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<http://bit.ly/2xhYvWG>

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1. Analysis points out what Zinke failed to tell Trump

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President Wilson cut 305,325 acres out of the Mount Olympus National Monument in Washington state, but Congress later protected that land, making it part of Olympic National Park. B. Bell/National Park Service

When Interior Secretary Ryan Zinke recommended that President Trump roll back the boundaries of a handful of national monuments last month, he pointed to the previously 18 instances in which presidents had struck land from memorials — more than 460,000 acres of federal land.

But a new analysis from conservation lobbyist Andy Kerr suggests Zinke's comparison omitted a key fact: The bulk of that acreage remains under strict protections, with the majority now under the control of the National Park Service.

"The secretary has mentioned on numerous occasions there are 18 times that presidents shrunk national monuments — not that any of them are litigated — so I think it's important to know the details: where and why these monuments shrunk," Kerr told E&E News.

In his analysis, Kerr found much of the former monument acreage remains protected land.

"Fortunately, most — but certainly not all — of the unproclaimed acreage was reproclaimed by a later president or otherwise protected by an act of Congress," Kerr wrote.

Zinke advocated the reduction of six national and marine monuments in a private report to Trump issued late last month.

Copies of the document leaked to reporters this week suggest significant changes could be made to Utah's Grand Staircase-Escalante and Bears Ears national monuments, as well as the Cascade-Siskiyou National Monument in Oregon and California, Gold Butte National Monument in Nevada, and Rose Atoll and Pacific Remote Islands marine national monuments (Greenwire, Sept. 18).

In his report, Zinke criticized the creation of large-scale "landscape" monuments under the Antiquities Act — which empowers presidents to designate monuments on federal land with historic, cultural or scientific interest — as well as arguing the sites have had negative impacts on activities like grazing and infrastructure maintenance, and prohibited extraction activities in Grand Staircase-Escalante in particular.

As he advocated for reducing monuments, Zinke pointed to past presidents' actions to shrink boundaries, in particular highlighting a series of cuts to the then-Mount Olympus National Monument in Washington state.

"The Act has been used to designate or expand national monuments on Federal lands more than 150 times. It has also been used at least 18 times by Presidents to reduce the size of 16 national monuments, including 3 reductions of Mount Olympus National Monument by Presidents Taft, Wilson, and Coolidge that cumulatively reduced the size of the 639,200-acre Monument by a total of approximately 314,080 acres," Zinke wrote.

But in Kerr's analysis, which reviews the original proclamations and reductions of the affected national monuments, the conservationist noted that the largest reduction — 305,325 acres cut by President Wilson — was later reinstated by Congress as part of Olympic National Park.

"That's all back in the park," Kerr said, noting the park unit is more than 50 percent larger than the original monument. "The park is nearly a million acres now."

The 1938 adoption of that area into the park system also ended commercial use of its forests, according to a 2013 report from Interior.

"The Park Service planned to manage the new park as a wilderness reserve as much as possible, preserving its great forests, as well as its impressive array of peaks, glaciers, rivers, lakes, and wildlife, in their primitive state," says the report, which sought to list the Olympic National Park Historic Trails District on the National Register of Historic Places.

"Though the agency managed the park differently than its predecessor," the report says, "it continued many of the Forest Service's plans and projects, and it would engage in its own development projects for visitors and management programs."

Kerr told E&E News he hopes his analysis will assist conservationists and others who have vowed to challenge any attempt by the Trump administration to alter the monuments without congressional action.

Democratic lawmakers and environmentalists, including Kerr, argue that the Antiquities Act does not grant the president the authority to reduce monuments, only to create or expand sites.

Although past presidents have done so, none of those decisions were opposed.

"I think what Zinke is proposing to Trump is something that's unprecedented in terms of scope and magnitude," Kerr said.

"Congress has the power to do anything it wants," he added. But since the Antiquities Act's enactment in 1906, Congress has opted to dismantle fewer than a dozen monuments.

"The fundamental question here is: Can the president shrink or weaken national monuments' proclamations?"

<http://bit.ly/2jOmDdV>

2. Whistleblower on climate policy wins award for courage

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Published: Thursday, September 21, 2017



Joel Clement. Special to E&E News

Interior Department whistleblower Joel Clement today is receiving the Callaway Award for Civic Courage, keeping the spotlight on a case that's already incited several investigations and drawn considerable political attention.

In an early evening ceremony at the Carnegie Institution for Science, Clement is scheduled to accept the award established in 1990 by actor and philanthropist Joe Callaway and presented annually by the Shafeek Nader Trust for the Community Interest.

"I hope the recognition I receive for blowing the whistle on the Trump Administration inspires others within the federal civil service to do the same; the continued health and safety of Americans depends upon it," Clement said in a statement.

The award credits Clement for having exposed how Interior allegedly used "personnel reassignments to shut down climate change programs, muzzle scientists and undermine subject matter experts" (*E&E News PM*, Sept. 19).

Prompted by Democrats on the Senate Energy and Natural Resources Committee, Interior's Office of Inspector General is investigating the department's decision in June to reassign dozens of senior career employees.

The reassigned Senior Executive Service staffers included the Bureau of Land Management state directors in Colorado, Alaska and New Mexico as well as Clement, a former climate policy adviser.

Clement was shifted into a job as senior adviser for the Office of Natural Resources Revenue, which is the agency responsible for collecting and dispersing royalty income from oil, gas and mining companies.

The IG inquiry is into whether Interior leaders acted properly in making reassignments. A separate investigation is underway by the independent U.S. Office of Special Counsel, focusing on Clement's claim of retaliation.

Interior officials characterize the reassignments as good management practice, and in keeping with the regulations that permit transfers of the highly paid SES personnel.

"Personnel moves among the Senior Executive Service are being conducted to better serve the taxpayer and the Department's operations," the department said in a statement.

The other individuals being given the Callaway Award today are Megan Rice, Michael Walli and Greg Boertje-Obed, who the award givers describe as "courageous activists who waged peace against nuclear weapons by taking their non-violent message of conscience inside the highly-guarded Y-12 Weapons Complex."

The three anti-nuclear activists served about two years in prison for breaking into a storage bunker at the Oak Ridge, Tenn., complex.

The Callaway Award comes with a \$2,500 check. Clement said he is donating the money to two organizations to help with the response to the hurricanes in the Caribbean: the Community Foundation of the Virgin Islands and the Fundación Comunitaria de Puerto Rico.

<http://bit.ly/2fE4QSd>

3. Nominee for top lawyer vows review of major habitat case

Michael Doyle, E&E News reporter

Published: Thursday, September 21, 2017



Ryan Nelson. American Bar Association

The Interior Department's top lawyer nominee may soon be involved in efforts by Western lawmakers to undo a key appellate court ruling that critics contend fuels environmental lawsuits and hinders forest managers.

What happens with that effort could steer endangered species protections in the Trump era.

"If confirmed, I would look forward to reviewing the *Cottonwood* opinion and any potential legal avenues to expedite the planning process," Ryan Nelson said in a written response to Sen. Steve Daines (R-Mont.), referring to 2015 decision for *Cottonwood Environmental Law Center v. U.S. Forest Service*.

The *Cottonwood* decision by the 9th U.S. Circuit Court of Appeals gave the Cottonwood Environmental Law Center legal standing to sue the federal government over a critical habitat designation for the Canada lynx. More broadly, it effectively expanded the Forest Service's and Bureau of Land Management's obligations to consult with the Fish and Wildlife Service on management decisions involving protected species.

Nelson is now awaiting his Senate confirmation vote, following the Senate Energy and Natural Resources Committee's approval of his nomination on a voice vote Tuesday (*Greenwire*, Sept. 19).

Committee members asked the Interior's solicitor nominee 33 written questions following his hearing and prior to the panel's vote. Underscoring its potential significance, the *Cottonwood* decision was the only specific court case to be mentioned.

Daines' framing of the question, moreover, made clear precisely where he wants Nelson's review to end up.

"As solicitor, will you work with me to reverse the *Cottonwood* decision, and will you work with Congress to fight against these obstructionist lawsuits and help land managers get through the planning process to get the work completed on the ground in reasonable time?" Daines asked.

Daines authored the "Litigation Relief for Forest Management Projects Act" that would effectively overturn the 9th Circuit's decision (*E&E Daily*, March 20). The bill currently has three co-sponsors.

A similar bill introduced in the House by Rep. Mike Simpson (R-Idaho) has four co-sponsors.

"For more than a generation, litigation — and the threat of litigation — alongside excessive process and cumbersome red tape, has greatly reduced the volume of timber being harvested from Montana and has obstructed much-needed forest management," Daines wrote to new Forest Service chief Tony Tooke earlier this month (*Greenwire*, Sept. 8).

As solicitor, Nelson would have considerable behind-the-scenes pull, though precisely what that might mean for *Cottonwood* is unclear.

"I expect that the [department] will attempt to dismantle endangered species protections across the board, so his code words about 'reviewing' the decision is nothing more than a green light to the industry special interests that [Interior Secretary Ryan] Zinke and the Trump administration are beholden to," Brett Hartl, government affairs director for the Center for Biological Diversity, said in an email today.

Already, under its acting solicitor, the Interior solicitor's office has withdrawn three legal opinions issued during the Obama administration. These reversals can sound technical, but they have real-world implications.

On Sept. 1, for instance, the solicitor's office withdrew an Obama-era opinion and replaced it with a different conclusion concerning an 1875 law and railroad companies' rights within their rights of way.

The new legal opinion was hailed as progress by Cadiz Inc., a company pursuing a controversial plan to ship water stored beneath California's Mojave Desert through pipes placed along a railroad right of way. Opponents of the Cadiz plan, meanwhile, worry about the opinion's reach.

"It's clear to me that this administration is taking every action it can to allow this misbegotten project to go ahead," Sen. Dianne Feinstein (D-Calif.) said following release of the new solicitor's opinion.

In the legal arena, the most obvious frontal assault against the *Cottonwood* decision has already fallen short. Last October, the Supreme Court declined to review the case.

The flanks, though, might still be vulnerable. A legal brief filed last year by the timber industry contended the 9th Circuit's reasoning on a key part of the decision differed from the reasoning of the 10th U.S. Circuit Court of Appeals in a similar case.

"It is important to resolve this Circuit split because the Ninth Circuit is continuing down the path of an over-expansive reading of agency action that compels non-legally required consultation under the ESA," the industry brief stated, summing up the point Nelson may soon confront.

<http://bit.ly/2wDNbEF>

4. Court punts on fracking authority but may revive rule

Ellen M. Gilmer, E&E News reporter

Published: Thursday, September 21, 2017



An oil and gas well produces on public lands in Utah. Ellen M. Gilmer/E&E News

Federal judges won't resolve a major legal debate over whether the U.S. government has authority to regulate hydraulic fracturing.

The 10th U.S. Circuit Court of Appeals dismissed litigation today over the Obama administration's scuttled fracking rule, declining to weigh the merits of the case in light of the Trump administration's ongoing effort to rescind the regulation.

But the court's decision may have a huge immediate impact: Environmental lawyers say it brings the fracking rule back into effect.

Environmentalists and other advocates had sought a declaration by the 10th Circuit that the Interior Department has the power to oversee fracking on public and tribal lands. The court didn't go that far, but the panel agreed to vacate a lower court's decision that rejected federal fracking authority — wiping that legal precedent from the books.

Vacating the lower court's decision also appears to bring the fracking rule back to life, as the district court's decision was the only legal mechanism holding it back.

The Trump administration is working to unwind the rule, but it hasn't yet finalized a decision.

"We're very pleased with the court's decision," Earthjustice attorney Mike Freeman said in an email. "The Tenth Circuit vacated the lower court's ruling, which means the rule will now take effect. These are long-overdue protections for our public lands, water and public health."

Other lawyers in the case dispute whether the decision actually revives the fracking rule. They note the court's opinion includes language that seems to contemplate the continued "status quo" as having no fracking rule on the books.

Additional legal proceedings to hash out that issue are expected.

The core question of whether the federal government has authority to regulate fracking will remain unanswered for now. The court ruled that the issue was "unfit for review" because of uncertainty surrounding the Trump administration's rollback of the fracking rule.

"It is clearly evident that the disputed matter that forms the basis for our jurisdiction has thus become a moving target," Judge Mary Beck Briscoe, a Clinton appointee, wrote for the three-judge panel handling the case.

The Trump administration formally proposed scrapping the Obama rule in July and is expected to finalize its decision soon. It is unclear whether the administration will replace any elements of the rule.

The court noted that deciding the issue now "appears to be a very wasteful use of limited judicial resources."

But the panel ruled that the underlying district court decision must be vacated to prevent it from "spawning any legal consequences," given the lack of appellate court review on the merits.

The parties argued the case in Denver in July (Energywire, July 28).

The decision caps off years of litigation over the fracking rule, which was finalized by Interior's Bureau of Land Management in March 2015. The rule — which set new standards for well construction, wastewater management and chemical disclosure for fracked wells — immediately faced legal challenges from the oil and gas industry, several Western states, and American Indian tribes.

The U.S. District Court for the District of Wyoming quickly blocked the rule from taking effect and ultimately ruled in June 2016 that Interior lacked authority over fracking in the first place. The decision was primarily based on an argument by Wyoming and other states that the Safe Drinking Water Act left U.S. EPA as the sole federal agency in charge of fracking, and that the Energy Policy Act of 2005 subsequently stripped EPA of that authority and left oversight to the states.

Government lawyers have steadfastly countered that the Mineral Leasing Act and Federal Land Policy and Management Act give Interior broad authority to regulate activities on public lands.

The Trump administration has defended its authority over fracking even as it seeks to roll back the fracking rule (Energywire, May 8).

Briscoe was joined in the opinion by Judge Jerome Holmes, a George W. Bush appointee. Judge Harris Hartz, another Bush appointee, concurred with the decision to steer clear of the merits of the case. But he argued that the panel should not have vacated the Wyoming district court's decision.

"Perhaps that is the proper choice," he wrote. "In my view, however, we do not have adequate information to make that determination."

He said the 10th Circuit could have instead remanded the issue to the district court for it to decide whether allowing its 2016 ruling to stand would cause any harm.

Hartz also wrote that he would have decided one merits issue in the case: the complaint from the Ute Indian Tribe that the fracking rule should not have applied to tribal lands.

Interior and BLM did not immediately respond to requests for comment. Lawyers for industry and environmental groups said they are reviewing the decision.

<http://bit.ly/2wKnItT>

5. Solar trade case could fall to 'unbridled' Trump

Zack Colman, E&E News reporter

Published: Thursday, September 21, 2017



A major trade case involving solar technology could fall to the White House for a decision. Ryan Johnson/North Charleston/Flickr

A closely watched decision coming tomorrow could put the fate of the U.S. solar industry squarely in the hands of a White House that's looking to hit China, the looming adversary in the case, on trade.

The International Trade Commission is expected to rule in favor of a pair of solar companies pressing for punitive measures against Chinese firms that they say have unfairly flooded the market with cheap solar cells and modules, according to sources familiar with the case. The panel is short one member, but the companies that brought the petition would win in a split ruling.

The case presents an opportunity for President Trump to capitalize on major policy goals: get tough on China by exerting trade muscle — the administration already is conducting a holistic review of China's trade policy to combat intellectual property theft and other matters — while taking action to buoy U.S. manufacturing, and

perhaps alleviate competition for the coal industry by raising solar prices through tariffs (*Climatewire*, Aug. 15).

The White House would have the final say on what policy to pursue if the ITC finds injury to the petitioners in a case that's pitted free-market advocates and the vast number of installers, solar service providers and others in the industry against manufacturers Suniva Inc. and SolarWorld Americas, both of which have filed for bankruptcy.

An intense round of lobbying is likely to ensue if the ITC finds injury. It would make formal trade remedy recommendations to Trump by Nov. 13, and the White House would make a final decision by Jan. 12, 2018.

Whether a tariff is issued — and at what rate — would become the question for a president who has reportedly instructed advisers to "bring me some tariffs" on China, according to [Axios](#).

Some of the behind-the-scenes jockeying and position moderating is already occurring. A handful of "conservative bigwigs" are trying to persuade the White House to accept a more modest tariff than the 40-cent-per-watt duty on cells and the 78-cent-per-watt floor price for panels that the petitioners are seeking, according to a source.

The Solar Energy Industries Association opposes the bid by Suniva and SolarWorld based on the concern that it could hurt workers if tariffs hike up the cost of solar technology. The group's CEO, Abigail Ross Hopper, has been in contact with the White House, the Commerce Department, the U.S. trade representative and others. Conservative groups like the Heritage Foundation have also voiced concern because of the case's far-reaching nature, as it would impose across-the-board tariffs on solar rather than targeting a specific country or company.

Hopper is preparing for every outcome. While saying she does "not think trade relief is appropriate," Hopper acknowledged SEIA is exploring solutions beyond tariffs to offer before a Sept. 27 deadline for proposals, should the ITC rule in favor of Suniva and SolarWorld.

"We are only even considering remedies that would not harm the petitioners," she said, declining to offer details. "The president has unbridled discretion to do whatever he feels is appropriate."

The petitioners are also exploring additional options, said Tim Brightbill, a lawyer with Wiley Rein LLP who is representing SolarWorld.

"We're trying to seek the best solution that will help solar manufacturers and will help keep demand strong and keep the industry growing as a whole," Brightbill said.

A finding of injury could have significant implications for U.S. solar manufacturing and the supply chain that's evolved as panel prices have plummeted.

Opponents, including SEIA, contend it would raise prices enough to shed jobs for installers, electrical workers and others who constitute the 260,000-person sector.

"In the worst-case scenario, it will further slow and stall an already beleaguered American marketplace, but it won't kill that marketplace," said Michael Dorsey, a partner at ECE North America. "It will kill some jobs, and that will be a function of how high an ultimate rate of a tariff is."

Suniva and SolarWorld contend protective action is justified to preserve U.S. manufacturing of high-tech solar kits and have pushed back against some of their opponents' price increase claims.

"This case is about almost 30 U.S. cell and module manufacturers driven out of business in the last 5 years, leaving only two U.S. companies to stand between China and its proxies from owning the sun," Suniva said in

a statement, referencing a report prepared by ITC staff. "The immediate question before the ITC on September 22nd is whether the injury is real and almost 30 companies killed off in 5 years does not lie."

<http://bit.ly/2xhYvWG>