

To: Foss, Scott[sfoss@blm.gov]
Cc: Shimada, Kenshu[KSHIMADA@depaul.edu]
From: Polly, P. David
Sent: 2017-03-30T11:04:14-04:00
Importance: Normal
Subject: Re: Executive Order, Promoting Energy Independence
Received: 2017-03-30T11:04:24-04:00

it's the year for overload.... thanks!

On 30 Mar 2017, at 11:02 AM, Foss, Scott <sfoss@blm.gov> wrote:

I don't mean to overload you, but the Yoo & Gaziano analysis is out today. It contradicts the Arnold & Porter conclusion. (attached)

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On Thu, Mar 30, 2017 at 9:18 AM, Foss, Scott <sfoss@blm.gov> wrote:

Good observation.

On Thu, Mar 30, 2017 at 9:16 AM, Polly, P. David <pdpolly@indiana.edu> wrote:

The Secretary moves faster on energy than on fossil protection! Thanks for the pointer.

On 30 Mar 2017, at 9:13 AM, Foss, Scott <sfoss@blm.gov> wrote:

This Secretarial Order (3349) goes along with the EO on "Energy Independence" that was signed on Tuesday. It sort of completes the set.

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On Thu, Mar 30, 2017 at 8:18 AM, Foss, Scott <sfoss@blm.gov> wrote:

Hi David,

I sent Kenshu a list of bills (with links) in the 115th Congress that, if enacted, could affect paleo resources. Many of those could have implications for Bears Ears. This EO is about energy extraction, but it does call for actions to be lawful, so I don't think it would directly affect work in monuments, but would definitely affect paleontological resources outside and near monuments. Extraction activities put pressure on paleo resources, but also provide the opportunity to discover and access paleo resources (when we have the ability to be part of the process).

With respect to Bears Ears there is an interesting conversation going on right now (see two articles, one

appended, one attached).

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AN E&E NEWS PUBLICATION

NATIONAL MONUMENTS

Grijalva baits Bishop on Antiquities Act

Jennifer Yachnin, E&E News reporter

Published: Wednesday, March 29, 2017

Arizona Rep. Raúl Grijalva, the top Democrat on the House Natural Resources Committee, is challenging Chairman Rob Bishop to introduce legislation to reform the Antiquities Act, accusing the Utah Republican of attempting to dismantle national monuments via "a behind-the-scenes legal strategy."

In a statement issued yesterday, Grijalva took aim at his counterpart, who has been a vocal critic of the 1906 law that allows presidents to designate land as monuments to protect objects of historic or scientific interest.

Along with other members of Utah's all-GOP delegation, Bishop has argued that the Antiquities Act can be used both to create and dismantle such sites, including the recently created 1.35-million-acre Bears Ears National Monument in southeast Utah.

Both Bishop and Sen. Mike Lee (R-Utah) are set to speak at an event in Washington, D.C., tonight hosted by the Pacific Legal Foundation and American Enterprise Institute on that subject.

The event, titled "Presidential Authority to Revoke or Reduce National Monument Designations," will focus on a new paper by AEI legal scholar John Yoo and PLF's Todd Gaziano.

In his statement, Grijalva criticized the GOP-aligned briefing and noted that the Natural Resources Committee has not held a hearing on the status of any monuments since Bishop became chairman in 2015.

"We can disagree about whether our federal lands should be protected or turned over to extraction industries, but let's do our jobs and have that debate with our colleagues about real legislation," Grijalva said.

Although Bishop has previously sponsored or co-sponsored measures that would prevent new national monuments in Utah or require congressional approval for such monuments, he has yet to do so in this session. Bishop did, however, author a change to the House rules this year that designates federal land transfers as cost-free (*E&E Daily*, Jan. 6).

"Chairman Bishop has the power to introduce a bill that puts his ideas into practice, discuss its merits and hold a vote whenever he chooses," Grijalva continued. "Rather than trying to convince a small handful of people to support a behind-the-scenes legal strategy, let's see what happens when he asks our colleagues to vote against our country's public lands when the cameras are rolling."

A committee spokesman declined to comment on Grijalva's statements.

Although Congress may opt to abolish monuments via legislation, it has done so fewer than a dozen times. It has, however, converted about 50 national monuments to national parks or preserves (*Greenwire*, Feb. 8).

While both state and federal GOP lawmakers from Utah have criticized the Bears Ears monument — as well as the older Grand Staircase-Escalante National Monument created by President Clinton — their aim has largely been to urge President Trump to rescind the designations for those sites or reduce their size.

A handful of monuments have been reduced by previous commanders in chief, but to date, no president has sought to undo a monument's status. Conservationists also suggest that any move by Trump to reduce a monument's boundaries would spark a legal challenge, asserting that the president does not have authority to amend monuments, but only to create them.

But in a December *op-ed* in *The Wall Street Journal*, published shortly after President Obama designated the Bears Ears site, Yoo and Gaziano argued that because Congress has granted power to presidents to create monuments, that means a commander in chief can undo those designations.

"After studying the president's legal authority, we conclude that he can rescind monument designations — despite the cursory but contrary view of Attorney General Homer Cummings in 1938," Yoo and Gaziano wrote. "While Congress could limit it further, the law's text and original purposes strongly support a president's ability to unilaterally correct his predecessors' abuses."

The duo point to Congress' ability to rescind regulations issued by the executive branch, as well as a president's ability to remove appointed officials even after they have been approved by the Senate.

"Similarly, presidents have the constitutional authority to terminate a treaty, even though they need Senate advice and consent to make it," Yoo and Gaziano wrote.

The pair's new paper on whether Trump can amend or rescind monuments is under embargo until this evening's event.

But Grijalva pointed to an [analysis](#) published earlier this month by law firm Arnold & Porter that argues presidents have not been given authority to undo monuments.

"The Antiquities Act and subsequent legislation reserved to Congress, which has Constitutional authority over public lands, the sole power to revoke such a designation," the analysis states.

The analysis highlights the Federal Land Policy and Management Act, enacted in 1976, which reserved for Congress "the authority to modify and revoke withdrawals for national monuments," while also arguing that removing monuments included in the National Park System would violate federal laws that prohibit derogation of the park system.

The firm also criticized Yoo and Gaziano's interpretation of the Antiquities Act, writing that allowing a president to rescind a monument would be equivalent to "a usurpation of congressional powers by the Executive Branch."

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E&E News
 122 C Street NW 7th Floor Washington, DC
 20001
 Phone: 202-628-6500 Fax: 202-737-5299
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Scott E. Foss, PhD
 BLM Senior Paleontologist
 20 M St. SE, Suite 2134, Washington, DC 20003

sfoss@blm.gov, 202-912-7253

On Wed, Mar 29, 2017 at 3:15 PM, Polly, P. David <pdpolly@indiana.edu> wrote:

Sigh. Among many other questions, do you think this will put pressure on Bears Ears, Grand Escalante, or other areas that have paleo resources?

On 29 Mar 2017, at 2:49 PM, Foss, Scott
<sfoss@blm.gov> wrote:

Just out today:

<https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economy-1>

<Yoo & Gaziano 2017, Presidential Authority to Revoke or Reduce National Monument Designations.pdf><Yoo & Gaziano 2017, Presidential Authority to Revoke or Reduce National Monument Designations, summary.pdf>