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From: **Spotts, Richard** <rspotts@blm.gov>
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(b) (6)

FYI - If you have not already seen them, you may find the two related articles below of interest.
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NATIONAL MONUMENTS

Legal experts argue Trump has power to abolish sites

Jennifer Yachnin, E&E News reporter

Published: Wednesday, March 29, 2017.

Conservative legal scholars today released an analysis arguing that President Trump has the authority to abolish large national monuments. Photo by Phil Taylor.

President Trump could move to abolish national monuments — including the recently created Bears Ears site in southeastern Utah — if his administration determines the areas are "illegally large," according to a new analysis of the Antiquities Act unveiled today by conservative scholars.

The Pacific Legal Foundation's Todd Gaziano and American Enterprise Institute legal scholar John Yoo are scheduled to review their new paper, "Presidential Authority to Revoke or Reduce National Monument Designations," at an event in the Dirksen Senate Office Building tonight.

In the 26-page [analysis](#), Yoo and Gaziano also seek to break down past legal advisories that found that while the Antiquities Act of 1906 permits presidents to designate national monuments to protect scientific or historic artifacts, it does not allow commanders-in-chief to revoke the status of monuments.

"An attorney general opinion in 1938 concluded that the statutory power granted to the president to create national monuments does not include the power to revoke prior designations," the duo wrote. "We think this opinion is poorly reasoned; misconstrued a prior opinion, which came to the opposite result; and is inconsistent with constitutional, statutory, and case law governing the president's exercise of analogous grants of power."

Echoing a *Wall Street Journal* op-ed the pair wrote in late December, just days after President Obama established the 1.35-million-acre Bears Ears National Monument, Yoo and Gaziano assert that the president maintains a "general discretionary revocation power."

"The Antiquities Act of 1906 grants the president the power to designate national monuments in order to protect historic landmarks and structures," the pair wrote. "We are confident that, pursuant to this power to designate, a president has the corresponding power to revoke prior national monument designations, although there is no controlling judicial authority on this question."

In their conclusion, the pair added: "This power is at its height when prior designations were made illegally or in contravention of the act's mandate that designations be reasonable in size."

Although past presidents have reduced the size of some monuments, no commander-in-chief has

ever sought to repeal the designation of one of his predecessors.

Utah Rep. Rob Bishop (R), chairman of the House Natural Resources Committee and a vocal opponent of the Bears Ears monument who has urged Trump to rescind its status, has highlighted the reduction of the Navajo National Monument in 1912 as an example of the president's authority (*Greenwire*, March 20).

But conservationists have argued that even though older reductions, such as cuts in the size of the Olympic National Monument or Grand Canyon II National Monument, have never been challenged in court, a move by Trump to do so would likely spur legal action.

Yoo and Gaziano argue, however, that even if a president does not have a "general discretionary revocation power," Trump could seek to revoke monuments by declaring them overly large.

"The Congress that enacted the Antiquities Act did not intend monuments of that size to be established by presidential designation," the pair wrote, asserting that early monuments tended to be 5,000 acres or less.

They later added: "If a president makes a credible determination, based on the facts and a reasonable interpretation of the act, that some former monuments are illegally large relative to the original 'object' supposedly being protected, he could declare that the initial designation was void, especially if there is no easy way to make it lawful by severing discrete parcels of land."

But Arizona Rep. Raúl Grijalva, the top Democrat on the House Natural Resources panel, offered a pre-emptive rebuttal to Yoo and Gaziano's arguments yesterday, pointing to an analysis published earlier this month by the firm Arnold & Porter.

"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* says (*E&E Daily*, March 29).

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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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