

August 26, 2019

*Sent via e-Planning and overnight mail*

Director (210)  
Attention Protest Coordinator, WO-210  
P.O. Box 71383  
Washington D.C. 20024-1383

**Re: Protest of the Bears Ears National Monument Indian Creek and Shash Jáa Units Proposed Monument Management Plans and Final Environmental Impact Statement**

Please accept this protest of the Bureau of Land Management's Bears Ears National Monument (BENM) Indian Creek and Shash Jáa Units Proposed Monument Management Plans and Final Environmental Impact Statement (MMP/FEIS), submitted by the Access Fund, Archaeology Southwest, Conservation Lands Foundation, Friends of Cedar Mesa, National Trust for Historic Preservation, Society for Vertebrate Paleontology and Utah Diné Bikéyah (Protesting Parties or Protestors). The Protesting Parties incorporate by reference the points and arguments raised in the protests filed by the Wilderness Society (and their partners), as well as by any tribes or tribally affiliated organizations.

**INTERESTS AND INVOLVEMENT OF THE PARTIES**

**The Access Fund** is a national advocacy organization whose mission keeps climbing areas open and conserves the climbing environment. A 501(c)(3) non-profit supporting and representing over 7 million climbers nationwide in all forms of climbing—rock climbing, ice climbing, mountaineering, and bouldering—the Access Fund is the largest US climbing organization with nearly 20,000 members and 120 affiliates. We currently hold memorandums of understanding<sup>1</sup> with the Bureau of Land Management, National Park Service, and Forest Service to work together regarding how climbing is managed on federal land. The Access Fund provides climbing management expertise, stewardship, project specific funding, and educational outreach for climbing areas across the country including the BENM region, and Utah is one of our largest member states.

**Archaeology Southwest** practices a holistic, conservation-based approach to exploring the places of the past. We call this Preservation Archaeology. We pursue this mission by conducting innovative, big-picture research using methods that minimize the consumption of nonrenewable archaeological resources. Archaeology Southwest promotes, and operates in accord with, communications and collaborations with Native American communities. Our programs and activities are guided by our vision of: "A society where the places of the past are valued as the foundations for a vibrant future." Archaeology Southwest is an Arizona nonprofit based in Tucson

and has 15 permanent staff members. We currently have over 1,750 members from across the United States, though the majority are from the U.S. Southwest, the area where our work is focused.

The **Conservation Lands Foundation** (CLF) is a non-profit organization that promotes environmental conservancy through support of the National Landscape Conservation System (National Conservation Lands) and preservation of the outstanding, historic, cultural, and natural resources of those public lands. CLF works to protect, restore, and expand the National Conservation Lands through education, advocacy, and partnerships. CLF achieves its mission by working with and supporting the Friends Grassroots Network (FGN). The FGN consists of over 60 organizations located in 13 states.

The core mission of **Friends of Cedar Mesa** (FCM) is to protect cultural resources on public lands in San Juan County, Utah's largest county and the most archaeologically rich county in the United States. FCM is a non-profit organization exempted from taxation under 26 U.S.C. § 501(c)(3), incorporated under the laws of the State of Utah, and headquartered in Bluff, Utah. FCM was founded in 2010 by a former BLM employee to foster stewardship and advocacy for the Cedar Mesa area, with a particular focus on protecting cultural resources. The organization's mission is to ensure that the federal public lands in San Juan County, Utah, with all their cultural, natural, and recreational value, receive appropriate protection and respect. FCM works to achieve its mission in four core areas: policy and advocacy; education and interpretation; stewardship and monitoring; and cultural resource research. FCM also works to create local, regional, and national support for greater protection of Cedar Mesa through education, advocacy for national designations, support for smart local policy-making, and organization of research and volunteer service activities.

The **National Trust for Historic Preservation** is a private, nonprofit organization chartered by Congress in 1949 to facilitate public participation in the preservation of our nation's heritage and to further the historic preservation policy of the United States.<sup>1</sup> Congress intended the National Trust "to mobilize and coordinate public interest, participation and resources in the preservation and interpretation of sites and buildings."<sup>2</sup> With headquarters in Washington, D.C., field offices around the country, 27 historic sites, more than one million members and supporters, and a national network of partners, the National Trust works to save America's historic places and advocates for historic preservation as a fundamental value in programs and policies at all levels of government.

**Society for Vertebrate Paleontology** (SVP) is a non-profit international scientific organization whose membership is made up of more than 2,200 researchers, educators, students, and enthusiasts. Our mission is to advance the science of vertebrate paleontology and to support and

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<sup>1</sup> 54 U.S.C. § 312102(a).

<sup>2</sup> S. Rep. No. 1110, 81st Cong., 1st Sess. 4.

encourage the discovery, preservation, and protection of vertebrate fossils, fossil sites, and their geological and paleontological contexts. SVP is a key stakeholder with regard to the paleontological resources at BENM. Paleontological resources are nonrenewable and irreplaceable once destroyed. Because of the ongoing scientific importance of the monument, SVP is concerned with management changes that would jeopardize sites or that would diminish the effectiveness of scientific research at those sites.

**Utah Diné Bikéyah** (UDB) has an all-Native American Board of Directors (comprised of Navajo and Ute community leaders). UDB works on public lands conservation by integrating traditional knowledge and Native leadership into land planning. UDB's primary goal is assisting local Native communities, Tribes, and federal agencies in engaging communities and wisdom keepers to develop a truly unique, well-informed Native American Management Plan for the Bear's Ears National Monument. UDB has more than 2,000 local indigenous supporters who utilize the Bears Ears landscape. In July 2019, UDB hosted the 5th annual Bears Ears Summer Gathering which is a cultural celebration of Tribes attended by more than 800 people.

A list of the names, mailing address, and telephone numbers of the Protesting Parties are included below, as required in 43 C.F.R. Sec. 1610.5-2(a)(2)(i). The Protesting Parties submitted comments that covered all issues raised herein that were germane at the time, as required by 43 C.F.R. Sec. 1610.5-2(a)(2)(iv). Protestors submitted scoping comments on April 11, 2018, attended public meetings and submitted comments on the draft EIS/RMP November 15, 2018. The National Trust for Historic Preservation, Friends of Cedar Mesa and Utah Diné Bikéyah also participated as Consulting Parties in the Section 106 process and submitted comments therein. Issues raised herein for the first time are limited to those that resulted from changes to the proposed action and accompanying documents.

The Protesting Parties advocated for the designation of the 1.35 million-acre Bears Ears National Monument, participated in former Secretary of Interior Ryan Zinke's Monuments Review<sup>3</sup> and submitted comments on the record throughout this planning process including scoping comments, and comments on the Draft MMP/EIS.

As described in more detail below, Protesting Parties' significant interests are harmed because the Proposed MMP fails to comply with governing legal requirements for the Bears Ears National Monument.

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<sup>3</sup> Executive Order 13972 Review of Designations Under the Antiquities Act, April, 2017.

## **ISSUES AND PORTIONS OF THE PROPOSED MMP/FEIS BEING PROTESTED**

### **I. The Proposed Monument Management Plan Violates the Antiquities Act of 1906**

### **II. The Proposed Monument Management Plan is Inconsistent with the Governing Proclamations**

- a. The BLM Failed to Develop a Singular Comprehensive MMP for Bears Ears
- b. The Proposed MMP prioritizes multiple uses over conservation of cultural resources in violation of the governing proclamation
- c. The Proposed MMP Failed to Adequately Plan for and Protect Paleontological Resources

### **III. The Proposed Monument Management Plan Ignored BLM's Duties to Protect National Conservation Lands**

- a. The Proposed MMP fundamentally fails to meet standards for protection of a National Monument as part of the National Conservation Lands
- b. As a unit of the National Conservation Lands, BLM must manage resources at the landscape-level

### **IV. The Proposed MMP/FEIS Violates the National Environmental Policy Act**

- a. BLM failed to consider an adequate range of alternatives
- b. The EIS failed to take a "hard look" at numerous impacts
- c. The Proposed MMP Lacks an Adequate Description of the Affected Environment as required by NEPA
- d. The Proposed MMP fails to address the issues raised in protestors comments
- e. The Final EIS Inappropriately Relies on Uncertain Mitigation Measures

### **V. BLM and USFS Violated Their Duties to Consult with Tribes and Prioritize Protection of Tribal Resources**

- a. BLM and USFS Failed to Consult with Tribes as Required
- b. Tribal Co-Management is required through representatives of Tribes and not "tribal interests"
- c. BLM and USFS Failed to fulfill consultation requirements through Government-to-Government Relationship with Federally Recognized Tribes

### **VI. BLM did not comply with the National Historic Preservation Act**

- a. BLM Failed to Coordinate Review under NHPA and NEPA, which Unlawfully Forecloses Consideration of Alternatives under NHPA
- b. BLM failed to satisfy official consultation requirements as outlined by the NHPA
- c. BLM failed to satisfy the requirement to Identify Historic Properties

- d. BLM Failed to adequately analyze and consider Impacts to Cultural Resource

## **VI. The MMP Violates the Archaeological Resources Protection Act by Failing to Include a Detailed Cultural Resource Survey Plan**

## **VII. The Monument Management Plan is Inconsistent with the Federal Land Policy Management Act**

- a. The MMP fails to appropriately recognize the multiple values of lands with wilderness characteristics
- b. The MMP fails to protect and consider new Areas of Critical Environmental Concern

## **CONCISE STATEMENT OF MMP/EIS VIOLATIONS**

### **I. The Proposed Monument Management Plan Violates the Antiquities Act of 1906**

As a preliminary matter, **the undersigned groups are not acquiescing to Proclamation 9681.**<sup>4</sup> The Protesting Parties contest the development of a Monument Management Plan (MMP) for Bears Ears as it is in violation of the Antiquities Act of 1906 (Antiquities Act).<sup>5</sup> In 2016, Bears Ears National Monument (BENM) was created by Proclamation 9558 pursuant to the Antiquities Act.<sup>6</sup> A president has the authority to create a national monument under the Antiquities Act, but only Congress has the authority to revoke or reduce a national monument. Nevertheless, on April 26, 2017, Trump issued an executive order calling for the review of a significant number of national monuments for the purpose of developing findings and recommendations.<sup>7</sup> Protestors believe the outcome of this review was pre-determined and ignored the overwhelming support for Bears Ears and national monuments in general. Nonetheless, following the review, Trump issued Presidential Proclamation 9681, which modified the original boundaries, reducing the size of the Bears Ears National Monument by 85%.<sup>8</sup> President Trump lacked the authority under the Antiquities Act to issue Proclamation 9681, thus the new boundaries of BENM are unlawful. By relying on Proclamation 9681 and its substantial boundary reductions, the Proposed MMP is also unlawful and inconsistent with the Antiquities Act, Proclamation 9558, and BLM's other governing authorities.

Consequently, we make no admissions with regard to Proclamation 9681, waive no litigation rights, nor otherwise waive any rights or privileges. We are simply exercising our right to participate in this public planning process. Nonetheless, this protest should be fully considered

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<sup>4</sup> 82 Fed. Reg. 58081 (Dec. 4, 2017).

<sup>5</sup> 54 U.S.C. §§ 320301, *et seq.*

<sup>6</sup> Proclamation 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

<sup>7</sup> Executive Order 13792- Review of Designations Under the Antiquities Act, April 26, 2017.

<sup>8</sup> Presidential Proclamation 9681- Modifying the Bears Ears National Monument, Dec. 4, 2017.

and applicable as part of the administrative record to the current planning process and environmental analysis. Planning not focused on interim measures to protect cultural and natural objects and values while litigation is pending is a waste of taxpayer resources, and we continue to advocate that the BLM take immediate protective measures for the full Bears Ears landscape instead of pursuing the current plan for only the reduced area.

## **II. The Proposed Monument Management Plan is Inconsistent with the Governing Proclamations**

The Federal Land Policy and Management Act (FLPMA) provides that tracts of public lands “dedicated to specific uses according to any other provisions of law shall be managed in accordance with such law.”<sup>9</sup> A Presidential Proclamation issued pursuant to the Antiquities Act is an example of such a law that governs BLM’s management of a National Monument.<sup>10</sup> Accordingly, BLM must act consistently with a governing proclamation when issuing monument management plans.<sup>11</sup> Further, under the 2009 Omnibus Public Lands Act, the agency must “protect the values for which the components of the system were designated.”<sup>12</sup>

Proclamation 9558 was established in close collaboration with, and provided co-management authority to, the Hopi Tribe, Navajo Nation, Ute Mountain Ute, Ute Indian Tribe, and the Pueblo of Zuni. Proclamation 9558 identified a wide, but specific, variety of monument objects and designated Bears Ears “for the purpose of protecting the objects” and as “the smallest area compatible with the proper care and management of the objects to be protected.” Further, Proclamation 9681, which, if found valid, also requires protection and proper care and management of monument objects within the reduced boundaries. Pursuant to the Proposed MMP, the objects identified in Proclamation 9558 are still considered to be monument objects “as modified by” Proclamation 9681. The Proposed MMP identifies the following “themes” as “objects and/or values in BENM” pursuant to Presidential Proclamation 9558, “as modified by” Presidential Proclamation 9681: “archaeological, historic, and cultural resources; geological features and landscapes; paleontological resources; biological and ecological resources and processes; recreational opportunities; and economic opportunities.”

As explained below, BLM has fallen far short of its obligations under this governing proclamation in numerous ways. The Proposed MMP/FEIS defers comprehensive management planning and prioritizes multiple use over the protection and conservation of monument objects. In almost every instance, the chosen alternative is admittedly the least protective of the analyzed alternatives.

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<sup>9</sup> 43 U.S.C. § 1732(a).

<sup>10</sup> See *Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 998 (9th Cir. 2013).

<sup>11</sup> See, e.g., *Natl. Tr. for Historic Preservation v. Suazo*, CV-13-01973-PHX-DGC, 2015 WL 1432632, at \*5 (D. Ariz. Mar. 27, 2015).

<sup>12</sup> See 16 U.S.C. § 7202(c).

a. The BLM Failed to Develop a Single Comprehensive MMP for Bears Ears

As an initial matter, the Proposed MMP is inconsistent with Proclamation 9558's requirements to create a plan that protects and conserves Monument objects and values. The MMP defers planning for cultural resources protection and management of recreation activities within the Monument to be completed several years down the road, despite these resources being primary reasons for the Monument's designation.<sup>13</sup>

The Proposed MMP exceeds the BLM's authority by creating a two-step management process where Proclamation 9558 envisioned and required one, comprehensive management plan. Proclamation 9558 requires:

*For purposes of protecting and restoring the objects identified above, the Secretaries shall jointly prepare **a management plan** for the monument and shall promulgate such regulations for its management as they deem appropriate. The Secretaries, through the USFS and the BLM, shall consult with other Federal land management agencies in the local area, including the National Park Service, in developing **the management plan**. In promulgating any management rules and regulations governing the NFS lands within the monument and developing **the management plan**, the Secretary of Agriculture, through the USFS, shall consult with the Secretary of the Interior through the BLM. The Secretaries shall provide for maximum public involvement in the development of that plan including, but not limited to, consultation with federally recognized tribes and State and local governments.<sup>14</sup>*

The language in Proclamation 9558 regarding "*the management plan*" (also, "*a management plan*" and "*that plan*") is evidence of the President's intent for one, unified plan and not a bifurcated set of multiple plans as directed by the Proposed MMPs. The BLM incorrectly proposes to approve this plan to develop multiple future plans (cultural, transportation and recreation), and thus the required management plan isn't comprehensive in that the BLM is planning what it calls "implementation level plans," which are really where the critical decisions will be made that will create regulations and protective measures. Whereas the Proposed MMPs will be amended into the Monticello Resource Management Plan, there is no discussion of whether these second-level plans will or will not have the same force of law. The BLM doesn't have authority to bifurcate the planning process in this way, and even if it did, the BLM does not provide adequate rationale for bifurcation and delay. The rushed planning process—evidently motivated to cement the downsizing of the monument as soon as possible—fails to appropriately manage monument objects identified for protection.

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<sup>13</sup> Section 2.4.12.2 does not include any stated timeframe for development of the travel management plan. In the time it takes to develop the plan, cultural resources are highly likely to be adversely affected by visitation and specifically by OHV travel.

<sup>14</sup> Proclamation 9558.

b. The Proposed MMP prioritizes multiple uses over conservation of cultural resources in violation of the governing proclamation

For the planning that was not deferred, the Proposed MMP adopts inadequate protections for monument objects by opening Monument lands to destructive uses, such as rights of ways, increased off-road vehicle use, and disparaging vegetation management techniques. This fails to protect cultural resources that must be protected under Proclamation 9558, the Antiquities Act, and the 2009 Omnibus Public Lands Act. The following examples illustrate specific resources, management uses, or standards that are inadequate and unlawful.

*i. Fire Management* - As written, vegetation management for fire prevention within cultural resource sites is left to the discretion of the agency managers and does not explicitly prioritize the protection of cultural resources.<sup>15</sup> In addition, the MMP contains internal inconsistencies among sections of the document.<sup>16</sup>

The MMP does not prohibit chaining—or even recommend avoiding chaining—within cultural resource sites or in areas with high cultural resource sensitivity. In fact, the plan calls for fuel reduction treatments, including destructive methodologies like chaining and Bullhogs, to be “maintained or increased.” However, the MMP later states that the Proposed plan will have “the beneficial effect of implementing fuel treatment projects based on monitoring and site evaluations and establishing priorities through annual funding.”<sup>17</sup> Yet, BLM offers no further explanation, evidence or plan to implement this “monitoring and evaluation.”

Including such a statement in the analysis of impacts from fire management actions is misleading since such restrictions are not mentioned elsewhere in the document or considered within the alternatives. We continue to assert that the MMP contains no evidence or analysis that would support a conclusion that chaining can be accomplished without direct adverse effects to cultural sites or to the setting, feeling, and association of the larger Bears Ears landscape.

*ii. Lands And Realty* - Under current management, the Newspaper Rock Site is a right-of-way (ROW) avoidance area. In the MMP, this would no longer be the case.<sup>18</sup> This change may cause negative impacts to this important site, which is currently listed on the NRHP and has already experienced damage from visitation.<sup>19</sup>

*iii. Livestock Grazing* - Cultural resource impacts from livestock grazing are left to management discretion. The MMP/FEIS is non-committal about whether action would be taken to mitigate any adverse effects from livestock grazing: BLM states that “... If monitoring indicates

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<sup>15</sup> MMP pg 2-7.

<sup>16</sup> *Id.* 3-18

<sup>17</sup> *Id.*

<sup>18</sup> BLM and USFS, BENM MMP/FEIS, 2019, section 2.4.3.3, page 2-9, Table 2-3.

<sup>19</sup> BLM Summary Report, 2019, pg 7.



that domestic livestock grazing is impacting Monument objects and values, including the following resources, appropriate mitigation measures *may* be used to minimize those impacts.”<sup>20</sup> The use of the word “may” indicates the agency envisions scenarios where impacts to objects and values are occurring, yet mitigation measures might not be undertaken.

*iv. Target Shooting* - Target shooting is prohibited in only a few areas: “[t]arget shooting would generally be allowed but would be prohibited at campgrounds/developed recreation sites, petroglyph sites, and structural cultural sites. Where problem areas occur regarding target shooting, the agencies would post signs notifying visitors of restrictions and **would consider** implementing supplemental rules.”<sup>21</sup> Again, this language suggests that the agencies envision scenarios where problem areas would occur, but managers would elect not to take mitigation measures. Target shooting is not prohibited at non-structural cultural resource or pictograph sites. Such an omission creates the likelihood of adverse effects to cultural resources and is vague and unenforceable.

The MMP also fails to specify the distance shooters must maintain from cultural resources; this means violators could simply argue that they did not realize they were at a cultural resource site. Furthermore, by failing to define a minimum distance from cultural sites sufficient to avoid effects to setting, feeling, and association, the MMP enables a likely scenario in which the soundscape and viewshed (e.g., surrounding canyon walls) could be impacted without agency recourse. In order for the restrictions to be useful, they need to be understandable by the public and enforceable by law enforcement. As written, the MMP is neither.

*v. Recreation Area Management/Business Plan* - The management actions common to all action alternatives section states that:

An implementation-level Recreation Area Management Plan/Business Plan would be developed for the BENM within 3 years following the cultural resources management plan. This implementation-level plan would restrict camping to designated sites if the following criteria apply:

- There are *conflicting resource impacts that cannot be mitigated* (e.g., cultural resources, visual, wildlife impacts).
- There are recurring issues with human waste, trash, campfires, and expanded disturbance that are best addressed through additional management.<sup>22</sup>

The MMP/FEIS states that “[t]he designation of the SRMAs and RMZs under Alternatives B, C, D, and E and the associated targeted activities and management actions of each alternative would help reduce impacts on cultural resources compared to Alternative A by focusing visitation

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<sup>20</sup> BLM and USFS, BENM MMP/FEIS, 2019, section 2.4.5.2, pg 2-10.

<sup>21</sup> *Id.* at section 2.4.7.4, pg 2-14, Table 2-8.

<sup>22</sup> *Id.* at section 2.4.7.2, pg 2-13.

in areas where cultural sites have been stabilized and prepared for visitation.”<sup>23</sup> Nevertheless, the MMP contains no plan for stabilizing and preparing cultural resource sites for visitation—in spite of the fact that, by the agencies’ own admission in this document, designation of the BENM is expected to increase recreational visitation of cultural resource sites in the Planning Area. The agencies appear to be counting on the fact that these as-yet-unplanned site stabilization, site hardening, and educational opportunities will avoid damage to sites from visitation, including looting or vandalism. The analysis relies on actions that are not detailed in the document and lack a timeframe for implementation. Therefore, the analysis is inadequate, and the conclusion is premature.

Research cited in the MMP shows that proximity to roadways influences the risk of adverse effects to cultural resource sites.<sup>24</sup> Further, because campsites are likely to be near roadways, the MMP acknowledges that cultural resources will be experiencing adverse effects for at least five years while additional implementation level planning occurs before action is taken *and that the agencies might not be able to mitigate some of those adverse effects*. This is clearly a situation with the potential to adversely affect historic properties.

*vi. Climbing Impacts to Cultural Resources* - Climbing can have adverse impacts on cultural resources without proper management because climbers can potentially impact rock art or other cultural resource sites. With increased visitation from climbers following the area's designation as a National Monument, these risks may increase. We appreciate that the Preferred Alternative includes the option to mitigate potential adverse effects to cultural resources resulting from climbing activities, which may include closure of climbing routes. Combined with educating climbers in “leave no trace” principles and encouraging self-regulation, this is an improvement over the Draft MMP. However, BLM must also include plans to survey areas with climbing routes for cultural resources in order to mitigate these risks in a proactive way and close climbing routes that are recognized as impacts to cultural resources.

*vii. Group Sizes* - By the agencies’ own admission, visitation to the BENM will increase as a result of its designation as a National Monument.<sup>25</sup> Large areas of the BENM, such as Whisker’s Draw, Mesa Tops, Canyons of Cedar Mesa (other than S/N Mule), and Milk Ranch Point, would have no group size limits. Therefore, the thousands of cultural resources in those areas have no protection from visitation impacts by large groups.

Likewise, in other culturally rich areas, such as Arch Canyon, Shay Canyon, and the San Juan River Corridor, BLM has determined that groups of up to 49 people need not apply for a

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<sup>23</sup> *Id.* section 3.5.2.2.5, page 3-13.

<sup>24</sup> *Id.* at pg 3-13-3-14.

<sup>25</sup> *Id.* at pg 3-13 and sec. 3.16.2, pg 3-78 and 3-79.

Special Recreation Permit (SRP). This means groups of up to 49 people may regularly visit these sites, with concordant adverse effects.

Allowing groups of this size without an SRP means that many groups would not be subject to the oversight and conditions involved with an SRP, which is likely to negatively impact cultural resources. Moreover, an increase in allowable group sizes is highly likely to increase impacts and adverse effects to sites in the vicinity of the Public Use sites—in part from more exploration on foot and in part from an increase in the need to stray from existing travel routes to allow two-way traffic to pass. As organizations repeatedly bring groups to the area, their institutional knowledge of sites in the areas around Public Use sites will increase, accelerating and exacerbating impacts and likely creating adverse effects to cultural resources near the Public Use sites. The analysis of impacts to cultural resources does not take these considerations into account.

*viii. Roads/OHV use* - The Proposed plan, Alternative E, closes “the least number of acres of high archaeological sensitivity and provide limited OHV access to the greatest number of acres of high archaeological sensitivity when compared with Alternative B.”<sup>26</sup> The MMP further states that “under all alternatives the agencies would close areas in which historic properties are being or would be *considerably adversely impacted* by off-road vehicles.”<sup>27</sup> However, this misreads the legal requirements of the NHPA, as mitigating action needs to be taken to address adverse effects, not “considerable” adverse effects.

Roads, opening of new ATV areas, or the re-opening of roads that were previously closed increases threats to cultural resources. Proclamation 9581 refers to Bears Ears as “one of the most intact and least roaded areas in the contiguous United States.” This lack of roads and the persistence of landscape integrity are defined as positive attributes of BENM. Yet the MMP/EIS states, “Any additional roads or trails designated for OHV use as part of implementation-level travel planning must be for the purpose of public safety and the protection of Monument objects and values.”<sup>28</sup> Protestors fail to see how additional OHV trails will help protect Monument objects and values. To be clear, there is no scientific evidence or commonsense basis for claiming that building or improving roads or enabling ATV could help protect BENM’s objects or values

Overall, there is a lack of analysis of the effects of motorized travel on cultural resources. Examples include:

**Milk Ranch Point** - The text for Alternative E in Table 2-12 states that the agencies shall “[d]etermine whether specific roads and motorized trails in the Milk Ranch Point Area are compatible and suitable with Monument objects and values when developing the travel management plan actions such as retention, rerouting, and/or closure for the BENM.”<sup>29</sup>

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<sup>26</sup> BLM and USFS, *BENM MMP/FEIS*, 2019, section 3.5.2.2.8, page 3-15.

<sup>27</sup> 43 CFR 8341.2.

<sup>28</sup> MMP/EIS Section 2.4.12.2.

<sup>29</sup> *Id.* at section 2.4.12.3, page 2-26, Table 2-12.

Calling out Milk Ranch Point indicates that this area is special in that closure of routes will be considered in that area to protect cultural resource sites, but not elsewhere in the Monument.

**Doll House Trail** -We object to the removal of Doll House Trail from the list of trails that would be managed for non-motorized and non-mechanized use.<sup>30</sup> The MMP/FEIS does not establish permit requirements for visiting Doll House. Motorized and mechanized access along Doll House Trail, combined with the absence of group size limits or permitting requirements, will facilitate an increase in visitation. This will increase adverse effects to the Doll House site.

**Shay Canyon** text for the Preferred Alternative in Table 2-12 makes it clear that limited OHV use would be allowed in Shay Canyon.<sup>31</sup> OHV use in Shay Canyon will cause new impacts to cultural resources.

*ix. Mitigation Measures* - For most of the actions affecting cultural resources, the MMP has no commitment to mitigation measures since the document is based on a finding of no adverse effect to cultural resources. Yet, throughout the MMP, references are made to actions that may impact cultural resources, and the Proposed Alternative often uses conditional language to refer to actions the agencies *may* take to protect cultural resources. The MMP presents a situation in which cultural resources are likely to be adversely affected by management actions without any associated firm commitment to mitigation measures.

c. The Proposed MMP Failed to Adequately Plan for and Protect Paleontological Resources

BLM and USFS have failed to establish an adequate plan for managing paleontological resources in the Monument. While Protestors are pleased that some of our comments were taken into consideration, other issues we raised were not incorporated into the proposed MMP, without which the long-term management, protection, and preservation of paleontological resources and their sites are threatened at BENM.

i) *No plan has been made for managing named paleontological resources that occur outside Shash Jáa and Indian Creek unit boundaries*

First, many, if not most, of the paleontological resources named in *both* Bears Ears proclamations are not covered by the MMPs/EIS because they lie outside the boundaries of the Shash Jáa and Indian Creek Units. The Cedar Mesa Sandstone, Wingate Sandstone, Kayenta Formation, Navajo Sandstone, and Chinle Formation rock units, paleontological sites at Bears Ears

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<sup>30</sup> *Id.* at section 2.4.12.2, page 2-26.

<sup>31</sup> *Id.* at section 2.4.12.3, page 2-26, Table 2-12.

(*sensu stricto*), Arch Canyon, Indian Creek, Comb Ridge, Cedar Mesa, and Valley of the Gods, and extinct animals and plants from these units and places were all named as priority resources in Proclamation 9558 (2016) and Proclamation 9681 reaffirmed *all* of them. Of those, only the paleontological resources at Comb Ridge, Bears Ears, and Arch Canyon fall within the boundaries of the Shash Jáa and Indian Creek units (**Map 1**). Sites at Valley of the Gods and the majority of sites at Indian Creek and Cedar Mesa, as well as the majority of the Cedar Mesa Sandstone, Chinle Formation, Navajo Sandstone, Kayenta Formation, and Wingate Sandstones are afforded no special status whatsoever by the MMPs other than the limited protection from illegal collection that available to all paleontological resources on Federal Land from the Paleontological Resources Preservation Act (PRPA).<sup>32</sup>

As stated in Proclamation 9558, these paleontological resources are “among the richest and most significant in the United States”. The land containing these treasures was reserved because many of the most important scientific discoveries of the last decade about vertebrate life before and after the Earth’s greatest mass extinction have come from these areas.<sup>33</sup> The primary purpose of National Monument designations under the Antiquities Act is to conserve and protect the scientific, archaeological, and historic resources described in the proclamation. Protestors raised in the draft MMPs/EIS that the named resources that are located outside the reduced boundaries are equally as important or, arguably, more important than those that remain inside. The excluded resources are vulnerable to mineral extraction activities, grazing, and other uses that are excepted by PRPA. BLM’s response about the management of the excluded resources was inadequate, stating simply that “[p]aleontological resources outside the boundaries of BENM will continue to be managed consistent with applicable laws, regulations, and management plans.”<sup>34</sup>

The priorities for monument management and management of the named resources that fall outside the boundaries of the Shash Jáa and Indian Creek units must focus on developing a comprehensive understanding of *all* of these paleontological resources so that their value for the people of the United States is realized, something that PRPA and other existing laws do not do.

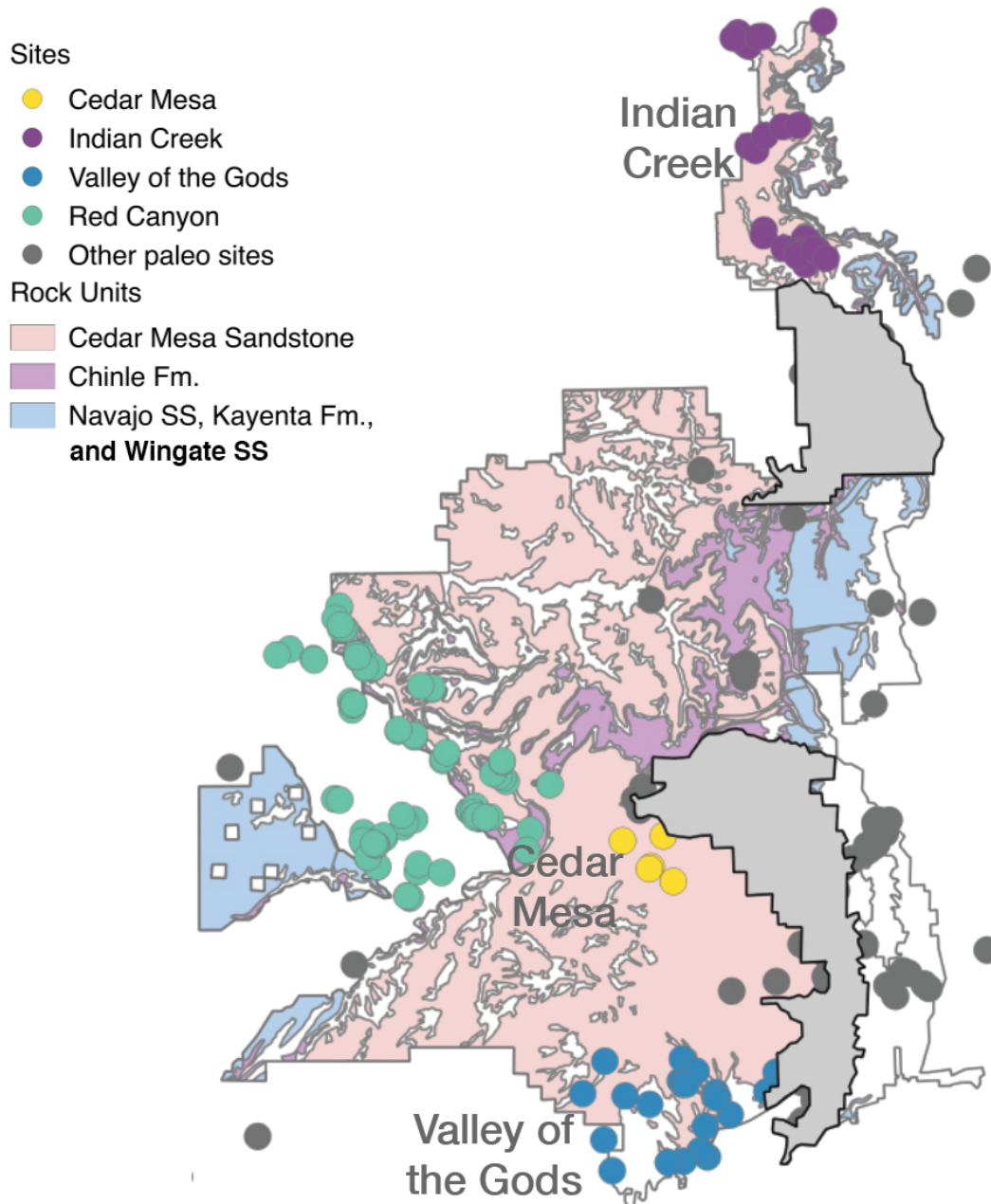
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<sup>32</sup> PRPA: Public Law 111-11, Title VI, Subtitle D.

<sup>33</sup> Lindstrom *et al.*, 2016; Stegner, 2016; Uglesich *et al.*, 2017; Huttenlocker *et al.*, 2018.

<sup>34</sup> [0-134, A.26-1].

## Paleontological resources named in Bears Ears proclamations (9558, 2016 and 9681, 2017)



*Map 1.* Locations of named paleontological resources that fall outside the Shash Jáa and Indian Creek units. These resources were explicitly identified in Proclamation 9558 and reaffirmed in Proclamation 9681.

- ii) *No comprehensive plan has been offered for scientific, educational, and outreach activities*

The management plan for resources that fall inside the boundaries of the Shash Jáa and Indian Creek units is inadequate for developing the scientific potential of the paleontological resources. The MMP offers no plan for developing our understanding of the paleontological resources and the history of life that are revealed by them. The management strategy presented in Section 2.4.6 and Appendix M, Section 1.8 merely stipulates that plans and maps submitted for proposed activities be reviewed, that they be cross referenced to geological maps to determine the Potential Fossil Yield Classification (PFYC) of the bedrock units, that a survey will be required if PFYC of the unit is category 4 or 5, that mitigation may be mandated for such sites at the discretion of managers, and that paleontological surveys will be documented. None of the planning items address the goals and objectives stated in 2.4.6.1 for promoting scientific, educational, or interpretive uses of fossils or identifying, evaluating, studying, or interpreting them. During the public comment period in November 2018, protestors stated that:

*“[t]There is no mention of some of the most fundamental facets of protecting paleontological resources in the monument: i.e., site stewardship and education/interpretation. Site stewardship is called out for certain archaeological resources, such as Alternative D of Table 2.9 (Page 17), but site stewardship programs and education/interpretation for paleontological resources must also be implemented in the new monuments and the excluded areas of BENM for their long-term management.”<sup>35</sup>*

Also commented that:

*“More personnel are required to satisfactorily manage paleontological resources at BENM, both in the new monuments and the excluded areas. We recommend that: four full-time paleontologists in the model of the monument paleontologist at Grand Staircase-Escalante National Monument, be hired to coordinate research, surveying and permitting (one each for the Shash Jáa and Indian Creek units of the new monument, and one each for the BLM and USFS lands in the excluded areas); and additional staff be taken on to augment enforcement of paleontological regulations for the entire BENM area.”*

Finally:

*“[w]hile field collecting is explicitly covered in the draft MMP, what happens after fossils have been collected were not. Like in the 1999 EIS for Grand Staircase-Escalante National Monument, the MMPs, RMPs, and EIS for the BENM units should include specific plans to ensure that paleontological resources achieve their full potential as scientific objects and national treasures. Appendix 5 contains relevant excerpts from the*

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<sup>35</sup> Specific language was submitted by Protestor Society for Vertebrate Paleontology but are endorsed by all protesting parties.

*suggestions we made during the scoping process. Important provisions that should be inserted into the MMPs and EIS include: paleontological research be funded for the entire BENM at the same level as in the new monuments (i.e., with increased funding for the excluded areas to offset losses from being removed from the National Conservation Lands system) to facilitate inventorying, field collecting, preparing, curating, and publishing; BLM and USFS paleontologists should actively cultivate and coordinate partnerships with external researchers to effectively manage of paleontological resources; BLM and USFS should provide financial and logistical support to communicate research findings through public programs, exhibits, interpretative materials, and scientific publications and presentations targeting local, regional, national, and international audiences; policies for paleontological collecting techniques, preparation, and research methods should be as flexible as possible; molding, casting, and digitization should be considered routine parts of the scientific study of paleontological resources, as should free dissemination of digital resources created by these processes; and BLM and USFS for partnerships with non-Federal public-trust repositories to prepare, preserve, and curate specimens, and to make non-sensitive data on these specimens available to the public through the electronic dissemination in online databases.”*

These issues are fundamental to the management of a national monument that conserves scientific resources, but they were brushed off by BLM with the statement that “[d]ecisions regarding infrastructure and staffing needs are beyond the scope of the development of the MMPs”<sup>36</sup> and “[d]ecisions regarding specific visitor educational materials and signage do not require a decision in the MMPs”.<sup>37</sup> That such issues are within the scope of MMPs is demonstrated by the management plans of other national monuments that manage paleontological resources. For example, the Final EIS for Grand Staircase-Escalante National Monument (1999) has an entire section on Science and Research that calls for a “comprehensive and integrated research science program [that] would ensure that scientific resources are not only available for current research opportunities, but that certain scientific resources are preserved in place for future study” [2.30]. The Final EIS for John Day National Monument (2009) contains statements such as:

*“Monument staff will focus on gaining a greater understanding of the monument’s paleontological resources through expanded research. The monument staff will seek more partnerships with other research institutions and museums while expanding the permanent and volunteer research staff at the monument. On a regional level, the monument staff will increase the amount of partnerships in the John Day Basin. Interpretive programs will be implemented at locations such as the mammal quarry and the public will have better access to important research areas that may currently be difficult to access or are unpublicized”* [p. 47]

and

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<sup>36</sup> [O-127, PAL-4].

<sup>37</sup> [O-155, REC-14].



*“To achieve this plan the monument needs to expand its current staffing levels of 22 fulltime equivalent staff (FTEs) by 6.5 for research, resource protection, and interpretation. (One FTE is one person working 40 hours per week for one year, or the equivalent.)” [p. 63]*

These examples clearly show that responsible MMP should address the management and development of scientific resources comprehensively and explicitly. Because both Bears Ears proclamations emphasize scientific paleontological resources, issues about stewardship, scientific research, and post-excavation care must be addressed in the MMP at this level of detail.

*iii) The plan misuses the Paleontological Fossil Yield Classification (PFYC)*

Third, the final MMP continues to misuse the concept of Paleontological Fossil Yield Classification (PFYC). As SVP stated in our review of the draft management plan, PFYC is a coarse scale estimate of the density of fossil sites expected in a particular geological unit. BLM’s own instructional memorandum describes how the PFYC system should be used in land management decisions:

*“PFYC assignments should be considered as only a first approximation of the potential presence of paleontological resources, subject to change based on ground verification”. The memorandum goes on to say for all PFYC classifications (1 through 5) that “**standard stipulations should be put in place prior to authorizing any land use action** in order to accommodate an unanticipated discovery”.<sup>38</sup>*

The final version of the management plan continues to use existing PFYC categories as a rule for determining when on-site surveys are required for surface-disturbing activities, restricting such surveys only to PFYC categories 4 and 5. Not only is the plan inconsistent with BLM’s own management policies, but it is unacceptable for a national monument that was established to conserve unusually important paleontological resources. Paleontological resource surveys and on-site monitoring must be conducted for any surface or subsurface disturbing activities.

### **III. The Proposed Monument Management Plan Ignored BLM’s Duties to Protect National Conservation Lands**

As a National Monument, Bears Ears is also part of the National Landscape Conservation System (National Conservation Lands), which was established by Congress in the Omnibus Public Land Management Act of 2009. This law made the National Conservation Lands a permanent system of public lands conservation with the stated purpose “to conserve, protect, and restore

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<sup>38</sup> IM 2016-124.

nationally significant landscapes that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations.”<sup>39</sup>

Conservation primacy and standards for the system have also been outlined in Department of Interior guidance and BLM policies. In 2010, Secretarial Order 3308 established a unified conservation vision for managing the National Conservation Lands ‘as required by the Omnibus Act of 2009’ to “conserve, protect, and restore nationally significant landscapes.” Further stating that “the BLM shall ensure that the components of the [system] are managed to protect the values for which they were designated, including, where appropriate, prohibiting uses that are in conflict with those values.” The MMP for Bears Ears fails to meet standards for national monuments managed as part of the National Conservation Lands.

- a. The Proposed MMP fundamentally fails to meet standards for protection of a National Monument as part of the National Conservation Lands.

The final MMP fails to meet standards for national monuments and units of the system for two distinct reasons: 1) The MMP states it will *continue multiple uses*, whereas National Conservation Lands and monuments should be managed to *conserve, protect and enhance* the resources they were designated to protect; and 2) The MMP *provides more flexibility in management prescriptions and maintains similar or increased recreation management levels*, whereas the National Conservation Lands and monuments should be managed *to only allow* uses that *further* conservation, protection and enhancement of the natural resources the areas were designated to defend. As explained in detail above, the Proposed MMP does not provide adequate protection for the conservation, protection, and enhancement of the monument objects and thus also violates BLM’s mandate to protect and conserve units of the National Conservation Lands.

- b. BLM must manage resources at the landscape-level.

The MMP fails to meet the landscape-scale planning and management requirements of the National Conservation Lands. Multiple federal government statutes and executive policies require the Bears Ears National Monument to be managed at a landscape scale. Proclamation 9558 employs “landscape” a dozen times before stating that BLM lands within BENM “shall be managed as a unit of the National Landscape Conservation System.” As stated above the establishing legislation for the National Conservation Lands states the system was established “to conserve, protect, and restore *nationally significant landscapes* that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations.”

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<sup>39</sup> 16 U.S.C. § 7202(a). While the Federal Land Policy and Management Act (FLPMA) requires BLM to manage lands under multiple use principles unless an area has been designated by law for specific uses, such as a national monument, in which case BLM must manage the land for those specific uses. 43 U.S. C. §1732(a). Accordingly, the standard approach to multiple use management does not apply to this monument, and any effort to adopt such a management approach to the detriment of its natural and cultural objects and values would be in violation of the Proclamation and the mandates of FLPMA.

In 2010, then Secretary of Interior, Ken Salazar, issued a Department of Interior Policy Memorandum No. 3308, requiring that “components of the National Conservation Lands shall be managed to offer visitors the adventure of experiencing natural, cultural and historic landscapes through self-directed discovery.” The BLM responded in 2011 with the publication of National Conservation Lands 15 Year Strategy, which puts forward BLM intentions “to be a world leader in conservation by protecting *landscapes*.” One of the four Themes in the 2011 Strategy is “Collaboratively managing the NLCS as part of a larger *landscape*.”<sup>40</sup> BLM’s 2017 Manual 6220 re-affirms BLM mandates to manage national monuments to “conserve, protect and restore nationally significant *landscapes* that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations.”

Another asset for guiding a cultural landscape approach to understanding and taking care of the BENM region emerged from a 2017 gathering of 30 experts, all with previous professional archaeological experience in the BENM region. One result of the gathering included in the online report is a series of maps that display past population “intensity” over ten millennia to convey the dramatic changes in land use and occupancy within the BENM region and broader geographic contexts. The Proposed MMP/FEIS Appendix A lists cultural landscapes under “Values” and identifies a number of specific, spatially restricted cultural landscapes as “Objects.” *A broader consideration of cultural landscapes is required to facilitate integrated management across spatial and jurisdictional scales, resource specialties, and tribal consultation and public engagement and interpretation of BENM.* The archaeological experts report cited here notes: “one of the most powerful elements of the landscape approach that a national monument such as Bears Ears offers: the opportunity for tribes and other stakeholders to collaboratively manage and interpret a rich and living tapestry of interrelated places.”

#### **IV. IV. The Proposed MMP/FEIS Violated the National Environmental Policy Act**

The purpose of the National Environmental Policy Act (“NEPA”) is “to foster excellent action” and “to help public officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”<sup>41</sup> The NEPA process requires that “environmental information is available to public officials and citizens before decisions are made and before actions are taken.”<sup>42</sup> Information agencies are required to gather and disclose during the NEPA process “must be of high quality.”<sup>43</sup>

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<sup>40</sup> Among the goals within this Theme is (1) for cultural resources to be managed “in the context of the cultural landscape and adjoining lands to provide the greatest conservation benefit” and (2) for BLM to “Adopt a cross-jurisdictional community-based approach to landscape-level conservation planning and management.”

<sup>41</sup> 42 U.S.C. §§ 4321–4370(h); 40 C.F.R. § 1500.1(c).

<sup>42</sup> 40 C.F.R. § 1500.1(b).

<sup>43</sup> *Id.*

“Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.”<sup>44</sup>

The scope of NEPA review is quite broad. A federal agency must consider alternatives to the proposed action and evaluate and disclose environmental impacts.<sup>45</sup> Impacts include direct, indirect, and cumulative effects of the proposed action and its alternatives on ecological, aesthetic, historic, cultural, economic, social, and health interests.<sup>46</sup> Cumulative effects are the impacts on the environment that result from incremental impacts of the action when added to all other past, present, and reasonably-foreseeable future actions regardless of what agency or person undertakes such other actions.<sup>47</sup> “Cumulative impacts can result from individually minor but collectively significant actions.”<sup>48</sup>

a. BLM failed to consider an adequate range of alternatives

The range of alternatives is “the heart of the environmental impact statement”<sup>49</sup> and NEPA requires BLM to “rigorously explore and objectively evaluate” a range of alternatives to proposed federal actions.<sup>50</sup> “An agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action.”<sup>51</sup> An agency violates NEPA by failing to “rigorously explore and objectively evaluate all reasonable alternatives” to the proposed action.<sup>52</sup> This evaluation extends to considering more environmentally protective alternatives and mitigation measures.<sup>53</sup> NEPA requires that an actual “range” of alternatives that will “preclude agencies from defining the objectives of their actions in terms so unreasonably narrow that they can be accomplished by only one alternative (i.e., the applicant’s proposed project).”<sup>54</sup> This requirement prevents the EIS from becoming “a foreordained formality.”<sup>55</sup>

The Final EIS does not offer a reasonable range of alternatives for several reasons.

*First*, the EIS failed to consider an alternative that manages for the entire Bears Ears Monument as first defined by Proclamation 9558. In defining what is a “reasonable” range of

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<sup>44</sup> *Id.*

<sup>45</sup> 40 C.F.R. 1508.9.

<sup>46</sup> 40 C.F.R. §§ 1508.7, 1508.8.

<sup>47</sup> *Id.* § 1508.7.

<sup>48</sup> *Id.*

<sup>49</sup> 40 C.F.R. § 1502.14.

<sup>50</sup> See 40 C.F.R. §§ 1502.14(a), 1508.25(c).

<sup>51</sup> *Nw. Env'tl. Defense Center v. Bonneville Power Admin.*, 117 F.3d 1520, 1538 (9th Cir. 1997).

<sup>52</sup> *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1310 (9th Cir. 1990) (quoting 40 C.F.R. § 1502.14).

<sup>53</sup> See, e.g., *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1122–23 (9th Cir. 2002) (and cases cited therein).

<sup>54</sup> *Col. Env'tl. Coal. v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir. 1999), citing *Simmons v. U.S. Corps of Engineers*, 120 F.3d 664, 669 (7th Cir. 1997).

<sup>55</sup> *City of New York v. Dep't of Transp.*, 715 F.2d 732, 743 (2nd Cir. 1983). See also *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002).

alternatives, BLM is required to consider alternatives “that are practical or feasible” and not just “whether the proponent or applicant likes or is itself capable of carrying out a particular alternative.” More importantly, “[a]n alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable.” An alternative that addressed management of all lands within the boundaries of BENM established by Proclamation 9558 was reasonable given that conservation and protection of all lands and objects in BENM is required, as described herein and due to the ongoing question about the legality of Proclamation 9681. An alternative for the entire Monument would have saved the agency time, money and resources. At a minimum, BLM should have considered management provisions on the larger landscape in order to protect the monument objects that are within the boundaries set by Proclamation 9681. By excluding those lands from all alternatives considered in the Proposed MMP/FEIS, BLM also violated NEPA.

*Second*, it fails to provide a “reasonable range of alternatives” regarding recreation management. As the Draft MMP BLM states for addressing recreation “[q]ualitatively, impacts from management decisions under Alternative B would be similar to those for Alternatives D and C.”<sup>56</sup> Additionally, certain management prescriptions, such as travel management, the language and implications in each alternative are practically identical.<sup>57</sup> This is certainly not the “reasonable range of alternatives” that is required under NEPA. BLM failed to correct this shortcoming in the final.

*Third*, it includes alternatives that fail to prioritize the protection of monument objects. *Western Watersheds Project v. Abbey* found that “BLM cannot ignore the Proclamation's goal of protecting Monument objects when it determines the reasonable range of alternatives for NEPA's review of site-specific actions . . . the agency's procedural efforts to explore alternatives in the EA did not satisfy NEPA.”<sup>58</sup> But here, BLM included multiple alternatives that fail to prioritize protection of monument objects, in violation of NEPA.

For all of the reasons listed above, the range of alternatives presented in the Proposed EIS is not reasonable.

b. The EIS failed to take a “hard look” at numerous impacts

Under NEPA, the BLM must take a “hard look” at the environmental consequences of a proposed action, and the requisite environmental analysis “must be appropriate to the action in question.”<sup>59</sup> NEPA’s implementing regulations also provide that the agency shall ensure the scientific accuracy and integrity of environmental analysis, “shall identify any methodologies

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<sup>56</sup> Draft MMP 3-45.

<sup>57</sup> See Draft MMP 2-24, Table 2.12.

<sup>58</sup> See 719 F.3d 1035, 1053 (9th Cir. Mont. 2013).

<sup>59</sup> *Metcalf v. Daley*, 214 F.3d 1135, 1151 (9th Cir. 2000).

used[,] and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions.”<sup>60</sup> The agency’s environmental information “must be of high quality.”<sup>61</sup> “Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.”<sup>62</sup> The agency must disclose if information is incomplete or unavailable and explain “the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts.”<sup>63</sup> The agency must also directly and explicitly respond to dissenting scientific opinion.<sup>64</sup>

To satisfy NEPA’s hard look requirement the direct, indirect, and cumulative effects of the Proposed MMP must be analyzed. The cumulative impacts assessment must do two things. First, the agencies must catalogue the past, present, and reasonably foreseeable projects in the area that might impact the environment.<sup>65</sup> Second, BLM must analyze these impacts considering the proposed action. If BLM determines that certain actions are not relevant to the cumulative impacts analysis, it must “demonstrat[e] the scientific basis for this assertion.”<sup>66</sup> A failure to include a cumulative impact analysis of actions within a larger region will render NEPA analysis insufficient.<sup>67</sup>

*i) Failure to look at impacts to the greater BLM landscape*

A proper “hard look” at the impacts of the selected action would have included consideration of the impacts to the greater Bears Ears landscape. Regardless of whether Proclamation 9681 could lawfully remove lands designated under Proclamation 9558 as part of the Monument, the Agencies have discretion to consider whether proper management of the objects in the Shash Jaa’ and Indian Creek areas requires management changes to the broader area surrounding those units, including the full extent of the original monument. In particular, the overlap and ecological connectivity of the resources and objects between the Shash Jaa’ and Indian Creek areas and the surrounding excised lands makes it clear that proper management of those units requires management changes beyond their bounds.

For example, maintaining and restoring ecosystems, flora, and fauna identified as “objects” under Proclamation 9558, and occurring within the areas labeled as Indian Creek and Shash Jaa’, necessarily requires management at the broader landscape scale to ensure the persistence of even the portion of the objects within the units. Similarly, protecting the air quality, water quality, and viewsheds for objects in the Indian Creek and Shash Jaa’ units requires consideration of whether extractive land uses on adjacent areas would impair those objects. Protecting the cultural resources of those areas requires consideration of whether potential new roads associated with extractive

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<sup>60</sup> 40 C.F.R. § 1502.24.

<sup>61</sup> *Id.* § 1500.1(b).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* § 1502.22(b)(1).

<sup>64</sup> *Id.* § 1502.9(b).

<sup>65</sup> *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 809–10 (9th Cir. 1999).

<sup>66</sup> *Sierra Club v. Bosworth*, 199 F.Supp.2d 971, 983 (N.D. Ca. 2002).

<sup>67</sup> *See, e.g., Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1078 (9th Cir. 2002).

land uses on the excised lands would expose those resources to vandalism and destruction by increasing the ease of access to otherwise remote areas of the units.

Despite these considerations, the Agencies have failed to consider any alternative that provides protective management beyond the boundaries of the two units. In particular, the Agencies have failed to consider whether limitations on extractive activities such as coal leasing and oil and gas leasing on the lands between and around the two units is necessary to advance the proper care and management of the objects of the monument. In deciding not to consider protective management extending beyond the bounds of the units, such as administratively withdrawing lands surrounding the units from fossil fuel leasing, the Agencies have made an affirmative decision that has significant environmental implications that they have failed to analyze.

ii) *The EIS failed to take a “hard look” at the impacts of the proposed MMP to Bears Ears and its resources*

The protection of tribal cultural resources and the cultural landscape was the primary purpose and original intent behind the submission of the Bears Ears National Monument proposal and the subsequent federal protections established by Proclamation 9558 establishing the Bears Ears National Monument. Proclamation 9558 required the establishment of an Inter-tribal Bears Ears Commission and the creation of a tribal collaborative management plan in order to protect the rich tribal, cultural, religious, and natural resources within the entire Bears Ears National Monument.<sup>68</sup> The agency failed to utilize the expertise of the Inter-tribal council in the development of the MMP. Due to the lack of input from the Inter-tribal council along with other compounding factors, the agency failed to take a “hard look” in regards to cultural resources throughout the plan. Furthermore, the agency failed to ensure the scientific integrity of the FEIS by ignoring available information, including that identified in the Protestors’s comment, about the impacts of the Proposed MMP. As the following examples illustrate, the Proposed MMP will have much greater impacts than the agency discussed and revealed to the public, thereby undermining NEPA’s purpose.

*BLM Failed to Put Group Size Limits in Place* - For large areas of the monument, including areas very rich in cultural resources, BLM’s preferred alternative would place no restrictions on

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<sup>68</sup> Proclamation 9558 acknowledging that “[f]or hundreds of generations, native peoples lived in the surrounding deep sandstone canyons, desert mesas, and meadows mountaintops, which constitute one of the densest and most significant cultural landscapes in the United States.” [p. 1, Establishment of the Bears Ears National Monument by the President of the United States of America A Proclamation, Dec. 28, 2016.] He asserted that “[a]bundant rock art, ancient cliff dwellings, ceremonial sites, and countless other artifacts provide an extraordinary archeological and cultural record that is important to us all, but most notably the land is profoundly sacred to many Native American tribes, including the Ute Mountain Ute, Navajo Nation, Ute Indian Tribe of the Uintah Ouray, Hopi Nation, and Zuni Tribe. [p. 1, Establishment of the Bears Ears National Monument by the President of the United States of America A Proclamation, Dec. 28, 2016.] President Obama highlighted that the “[p]rotection of the Bears Ears area will preserve its cultural, prehistoric, and historic legacy and maintain its diverse array of natural and scientific resources, ensuring that the prehistoric, historic, and scientific values of this area remain for the benefit of all Americans.” [pp. 5-6].

the size of visiting groups. This leaves cultural resources vulnerable to adverse impacts caused by unmanaged visitation. The MMP does not consider the reasonably foreseeable direct, indirect and cumulative negative impacts that large group visitation will cause to cultural resources.

*Inadequately Designated Campsites* - The MMP does not address the need for specifically designated campsites, for areas rich in cultural resources, such as Comb Ridge and Cedar Mesa. By failing to direct camping usage, campers, many of whom may be unaware of or untrained in cultural resource identification, may cause unintended damage to resources that are eligible for the National Register of Historic Places (NRHP). Once a new camp site is established, future visitors are likely to view the site as already disturbed, and choose to camp there, thus creating a self reinforcing pattern of likely negative impacts to cultural resources. Given that camping sites are most often established near roads, and given research cited in the MMP that cultural resource sites near roads are more likely to suffer adverse effects from human activities, the analysis in the MMP is flawed because it does not take the potential impacts from camping activities on cultural resource sites into account.

*Restrictions on Chaining* - Without putting in place any requirement for cultural resource survey prior to chaining, or including restrictions on the use of chaining in areas with high cultural resource density, BLM's preferred alternative leaves decisions on chaining for vegetation management largely to the manager's discretion. By allowing highly disruptive treatment procedures, such as chaining and mechanical bull hogs, the MMP assumes that these techniques could be used in some places in the BENM without adverse effects on cultural resources. This does not comply with the protective mandate for conservation lands. Even previously chained areas cannot be chained again without the risk of harm to cultural resources. This is because any remaining intact cultural sites may be harmed by uprooting new growth.

*Target Shooting* - BLM's preferred alternative generally allows target shooting throughout the BENM (with a few vague and likely unenforceable restrictions). The MMP contains no target-shooting protections for cultural sites that do not include without structures, pictograph sites, and natural and geological features. There is a long history of resources being damaged by bullet fire in the planning area. The analysis in the MMP is flawed because it does not take these potential impacts into account.

*OHV Routes* - The MMP Fails to Adequately Assess the Environmental Consequences of OHV Use in the Monument. An EIS must analyze the direct impacts of a proposed action and the indirect impacts of past, present and reasonably foreseeable future actions.<sup>69</sup> Additionally, an EIS must assess cumulative impacts, defined by the NEPA regulations as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes

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<sup>69</sup> 40 C.F.R. § 1502.16(a), (b); Custer County Action Ass'n. v. Garvey, 256 F.3d 1024, 1035 (10th Cir. 2001).



such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”<sup>70</sup>

The MMP allows and prioritizes development of new OHV routes in culturally rich and scenic areas, including Indian Creek. The MMP simply assumes these trails can be created without adverse effects to cultural resources. The analysis in the MMP is flawed because it does not take potential or cumulative impacts to cultural resources into account. The OHV review included in the MMP fails to satisfy the requirements of NEPA.

*Public Use Sites* - The MMP commits the BLM and USFS to implementation-level actions prior to completion of required legal analyses and consultation (with Tribes, Consulting Parties, or the public). This is the case for the designation of Public Use sites, construction of the new Shay Mountain Vista Campground, use of existing climbing routes, and adoption of the San Juan County OHV route system. The analysis in the MMP is flawed because it does not provide a detailed analysis of the potential impacts from these actions.

*Recreation generally* - The BLM’s rushed planning process delays the critically needed recreation management planning for several years, thus the agency failed to take a hard look at the cumulative impacts from recreation on the objects the monument was designed to protect. The proposed MMP acknowledges the risk of delaying a recreation management plan (until analyzed in an implementation-level Recreation Area Management Plan/Business Plan), and fails to thoroughly evaluate the cascading repercussions of not prioritizing recreation impacts.<sup>71</sup>

The likely cumulative impacts from the intensity of the rising levels of recreational use at BENM clearly indicate the need for detailed recreation planning and management, and this agency action failing to address an obvious management need is therefore “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>72</sup>

The Proposed BENM MMPs state “BLM data suggest approximately 225,000 people visit the areas which have been designated as BENM on an annual basis, including an estimated 187,511 visits to the Indian Creek Unit and an estimated 36,994 visits to the Shash Jáa Unit.”<sup>73</sup> Moreover,

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<sup>70</sup> 40 C.F.R. § 1508.27(b)(7).

<sup>71</sup> *Where recreation activities are concentrated, the greatest potential direct impact to cultural resources is surface disturbance from excessive visitation and the potential increase in site vandalism and looting. These effects can be reduced by encouraging visitors to visit sites that have been prepared for public visitation. Possible indirect effects from recreation decisions may also include the potential for increased visitation to change the setting or feeling of a significant cultural locality. Increased recreational visitation to cultural sites would also affect Tribes by increasing the potential for impacts to cultural resources and sites that are of cultural and religious significance to Tribes.* (3.5.2.2.5 Impacts from Recreation Management Actions, page 3-13).

<sup>72</sup> 5 U.S.C. § 706(2)(A).

<sup>73</sup> Appendix N-2, 1.3.1 Recreation-Related Effects.

the monument is experiencing “rapidly expanding use by the public”<sup>74</sup> and very likely to increase. “In 2017, there were 64% more visits recorded than in 2013. This long-term growth trend is expected to continue and increasing recreation visits are anticipated”<sup>75</sup>

Evidence from “previous Monument designations suggests that managing public land as a National Monument raises the profile of the area to potential visitors and increases visitation and visitor spending in the region.”<sup>76</sup> And visitation growth scenarios outlined in the MMPs indicate that visitation could increase as much as 100% to almost half a million visitor days over the next 15 years.<sup>77</sup> Clearly, visitation to BENM will continue to rapidly increase with many of these visits from recreational users eager to experience the monument’s world class recreational resources found among the fragile “object[s] of antiquity” and “objects of historic or scientific interest” that the monument was designed to protect.

The failure of the BLM to provide a comprehensive recreation plan is likely to lead to increased impacts caused by poorly managed and insufficient camping areas, the creep of new roads and trails, and human waste concerns. The failure to address recreation management could impact monument objects (cultural, paleontological, and a range of natural resources), but also stand to impair recreational experiences and the desired conditions outlined in the Proposed MMPs. The recreation community, including protestors, has a long history of stewarding the BENM landscape, addressing human waste issues and building trails, among other projects designed to increase the resiliency of recreation areas that attract use-levels that are exceeding the carrying capacity of existing recreation infrastructure. The failure to develop a recreation management plan will also impair the quality of the recreation experience at BENM, which is the method that the public experiences and enjoys monument “objects.”

In the Proposed MMPs the BLM’s rush to make permanent a plan for the reduced monument is prioritized over the mandate to take the required “hard look” at the environmental consequence.<sup>78</sup> In fact, in many circumstances the agency ignores their own findings pertaining to impacts to reach a predetermined conclusion.<sup>79</sup> BLM should have not rushed these MMPs and

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<sup>74</sup> *international recognition for its extraordinary natural beauty and numerous recreational opportunities. ...[that] include: hiking, biking, boating, cultural resource viewing, camping, off-highway vehicle (OHV) use, rock climbing, canyoneering, horseback riding, hunting, wildlife viewing, sightseeing and scenic photography ... [A]s the popularity of the entire region has increased, seasonal visitation and demand for a variety of recreation opportunities in the Monticello FO . . . has increased significantly over the last five years.* MFO Business Plan, P. 5.

<sup>75</sup> (Final Business Plan for BLM Monticello Field Office Campgrounds, P. 8-9).

<sup>76</sup> (Proposed MMPS, N-2).

<sup>77</sup> MMPS, at N-3.

<sup>78</sup> *Metcalf v. Daley*, 214 F.3d 1135, 1151 (9th Circ. 2000); *Robertson*, 490 U.S. at 348 (the requisite environmental analysis “must be appropriate to the action in question.”).

<sup>79</sup> For example, the proposed MMPs state: *Camping: Until analyzed in an implementation-level plan, dispersed camping will be allowed following current management rules, and encouraged in designated sites. A new campground called Shay Mountain Vista Campground would be constructed (2.4.7.4. Management Actions by Alternative, Indian Creek Unit, page 2-14), and, Allowing dispersed camping in areas outside designated dispersed camping areas (until analyzed in an implementation-level Recreation Area Management Plan/Business Plan) could also degrade*

instead should have completed a comprehensive single plan for the monument that included extensive provisions related to transportation, cultural resources, and recreation. The implications of delaying monument planning and management for three extremely important issues pertaining to the protection of the BENM, will likely causes cumulative impacts on the “object[s] of antiquity” and “objects of historic or scientific interest” that the monument was established to protect, as well as on the recreational experiences of the visiting public. Accordingly, these MMPs violate the clear direct language of Proclamation 9558 by not acting immediately to manage increasing visitation and recreation.

c. The MMP Lacks an Adequate Description of the Affected Environment as Required by NEPA

The MMP lacks adequate baseline data concerning the existing condition of significant cultural resources. BLM is required to “describe the environment of the area(s) to be affected or created by the alternatives under consideration.”<sup>80</sup> Establishing baseline conditions of the affected environment is an essential requirement of the NEPA process.<sup>81</sup>

In the MMP, BLM provides an inadequate overview of cultural resource site types and lists of National Register sites. The BLM must provide enough information in the MMP about the existing condition of significant sites—at a minimum, sites listed in or previously proposed for listing in, or determined eligible for, the National Register—to allow BLM and the public to make an informed assessment of the proposed alternatives. The MMP lacks even this bare minimum level of information about significant cultural sites, rendering it noncompliant with the requirements of NEPA. Without this information, neither BLM nor the public can fully understand the consequences of the proposed alternatives.

d. The Proposed MMP fails to address the issues raised in protestors comments

Public participation and intergovernmental consultation are paramount to the NEPA process. One of the statute’s goals is to “insure that environmental information is available to public officials and citizens before decisions are made and actions are taken” and to “help public officials make decisions that are based on [an] understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”<sup>82</sup> To that end, NEPA’s implementing regulations require federal agencies to encourage and facilitate public involvement

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*wilderness characteristics because of resulting impacts on vegetation and soils* (3.8.2.2., Direct and Indirect Impacts, page 3-25).

<sup>80</sup> 40 C.F.R. § 1502.15.

<sup>81</sup> See *Half Moon Bay Fishermans’ Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988) (“without establishing . . . baseline conditions . . . , there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA.”).

<sup>82</sup> 40 C.F.R. § 1500.1.

“to the fullest extent possible,”<sup>83</sup> and impose on BLM an obligation to respond to substantive comments.

*An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:*

- 1) Modify alternatives including the proposed action*
- 2) Develop and evaluate alternatives not previously given serious consideration by the agency.*
- 3) Supplement, improve, or modify its analyses.*
- 4) Make factual corrections.*
- 5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency’s position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.<sup>84</sup>*

But here, BLM failed to comply with this obligation. Instead, BLM inadequately responded to comments of the protesting parties, including examples throughout this protest and the following:

- **Recognition of paleontological research.**

- SVP’s November 2018 letter commented:

*Chapter 1, Page 2, third line from the bottom that states “Scientific research is being conducted on soil and vegetation resources in the area”:* Scientific research into the paleontology of the BENM has a long history, beginning in the mid-1800s and explicitly recognized in both Presidential Proclamations 9681 and 9682. SVP is concerned that this rich history is ignored in this statement, in favor of sciences that are often used in relation to economic uses of public lands (e.g., grazing) which neither are called out in the proclamations, nor have a deep history of scientific study in the area.

- However, BLM failed to adequately respond to this comment by:

While the sentence in the July 2019 Proposed MPP occurs on Page 1-3, failing to mention, on Page 1-3 of the Proposed MMP, the long history of paleontology in the area as well as the fact that paleontology is explicitly recognized in both Presidential Proclamations 9681 and 9682.

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<sup>83</sup> *Id.* § 1500.2(d).

<sup>84</sup> 40 C.F.R. §1503.4(a).

- **OHV use**

- In SVP's November 2018 letter, protestor SVP commented:  
Chapter 2, Page 11, Section 2.4.6.3, Table 2-6, Row 5: None of these alternatives are acceptable. OHV uses is a potential threat to paleontological resources if the route passes over fossiliferous strata, but vehicle access is often needed to conduct paleontological field research, especially for removing fossils from the field. OHV use should only be allowed in the monuments for management activities or by special permit for activities consistent with the protection of Monument objects and values.
- However, BLM failed to respond to this comment:  
Although BLM removed or moved this in the context of 'recreational travel' in Table 2-9, this does not mean the issue has been resolved. We request that, throughout Table 2-9, where motorized travel is permitted, travelling be restricted to designated routes only. We also note that Alternative E is acceptable throughout the table if amended to explicitly emphasize the aforementioned travel restriction.

- **Recognition of vertebrate fossils.**

- SVP's November 2018 letter commented:  
Chapter 3, Page 31, Lines 3–4 of Paragraph 2 in Section 3.10.1: The sentence reads "Over 300 paleontological localities, ranging from invertebrates to plants have been recorded in the two units." However, this statement is not accurate and should be re-written to read "Over 300 paleontological localities, including invertebrates, vertebrates, plants, and trace fossils, have been recorded in the two units."
- However BLM failed to respond to this comment:  
BLM made some effort to revise the sentence that now reads "Over 300 paleontological localities, including plants, invertebrates, and trace fossils, have been recorded in the two units." However, we must point out that the sentence would not accurately reflect the significance of the paleontological resources in the BENM area without the word 'vertebrates.' We request that the word 'vertebrates' be added to the sentence as originally suggested.

- **OHV travel.**

- SVP's November 2018 letter commented:  
Chapter 3, Page 33, Section 3.10.2.2.2: All areas of the new monuments should be closed to OHV travel except for administrative or permitted purposes consistent with management of the monuments' designated resources (including paleontology).
- However BLM failed to respond to this comment:  
BLM made no change to the section except for the addition of Alternative E in Table PAL-3. In order to eliminate any uncertainty, we request that the section to include an explicit sentence stating that "All areas of the new monument units should be closed to OHV travel except for administrative or permitted purposes consistent with

management of the monuments' designated resources, including paleontological resources."

- **Shay Mountain Vista Campground.**

- VP's November 2018 letter commented:

Chapter 3, Page 48, Section 3.11.2.3, Lines 10–11 of Paragraph 3: The document states "Under Alternative A, a new campground called Shay Mountain Vista Campground would be constructed in the Indian Creek Unit", but it is unclear where the proposed campsite would be. We must note that a campground near Shay Canyon could be a serious threat to paleontological (and cultural) resources at Shay Canyon. Therefore, proposed development of any new campground must be in consultation with Monument paleontologists, which the Monument currently lacks.

- However BLM failed to respond to this comment:

On Page 3-50 of the July 2019 draft MMP, it states "A new campground called Shay Mountain Vista Campground would be constructed in the Indian Creek Unit, and camping fees would be charged if deemed necessary. This would provide more camping opportunities for recreational users seeking more developed campgrounds but would also create surface disturbance and increased human activity that would impact soils, vegetation, and wildlife. Prior to site selection and construction, the impacts of the Shay Mountain Vista Campground would be analyzed in an implementation-level environmental analysis." However, it is in our opinion that Shay Mountain Vista Campground should not be constructed in Indian Creek to begin with because Indian Creek has unparalleled paleontological resources and is already vulnerable to excessive recreation demand. If the construction is unavoidable, we will then request that the following passage be added: "... and increased human activity that would impact soils, vegetation, and wildlife, as well as cultural and paleontological resources."

- **Paleontologists as stakeholders.**

- VP's November 2018 letter commented:

Chapter 3, Pages 75–76, Section 3.16, regarding "categories of stakeholders" Paleontological resource researchers should be identified as important stakeholders distinct group from the five groups. This is because management of paleontological resources requires a unique combination of knowledge and expertise that is very different from that required for 'cultural resources' or any other categories covered in the listed stakeholder categories. We strongly recommend 'Paleontological resource research stakeholders' be added as a sixth group formally identified by BLM and USFS.

- However, BLM failed to respond to this comment:

However, the July 2019 draft MMP still does not explicitly consider paleontological resource researchers as a distinct category of important stakeholders. We ask that this category of people be added as the sixth category that requires special skill sets and

knowledge about the resources likely not be adequately covered by typical "Habitat and resource conservation stakeholders."

- **List of paleontological resources.**

- VP's November 2018 letter commented:

Appendices (Volume 2), Page A-17, regarding 'Objects' under 'Paleontological Resources': The list of 'Objects' showing examples of paleontological resources in this table is excessively simplified, especially since Proclamation 9681 specifically recognizes those objects named in Proclamations 9558. We suggest replacing the list (that currently has only three bullet-points) with the following simple, but more accurate list that better reflects the full significance of the paleontological resources at BENM: Objects Specific objects that should be considered under Presidential Proclamation 9558, as modified by Presidential Proclamation 9681, include, but not limited to, the following:

- Petrified wood, leaf fossils, marine invertebrates (e.g., echinoderms, brachiopods, bivalves, gastropods), and vertebrate bones found at Indian Creek, Arch Canyon, and elsewhere in the monuments
- Plant fossils, vertebrate tracks, and vertebrate bones and teeth, including remains of extinct amphibians found at Bears Ears Buttes, Indian Creek, and elsewhere.
- Prehistoric plant debris and petrified wood, plant root casts, leaf impressions, coquinas (debris of shelled animals), animal burrows and trackways, and vertebrate bones and teeth, including the only known proclophionid skull found at Bridger Jack Mesa, Cathedral Butte, Comb Ridge, Indian Creek, Lavender Canyon, and elsewhere.
- Vertebrate tracks and trackways, vertebrate burrows, root and plant casts found at Indian Creek, Butler Wash, and elsewhere
- The type locality and only occurrence of the dinosaur *Seitaad ruessi* at Indian Creek
- Numerous Quaternary deposits, including prehistoric packrat middens in natural cliff alcoves, found in Davis and Lavender Canyons, Cathedral Butte and its vicinity, and elsewhere BLM responded to this by somewhat modifying the table, adding: "Generally paleontological objects within the BENM include the following: Vertebrate, invertebrate, plant, and trace fossils". However, this treatment is grossly oversimplified compared to the table for "Archaeological, Historic, and Cultural Resources" on Page A-14 of the July 2019 draft MMP. BLM should replace the 'Objects' section of the table for 'Paleontological resources' on Page A-15 be replaced with that shown above.

As these examples illustrate, BLM failed to respond adequately to comments submitted by the protesting parties and others.

e. The Final EIS Inappropriately Relies on Uncertain Mitigation Measures

NEPA requires BLM to include and discuss appropriate mitigation measures in an EIS.<sup>85</sup> The agency must do more than “merely list” possible mitigation measures.”<sup>86</sup> Without certainty or sufficient detail about mitigation measures or their effectiveness, an agency cannot provide an adequate description of the impacts of a proposed action in an EIS.<sup>87</sup>

As mentioned throughout this protest, the Proposed MMP/FEIS includes mitigation measures that are either inadequate to protect monument objects or are uncertain and ineffective, and contained insufficient analyses of the mitigation measures that were included. Virtually no mitigation is proposed for the harmful effects that will be caused by the proposed MMP. Instead, the MMP claims that agencies will follow “best management practices...and compliance with application laws.”<sup>88</sup> This does not guarantee the protection of significant cultural resources, sacred places, environmental resources, and medicinal gathering sites. Instead, it suggests that a process could be reviewed, which ultimately may result in the development and/or destruction of these resources. Increases in use within the BENM may make cultural resources more vulnerable to harm or destruction under the proposed MMPs. The Proposed MMP/FEIS should have disclosed the uncertainty surrounding the implementation of best management practices and evaluated such impacts.

In particular, as explained in detail above, the Proposed MMP relies heavily on monitoring, evaluation, best management practices, and agency discretion to avoid or reduce impacts of management and uses; but these provisions are inadequate to protect resources because they are undefined, unexplained, unenforceable, and uncertain to occur. The resulting analysis in the FEIS fails to take a “hard look” at these problems and disclose them to the public as required under NEPA.

By failing to adequately include and discuss mitigation measures, and the impacts that will flow from inadequate and uncertain measures, BLM also violated NEPA.

**V. BLM and USFS Violated Their Duties to Consult with Tribes and Prioritize Protection of Tribal Resources**

a. BLM and USFS Failed to Consult with Tribes as Required

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<sup>85</sup> 40 C.F.R. §§ 1500.16(h), 1502.14(f).

<sup>86</sup> *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1173 (10th Cir. 1999) (citing *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1380 (9th Cir.1998)).

<sup>87</sup> See *High Sierra Hikers Ass’n v. Weingardt*, 521 F. Supp. 2d 1065, 1084–88 (N.D. Cal. 2007).

<sup>88</sup> Draft EIS at ES-6.



The Bears Ears National Monument was proposed by tribes and established by President Obama with the primary purpose of protecting the Native American sacred place known as Bears Ears and its cultural and environmental resources. Co-management with the tribes was at the heart of the proposal and the subsequent designation as a National Monument.<sup>89</sup> The establishment of the National Monument was the direct result of the Bears Ears National Monument proposal, which was submitted on October 15, 2015, by the Hopi Tribe, Ute Indian Tribe, Ute Mountain Ute Tribe, Navajo Nation, and Zuni Tribe through the Bears Ears Inter-tribal Coalition with significant work done by the Utah Diné Bikéyah (UDB).

The original proposal requested the protection of 1.9 million acres of federal lands. Proclamation 9558 protected 1.3 million acres as the Bears Ears National Monument. While this was a reduction from the original proposal by the Inter-tribal Coalition, it was nonetheless a celebrated protection for innumerable interrelated tribal cultural resources across the Bears Ears region.<sup>90</sup> It was also the first Native American-led national monument designation in the United States and clearly stated that Indian tribes shall be consulted on management “to the maximum extent permitted by law.”<sup>91</sup> Protestors want to make clear that Executive Order 9681 does not extinguish the original intent of the Bears Ears National Monument, nor can it replace the requirements for consultation under federal laws passed by Congress.

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<sup>89</sup> [t]he Bears Ears National Monument was proposed by the Inter-Tribal Coalition of the Hopi Tribe, Ute Mountain Ute Tribe, Ute Indian Tribe, Pueblo of Zuni, and Navajo Nation with the primary purpose of protecting the 1.9 million-acre Bears Ears traditional cultural landscape, which includes the cultural resources, environmental resources, and traditional resources that are all intricately related with one another. These tribes, together with the Paiutes, 19 Pueblos, and other tribes have present-day and aboriginal ties to the Bears Ears National Monument and **great deference should be given to the tribes to collaboratively manage and protect *their* historic, cultural, and environmental resources** [...] Non-Indigenous settlers have been in the region for a mere one-hundred-and-forty years, as compared to the thousands of years of (scientifically established) presence, use, caretaking, stewardship, and ownership under the traditional law[s] of these American Indian nations. According to traditional laws and cultural beliefs, these American Indian Nations have been in the Bears Ears region since time immemorial, and this is established within their oral histories, language, and creation stories. Utah Diné Bikéyah (UDB) [Public comment letter on the BENM EIS from Utah Diné Bikéyah, Gavin Noyes, Executive Director to BLM, Canyon Country District, p. 1]

<sup>90</sup> The area’s cultural importance to Native American tribes continues to this day. As they have for generations, these tribes and their members come here for ceremonies and to visit sacred sites. Throughout the region, many landscape features, such as Comb Ridge, the San Juan River, and Cedar Mesa, are closely tied to native stories of creation, danger, protection, and healing. The towering spires in the Valley of the Gods are sacred to the Navajo, representing ancient Navajo warriors frozen in stone. Traditions of hunting, fishing, gathering, and wood cutting are still practiced by tribal members, as is collection of medicinal and ceremonial plants, edible herbs, and materials for crafting items like baskets and footwear. The traditional ecological knowledge amassed by the Native Americans whose ancestors inhabited this region, passed down from generation to generation, offers critical insight into the historic and scientific significance of the area. Such knowledge is, itself, a resource to be protected and used in understanding and managing this landscape sustainably for generations to come. [p.2]

<sup>91</sup> 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, consistent with the American Indian Religious Freedom Act (42 U.S.C. 1996) and Executive Order 13007 of May 24, 1996 (Indian Sacred Sites), including collection of medicines, berries and other vegetation, forest products, and firewood for personal noncommercial use in a manner consistent with the care and management of the objects identified above.

Protestors argue the MMP fails to address the requirements of Proclamation 9558 and multiple federal laws<sup>92</sup> by failing to include the protection of Indian sacred sites and traditional cultural properties, as well as adequate and meaningful tribal consultations. This is evident within the “Purpose and Needs” section of the plan, which states “[t]he purpose of the MMPs is to provide a comprehensive framework for the BLM’s and USFS’s allocation of resources and management of the public lands within the Planning Area pursuant to *multiple-use and sustained yield* mandates of the Federal Land Policy and Management Act (FLPMA) of 1976 and the National Forest Management Act (NFMA) of 1976 [...]”.<sup>93</sup> This “purpose” does not comply with federal laws and clear obligations to consult with Tribes, as such all planning decisions based on this “purpose” throughout the MMP are inherently flawed.

In their Finding of No Adverse Effect (Aug. 2, 2019), the BLM and USFS disclosed that they sent letters to tribes as a demonstration of meaningful consultation. However, tribes engaged in the environmental review and planning process, have generally been ignored and their comments not incorporation into the MMP. It appears the agencies are relying solely on a Class I inventory and predictive model created by SWCA Environmental Consultants Inc. (2017) to inform decisions made about cultural resources and historic properties in the FEIS and MMPs.

This model by SWCA is severely flawed and was challenged by multiple Consulting Parties and archaeological experts. Overall, in making the MMP for Bears Ears 8.2% of the lands within the Shash Jaa’ Unit and 14.7% of lands within the Indian Creek unit were surveyed for archaeological site. No cultural monitors were present from the tribes and no meaningful consultations were pursued by the BLM and USFS to inform the process. Protestors voiced concerns in comments stating:

*The proposed MMPs and DEIS should not move forward without cultural surveys, environmental studies, and meaningful consultations to fully understand the extent of cultural and environmental resources, and how to protect them, with alternatives that focus upon how to protect these resources. If these are not done, it will likely lead to the destruction of cultural and environmental resources that the National Monument designation is meant to protect. The BLM and other federal agencies should not be in the business of religious and cultural persecution by destroying the ability of these American*

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<sup>92</sup> such as the Archaeological Resources Protection Act (ARPA), and the American Indian Religious Freedom Act (AIRFA), and Executive Orders, such as Executive Order 13007 “Indian Sacred Sites”, Executive Order 13084 “Consultation & Coordination with Indian Tribal Governments”, and Executive Order 13175 “Consultation & Coordination with Indian Tribal Governments.”

<sup>93</sup> BENM FEIS/MMPs Shash Jaa and Indian Creek Units, p. 1-1.

*Indian Nations to practice their religious and cultural beliefs in sacred places that they have visited, maintained, and used since time immemorial.*<sup>94</sup>

Unfortunately, protestors concerns were largely ignored by the agencies.

Lastly, the BLM and USFS have introduced a new alternative (Alternative E) that had not been previously seen in the Draft Environmental Impact Statement (DEIS) and draft MMPs. The failure to provide an opportunity to comment on the new alternative not only violates NEPA and FLPMA, Tribes had no opportunity to assess impacts or comment. Under FLPMA, BLM was obligated to provide the public the opportunity to disclose and take comment on alternatives in a management plan. BLM and USFS must give tribes and the general public the opportunity to fully comment on the alternative. Protestors request the agencies officially submit Alt. E as a Supplemental EIS and allow for meaningful engagement.<sup>95</sup>

- b. Tribal Co-Management is required through representatives of Tribes and not “tribal interests”

Tribal co-management was emphasized throughout Proclamation 9558 and manifested, in part, through the creation of a Bears Ears Commission composed of tribes or other entities that represents tribal government”<sup>96</sup> and “in developing or revising the management plan, the Secretaries shall carefully and fully consider integrating the traditional and historical knowledge and special expertise of the Commission or comparable entity.”<sup>97</sup> Further, this tribal entity had the jurisdiction to “adopt such procedures as it deems necessary to govern its activities, so that it may effectively partner with the Federal agencies by making continuing contributions to inform decisions regarding the management of the monument.”<sup>98</sup> Lastly, “[t]he management plan shall

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<sup>94</sup> Utah Diné Bikéyah (UDB), Public comment letter on the BENM EIS, Gavin Noyes, Executive Director to BLM, Canyon Country District.

<sup>95</sup> FLPMA requires BLM to involve the public in the preparation of management plans and 43 U.S.C. § 1712(a); *see also* 43 C.F.R. § 1610.2(a). BLM’s regulations further require the agency to evaluate alternatives and their effects, identify a preferred alternative in a draft RMP and draft EIS, and take public comment on those alternatives and drafts. 43 C.F.R. § 1610.4-7. BLM must supplement a draft EIS where “(i) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c); *see also Russell County Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011). Changes to alternatives that alter the location or extent of impacts warrant a supplemental EIS. *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 707 (10th Cir 2009).

<sup>96</sup> [Obama Proclamation, p7] The Bears Ears Commission, composed of the Hopi Nation, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah Ouray, and Zuni Tribe, or in the event that the Commission did not exist, “the tribal governments through some other entity composed of elected tribal government officers (comparable entity)” shall be engaged by the Secretaries “in the development of the management plan and to inform subsequent management of the monument.

<sup>97</sup> *Id.* at 8.

<sup>98</sup> *Id.* 7-8.

also set forth parameters for continued meaningful engagement with the Commission or comparable entity in implementation of the management plan.”<sup>99</sup>

During the development of the MMP, BLM and USFS established an advisory committee to provide information and advice regarding the development of the management plan and, as appropriate, the management of the monument.<sup>100</sup> The advisory committee was to consist of a fair and balanced representation of interested stakeholders, including State and local governments, tribes, recreational users, local business owners, and private landowners.<sup>101</sup> More specifically this committee was to secure “two representatives of tribal interests.”<sup>102</sup>

However, the current National Monument Advisory Committee does not have a single representative from the tribes. Instead, the Monument Advisory Committee’s charter specifies that out of the 15 members of the MAC, “Two representatives of tribal interests” are to sit on the Monument Advisory Committee. Thus, the BLM and USFS, disregarding the government-to-government relationship with tribes and the requirements of Proclamation 9558, have placed two individuals who are not representatives of the tribes on the Bears Ears Advisory Committee.

In addition, the Bears Ears Advisory Committee is not “fairly balanced”, as per the requirements of the Federal Advisory Committee Act and the requirements of Proclamation 9558. It is composed almost exclusively of individuals who have, at various points, ***publicly vocalized opposition to the creation of the Bears Ears National Monument***. In short, the BLM and USFS have completely excised tribes from meaningful engagement in the planning process.

American Indian tribes and their spiritual and ceremonial leaders have been taking care of the sacred Bears Ears landscape since time immemorial and should not be surreptitiously excluded from the environmental review and MMPs planning process. BLM and USFS should have halted the planning process while litigation ensued over Bears Ears and the legality of the Trump Proclamation, as the tribes who proposed the creation of the Bears Ears National Monument were unable to participate in the planning process until this litigation resolved. While some of the Pueblos have participated in meetings, their suggestions pertaining to the environmental review process and MMPs planning have been excluded. In addition, a simple Class I survey with 8.2% of the Shash Jaa’ unit and 14.7% of the Indian Creek unit is all that is informing any cultural resources decisions. This fails to comply with the National Historic Preservation Act, the National Environmental Policy Act, and other federal laws, as well ignoring tribal consultations necessary through the government-to-government relationship that tribes have with the federal government.

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<sup>99</sup> *Id.* at 8.

<sup>100</sup> Federal Advisory Committee Act (5 U.S.C. App.).

<sup>101</sup> *Id.* at 7.

<sup>102</sup> BENM Management Advisory Council Charter.

<https://www.blm.gov/sites/blm.gov/files/Utah%20Resource%20Advisory%20Councils%20BEARS%20EARS%20NM%20MAC%20SIGNED%20CHARTER9-12-2018.pdf>

Tribal consultations should happen early in the planning process, not excluded and excised from the planning process altogether.

The FEIS and MMPs are out of compliance with NEPA/NHPA/Antiquities Act because they have failed to adequately and meaningfully consult with tribes and the FEIS/MMP does not adequately protect cultural resources.

c. BLM and USFS Failed to conduct Government-to-Government Relationship with Federally Recognized Tribes

The BLM and USFS have failed to adequately and meaningfully consult with American Indian tribes on a government-to-government basis in creating the MMP for the Shash Jaa' and Indian Creek units of the Bears Ears National Monument. The political relationship tribes have with the federal government has been long-established through treaties, statutes, and the Supreme Court. The federal government is, thus, required to consult with tribes on a government-to-government basis on projects that directly affect sacred places, such as the Bears Ears National Monument and Bears Ears sacred cultural landscape

The lack of tribal consultation is a clear violation by the BLM's and USFS's requirement to meaningfully consult with American Indian tribes through the government-to-government relationship the federal government has with tribes and under the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA), as well as other federal laws and policies.<sup>103</sup> In addition, the expedited planning process has failed to uphold these federal laws by not conducting cultural surveys and environmental studies necessary to produce an adequate Draft Environmental Impact Statement that meets their requirements.

As clearly outlined in the *Memorandum for the Heads of Executive Departments and Agencies on Government-to-Government Relations with Native American Tribes* from the President of the United States (April 29, 1994) states on the Department of the Interior website:

*The United States Government has a unique legal relationship with Native American governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in*

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<sup>103</sup> See Art. I, Sect.8, U.S. Constitution; National Historic Preservation Act, 16 U.S.C. §§ 470a(d)(6)(B) & 470h (1992); 36 C.F.R. 800.2(c); National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4335; Archaeological Resources Protection Act (ARPA), 16 U.S.C. § 470cc.; Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3002-2005 and § 3010; 43 C.F.R. § 10.5; Executive Order 12875 (1993) *Tribal Governance*; Executive Order 12989 (1994) *Environmental Justice*; Executive Order 13007 (1996) *Sacred Sites*; Executive Order 13084 (1998) *Consultation and Coordination with Indian Tribal Governments*; Executive Order 13175 (2000) *Consultation with Indian Tribal Governments*; and Executive Memorandum, *Government-to-Government Relationship with Tribal Governments* (September 2004).

*a knowledgeable, sensitive manner respectful of tribal sovereignty [...] The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes [...]*<sup>104</sup>

The American Indian tribes that proposed the creation of the Bears Ears National Monument, the Ute Mountain Ute Tribe, Ute Indian Tribe, Hopi Tribe, Zuni, and the Navajo Nation have explicitly requested that the planning process should be halted until litigation resolved. If the agencies truly respected and the government-to-government relationship with tribes, they would halt the planning process until litigation is resolved. All other actions fail to fulfill the federal trust responsibility the United States has with tribes, the government-to-government relationship tribes have with the federal government, and federal law.

## **VI. BLM did not comply with the National Historic Preservation Act**

### **a. BLM Failed to Coordinate Review under NHPA and NEPA, which Unlawfully Forecloses Consideration of Alternatives under NHPA**

Congress enacted the National Historic Preservation Act (NHPA) in 1966 to implement a broad national policy encouraging the preservation and protection of America's historic and cultural resources.<sup>105</sup> The NHPA requires federal agencies to "take [ ] into account any adverse effects on historical places from actions concerning that property."<sup>106</sup> Pursuant to Section 106 of the NHPA, *before* approving any undertaking, a federal agency must identify all historic properties that may be affected by the undertaking and must assess the effects of the project on those properties.<sup>107</sup> Here, BLM has unlawfully rushed to complete the MMP prior to completing consultation under Section 106. As a result, the agency has made final management decisions on alternatives under NEPA that will foreclose meaningful consideration of alternatives to avoid, minimize or mitigate harm to historic properties as NHPA requires.

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<sup>104</sup> In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities shall be guided by the following: (a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally recognized tribal governments. (b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law with tribal governments prior to taking actions that affect federally recognized tribal governments [...] (c) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities. (d) Each executive department and agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes [...] [p. 2] (<https://www.doi.gov/pmb/cadr/programs/native/Government-to-Government-Relations-with-Native-American-Tribal-Governments>)

<sup>105</sup> See 16 U.S.C. §§ 470(b), 470-1.

<sup>106</sup> *Friends of the Atglen-Susquehanna Trail Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 252 (3rd Cir. 2001); see also 16 U.S.C. §§ 470(f), 470h-2(d).

<sup>107</sup> See 36 C.F.R. §§ 800.4, 800.5.

BLM is moving forward with the MMP far in advance of fulfilling its responsibilities under the NHPA. The MMP was released by BLM on July 26, 2019. On July 30, 2019, the second Section 106 consulting party meeting was held. At that meeting, BLM verbally indicated the intent to recommend a finding of no adverse effect under NHPA. On August 2, 2019, BLM issued a letter indicating its finding of no adverse effect. This triggers a thirty-day comment window under NHPA for consulting parties to object to such finding. The deadline for the objection is September 3, 2019, which is eight days *after* the administrative protest deadline for the MMP. The Consulting Parties intend to submit formal comments objecting to BLM's finding of no adverse effect and outlining the reasons for the disagreement within the thirty-day comment window. This will trigger the BLM's responsibility for additional consultation to resolve the disagreement or require that the agency solicit the position of the Advisory Council on Historic Preservation.<sup>108</sup> However, BLM has already released its final MMP and selected its preferred alternative under the FEIS. Thus, it is difficult to see how BLM intends to consult in good faith to resolve the Consulting Parties' objections to the agency's determination of no adverse effects when final management decisions have already been made under NEPA.

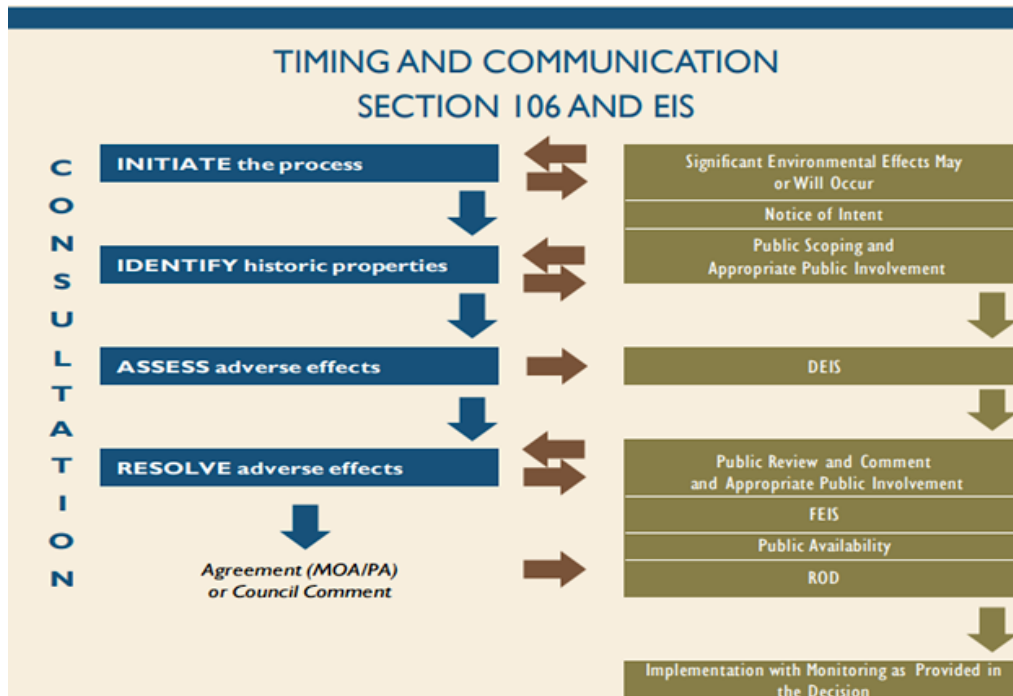
It is just this type of situation that prompted the Council on Environmental Quality (CEQ) and the Advisory Council on Historic Preservation (ACHP) to develop guidance (hereafter Section 106-NEPA Handbook) on proper coordination of reviews under NEPA and NHPA.<sup>109</sup> Consideration of adverse effects under NHPA should occur prior to release of a FEIS. The following diagram illustrates the proper coordination process.<sup>110</sup>

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<sup>108</sup> 36 C.F.R. § 800.5(c)(2).

<sup>109</sup> NEPA and NHPA: A Handbook for Integrating NEPA and Section 106, March 2013, available at: [https://www.achp.gov/sites/default/files/2017-02/NEPA\\_NHPA\\_Section\\_106\\_Handbook\\_Mar2013\\_0.pdf](https://www.achp.gov/sites/default/files/2017-02/NEPA_NHPA_Section_106_Handbook_Mar2013_0.pdf)

<sup>110</sup> *Id.* at 26.



Due to the failure to coordinate review under NEPA and NHPA, BLM has unlawfully foreclosed consideration of less harmful alternatives under NHPA. The procedural nature of Section 106 reinforces the importance of strict adherence to the binding process set out in the NHPA regulations: “While Section 106 may seem to be no more than a ‘command to consider,’ . . . the language is mandatory and the scope is broad.”<sup>111</sup> BLM failed to adhere to this important process in violation of the clear mandates of the NHPA. BLM must conclude the Section 106 consultation process and then issue a Supplementary EIS to resolve this issue in accordance with federal law.

b. BLM failed to satisfy official consultation requirements as outlined by the NHPA

Consulting Parties under Sec. 106, Friends of Cedar Mesa, Utah Diné Bikéyah, and the National Trust for Historic Preservation contend there are serious deficiencies in the consultation process to date. This lack of consultation is explained in the MMP:

*“BLM and USFS notified the public that they would fulfill the public involvement requirements of the NHPA (54 USC 306108) through this NEPA process as provided for in 36 CFR 800.2(d)(3). During the scoping process, numerous commenters requested to be “consulting parties” under Section 106 of the NHPA. The BLM, in consultation with the SHPO, determined that **this was not necessary** because no findings or determinations of eligibility or effect are being made as part of this planning effort.”<sup>112</sup>*

<sup>111</sup> United States v. 62.20 Acres of Land, More or Less, 639 F.2d 299, 302 (5th Cir. 1981).

<sup>112</sup> Section 4.1.3 of the DMMP/EIS.



There are at least two apparent ambiguities and inconsistencies in this assertion:

1) The term “this” in the last sentence would seem to refer to and dismiss participation by consulting parties in agency consideration of effects of the MMP on historic properties. Such exclusivity seems in conflict with 36 CFR 800.2(d)(3), which states, “The agency official may use the agency's procedures for public involvement under the National Environmental Policy Act or other program requirements in lieu of public involvement requirements in subpart B of this part, *if they provide adequate opportunities for public involvement consistent with this subpart*”.

2) The apparent rationale for excluding consulting parties from participation on the 106 side of the NHPA/NEPA interface—namely, that no determinations of eligibility or effect will result from the MMP—attempts to evade (i) the general intent of 36 C.F.R. §800 to involve the public in general, and consulting parties (especially tribes) in particular, in considering effects on historic properties and, more specifically, (ii) consulting party consultations to determine the area of potential effects (APE) of the establishment and management of BENM and to plan and specify recommended historic property identification and adverse effect avoidance/ reduction strategies and methods.

Moreover, the analysis presented in the BLM’s Summary Report is completely absent from the MMP. There is no discussion included under any of the alternatives in the MMP of impacts to cultural resources located in the APEs developed for the 13 Public Use Sites, no detailed analysis of impacts to cultural resources at the Shay Mountain Vista campground, no detailed analysis of impacts to cultural resources along open climbing routes, no detailed analysis of impacts to cultural resources along the San Juan County OHV route system, and no detailed analysis of site-specific, local, regional, direct, indirect or cumulative impacts to cultural resources. Failure to include this information, and to coordinate NEPA and NHPA review, is arbitrary, capricious and an abuse of discretion.

APE delineation, historic property identification, and adverse effect assessment and avoidance/reduction are all vital to good and actionable MMPs; all require consultation with consulting parties, tribes, and public involvement. BLM and USFS have initiated the Section 106 process via communications with the Utah SHPO, and the process cannot be concluded in the absence of a clear determination by the agency official that the BENM has (i) no potential to cause effects, or (ii) no properties, or (iii) no effects, or (iv) no adverse effects. If there is a lawful basis for the apparent intention on the part of BLM and USFS to conclude Section 106 “because no findings or determinations of eligibility or effect are being made” then this must be explicitly disclosed for public scrutiny and comment prior to finalizing the MMP.

In reaching a determination on how to proceed, BLM and USFS should carefully consider the NEPA-Section 106 Handbook, page 22 of which states, “Section 106 requires both public involvement and consultation with the SHPO and/or THPO and other consulting parties”. The CEQ-ACHP Handbook confirms that any decision to exclude participation by 106 consulting parties must be complemented by wider opening of opportunities for public participation in the NEPA process, something we eagerly await. In particular, page 2 of the Handbook states, “An EIS includes the analysis of the environmental impacts of each reasonable alternative. The relative scope of this analysis depends upon the level of probable effects and the complexity of the proposed alternative, and should be informed by consultation with the SHPO/THPO, affected Indian tribes, and Native Hawaiian organizations under Section 106, *particularly with regard to the potential for large scale properties of religious or cultural significance*”. The controversial nature of proposed government actions is a commonsense basis for broadening and intensifying the level of NEPA analyses, of tribal and stakeholder consultations, and of public involvement. It is never, ever, a lawful basis for limiting or forestalling public participation.

Protestors Friends of Cedar Mesa, Utah Diné Bikéyah, and the National Trust for Historic Preservation are Consulting Parties under Section 106.<sup>113</sup> Each organization objects to BLM’s finding of no adverse effect, based on serious deficiencies in the Section 106 consultation process to date. Formal objections to BLM’s proposed no adverse effect finding will be provided to BLM and Utah SHPO through the 106 consultation process pursuant to 36 C.F.R. § 800.5(c)(2). This objection will trigger the need for additional consultation under NHPA. A Supplemental FEIS will be required that integrates information from such additional consultation into the MMP.

c. BLM failed to meet the requirements to Identify Historic Properties

BLM fell short of its obligation to identify historic properties. BLM conducted a small identification, survey and analysis effort in July of 2019, which resulted in a report dated August 1, 2019.<sup>114</sup> That report identified localized APEs for each of the thirteen Public Use sites, made determinations of eligibility for any site that did not have a previous determination of eligibility for the NRHP, and made determinations of effects. Unfortunately, the results of that report have not been incorporated into the MMP.<sup>115</sup> This is also the type of analysis that should be completed for all management actions for which specific locations are known. Because this analysis was not completed for all such locations and because the analysis was not incorporated into the MMP/FEIS, the conclusions in the MMP/FEIS are unsupported factually and made prematurely.

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<sup>113</sup> Archaeology Southwest submitted a request to be recognized as a formal Consulting Party under the Section 106 process. No response to that request was ever received.

<sup>114</sup> BLM, Summary Report, 2019.

<sup>115</sup> Additionally, the findings of that report have not been made available for review and comment during the Section 106 process in a manner that allows consulting party input to inform either the NHPA or NEPA review process. Proceeding with the MMP without this information is arbitrary, capricious and an abuse of discretion.

In addition, BLM documented in the *Summary Report* that a pedestrian survey at one of the Public Use sites was merited but the results of that survey are not included in the MMP/FEIS analysis. Moreover, although thirteen localized APEs were identified, survey was conducted only at the Butler Wash developed roadside trail. The rationale provided in the *Summary Report* for not conducting survey at the other proposed Public Use sites is inadequate, arbitrary, and capricious.<sup>116</sup>

d. BLM Failed to adequately analyze and consider Impacts to Cultural Resource

Visitation and Public Use - In the Section 106 process, BLM has argued that simply designating “Public Use” sites will not lead to a substantial increase in visitation to those sites (or to sites in their vicinity) and, therefore, will not create adverse effects on nearby cultural resources.<sup>117</sup> This directly contradicts statements made by BLM in the MMP. There, BLM states that “[t]he designation of the BENM is anticipated to increase recreational visitation, including visitation at cultural resource sites, in the Planning Area.”<sup>118</sup> Additionally, “[e]vidence from previous National Monument designations suggests that managing public land as a National Monument raises the profile of the area to potential visitors and increase visitation and visitor spending in the region.”<sup>119</sup>

BENM is already experiencing an increase in visitation caused by its designation as a National Monument. Visitation is likely to continue to increase, and sites that have already been publicized as Public Use sites as part of the NEPA process (a process that is receiving more publicity than a standard planning process due to the legal controversy around the Bears Ears revocation), are likely already experiencing adverse effects from increased visitation. In sum, BLM is claiming in the MMP/FEIS that visitation *will* increase and claiming under NHPA that visitation will *not* increase. Claiming that visitation will not increase under NHPA is one of the bases for BLM’s determination of no adverse effect. This inconsistency is arbitrary, capricious and an abuse of discretion.

OHV Decisions - The MMP also violates the NHPA by failing to adequately consider the impacts of its OHV decisions on historic properties. BLM must comply with the Section 106 process for each “undertaking” that may affect historic properties. An “undertaking” is defined as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.”<sup>120</sup> Making decisions about OHV routes on public land falls squarely within the four corners of this definition. Moreover, even OHV use on “existing” routes may cause direct as well as indirect

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<sup>116</sup> *Id.* pg 3.

<sup>117</sup> Letter from Gary Torres (Field Manager, BLM) and Ryan Nehl (Forest Supervisor) to Josh Ewing (FCM), *Finding of No Adverse Effect for the Bears Ears National Monument Management Plan*, August 2, 2019, page 8.

<sup>118</sup> BLM and USFS, *BENM MMP/FEIS*, 2019, section 3.5.2.2.5, page 3-13.

<sup>119</sup> *Id.* Sec. 3.16.2, page 3-78.

<sup>120</sup> 36 C.F.R. § 800.16(y).

effects on cultural resources. BLM must comply with Section 106 by considering potential adverse effects to cultural resources, and taking action to avoid, minimize or mitigate such adverse effects, for resources along all OHV routes prior to finalizing the MMP. However, BLM failed to do so in the MMP, thereby violating the NHPA.

## **VI. The MMP Violates the Archaeological Resources Protection Act by Failing to Include a Detailed Cultural Resource Survey Plan**

The MMP fails to identify which areas BLM would prioritize for inventory and lacks a schedule for completing the inventories. Section 14 of the Archaeological Resources Protection Act (ARPA) is unequivocal here—BLM must develop a plan and schedule for “surveying lands that are likely to contain the most scientifically valuable archaeological resources. . . .”<sup>121</sup> The MMP’s future plan to prepare a cultural resources plan in no way satisfies the discrete requirements of Section 14.

## **VII. The Monument Management Plan is Inconsistent with Federal Land Policy Management Act**

- a. The MMP fails to appropriately recognize the multiple values of lands with wilderness characteristics

The proposed MMP identified 101,497 acres as having wilderness values or Lands with Wilderness Characteristics (LWC). Managing for wilderness values will ensure lasting conservation of the objects and values identified in the proclamation. Unfortunately, the MMP fails to manage any of the over 100,000 acres for wilderness characteristics.<sup>122</sup> The MMP is clear that the agency has prioritized other uses over the protection of wilderness qualities. The agency acknowledges that “managing lands with wilderness characteristics for multiple uses...could diminish wilderness characteristics over time.”<sup>123</sup>

There is little discussion of how BLM determined to favor and prioritize other uses over the protection of LWC. This is inconsistent with FLPMA’s mandate for BLM to protect land from “unnecessary or undue degradation.”<sup>124</sup>

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<sup>121</sup> 16 U.S.C. § 470mm.

<sup>122</sup> See Proposed MMP 3-23.

<sup>123</sup> *Id.* at 3-25.

<sup>124</sup> 43 U.S.C. § 1732(b).

b. The MMP fails to protect Areas of Critical Environmental Concern

Areas of Critical Environmental Concern (ACECs) are established to “protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources, or other natural systems or processes.”<sup>125</sup> FLPMA’s requirement that BLM “give priority” to designation and protection of ACECs is not nullified or diminished by monument designation.<sup>126</sup> For areas where ACEC and National Conservation Lands overlap, BLM must apply and manage the resources according to the more restrictive conservation standard.<sup>127</sup>

In developing land use plans, FLPMA requires BLM to “*give priority* to the designation and *protection* of areas of critical environmental concern.”<sup>128</sup> In other words, even though BLM must manage the monument to protect the objects and values as set out in the proclamation, it must nevertheless prioritize protection of ACECs within the monument boundaries as well.

The 2008 Monticello RMP includes three ACECs within the BENM Planning Area (*e.g.*, San Juan River, Lavender Mesa, and Shay Canyon), which we are glad to see retained in the Proposed MMP. To meet FLPMA’s statutory requirement of prioritizing the protection of ACECs, BLM must apply special management to protect the values identified for each of the ACECs and designated new ACECs as nominated.<sup>129</sup> BLM’s failure to do so is inconsistent with the agency’s duties under FLPMA.

## CONCLUSION

In closing, Protestors respectfully urge you to reconsider the current course and recognize that there are monumental obstacles and shortcomings to the MMP. We urge the agency to halt development of the Bears Ears National Monument Indian Creek and Shash Jaa’ units management plans until the legality of Presidential Proclamation 9681 is resolved by the courts.

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<sup>125</sup> 43 U.S.C. Sec. 1712(a).

<sup>126</sup> 43 U.S.C. § 1712(c)(3).

<sup>127</sup> Because many ACEC focus on the protection of a specific resource that are under threat, at times they can have stronger conservation standards than offered in the National Conservation Lands. When this is the case, the more restrictive conservation standards in the ACEC must be retained in order to protect the resource. This overlapping is common in the National Conservation Lands and BLM has recognized the importance of applying the more restrictive conservation standard in order to protect the resources.

<sup>128</sup> 43 U.S.C. § 1712(c)(3) (*emphasis added*).

<sup>129</sup> The MMP should manage all ACECs as rights-of-way exclusion areas. Currently, the preferred alternative would manage the San Juan River, Lavender Mesa, and Shay Canyon ACECs as ROW avoidance areas — a determination that is at odds with BLM’s own acknowledgment that designating ACECs as ROW exclusion areas best protect the areas’ relevant and important values.



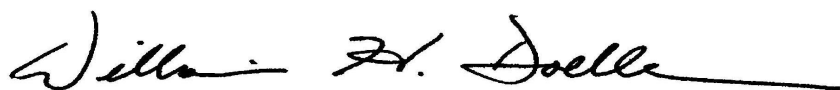
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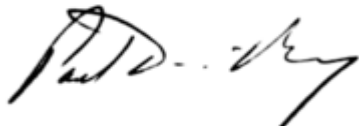
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