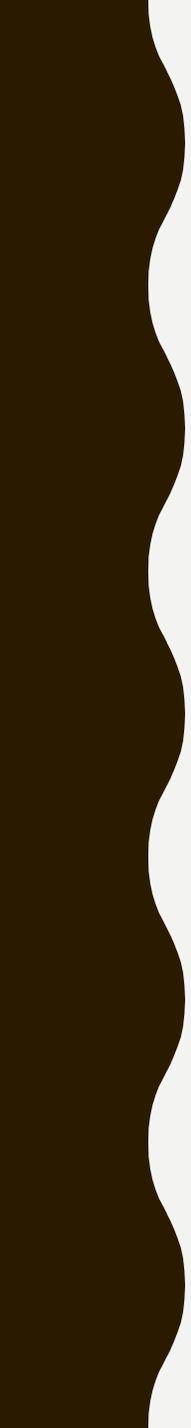


**PUBLIC LANDS,
CULTURAL PROPERTY, AND
INDIGENOUS INTERESTS**

**LEGAL FRAMEWORKS FOR
RESEARCH AND PRACTICE**

Robin Willscheidt
Associate, O'Melveny & Myers
Senior Fellow, Berkeley Art, Law & Finance Project



1. LAYING THE GROUND RULES

2. BUILDING OUR FOUNDATION

3. BEARS EARS: A CASE STUDY

4. SEDIMENTING OUR UNDERSTANDING





1. LAYING THE GROUND RULES

PUBLIC LANDS are home to Indigenous cultural landscapes, sacred sites, traditional use areas, archaeological deposits, and ancestral burial grounds

→ **The federal government's stewardship of these lands**, which have ongoing religious, cultural, archaeological, and historical significance, **intersects deeply with tribal sovereignty, treaty rights, and historic (and ongoing) injustices**

→ Native peoples and Tribes have sovereign and ancestral interests since time immemorial

KEY THEMES

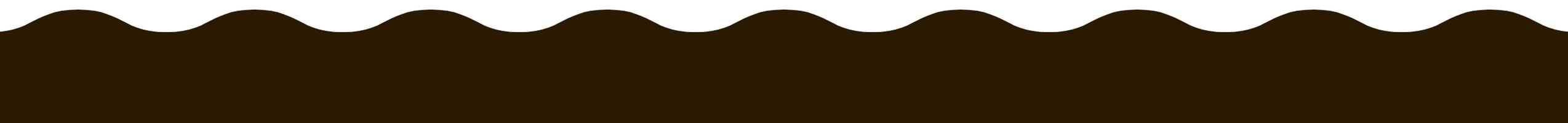
- **TITLE AND CONTROL OVER LANDS**
- **CULTURAL “PROPERTY” AND LIVING CULTURAL LANDSCAPES**
- **SOVEREIGN-TO-SOVEREIGN RELATIONSHIPS (AND TENSIONS)**
- **TRIBAL CO-MANAGEMENT AND INDIGENOUS STEWARDSHIP**

“CULTURAL LANDSCAPE”

“A geographic area, including both natural and cultural resources, that has special significance to an Indigenous tribe due to enduring relationships, traditional practices, stories, and beliefs.”

“Cultural landscapes provide a sense of place and identity; they map our relationship with the land over time; and they are part of our ... heritage and each of our lives.”

“Networks of natural and constructed places perceived and made meaningful by particular human communities that are as critical to archaeological and cultural meaning as singular built structures.”



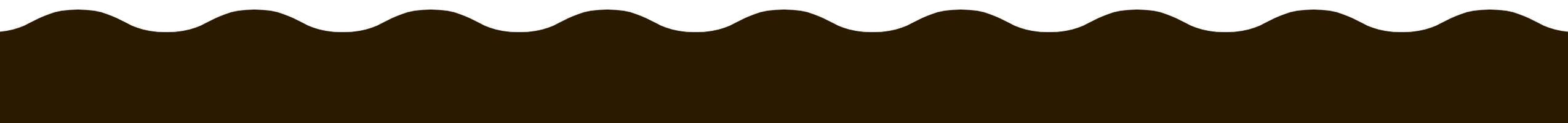
KEY THEMES

- **TITLE AND CONTROL OVER LANDS**
- **CULTURAL “PROPERTY” AND LIVING CULTURAL LANDSCAPES**
- **SOVEREIGN-TO-SOVEREIGN RELATIONSHIPS (AND TENSIONS)**
- **TRIBAL CO-MANAGEMENT AND INDIGENOUS STEWARDSHIP**



2. BUILDING OUR FOUNDATION

SOVEREIGNTY & TRUST RELATIONSHIP

- **TRIBAL SOVEREIGNTY AND GOVERNMENT-TO-GOVERNMENT RELATIONSHIPS**
 - **PLENARY POWER DOCTRINE** (*United States v. Kagama (1885)*, *Lone Wolf v. Hitchcock (1903)*)
 - **FEDERAL TRUST RESPONSIBILITY:** “moral obligations of the highest responsibility and trust” (*Cherokee Nation v. Georgia (1831)*; *Seminole Nation v. United States (1942)*)
- 

JURISDICTIONAL BEDROCK

- **FEDERAL PUBLIC LANDS**

- *Managed by federal agency with different governing statutes, regulations, and management priorities/permitted uses*

- **TRIBAL TRUST LANDS**

- *Indian Country - tribal jurisdiction and cornerstone of sovereignty*

- *Treaty reservations vs. executive order reservations*

- *Fee-to-trust (§ 5 of the Indian Reorganization Act of 1934)*

- **FEE LAND**



NATIONAL HISTORIC PRESERVATION ACT (§106 CONSULTATION) - 1966

- Requires **CONSULTATION** with tribes on federal **UNDERTAKINGS** (projects, licenses, funding) on properties listed or eligible for the National Register of Historic Places
- Established **Tribal Historic Preservation Officers (THPOs)**: designated officials of federally recognized tribes responsible for managing, identifying, and protecting historic and cultural sites on Tribal lands

ARCHAEOLOGICAL RESOURCES PROTECTION ACT (ARPA) - 1979

- Protects archaeological sites and objects on **PUBLIC AND INDIAN LANDS**
- Mandates **permits** for excavation, **prohibits looting**, and **imposes strict penalties** (including up to \$100k and imprisonment)

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA) - 1990

- Governs **REPATRIATION** of human remains, funerary objects, sacred objects and objects of cultural patrimony (1) excavated or removed from federal or Indian lands after 1990 and (2) in collections of institutions that receive federal funds (museums, universities, federal agencies)
- **Requires:** inventory, consultation, evaluation of requests for repatriation or claims for disposition, public notice prior to disposition or repatriation

AMERICAN ANTIQUITIES ACT - 1906

- Permits the president to designate objects of “historic and scientific interest”—and the lands that encompass them—**NATIONAL**

MONUMENTS

FEDERAL RECOGNITION

TRIBAL INTERESTS ON FEDERAL LANDS

- **TREATY-RESERVED RIGHTS**

- **KEY CHALLENGES**

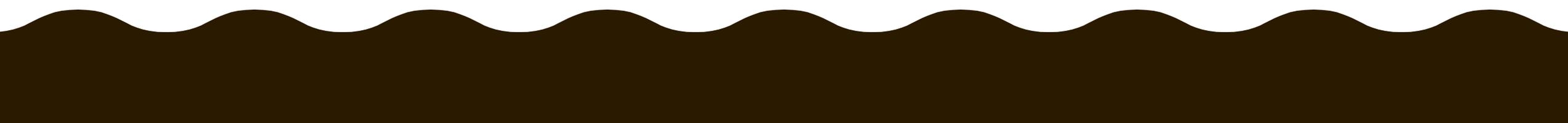
- *Permitting authority and process*

- *Consultation ≠ consent*

- *Disclosure requirements*

- *Access – Indigenous and Public*

- **INTERGOVERNMENTAL AGREEMENTS**



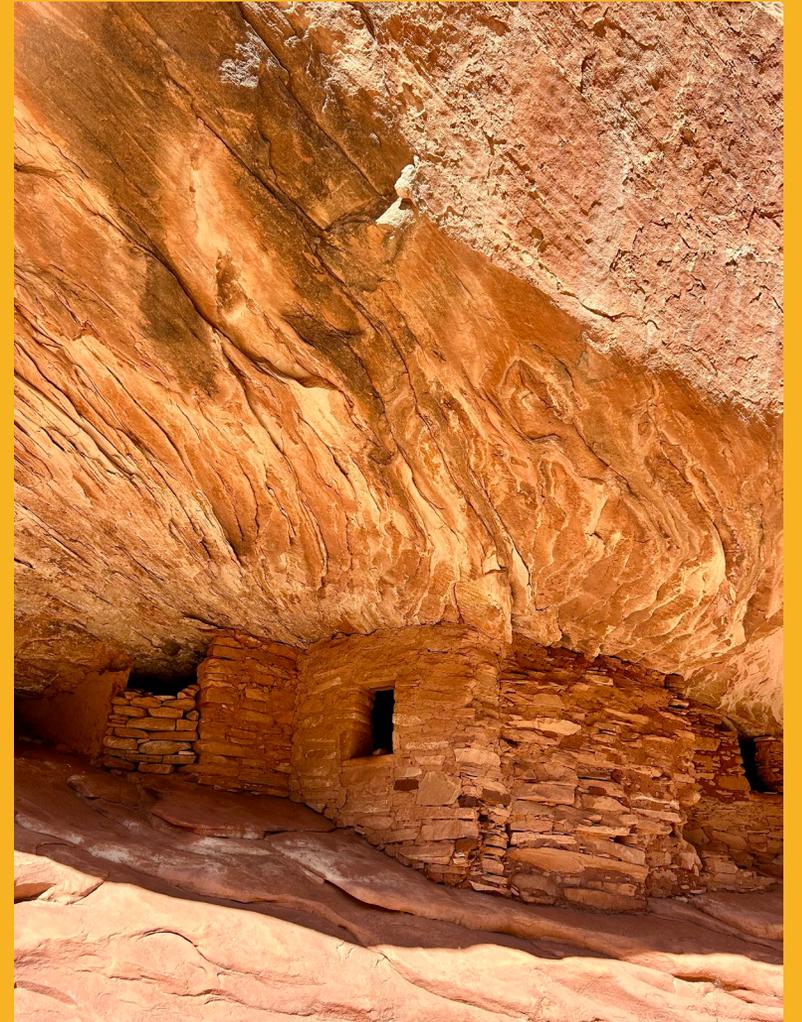


3. BEARS EARS: A CASE STUDY

AMERICAN ANTIQUITIES ACT OF 1906

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





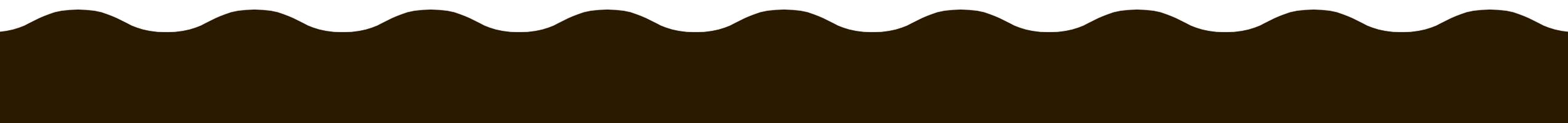
BEARS EARS NATIONAL MONUMENT



BEARS EARS INTER-TRIBAL COALITION

AVI KWA AME – SPIRIT MOUNTAIN

**BAAJ NWAAVJO I'TAH KUKVENI-
ANCESTRAL FOOTPRINTS OF THE
GRAND CANYON NATIONAL
MONUMENT**



RESOURCE MANAGEMENT PLAN

- **FORMALIZED** tribal advisory role
- **STRUCTURAL**, not episodic, involvement
- Embeds **TRADITIONAL ECOLOGICAL KNOWLEDGE** into planning decisions
- Clear recognition of **CULTURAL LANDSCAPES** and landscape-scale management

Trump Slashes Size of Bears Ears and Grand Staircase Monuments

Trump Orders Largest National Monument Reduction In U.S. History

Trump shrinks Utah monuments in historic move

GARFIELD COUNTY

“[t]he Act does not authorize the president to draw boundaries around an enormous land area and then stitch together hundreds of items and features within those boundaries to try to reverse engineer a landscape-scale national monument.”

→ Sites, landmarks, and “objects” **cannot be “protected” under the Act** absent preservation of the cultural landscape that surrounds them.

“President Biden’s judgment in drafting and issuing the Proclamations . . . is **not an action reviewable by a district court.**”





**4. SEDIMENTING
OUR
UNDERSTANDING**

KEY THEMES

- **TITLE AND CONTROL OVER LANDS**
- **CULTURAL “PROPERTY” AND LIVING CULTURAL LANDSCAPES**
- **SOVEREIGN-TO-SOVEREIGN RELATIONSHIPS (AND TENSIONS)**
- **TRIBAL CO-MANAGEMENT AND INDIGENOUS STEWARDSHIP**