly by the Secretaries of Agriculture and the Interior.
Management Plan Administration	The Inter-Tribal Coalition proposes the creation of an 8-member council, comprised of the 5 tribes alongside the USFS, NPS, and BLM. The Council has hiring authority over the Monument Manager and creates all monument policy. "The Agencies and the Tribes shall, from the beginning to the conclusion of all plans and projects, collaborate jointly on all procedures, decisions, and other activities except as otherwise provided in the Proclamation. In the case of impasse, undue delay, or other extraordinary circumstances, the Agencies and the Tribes shall proceed to appropriate mediation. If such mediation fails, the Secretary of Interior or the Secretary of Agriculture, as appropriate, shall in a written opinion explaining the reasons, make the relevant decisions."	Creates a 10-person "Bears Ears Advisory Committee" to advise the Secretary regarding on management plan implementation and administration. The Committee would include an expert in the Hole-in-the-Rock Trail, a paleontologist, an archeologist or historian, an off-highway vehicle representative, a non-off-highway vehicle representative, a conservationist, a sportsman, a cattle grazer, a member of the San Juan County commission, and a Tribal representative. Creates a [PLI] Planning and Implementation Advisory Committee will include 22 members, 13 of which will represent federal, state and local governments; 9 of which will represent community interests. Members are appointed jointly by the Secretaries of Agriculture and the Interior.	Creates a [PLI] Planning and Implementation Advisory Committee will include 22 members, 13 of which will represent federal, state and local governments; 9 of which will represent community interests. Members are appointed jointly by the Secretaries of Agriculture and the Interior The Secretary of the Interior is also encouraged to maintain and enhance "cooperative and innovative management practices between resource managers, private landowners, and the public in the Conservation Area."
Mineral Development	"A permanent withdrawal from the mining laws, for both location and leasing, of all lands within the monument."	PLI imposes no new limitations or protections.	Withdrawn from disposal and mineral development under applicable public land laws.

	Bears Ears National Monument	*Bears Ears National Conservation Area*	*Indian Creek National Conservation Area*
Livestock Grazing	"Grazing under existing permits or leases should continue under existing law."	PLI imposes no new limitations or protections.	The number of grazing permits cannot decrease in response to the new designation. "The number of livestock permitted to graze in areas designated by this title shall continue at approximate stocking levels prescribed in the grazing permit that existed on January 1, 2016 and additional or suspended [AUMs] shall be allowed to graze as range conditions allow or if range treatments improve conditions." Existing grazing facilities can be maintained, and new grazing facilities can be constructed.
Water Rights	The proposal protects existing water rights.	PLI imposes no new limitations or protections.	Designation does not create federal reserved water rights. "Nothing in this title…affects any water rights in the State of Utah existing on the date of enactment of this title, including any water rights held by the United States."
Wildlife	"State of Utah and Ute Mountain Ute hunting and fishing laws should continue to apply within the monument."	PLI imposes no new limitations or protections.	"Nothing in this title affects the jurisdiction of the State of Utah with respect to the management of fish and wildlife on Federal land in the State, including the regulation of hunting, fishing, and trapping and use of helicopters to maintain healthy wildlife populations, within the [NCA]."
Native American Uses	"The management plan should, to the maximum extent permitted by law, ensure the protection of Native American sacred and cultural sites in the monument and provide access to the sites by members of Indian tribes for traditional and cultural uses, including gathering of minerals, medicines, berries and other vegetation, forest products, and firewood." "Firewood gathering should continue under current management proscriptions and then be subject to such provisions as adopted in the management plan."	"Provides for traditional access by indigenous persons for culturally significant subsistence, including but not limited to traditional gathering, wood cutting, hunting, and cultural and religious uses within Bears Ears."	Native American uses are not specifically protected within the proposed Indian Creek NCA, but tribes will be consulted with during management plan development.
Vehicle Use	"Motorized vehicle use should be permitted only on designated roads. Non-motorized mechanized vehicle use should be permitted only on roads and trails designated for their use consistent with the purposes of the monument "	PLI imposes no new limitations or protections.	"The use of off-highway vehicles shall be permitted only on designated routes." Those routes cannot "significantly damage designated critical habitat or cultural resources" and cannot "interfere with private property or water rights." OHV use is authorized for maintaining grazing facilities; response to grazing management emergencies; water infrastructure maintenance and development; administrative purposes including emergency response, project construction and maintenance, and fire suppression. Secretary may only temporarily close or permanently reroute routes in consultation with the state and county if there is "significant[ ] damage to designated critical habitat or cultural resources," threat to public safety, or resource damage."
Recreation	Not explicitly addressed, but recreation users are mentioned. "Monument status for Bears Ears will lead to better management of off-road vehicle use and will improve the recreational experience for everyone who visits, including off-roaders."	"Protects, conserves, and enhances the unique and nationally important historic, cultural, scientific, scenic, recreational, archaeological, natural, and educational resources of Bears Ears."	"Authorize, maintain, and enhance the recreational use of the [NCA], including hunting, fishing, camping, hiking, backpacking, cross-country skiing, hang gliding, paragliding, rock climbing, canyoneering, sightseeing, nature study, horseback riding, mountain biking, rafting, off-highway vehicle recreation on designated routes, and other recreational activities."
Land Exchange	The Secretaries would be directed to, upon request of the state of Utah, to negotiate for an exchange of the state inholdings within the monument.	If Utah offers to convey inholdings within the PLI area to the federal government, the federal government *shall* accept the offer and convey to the state all right, title, and interest in the land. The exchange would be subject to streamlined NEPA review.	If Utah offers to convey inholdings within the PLI area to the federal government, the federal government *shall* accept the offer and convey to the state all right, title, and interest in the land. The exchange would be subject to streamlined NEPA review.

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[1] Utah Ass'n of Counties, 2015 Utah Counties Fact Book 37 (2015).
[2] *Id*.
[3] H.R. 5780, 114th Cong. 2d Sess. (2016) (*hereinafter* PLI).
[4] Acreage figures are approximations only, as it appears that NCA and National Monument acreages were calculated using differing assumptions.
[5] 54 U.S.C. §§ 320101-303 (2014 supp. II).
[6] *See* Collins & Green, *A Proposal to Modernize the American Antiquities Act*, 202 SCIENCE 1055 (1978).
[7] Congress may also enact legislation creating new National Monuments. When Congress designates a new National Monument, its power to ascribe management requirements and include other protective designations is limited only by the Constitution. When Presidents designate a new National Monument they are limited to the authority delegated to them by Congress.
[8] 54 U.S.C. §§ 320310(a) and (b) (2014 supp. II).
[9] *See e.g*. Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1191 (D. Utah 2004), appeal dismissed for lack of standing, 455 F.3d 1094 (10th Cir. 2006).
[10] Pres. Proc. No. 9194, Establishment of the San Gabriel Mountains National Monument, 79 Fed. Reg. 62303 (October 10, 2014).
[11] *See e.g*., *id*.
[12] Cameron v. U.S., 252 U.S. 450 (1920) (Grand Canyon); Wyoming v. Franke, 58 F. Supp. 890 (D. Wyo. 1945) (Jackson Hole); Cappaert v. U.S., 426 U.S. 128 (1976) (Devils Hole); Tulare Cty. v. Bush, 185 F. Supp. 2d 18, 27 & n.2 (D.D.C. 2001), aff'd, 306 F.3d 1138 (D.C. Cir. 2002) (Giant Sequoia); Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172 (D. Utah 2004), appeal dismissed for lack of standing, 455 F.3d 1094 (10th Cir. 2006) (Grand Staircase-Escalante); and Anaconda Copper Co. v. Andrus, 1980 U.S. Dist. LEXIS 17861; Alaska v. Carter, 462 F. Supp. 1155 (D. Alaska 1978) (several Alaskan national monuments).
[13] 54 U.S.C. § 320301(b) (2014 supp. II).
[14] Cappaert v. U.S., 426 U.S. 128 (1976) (Devil's Hole); Cameron v. U.S., 252 U.S. 450 (1920); Wyoming v. Franke, 58 F. Supp. 890 (D. Wyo. 1945).
[15] Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1183-85 (D. Utah 2004), appeal dismissed for lack of standing, 455 F.3d 1094 (10th Cir. 2006). *See also*, Tulare County v. Bush, 185 F.Supp.2d 18, 24 (D. D.C. 2001) ("The Antiquities Act sets forth no means for reviewing a President's proclamation other than specifying that a President has discretion in his or her use of the Act."), *affirmed* 306 F.3d 1138 (D.C. Cir. 2002).
[16] Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1137 (D.C. Cir. 2002).
[17] Cameron v. U.S., 252 U.S. 450 (1920); Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1192-93 (D. Utah 2004), appeal dismissed for lack of standing, 455 F.3d 1094 (10th Cir. 2006). *See also*, Tulare County v. Bush, 306 F.3d 1138, 1141-42 (D.C. Cir. 2002).
[18] Pres. Proc. No. 9297, Establishment of the Basin and Range National Monument, 80 Fed. Reg. 41969 (July 10, 2015).
[19] Pres. Proc. No. 9232, Establishment of the Browns Canyon National Monument, 90 Fed. Reg. 9975 (Feb. 24, 2015).

[20] Pres. Proc. No. 8946, Establishment of the Río Grande del Norte National Monument, 78 Fed. Reg. 18783 (March 25, 2013).
[21] Basin and Range Proc., *supra* note 18.
[22] Pres. Proc. No. 9298, Establishment of the Berryessa Snow Mountain National Monument, 80 Fed. Reg. 41975 (July 10, 2015).
[23] 42 U.S.C. § 1996 (2012), *but see* U.S. v. Mitchell, 502 F.3d 931 (9th Cir. 2007).
[24] Pres. Proc. No. 9476, Establishment of the Katahdin Woods and Waters National Monument, 81 Fed. Reg. 59121 (Aug. 24, 2016). *See also*, Pres. Proc. No. 9396, Establishment of the Sand to Snow National Monument, 81 Fed. Reg. 8379 (Feb. 12, 2016); Pres. Proc. No. 9395, Establishment of the Mojave Trails National Monument, 81 Fed. Reg. 8371 (Feb. 12, 2016); Pres. Proc. No. 9394, Establishment of the Castle Mountains National Monument, 81 Fed. Reg. 8365 (Feb. 12, 2016); Berryessa Snow Mountain Proc., *supra* note 22; Basin and Range Proc., *supra* note 18; Browns Canyon Proc., *supra* note 19; Pres. Proc. No. 9131, Establishment of the Organ Mountains-Desert Peaks National Monument, 79 Fed. Reg. 30431 (May 21, 2014); and Pres. Proc. No. 8947, Establishment of the San Juan Islands National Monument 78 Fed. Reg. 18789 (March 25, 2013) (all containing identical substantive language).
[25] San Gabriel Mountains Proc., *supra* note 10.
[26] Río Grande Del Norte Proc., *supra* note 20.
[27] Pres. Proc. No. 8868, Establishment of the Chimney Rock National Monument, 77 Fed. Reg. 59275 (Sept. 21, 2012).
[28] Beaver Dam Wash NCA, Pub. L. No 111-11 (2009).
[29] *See e.g.*, Dominguez Escalante NCA, Pub. L. No 111-11 (2009) (adding protection of riparian and wilderness values).
[30] Kings Range NCA, Pub. L. No. 91-476 (1970).
[31] Dominguez Escalante NCA, Pub. L. No 111-11 (2009).
[32] *See e.g.*, Kings Range NCA, Pub. L. No. 91-476 (1970).
[33] *See e.g.*, El Malpais NCA, Pub. L. No. 100-225 (1987), and Gila Box Riparian NCA, Pub. L. No. 101-628 (1990).
[34] *See e.g.*, Gunnison Gorge NCA, Pub. L. No 106-76 (1999), and Colorado Canyons NCA, Pub. L. No. 106-353 (2000).
[35] Beaver Dam Wash NCA, *supra* note 28, and Red Cliffs NCA, Pub. L. No 111-11 (2009).
[36] Red Cliffs NCA, *supra* note 35.
[37] Beaver Dam Wash NCA, *supra* note 28.
[38] El Malpais NCA, Pub. L. No 100-225 (1987).
[39] *Id*.
[40] *See e.g.*, San Pedro Riparian NCA, Pub. L. No 100-696 (1988), and Gila Box Riparian NCA, *supra* note 33.
[41] Beaver Dam Wash NCA, *supra* note 28, Red Cliffs NCA, *supra* note 35.
[42] The Bears Ears Inter-Tribal Coalition, Proposal to President Barack Obama for the Creation of Bears Ears National Monument (Oct. 15, 2015) (hereinafter "Inter-Tribal Proposal") http://utahdinebikeyah.org//wp-content/documents/Bears-Ears-Inter-Tribal-Coalition-Proposal-10-15-15.pdf.
[43] The Bears Ears Inter-Tribal Coalition, Tribes Uniting to Protect Bears Ears (last visited July 13, 2016) http://www.bearsearscoalition.org/about-the-coalition/tribal-statements-of-support/.
[44] Inter-Tribal proposal, *supra* note 42 at 30-31.
[45] *Id*. at 22.
[46] *See e.g.*, 43 U.S.C. § 1712(c)(9) (2012) (land use plan consistency under the Federal Land Policy and Management Act), and 40 C.F.R. § 1501.6 (2015) (cooperating agency status under the National Environmental Policy Act).
[47] The Inter-Tribal proposal also states that "All existing mineral rights should be honored, but future mining should be prohibited in Bears Ears." *Id*. at 35.

[48] SITLA, Monument Designations May Impact Utah Education Funding, https://trustlands.utah.gov/monument-designations-may-impact-utah-education-funding/ (last visited Aug. 10, 2016).
[49] Inter-Tribal proposal, *supra* note 42 at 36.
[50] *Id*. at 36-37.
[51] PLI, *supra* note 3, at 118:14-21.
[52] *Id*. at 122:16—123:14.
[53] 16 U.S.C. § 1131(c) (2012).
[54] PLI, *supra* note 3, at 21:21—22:4.
[55] *Id*. at 18:9-120.
[56] 43 U.S.C. § 1782(c) (2012).
[57] Bureau of Land Management, Dep't of the Interior, Monticello Field Office Record of Decision and Approved Resource Management Plan, Map 8 (2008).
[58] PLI, *supra* note 3, at 100:22-25.
[59] *Id*. at 206:14—207:25. The U.S. Forest Service is part of the Department of Agriculture. It is unclear whether Forest Service planning requirements are intended to apply to either the BLM or the National Park Service, both of which are in the Department of the Interior, which would also manage lands within the proposed NCA.
[60] PLI, *supra* note 3 at 31:1-20, and 208:1-20.
[61] *Id*. at 31:7-12, and 208:7-12.
[62] *Id*. at 209:1-16. Note that Department of the Interior regulations stipulate that under the National Environmental Policy Act, management plans require a full environmental impact statement and cannot be authorized in a less detailed environmental assessment. 43 C.F.R. § 1601.0-6 (2015).
[63] *Id*.
[64] PLI, *supra* note 3, at 210:10-20.
[65] *Id*. at 212:6—213:4.
[66] *Id*. at 198:8-11.
[67] *Id*. at 166:19—201:6.
[68] *Id*. at 201:8-21.
[69] *Id*. at 30:8—31:20.
[70] *Id*. at 33:8:18.
[71] *Id*. at 36:15—37:6, and 35:24—36:5 (wildlife).
[72] *Id*. at 31:22—32:32:8.
[73] *Id*. at 38:13:20.
[74] The Bears Ears Tribal Commission would include one representative from each interested Tribe and Pueblo that traces their culture and heritage to the lands within the Bears Ears NCA. While the Bears Ears National Monument proposal is being put forth by five tribes and supported by an additional twenty-six tribal governments, conservative estimates put Commission membership at between eleven and thirteen.