
**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

HOPI TRIBE, et al.,)
)
)
Plaintiffs,) Case No. 17-cv-2590 (TSC)
)
)

v.)
)

DONALD J. TRUMP, et al.,)
)
)
Defendants.)
)

UTAH DINÉ BIKÉYAH, et al.,)
)

Plaintiffs,) Case No. 17-cv-2605 (TSC)
)
)

v.)
)

DONALD J. TRUMP, et al.,)
)
)
Defendants.)
)

NATURAL RESOURCES DEFENSE)
COUNCIL, INC., et al.)
)

Plaintiffs,)
)
)

v.) Case No. 17-cv-2606 (TSC)
)
)

DONALD J. TRUMP, et al.,)
)
)
Defendants.)
)

CONSOLIDATED CASES

**BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AND
THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS
AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS
AND IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS**

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Curiae are leading national Native American organizations. They submit this brief in opposition to Federal Defendants' motion to dismiss and in support of Plaintiffs' claims that President Donald J. Trump's December 4, 2017 proclamation effectively revoking monument status and protections from nearly all of the Bears Ears National Monument (the Monument) is unlawful.¹

The National Congress of American Indians (NCAI) is the oldest and largest national organization of American Indian and Alaska Native tribal governments and their citizens. It advocates on behalf of a broad cross-section of tribes with varying land bases, economies, histories, and peoples. Since 1944, NCAI has advised tribal, federal, and state governments on a wide range of Indian issues, including the importance of federal monuments such as the one at issue in this suit. Currently, NCAI's member tribes and their citizens regularly visit the Monument, which contains thousands of objects and landmarks of historic importance, including sacred sites. They also use Monument lands to collect plants and other materials for religious and cultural rituals and medicinal purposes; to hunt, fish, and gather; and to provide offerings and conduct ceremonies.

The Association on American Indian Affairs (AAIA) was established in 1922 as a nonprofit American Indian advocacy organization committed to change the direction of federal Indian law and policy away from assimilation and allotment and toward tribal sovereignty and self-determination. Today, one of AAIA's primary initiatives is to advocate for the protection of sacred lands and Native American cultural resources in partnership with American Indian and Alaska

¹ In accordance with Local Rule 7, *Amici* affirm that no counsel for a party authored this brief in whole or in part, and no such counsel, no party, and no person other than *Amici*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Native tribes and traditional leaders. Over the course of its 96-year history, AAIA has helped draft the National Museum of the American Indian Act and the Native American Graves Protection and Repatriation Act (NAGPRA) and has actively advocated for stronger protections by providing comments for, and legal and technical assistance to, tribes in the federal environmental and cultural review process required by NAGPRA, the National Environmental Protection Act, the National Historic Preservation Act, and Section 4f of the Transportation Act, among other laws.

Together, NCAI and AAIA are uniquely situated to articulate the vital role the Monument plays in preserving the histories and cultures of Indian tribes. This perspective is critical in evaluating the legality of the Monument's effective revocation. In particular, NCAI and AAIA will describe the historic importance of the Monument (including the cultural, spiritual, and archaeological aspects of that historic importance) for tribes not otherwise represented in this case. *Amici* also will explain why revocation of the Monument erodes the progress the federal government has made toward protecting tribal cultural heritage and supporting tribal self-government by establishing a framework for the tribal management of lands containing tribal cultural heritage. They will explain how revocation of the Monument, if upheld, would undermine the continued viability of all other national monuments intended to protect landmarks of importance to Native American tribes. And finally, they will examine the role that other laws play in the protection of historic tribal landmarks, structures, and objects—illustrating how such laws cannot replace the protections that accompany designation of an area as a national monument.

INTRODUCTION AND SUMMARY OF ARGUMENT

Native American graves, burial items, and other cultural heritages have been the target of a lengthy and disturbing removal campaign in the name of “scientific research.”² Especially in the nineteenth and early twentieth centuries (but even still today), rampant amateur looting of Native American landmarks destroyed or lost countless antiquities. See Ronald F. Lee, U.S. Dep’t of the Interior, *The Antiquities Act of 1906*, at 29 (1970) [hereinafter Lee]. This looting forever separated tribes from sites and objects essential to their culture. It also, ironically, made these areas less available for scientific study. In 1906, Congress passed the Antiquities Act in an effort to stem the tide of looting and desecration and to protect landmarks, structures, and other objects of scientific or historic interest. See Pub. L. No. 59-209, 34 Stat. 225 (1906) [hereinafter Antiquities Act]; John Ise, *Our National Park Policy: A Critical History* 153 (1961) [hereinafter Ise] (“The act obviously referred principally to archeological ruins, to the ancient cliff dwellings and pueblos . . .”). As explained in more detail below, the Act achieved these ends by empowering the President to designate areas of public lands as national monuments, thereby protecting them against damage or destruction.

Initially, the Act was used predominantly to protect landmarks, structures, and objects rooted in Native American history. The first three monuments designated by President Theodore Roosevelt—Devils Tower in Wyoming, El Morro in New Mexico, and Montezuma Castle in Arizona—protected areas of public land on account of their connection to tribal cultural heritage. This commitment to preserving Native American landmarks, structures, and objects continued throughout President Theodore Roosevelt’s time in office and beyond.

² See Jack F. Trope, *The Case for NAGPRA, in Accomplishing NAGPRA: Perspectives on the Intent, Impact, and Future of the Native American Graves Protection and Repatriation Act* 19, 20–24 (Sangita Chari & Jaime M.N. Lavellee eds., 2013) [hereinafter Trope].

The creation of Bears Ears National Monument, like the creation of many other monuments before it, was due in large part to its connection to tribal cultural history, including thousands of American Indian structures and objects. The proclamation establishing the Monument begins by acknowledging that the land is of great historic interest on account of its various tribal antiquities: “Abundant rock art, ancient cliff dwellings, ceremonial sites, and countless other artifacts provide an extraordinary archaeological and cultural record that is important to us all, but most notably . . . to many Native American tribes.” Proclamation No. 9558: Establishment of the Bears Ears National Monument, 82 Fed. Reg. 1139, 1139 (Dec. 28, 2016) [hereinafter Obama Proclamation]. Individual Indians continue to visit the Monument to perform ceremonies, collect plants, and maintain their connection to these sacred and historic landmarks.

President Trump’s declaration purporting to abolish the original Monument violates the Antiquities Act by failing to account for the thousands of tribal objects and places of historic interest throughout the Monument and the threats these historic objects will now face. The types of tribal antiquities in the excluded areas are identical to those the Trump declaration recognizes as worthy of protection under the Antiquities Act. There is accordingly no rational—or legal—justification for removing them from the Monument. Moreover, other federal laws are inadequate on their own to protect the landmarks, structures, and other objects of historic interest that were part of the original Monument. For these reasons, *Amici* oppose Federal Defendants’ motion to dismiss.

ARGUMENT

I. Protecting Native American Antiquities Is a Central Purpose of the Antiquities Act of 1906.

“As its name suggests, the Antiquities Act was passed primarily to protect American Indian archeological sites from looting.” Defendant-Intervenors’ Memorandum of Points and Authorities

in Support of Defendants’ Motion to Dismiss at 2 (Oct. 1, 2018), ECF No. 50 (citing Lee, *supra*). The text of the Act makes this plain: It protects “prehistoric ruin[s] or monument[s]” and “any object of antiquity, situated on lands owned or controlled by the Government of the United States.” Antiquities Act, *supra*; see also H.R. Rep. No. 96-1457, at 17–18 (1980), as reprinted in 1980 U.S.C.C.A.N. 6378, 6380–81; *United States v. Diaz*, 499 F.2d 113, 114 (9th Cir. 1974) (explaining that the Antiquities Act was intended to protect “the culture and heritage of native Americans” and their “sacred places, past and present, against commercial plundering”).

The Act is a product of the history that preceded it. In the mid-to-late 1800s, federal policy supported the removal of Native American graves, burial items, and other cultural heritage from tribes for “scientific” study and museum curation. See Trope, *supra* note 2, at 20–24. During that time, looting and the commercial collection of American Indian antiquities—already common—increased substantially, causing irrevocable damage to tribal cultural heritage. See Lee, *supra*, at 29; Kristine Olson Rogers, *Visigoths Revisited: The Prosecution of Archaeological Resource Thieves, Traffickers, and Vandals*, 2 J. Env’tl L. & Litig. 47, 51 (1987) [hereinafter Rogers]. Ancient artwork was destroyed, and even sacred burial sites, including human remains and grave goods, were ripped out of the ground for collection and sale. See Adolph F.A. Bandelier, *Report on the Ruins of the Pueblo of Pecos*, in *Papers of the Archaeological Institute of America: American Series* 42 (2d ed. 1976).

This destruction caused uproar, often because the looting affected the integrity of a landmark or object of scientific interest. See Rogers, *supra*, at 49. Legislative efforts to change course followed. See, e.g., H.R. 8066, 56th Cong., J.A. 14–18 (Feb. 5, 1900) (proposal to preserve natural and historic areas); H.R. 8195, 56th Cong., J.A. 19 (Feb. 6, 1900) (proposal to penalize those who damaged antiquities); H.R. 11021, 56th Cong., J.A. 25–27 (Apr. 26, 1900) (proposal to

empower the President to establish and administer national parks). These proposals, many of which focused on preserving the integrity of particular American Indian lands and artifacts, along with a U.S. Department of the Interior study that surveyed “all the districts of the Southwest that are rich in prehistoric remains,” paved the way for the Antiquities Act of 1906. H.R. Rep. No. 58-3704, at 2–3 (1905). As the congressman who introduced the bill wrote: “I have no doubt this law can . . . protect substantially all the important [Native American] ruins yet remaining on the public lands in the Southwest.” Letter from John F. Lacey, U.S. Congressman to W.H. Holmes, Bureau of American Ethnology (June 15, 1906), *quoted in* Richard West Sellars, *A Very Large Array: Early Federal Historic Preservation—The Antiquities Act, Mesa Verde, and the National Park Service Act*, 47 Nat. Resources J. 267, 292–93 (2007); *see* Ise, *supra*, at 153 (observing that the existing ruins on public lands in the early twentieth century were largely of Native American origin).

President Theodore Roosevelt signed the bill into law on June 8, 1906. As amended, the Act states in part:

The President may, in the President’s discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.

54 U.S.C. § 320301(a). This statutory text moved away from the federal government’s previous efforts to protect landmarks on a one-off, often temporary basis, and instead delegated authority to the President under the Property Clause to protect landmarks, ruins, and any objects of historic or scientific interest. *See* Tribal Compl. ¶¶ 44–48; Lee, *supra*, at 39. In turn, the Act was “the first law to establish that archaeological sites are important public resources,” Nat’l Park Serv., *Archeology Program: Antiquities Act 1906-2006*, <https://www.nps.gov/archeology/sites/>

antiquities/about.htm (last visited Nov. 12, 2018), as it moved beyond prior statutes' focus on protecting only objects of *scientific* interest to also protecting objects of purely historic interest.

In keeping with Congress's intent, the Act has been used to protect innumerable landmarks, structures, and objects of historic or scientific interest, including countless areas of continuing importance to tribes. In fact, the very first monument President Roosevelt created under the Act was Devils Tower, a site in Wyoming that is sacred to the Kiowa and various Northern Plains tribes.³ To this day, tribes use the site for personal and group ceremonies, such as prayer offerings and sun dances.

So too, the next two monuments created by President Roosevelt—El Morro in New Mexico and Montezuma Castle in Arizona—contain Native American ruins of great cultural and historic importance to tribes—as well as to the public in general. The Atsinna Ruins atop El Morro date from the late 1200s. These ruins and nearby landmarks “continue to be sacred places” with “symbols and pictures [that] communicate both the mundane and the spiritual,”⁴ while also showcasing the accomplishments of ancient communities that are the ancestors of some of today's American Indians. Likewise, President Roosevelt's Montezuma Castle proclamation expressly acknowledged the monument's great “ethnological value and scientific interest” in light of the “prehistoric structure” for which it is known. Proclamation No. 696, 34 Stat. 3265, 3265 (Dec. 8, 1906).

³ See Nat'l Park Serv., *Devils Tower National Monument Wyoming: A Sacred Site to American Indians*, https://www.nps.gov/deto/learn/historyculture/sacredsites.htm#CP_JUMP_5291770 (last updated Oct. 5, 2018).

⁴ Nat'l Park Serv., *El Morro National Monument New Mexico: The Puebloans*, <https://www.nps.gov/elmo/learn/historyculture/the-puebloans.htm> (last updated Feb. 24, 2015).

Throughout the rest of his tenure, President Roosevelt continued to use the Antiquities Act to protect historic tribal landmarks, structures, and objects. Of the 18 national monuments he created,⁵ at least 14 protected tribal history. For example: Chaco Canyon hosts one of the densest and best preserved concentrations of pueblos in the American Southwest.⁶ The Gila Cliff Dwellings Monument features cliff dwellings from the Mogollon culture, as well as classic pueblo buildings and an Apache grave.⁷ Tonto National Monument showcases two Salado-style cliff dwellings, pottery, woven cloth, and other artifacts.⁸ Mount Olympus National Monument (now a part of Olympic National Park) is located in the ancestral homelands of the Makah, Quinault, Hoh, and Skokomish Indians.⁹ And the Tumacácori, Petrified Forest, Lassen Volcanic, Grand Canyon, Pinnacles, Jewel Cave, and Natural Bridges National Monuments similarly protect remnants of earlier indigenous cultures and societies and continue to be important to various modern tribes.¹⁰

⁵ These include Devils Tower, El Morro, Montezuma Castle, Chaco Canyon, Gila Cliff Dwellings, Tonto, Tumacácori, Petrified Forest, Lassen Volcanic, Cinder Cone, Muir Woods, Grand Canyon I, Pinnacles, Jewel Cave, Natural Bridges, Mount Olympus, Lewis & Clark (abolished by Congress in 1937), and Wheeler (abolished by Congress in 1950). Some of these monuments are now national parks.

⁶ See Nat'l Park Serv., *Chaco Culture National Historic Park New Mexico: The Center of an Ancient World*, <https://www.nps.gov/chcu/index.htm> (last updated Nov. 4, 2018).

⁷ See Peter Russell, *Gila Cliff Dwellings National Monument: An Administrative History, Introduction* (1992).

⁸ See Nat'l Park Serv., *Tonto National Monument Arizona: Quintessential Arizona*, <https://www.nps.gov/tont/index.htm> (last updated Aug. 31, 2018).

⁹ See Nat'l Park Serv., *Mount Olympus National Monument (now Olympic National Park), Washington*, <https://www.nps.gov/archeology/sites/antiquities/profileolympic.htm> (last updated Nov. 13, 2018).

¹⁰ See Nat'l Park Serv., *Tumacácori National Park Arizona: Culture, Nature, and Community*, <https://www.nps.gov/tuma/index.htm> (last updated Oct. 19, 2018); Nat'l Park Serv., *Petrified Forest National Park Arizona: Prehistoric People*, <https://www.nps.gov/pefo/learn/historyculture/paleo-people.htm> (last updated Feb. 24, 2015); Nat'l Park Serv., *Lassen Volcanic*

Subsequent Presidents have continued to use the Antiquities Act to protect Native American antiquities. Of the 158 national monuments that Presidents have created or enlarged under the Act, at least 78 protect Native American landmarks, structures, or objects. To name just a few:

- In 1923, President Harding created the Mound City Group National Monument (now Hopewell Culture National Historic Park) to protect from “all depredations” the earthen mounds and embankments where Hopewellian people gathered for feasts, funerals, and rites of passage. Proclamation No. 1653, 42 Stat. 2298, 2299 (Mar. 2, 1923). This site is seen as a place of origin for many tribes in the Great Lakes region and the Southeast.
- In 1961, President Kennedy established Russell Cave National Monument to protect its trove of Native American artifacts. Nat’l Park Serv., *Russell Cave National Monument Alabama: History & Culture*, <https://www.nps.gov/ruca/learn/historyculture/index.htm> (last updated Apr. 14, 2015). This site continues to be a part of the cultural heritage of Creek peoples.
- In 2006, President George W. Bush set aside the Northwestern Hawaiian Islands Marine National Monument in part because “this area has great cultural significance to Native Hawaiians and a connection to early Polynesian culture worthy of protection

National Park California: History & Culture, <https://www.nps.gov/lavo/learn/historyculture/index.htm> (last updated Aug. 31, 2018); Nat’l Park Serv., *Pinnacles National Monument California: History & Culture*, <https://www.nps.gov/pinn/learn/historyculture/index.htm> (last updated Apr. 21, 2018); Gail Evans-Hatch *et al.*, *Place of Passages: Jewel Cave National Monument Historic Resource Study* 24–32 (2006), <https://www.nps.gov/jeca/learn/management/upload/JewelCaveHRS2006.pdf>; Nat’l Park Serv., *Natural Bridges National Monument Utah: History & Culture*, <https://www.nps.gov/nabr/learn/historyculture/index.htm> (last updated May 3, 2018); *The National Parks, Episode 5: 1933-1945: A Film by Ken Burns*, PBS, <http://www.pbs.org/nationalparks/history/ep5/4> (last visited Oct. 31, 2018).

and understanding.” Proclamation No. 8031: Establishment of the Northwestern Hawaiian Islands Marine National Monument, 71 Fed. Reg. 36,443 (June 15, 2006); *see also* Press Release, White House, President Bush Establishes Northwestern Hawaiian Islands Marine National Monument (June 15, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/06/20060615-6.html> (“[W]e have worked with . . . Native Hawaiian leaders to ensure . . . that we protect the cultural and historical heritage of these islands. . . . We respect these natives’ beliefs, and this monument will safeguard both the natural and spiritual treasures of the region.”).

The text, history, and—as these examples indicate—implementation of the Antiquities Act confirm that a primary objective of the Act is to protect and preserve landmarks, structures, and objects of historic interest to tribes (and by extension, to the United States as a whole).

II. The Bears Ears National Monument Was Created to Protect and Preserve Historic Tribal Landmarks, Structures, and Objects.

As Plaintiffs discuss, Bears Ears National Monument was specifically created to protect landmarks, structures, and objects of historic importance to various American Indian tribes. *See* Tribal Compl. ¶¶ 55–72; Tribal Plaintiffs’ Response to Federal Defendants’ Motion to Dismiss at 7–8 (Nov. 15, 2018), ECF No. 74 [hereinafter Tribal Response]. This purpose is reflected in the efforts to obtain monument designation for Bears Ears, the Proclamation creating the Monument, and subsequent government publications concerning the Monument.

The most recent push for creation of the Monument began in 2010, when former U.S. Senator Bob Bennett of Utah asked Native people in San Juan County if they had any interest in the management of public lands. Native communities responded strongly in the affirmative, noting that their ancestral lands in Bears Ears were of special historic interest for their tribes. To better advocate for proper protection of these lands, the Navajo, Hopi, Zuni, Ute Mountain Ute, and

Uintah & Ouray Ute tribes (the UDB Tribes) formed a nonprofit organization, Utah Diné Bikéyah, or UDB. UDB began to map the Bears Ears region, drawing on elders' and leaders' knowledge to provide a comprehensive overview of the historic interest of these lands. *See* Tribal Compl. ¶ 56. After completing this review, UDB proposed creating a 1.9-million-acre monument to ensure adequate protection of the tribes' ancestral areas. *See id.* ¶ 59; Tribal Response, *supra*, at 8.¹¹

Frustrated with how UDB's proposal was handled over the following five years, leaders from the UDB Tribes formed the Bears Ears Inter-Tribal Coalition in 2015. *See* Tribal Compl. ¶¶ 60–67; Tribal Response, *supra*, at 8. The Coalition sought to protect and preserve the homeland area for which plaintiff and non-plaintiff tribes care so deeply, and it accordingly urged the President to exercise his powers under the Antiquities Act to designate Bears Ears as a National Monument. The Coalition submitted its monument proposal to President Obama on October 15, 2015, again calling for protection of 1.9 million acres of ancestral land. And on October 18, 2016, the Coalition submitted a supplemental report explaining the importance of the various regions within Bears Ears and the need for protection. *See* Tribal Compl. ¶ 69. Although the President ultimately protected a smaller area than the entire 1.9 million acres, the Monument was still uniquely a product of the UDB Tribes' history, efforts, and advocacy. Any repudiation of that Monument's original boundaries will undermine not only this country's commitment to protecting sites of historic interest but also its relationships with Indian tribes and their culture heritage.

Consistent with the tribal origins of and advocacy for the Monument, the Proclamation creating the Bears Ears National Monument recognized that it encompassed land, structures, and objects (especially religious and cultural items) of great historic importance to the UDB Tribes.

¹¹ *See also* Utah Diné Bikéyah, History, <http://utahdinebikeyah.org/history/> (last visited Nov. 5, 2018).

Specifically, with respect to land, the Proclamation states that “the land is profoundly sacred to many Native American tribes, including the Ute Mountain Ute Tribe, Navajo Nation, Ute Indian Tribe of the Uintah Ouray, Hopi Nation, and Zuni Tribe.” Obama Proclamation, 82 Fed. Reg. at 1139. As to structures, the Proclamation notes that the Monument contains “the Doll House Ruin in Dark Canyon Wilderness Area and the Moon House Ruin on Cedar Mesa,” as well as “remains of single family dwellings, granaries, kivas, towers, and large villages and roads” that are still used to access dwellings. *Id.* As to other historic objects, the Proclamation observes that ancient “baskets, pottery, and weapons” were left by “[a]ncestral Puebloans”; that “remnants of Native American sheep-herding and farming [activities] are scattered throughout the area”; that “pottery and Navajo hogans record the lifeways of native peoples in the 19th and 20th centuries”; and that the Monument contains “petroglyphs and pictographs . . . dating back at least 5,000 years and spanning a range of styles and traditions.” *Id.* at 1139–40. Finally, as to historic religious and cultural items, the Monument is where “tribes and their members” have come for generations “for ceremonies and to visit sacred sites.” *Id.* at 1140. In short, the text of the Proclamation consistently underscores the importance of protecting the land within the Monument, given its historic cultural importance to the UDB Tribes.

Further confirming the unique Native American interests at play in the lands that compose the Bears Ears National Monument, the Proclamation established a Commission of elected officers from the UDB Tribes. *Id.* at 1144. This Commission was “to provide guidance and recommendations on the development and implementation of management plans and on management of the monument.” *Id.* This unique structure was created to recognize “the importance of tribal participation” to the management of the Monument, and to ensure that

“decisions affecting the Monument reflect tribal expertise and traditional and historical knowledge.” *Id.*

Subsequent government documents discussing management of Bears Ears similarly reflect the Monument’s focus on landmarks, structures, and other objects of historic importance to Native Americans. A recent U.S. Forest Service document notes that the Monument “has abundant rock art, dwellings, ceremonial sites, granaries, and many other cultural resources reflecting its historical and cultural significance to a variety of Native American peoples.” U.S. Forest Serv., *Bears Ears National Monument: Questions and Answers* (2017), <https://www.fs.fed.us/sites/default/files/bear-ears-fact-sheet.pdf>. The same document acknowledges that the Monument “ensures that tribes will continue to be able to collect plants, firewood, and other traditional materials within the monument,” as well as to hunt and fish. *Id.* And the Secretary of the Interior has recognized that “objects . . . deemed culturally important to Native American tribes, including [the] artifacts, rock art, archaeological sites, dwellings, and areas used for traditional rituals, gatherings, and tribal practices” within the Monument can be “objects of historic or scientific interest” that merit protection under the Act. Memorandum from Ryan Zinke, Secretary, U.S. Department of the Interior to President Donald J. Trump, Interim Report Pursuant to Executive Order 13792, at 1 (June 10, 2017), <https://digitallibrary.utah.gov/awweb/awarchive?type=file&item=85969>.

Even President Trump, in purporting to abolish the Monument and create two much smaller monuments, acknowledged that “cultural resources such as ancient cliff dwellings . . . , Native American ceremonial sites, tools and projectile points, remains of single-family dwellings, granaries, kivas, towers, large villages, rock shelters, caves, and a prehistoric road system, as well as petroglyphs, pictographs, and recent rock art left by the Ute, Navajo, and Paiute peoples” and

“remnants of Native American sheep-herding and farming operations” are exactly the type of “objects of historic or scientific interest” that the Antiquities Act protects. Proclamation No. 9651: Modifying the Bears Ears National Monument, 82 Fed. Reg. 58,081, 58,081 (Dec. 4, 2017) [hereinafter Trump Proclamation].

In short, there is a wealth of evidence that Bears Ears was created to protect areas of longstanding historic interest to tribes and the public, and to protect and encourage tribal cultural practices. As described in greater detail in the next section, in attempting nevertheless to reverse that protection Federal Defendants have acted inconsistently with the Antiquities Act and with the government’s own acknowledgement that tribal “cultural resources” are worthy of protection under the Act.

III. Federal Defendants’ Actions Violate the Antiquities Act by Removing Protections for Tribal Landmarks, Structures, and Other Objects of Historic Interest in the Bears Ears National Monument.

Federal Defendants’ position that the Monument’s dimensions were overbroad relative to the objects of historic interest to be protected is misinformed and inconsistent with other statements in the same proclamation. It reflects a lack of knowledge of or disregard for the historic importance of numerous lands, structures, and objects protected by the original Monument but left unprotected by the proposed new monuments. Because the importance of the original Monument to the Plaintiff Tribes has been amply covered in their filings, this brief does not reiterate those points, but rather explains the historic importance of the Monument to non-plaintiff tribes and their citizens.

The Monument contains thousands of landmarks, structures, and objects that are of historic importance to non-plaintiff tribes but which will no longer be protected if the Trump Proclamation

is upheld. Indeed, the vast bulk of the landmarks, structures, and objects found in the excluded lands predate European contact. Those landmarks, structures, and objects include the following:¹²

- Cedar Mesa, a large plateau that hosts the original Monument's densest concentration of archaeological sites and that was once occupied by ancestral Puebloan farming communities;
- The remains and burial items of several dozen Acoma ancestors who were buried at or near Cedar Mesa;
- Numerous archaeological sites, including kivas and plaza sites, where Pueblo of Laguna members believe the spirits of their ancestors still live and from which the spirits provide blessings of wellness, prosperity, protection from harm, and abundance of moisture, crops, and game;
- Ancestral Puebloan cliff dwellings, kivas, rock art, pictographs, petroglyphs, granaries, middens, pottery, and shrines of historic interest to the Santa Clara Pueblo;
- The Santa Clara Pueblo people's ancestral homeland, which includes but is not limited to the Mesa Verde region, and which is described extensively in the tribe's oral histories;
- Land sacred to the Pueblo of Pojoaque and to the Tewa Pueblos more generally, who migrated from the Bears Ears region to the upper Rio Grande Valley around 850 A.D., leaving behind tribal homes, communities, art, and possessions;

¹² In many instances, the affected tribes cannot be specific about the exact locations of the objects and sites of historic interest because specifying locations could expose the areas to looting and vandalism and because knowledge of such sites is closely held by religious leaders and considered sacred.

- Caves and rock spires that Acoma Indians believe serve as portals of communication between the natural and supernatural worlds;
- The Et Al Great House and network, including a prehistoric road leading north from the Et Al landmark for several miles to connect the House to a spring near the head of Bullet Canyon, and a shrine just northeast of the Et Al landmark;
- The Sand Island Petroglyphs, one of the finest examples of Anasazi rock art (*see* pictures attached as Exhibit A);
- The Cottonwood Wash, which holds many ancestral Puebloan dwelling sites, rock art panels, great houses, and kivas (*see* pictures attached as Exhibit B);
- A great Pojoaque kiva and two other villages marked with early pottery styles found in the northern area of Bears Ears;
- Black-and-white pottery and corrugated and neck-banded pottery of historic importance to the Pojoaque (*see* pictures of examples of such pottery attached as Exhibit C);
- Rock art of deer, rams, and elk of the sort represented in Tewa dances and ceremonies (*see* pictures of examples of such rock art attached as Exhibit D);
- A dwelling and related rock art (*see* picture attached as Exhibit E) showing the handprints and dwellings of the Ute Indian Tribe's ancestors whose burial sites and funerary objects have been looted;
- Rock art representing a cradleboard of Ute origin (*see* picture attached as Exhibit F) that is rare and particularly valuable because it is located on a horizontal surface; and
- Basketmaker or Ancestral Puebloan pictographs painted on a rock surface (*see* picture attached as Exhibit G).

The historic importance of the land protected by the Monument's original scope is inextricably connected to tribal identity and the land's sacredness to the affected tribes. This land is an integral part of the affected tribes' creation stories, patterns of migration, and ancestral homelands, as described in the examples above. Carving up the original Monument and cherry-picking a limited number of sites for protection while excluding others of the same character undermines a key reason for creating the Monument in the first place: preserving an interconnected historic landscape that continues to be used as part of a sacred cultural heritage.

Many tribes beyond Plaintiff Tribes continue to rely on the protection of these lands. For example, the Tewa make annual pilgrimages to Bears Ears and send prayers for goodness and fertility there. In the Tewa worldview, Bears Ears cannot be divided or damaged without losing its ability to serve as an allegorical place to send such prayers. Similarly, in traditional Acoma culture, archaeological traces have been imbued with the "breath of life" by their Pueblos' ancestors during their production and use. They do not simply exist in the past, but in the present; if left undisturbed, the spiritual life that they embody will continue to live into the future, according to the Acoma. The original Monument boundaries recognized and protected these tribes' uses of the land; Federal Defendants' proposed monuments do not.

Additionally, the water within the original Monument—which is considered sacred by these tribes—is not adequately protected by the new, smaller, non-contiguous monuments. These water sources are believed to be not only the avenues through which the Earth nourishes and sustains life in the natural world, but also portals through which communications between spiritual beings and tribes' traditional practitioners occur. The development of Bears Ears through alteration of drainage channels and installation of pipelines for runoff management could accordingly be seen as impeding or even blocking the movement of blessings between the tribes

and the spiritual world. Thus, if the monument boundary amendments are upheld, the tribes will consider the water's ability to nourish them and their continuing relationships with the spirit world to be defiled.

The proposed monument modification is inconsistent with President Trump's own proclamation. It acknowledges that buttes "considered sacred to the Native American tribes that call this area their ancestral home" are worthy of protection, as are "pit houses, storage pits, lithic scatters, campsites, rock shelters, pictographs, and baskets, as well as manos and metates for grinding corn," and "pottery, bows and arrows, . . . kivas, storage rooms, and dispersed villages." Trump Proclamation, 82 Fed. Reg. at 58,082. It further specifically acknowledges that "pictographs and petroglyphs" are worthy of protection, as are other forms of "rock art." *Id.* at 58,083. Yet these are the same types of objects of historic interest that President Trump's purported revocation of the original Bears Ears National Monument would leave without monument protection.

The proposed monument modification is not only inconsistent with the text, history, and implementation of the Antiquities Act, but also an affront to tribes' special government-to-government relationship with the United States. Bears Ears is the first national monument protected at the request of tribes and the first to be collectively managed by the Bureau of Land Management (BLM), the U.S. Forest Service, and representatives from multiple tribes. The Trump Proclamation undermines this government-to-government relationship and the progress the federal government has made in building "a more effective day-to-day working relationship reflecting respect for the rights of self-government due the sovereign tribal governments." Exec. Mem. Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951, 22,951 (Apr. 29, 1994). And the precedent created by revoking the Bears Ears National

Monument would render uncertain the continued viability of all other national monuments intended to protect landmarks, structures, and objects of importance to Native American tribes—in turn further undermining relations between tribes and the federal government.¹³

Because the Antiquities Act’s text, legislative history, and subsequent practice all show that the Act was intended to protect objects of historic interest to Native American tribes, few actions could be more inconsistent with the Act’s letter and spirit than Federal Defendants’ attempts to remove protection for more than a million acres of land. For these reasons and for the reasons Plaintiffs provide, *see, e.g.*, Tribal Compl. ¶¶ 197–201, Federal Defendants’ attempt to revoke the Monument and create two smaller monuments violates the Antiquities Act.

IV. Other Federal Protections Are Inadequate to Preserve Tribal Landmarks, Structures, and Other Objects of Historic Interest.

The Trump Proclamation suggests that lands removed from the Monument will be adequately protected under other federal laws. *See* Trump Proclamation, 82 Fed. Reg. at 58,082. Defendants have similarly argued that Plaintiffs lack standing because existing laws are sufficient to prevent Plaintiffs from suffering a concrete and imminent injury. *See* Memorandum in Support of Federal Defendants’ Motion to Dismiss at 19 (Oct. 1, 2018), ECF No. 49-1. These arguments are without merit: Multiple Presidents have seen the need to establish numerous monuments under

¹³ Additionally, the United Nations Declaration on the Rights of Indigenous Peoples recognizes indigenous peoples’ “right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, [and] designs.” Art. 11(1), https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. The United States has supported this declaration since 2010. *See* Krissah Thompson, *U.S. Will Sign U.N. Declaration on Rights of Native People, Obama Tells Tribes*, Wash. Post (Dec. 16, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/16/AR2010121603136.html>.

The United States has also entered into other international conventions recognizing the importance of protecting cultural heritage, including the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property.

the Antiquities Act, notwithstanding the existence of the other laws cited in the Trump Proclamation. Congress saw fit to leave the President's Antiquities Act authority undisturbed when it enacted the Federal Land Policy and Management Act, even while it otherwise comprehensively revised federal public-lands laws. *See* H.R. Rep. No. 94-1163, at 29 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6175, 6203; James Salzman, *Making Sense of the National Monuments Conflict*, Harv. L. Rev. Blog (Dec. 7, 2017), <https://blog.harvardlawreview.org/making-sense-of-the-national-monuments-conflict/>. And the D.C. Circuit has recognized that in the Antiquities Act context Congress chose to enact overlapping statutes whose protections reinforce but do not duplicate each other. *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1138 (D.C. Cir. 2002). The statutes cited in the Trump Proclamation remain distinct from the Antiquities Act—significant, but less robust than the Act in some key respects. We focus here on three statutes that provide procedures to mitigate damage to Native American sites and objects, and on the history that has demonstrated the need for continued Antiquities Act protection.

A. The Native American Graves Protection and Repatriation Act

The Native American Graves Protection and Repatriation Act (NAGPRA) provides a process to mitigate damage to and determine ownership of Native American human remains and cultural objects. Among other things, NAGPRA temporarily suspends activities such as construction and mining on federal lands when they uncover Native American cultural items, 25 U.S.C. § 3002(d)(1); prohibits removal of cultural items absent consultation with the appropriate tribe, *id.* § 3002(c)(2); and criminalizes trafficking in Native American cultural items, 18 U.S.C. § 1170.

But NAGPRA is no silver bullet for at least three reasons. First and foremost, it does not prohibit activities such as construction or mining that can destroy, alter, or desecrate cultural items on federal lands. NAGPRA requires that a person engaging in such activities who knows or has

reason to know that he or she has discovered Indian cultural items “make a reasonable effort to protect the items discovered before resuming such activity, and provide notice [to the applicable tribe].” 25 U.S.C. § 3002(d)(1). But if the activity does not involve removal of the cultural items and the relevant agency fails to take any additional action, then the activity may resume 30 days after the agency or tribe certifies that tribal notification has occurred. *See id.* Worse, if a person engaging in destructive activities does not know or have reason to know of the cultural items, the statute provides no protection whatsoever.

Second, a tribe seeking to assert its NAGPRA rights must demonstrate its cultural affiliation with the relevant cultural items. A tribe claiming such affiliation bears the burden of proof, 43 C.F.R. § 10.2(e), and that burden can be difficult to carry, *see, e.g., Bonnichsen v. United States*, 217 F. Supp. 2d 1116 (D. Or. 2002) (deciding legal custody over remains of Kennewick Man), *aff’d & remanded*, 367 F.3d 864 (9th Cir. 2004).¹⁴ Complicating the issue further, when multiple tribes have ties to a region—as is the case at the Monument—NAGPRA requires a determination as to which tribe has the closest cultural ties to the items and grants only that single tribe a say in how the items are treated. *See* 25 U.S.C. § 3002(a)(2)(B), (c)(2).

Third, even after cultural affiliation is established, excavation or removal can still occur. NAGPRA does not give tribes the right to prevent excavation or removal of Native American cultural items found within federal lands. Instead, it grants the right to be consulted before

¹⁴ This requirement need not be satisfied when “objects [are] discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe.” 25 U.S.C. § 3002(a)(2)(C). Only part of the lands excluded from the Monument are subject to such a judgment. *See* Nat’l Park Serv., *Indian Land Areas Judicially Established 1978*, <https://www.nps.gov/nagpra/documents/claimsmatp.htm> (last visited Nov. 12, 2018).

excavation or removal occurs. *See id.* § 3002(c)(2). While this consultation right is important, it is no substitute for the protections afforded to national monuments.

This last point is especially true with regard to Bears Ears specifically, which affords more protection to Native American landmarks, structures, and objects than any other monument previously created, through an unprecedented system of tribal-federal collaborative management of Monument lands. The Plaintiff Tribes' right under the Obama Proclamation to engage in collaborative management of the Monument lands is substantially more robust than the tribal consultation rights provided by statutes like NAGPRA (and the National Historic Preservation Act, discussed *infra*). Those statutes typically provide a *reactive* consultation right, giving tribes a voice only after a Native American object is threatened with damage, destruction, or desecration. At Bears Ears, by contrast, the Obama Proclamation grants tribes broader rights, including the right to participate *prospectively* in the “development and implementation of management plans.” Obama Proclamation, 82 Fed. Reg. at 1144. And to give this right some “teeth,” the Obama Proclamation also required federal agencies to “*ensure* that management decisions affecting the monument reflect tribal expertise and traditional and historical knowledge.” *Id.* (emphasis added).

In short, while NAGPRA provides procedures that mitigate damage from intentional or inadvertent excavation on federal land, it cannot provide the protection needed to maintain and preserve especially sensitive areas like Bears Ears.

B. The Archaeological Resources Protection Act and the National Historic Preservation Act

The Archaeological Resources Protection Act (ARPA), 16 U.S.C. § 470aa *et seq.*, generally prohibits purposeful excavation or removal of archaeological resources found within federal lands absent a permit. And the National Historic Preservation Act (NHPA) provides that “[p]roperty of traditional religious and cultural importance to an Indian tribe or Native Hawaiian

organization” may be included in the National Register of Historic Places. 54 U.S.C. § 302706(a). If a property is eligible for inclusion in the Register, a federal agency must “consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to [that] property” when agency action will potentially impact the site. *Id.* § 302706(b); *see also id.* § 306108. The protections provided by these statutes are important, but they are no substitute for those that accompany national-monument designation.

ARPA specifies that it shall not “be construed to . . . modify[] or impose additional restrictions on the activities permitted under existing laws and authorities relating to mining, mineral leasing, reclamation, and other multiple uses of the public lands.” 16 U.S.C. § 470kk(a). Thus, under ARPA, it is unlikely that objects of historical importance would be protected from the unintentional harms caused by the activity that currently poses the most risk to the objects at Bears Ears: mining. *See Attakai v. United States*, 746 F. Supp. 1395, 1410 (D. Ariz. 1990). Nor does ARPA apply to the type of activity that spurred the passage of the Antiquities Act in the first place: “casual collecting.” 16 U.S.C. § 470kk(b).¹⁵ While a permit is required to intentionally “excavate or remove” archaeological resources located on public lands, even activities that require a permit can be a threat to religious or cultural sites. Indeed, if an excavation permit may result in harm to—or even destruction of—a religious or cultural site, notice must be provided to any Indian tribe that may consider the site as having religious or cultural importance, 16 U.S.C. § 470cc(c), but the statute does not mandate elimination or mitigation of the harm or destructive activity. Nor is tribal consultation required.

¹⁵ The private-collecting exception does not apply to collection of “archaeological resource[s],” but nevertheless encourages amateur searches for “rock[s], coin[s], bullet[s], or [minerals].” *Id.* It provides no remedy when those amateurs inadvertently destroy or desecrate Native American objects. *See id.*

NHPA grants tribes a right of consultation, but its requirements are only procedural; agencies have been allowed to approve destructive activities despite tribes' objections. *See, e.g., Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1060 (9th Cir. 2007), *adopted as relevant after reh'g*, 535 F.3d 1058 (9th Cir. 2008) (en banc). As discussed *supra*, this consultation right is far less robust than the collaborative management process created by the Obama Proclamation. And of course, when a site does not meet the National Register criteria, NHPA's limited protections do not even apply.

C. The History of Bears Ears

The history of Bears Ears prior to the issuance of the Obama Proclamation in 2016 shows exactly how vulnerable Native American cultural and archaeological sites will be absent Monument protection. For example, in 2009, more than 20 people were arrested for looting and vandalizing Native American artifacts from land that eventually became part of the Monument. Over 40,000 artifacts were ultimately seized. The Secretary of the Interior and the Deputy Attorney General announced that the arrests were part of "the nation's largest investigation of archaeological and cultural artifact thefts."¹⁶

This was not the last act of vandalism prior to the Obama Proclamation: The BLM Field Office in Monticello, Utah, reported at least 25 incidents of looting, vandalism, and disturbance of human remains in the five years preceding creation of the Monument.¹⁷ A nonprofit that tracks

¹⁶ Kathleen Sharp, *An Exclusive Look at the Greatest Haul of Native American Artifacts, Ever*, Smithsonian Mag. (Nov. 2015), <https://www.smithsonianmag.com/history/exclusive-greatest-haul-native-american-artifacts-looted-180956959/?no-ist>.

¹⁷ Jim Mimiaga, *Reward Offered to Catch Looters in SE Utah*, The Journal (May 17, 2017), <https://the-journal.com/articles/1670>.

disturbances reported 50 incidents over the same period.¹⁸ And the Bears Ears Inter-Tribal Coalition counted more than a dozen serious looting cases between May 2014 and April 2015 alone.¹⁹ The damage included destruction of a nineteenth-century Navajo hogan and graffiti on rock art that was over 1500 years old.²⁰ These incidents unequivocally demonstrate that, without the monument designation, existing federal laws cannot adequately protect Bears Ears.

CONCLUSION

For the foregoing reasons, *Amici* respectfully ask the Court to deny Federal Defendants' motion to dismiss.

Dated: November 19, 2018

Respectfully submitted,

/s/ Sam Hirsch

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¹⁸ Friends of Cedar Mesa, *Cultural Resource Damage in Southeastern UT & Bears Ears Region*, https://www.friendsofcedarmesa.org/wp-content/uploads/2016/09/FCM-BearsEars-damagebrief_9-19-16-NO-BONES-web.pdf.

¹⁹ Bears Ears Inter-Tribal Coalition, *Threats*, <http://bearssearscoalition.org/threats/> (last visited Nov. 5, 2018).

²⁰ *Id.*

**CERTIFICATE REQUIRED BY LCVR 26.1
OF THE LOCAL RULES OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

I, the undersigned, counsel of record for *Amici Curiae* the National Congress of American Indians and the Association on American Indian Affairs, certify that to the best of my knowledge and belief, the following are parent companies, subsidiaries, affiliates, or companies which own at least 10% of the stock of *Amici* which have any outstanding securities in the hands of the public:

None.

The representations are made in order that judges of this court may determine the need for recusal.

Dated: November 19, 2018

Respectfully submitted,

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Exhibit A











Exhibit B





Exhibit C





Exhibit D

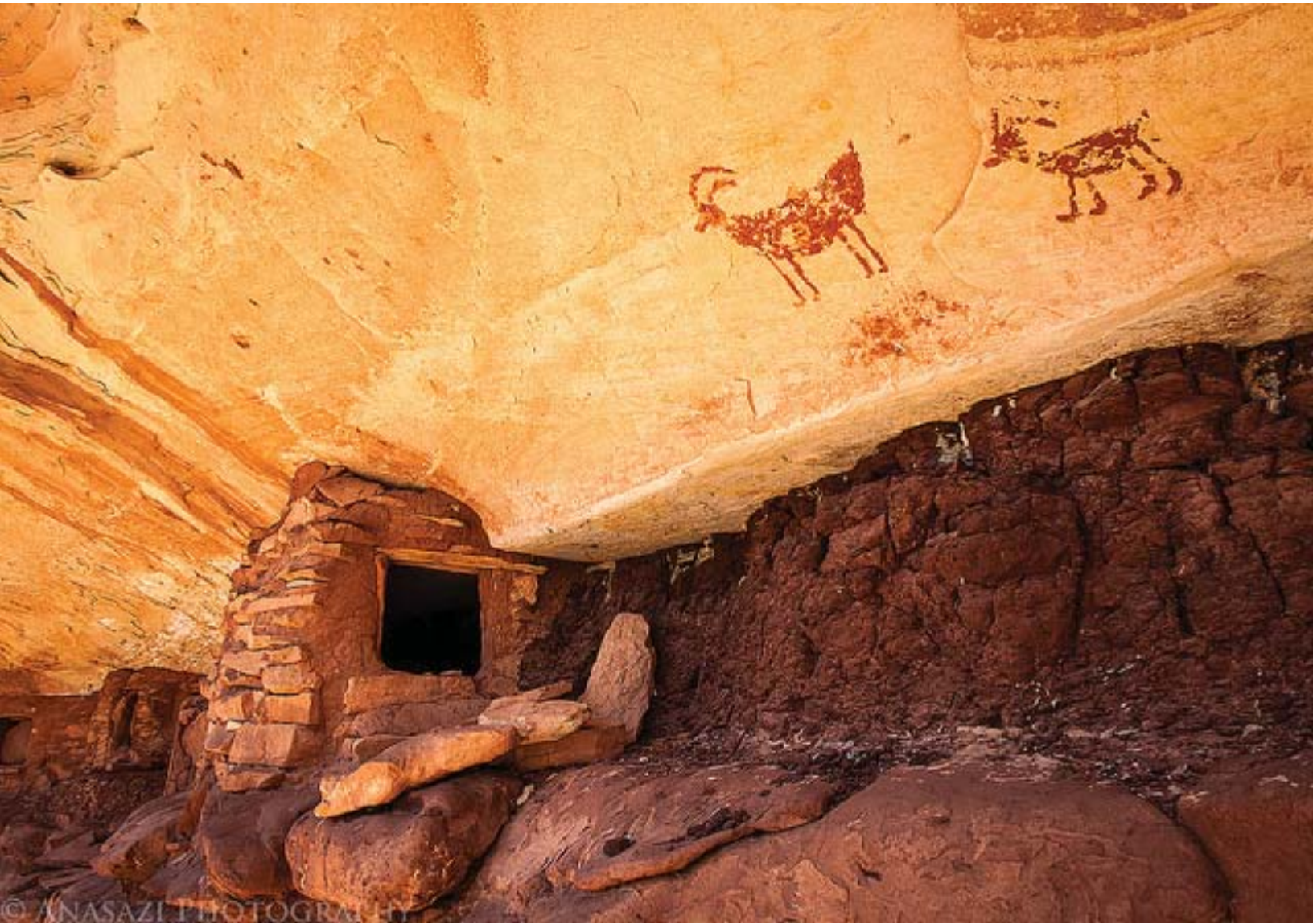






Exhibit E



Exhibit F



Exhibit G

