



Public Employees for Environmental Responsibility

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April 17, 2019

Ms. Mary L. Kendall
Deputy Inspector General
U.S. Department of Interior
1849 C Street, NW
Mail Stop 4428
Washington, DC 20240

Also filed online at: <https://www.doioig.gov/oig-hotline-forms>

RE: Request for Review of Appointment of David Vela as Deputy Director of National Park Service and of Eight Apparent Vacancies Reform Act Violations in Interior Bureaus

Dear Deputy Inspector General Kendall:

I am writing on behalf of Public Employees for Environmental Responsibility (PEER) to request that your office review the legality of a recent National Park Service (NPS) appointment. On April 15, 2019, the NPS installed David Vela as its “Acting” Deputy Director of Operations. This happened through the April 12 appointment made by another NPS Deputy Director, P. Daniel Smith.¹

However, Deputy Director Smith lacks the legal authority to appoint Mr. Vela into that position. Under the Park Service’s foundational statute, only a Senate-confirmed Director can appoint the Deputy Director of Operations position. 54 U.S. Code § 100302(b). Yet, in an all-employees email announcing the Vela appointment, Deputy Director Smith said in making the appointment he was “exercising the authority of the Director.” Yet, Mr. Smith has never himself been appointed as the Director – whether “acting” or otherwise - and President Trump has not named a permanent nominee for that position.

Deputy Director Smith cannot unilaterally assume the “authority of the Director” to select another Deputy and he cannot put “Acting” in front of David Vela’s title to circumvent the

¹ May 12 letter from Smith naming Vela as Acting Deputy Director, online at: https://www.eenews.net/assets/2019/04/15/document_gw_02.pdf.

law's requirements. A January 29, 2019, Order, "Temporary Redelelegation of Authority" from then Acting Secretary of the Interior David Bernhardt allows lesser political appointees such as Mr. Smith to occupy higher jobs, but Section 4 of that Order specifically delegates "only those functions or duties that are not required by statute or regulation to be performed only by the Senate-confirmed official occupying the position." (emphasis added).²

Put simply, one Deputy Director cannot appoint another Deputy Director. Mr. Smith cannot simply put the word 'acting' in front of David Vela's title to evade the law. There is no legal precedent for a political appointee like Mr. Smith, who has never been properly named into the Director position under the Vacancies Reform Act, to use word games like 'exercising the authority of the Director' to claim a power he does not have.

We note that the confusion about the NPS's word games is so rampant that the E&E report on Mr. Vela's appointment repeats the notion that Mr. Smith "will remain in his post as acting director" despite his never being appointed to that post.³

The NPS now, more than halfway through President Trump's term, is run by three Deputy Directors -- one of them (Mr. Vela) "acting" -- but no Director to whom they are deputies. This is the latest in a long line of violations of the Federal Vacancies Reform Act (FVRA) by the Department of the Interior (DOI).⁴ In a report PEER issued last month, *Bernhardt's Bad Actors*, PEER charged then-Acting Secretary David Bernhardt with undermining the constitutional advice and consent power of the U.S. Senate by using similar word games to appoint Mr. Smith and seven other chief officials within his sprawling Department.⁵

PEER's asks the IG to examine their legality as well. Interior now has the dubious title of leader of the Federal agencies in circumventing the law in appointing bureau chiefs. The DOI has eight quasi-acting officials in charge of most of its major bureaus. These unconfirmed political appointees manage more than 450 million acres of the public's frequently-visited national parks, wildlife refuges, monuments, and rangelands, covering almost one-fifth of the nation's land area. The eight DOI political appointees are in violation of FVRA, which allows for "acting" officials, but only under limited conditions, generally for a maximum of 210 days. None of the DOI officials comply. The result has been extensive evasion of the requirement for Senate advice and consent before filling those positions, all of which require Senate confirmation under the law.

² Secretary (Acting) of the Interior, Order No. 3345, Amendment No. 24, "Temporary Redelelegation of Authority for Certain Vacant Non-Career Senate-Confirmed Positions," Jan. 29, 2019, at: https://www.doi.gov/sites/doi.gov/files/elips/documents/so_3345_amendment_24_signed.pdf. Note that Sec. 5 of the Order extends the "Redelelegation" for four months, through May 30, 2019, which is the longest such extension of the seven such Orders, which date back to at least November of 2017.

³ R. Hotakainen, "Trump's nominee to lead NPS lands new job" E&E News, April 15, 2019, online at: <https://www.eenews.net/greenwire/2019/04/15/stories/1060165353>.

⁴ 5 U.S.C. § 3345 et seq. The word "reform" is in FVRA's title specifically because earlier Presidents had tried various ways to avoid the Senate advice and consent requirement from time to time.

⁵ PEER report online at: https://www.peer.org/assets/docs/doi/3_18_19_Bad_Actors_report.pdf.

As explained fully in the *Bad Actors* report, Mr. Bernhardt and the President are detouring around the Appointments Clause in Article II, Section 2, which mandates (emphasis added):

[The President] *by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.*

This give and take between the two branches is an essential check and balance. The President is allowed to appoint acting officers, but only temporarily. However, within DOI now, these eight listed key positions have been long-occupied by non-Presidentially appointed and non-Senate confirmed “politicals” fully performing in the roles of the offices, but who merely have not been given the “acting” title:

- **Solicitor**, by Daniel Jorjani, Principal Deputy Solicitor
- **Assistant Secretary for Policy, Management and Budget**, by Susan Combs, Senior Advisor to the Secretary
- **Assistant Secretary for Fish and Wildlife and Parks**, by Andrea Travnicek, Principal Deputy Assistant Secretary for Fish and Wildlife and Parks
- **Director, Bureau of Land Management**, by Brian Steed, Deputy Director for Policy and Programs
- **Director, National Park Service**, by P. Daniel Smith, Deputy Director
- **Director, Office of Surface Mining Reclamation and Enforcement**, by Glenda Owens, Deputy Director
- **Director, U.S. Fish and Wildlife Service**, by Margaret Everson, Principal Deputy Director
- **Special Trustee for American Indians**, by Jerold Gidner, Principal Deputy Special Trustee

All of those DOI roles require Senate confirmation. None have it, going back two and one-quarter years to the Trump Inauguration on January 20, 2017.

Please note that this request is an updated, expanded request beyond our February 12, 2018 letter to you that sought a similar review.⁶ The reasons given in that letter still apply and are incorporated herein. Additionally, PEER’s *Bernhardt’s Bad Actors* report provides more current and detailed analysis; its analysis is incorporated herein also. We bring your particular attention to the fact that the Government Accountability Office (GAO) maintains a website that bolsters the arguments PEER is making: that those eight positions are occupied by “acting” officials.⁷ GAO has informed PEER it is not in a position to rule on

⁶ PEER letter to Deputy IG Mary L. Kendall, online at: https://www.peer.org/assets/docs/doi/2_12_18_IG_Complaint.pdf .

⁷ GAO, Federal Vacancies Reform Act webpage and database “Search Federal Vacancies for Current Administration” <https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act>; search under Department of the Interior. “Vacancy Status” and select “Vacant Positions with Acting Official” .

the legality of these acting officials' roles. However, the IG can and should investigate the potential illegality of those Interior appointments under the Federal Vacancies Reform Act, the U.S. Constitution Appointments Clause and other laws.

In conclusion, PEER is calling on the IG to finally put an end to the word games. Your office should: a) reject David Vela's illegal appointment by Deputy Director Smith and b) find the eight delegated officials listed above to be acting in violation of FVRA. The widespread lapse of properly appointed and confirmed senior leadership in core Interior bureaus necessitates your immediate action to prevent the major loss of effectiveness in the management of the Federal lands, resources, personnel and other vital interests involved.

If your office needs any additional information about this matter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter T. Jenkins". The signature is fluid and cursive, with a large initial "P" and "J".

Peter T. Jenkins, Senior Counsel
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