



Public Employees for Environmental Responsibility

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May 24, 2019

Hon. David Bernhardt
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

FEDERAL EXPRESS

Re: request for immediate action regarding violations of the Federal Vacancies Reform Act in six BLM Greater Sage-Grouse Resource Management Plan Amendments

Dear Secretary Bernhardt,

According to the Federal Land Policy and Management Act, the position of Director of the Bureau of Land Management (BLM) in your Department requires Senate confirmation, after advice and consent.¹ For the last 18 months, the Director position has been carried out by Brian Steed, Deputy Director for Policy and Programs, who has not had Senate confirmation.² PEER has uncovered at least six major cases in which Deputy Director Smith performed the role of Director in violation of Federal law because of his lack of either being confirmed by the Senate or properly-appointed by President Trump as the “acting” Director under the Federal Vacancies Reform Act (FVRA), 5 USC §3345(a). PEER, whose membership includes a large number of current and former BLM employees as well as other stakeholders, urges you to remedy these violations immediately.

¹ 43 USC §1731(a)

² Redelegation Order Amendment 15, at: <https://www.documentcloud.org/documents/4627065-15-January-24-2018-SO-3345-A15-Temporary.html> . Mr. Steed recently announced his resignation from BLM, apparently to be effective by May 31. Yachnin, J., 2019. “Top BLM official heads for the exit,” *E&E News*, Apr. 30, at <https://www.eenews.net/greenwire/stories/1060247011> . Note the article refers to him as BLM’s “de facto acting director”. Then, on May 11, you issued a new Redelegation Order, now in effect until July 31: https://www.doi.gov/sites/doi.gov/files/elips/documents/s0_3345a26_-_temporary_redelegation_of_authority_for_certain_vacant_non-career_senate_confirmed_positions.pdf . In it you dropped out Mr. Steed for the BLM Director and substituted in Mr. Casey Hammond, Principal Deputy Assistant Secretary - Land and Minerals Management. Steed’s authority was first delegated by Secretary Zinke on November 14, 2017. Redelegation Order Amendment 12, at: <https://www.documentcloud.org/documents/4627073-12-November-2017-3345a12-Temporary-Redelegation.html> .

Mr. Steed's violations all involve BLM's Greater Sage-Grouse Proposed Resource Management Plan Amendments that weakened pre-existing protections for this iconic and dwindling bird species, *Centrocercus urophasianus*, across the West. These amendments would exacerbate the threats to bird populations and habitat under the Bureau's control, primarily from oil and gas drilling. Each of BLM's actions related to those Proposed Plan Amendments occurred during Mr. Steed's tenure of carrying out the Director's role.³ It turns out that his quasi-triumphant announcement of these Plan amendments, aimed to serve President Trump's Energy Dominance Agenda, was premature.⁴ Mr. Steed's own improper actions actually have rendered the Plan Amendments void and without force or effect.

Mr. Steed's violations involve the procedures that he followed for resolving the numerous **protests** filed against the Proposed Management Plan Amendments at issue. BLM regulation 43 CFR §1610.5-2 provides (in pertinent part; emphasis added):

*(a)(3) The **Director** shall promptly render a decision on the protest. The decision shall be in writing and shall set forth the reasons for the decision.*

*(b) The decision of the **Director** shall be the final decision of the Department of the Interior.*

(Note: the Applicable Law appendix at the end of this letter contains the full regulation and other key Constitution and Federal law provisions.)

Dozens of protests were filed against the six sets of Proposed Amendments, primarily by conservation NGOs concerned about the reduced sage-grouse protections that would result. However, 43 CFR §1610.5-1(b) provides:

Approval shall be withheld on any portion of a plan or amendment being protested until final action has been completed on such protest.

³ Per BLM's webpage on all of the amendments at issue, at: <https://goo.gl/7wdKmM>, on Oct. 11, 2017, the bureau issued a Notice of Intent initiating a 45-day public scoping period for Resource Management Plan amendments with associated NEPA documents. Public scoping closed on Dec. 1, 2017. BLM then published the six Draft Environmental Impact Statements for Oregon, Nevada/Northeastern California, Idaho, Utah, Colorado, and Wyoming on May 4th, 2018. The BLM published Final Environmental Impact Statements/Proposed Resource Management Plan Amendments on Dec. 7, 2018. The webpage states: "After resolving Protests and responding to Governors Consistency Reviews, the BLM issued signed Records of Decision (RODs) on March 15, 2019."

⁴ See BLM Press release of Mar. 15, 2019, at: <https://www.blm.gov/press-release/sage-grouse-conservation-plan-amendments-supported-affected-states-governors>; and Brown, M. 2019. "Bureau of Land Management eases land use rules protecting sage-grouse in Western states". *Statesman-Journal* (Salem, OR), Mar. 15, stating: *Under President Donald Trump, Interior Department officials have vowed to lift obstacles to drilling. Grouse protections have long been viewed by the energy industry as an obstacle to development. The new plans were expected to remove the most protective habitat designations for about 13,000 square miles (34,000 square kilometers) of public land. Those areas, considered essential to the species' survival, were a centerpiece of the Obama policy. The Trump administration also would drop some requirements to prioritize leasing for oil and gas outside sage-grouse habitat and allow for more waivers for drilling.*

The legal defect that occurred was that there was not a BLM Director who could resolve the protests as 43 CFR §1610.5–2, quoted above, mandates before the Amendments could receive final approval. Mr. Steed was not the Director (nor was anyone else), therefore he could not carry out the protest resolution function that §1610.5–2 exclusively assigns to the Director. Therefore, the six approvals should have been “withheld” as §1610.5–1(b) directs.

An illustrative example of this defect is the Record of Decision (ROD) for the Resource Management Plan Amendment for Oregon, at: https://eplanning.blm.gov/epl-front-office/projects/lup/103348/168708/205327/2019_Oregon_GRSR_ROD_ARMPA.pdf . At page 1-17, it asserts that all of the twelve Oregon amendment protests were resolved by the “Office of the Director”. Then, the final March 15, 2019, decision by the acting State Director was (p. 1-20; emphasis added):

*It is the decision of the Bureau of Land Management to approve the Resource Management Plan Amendment for Oregon as described in this Record of Decision. The Proposed Plan Amendment and related Final Environmental Impact Statements were published via ePlanning on December 7, 2018, and in the Federal Register (83 FR 63524) on December 10, 2018. **The BLM Director has resolved all protests** and, in accordance with BLM regulations 43 CFR 1610.5-2, the protest resolutions represent the final decision of the Department of the Interior.*

The BLM Director's Protest Resolution Report for Oregon, is here: <https://www.blm.gov/sites/blm.gov/files/Oregon%20GRSR%20Protest%20Report%20%28March%202015%2C%202019%29.pdf> . In it, the unnamed “Director” allegedly made a final decision to dismiss or deny each of the written protests filed by numerous conservation NGOs ranging from the Defenders of Wildlife to the Oregon Natural Desert Association. Thus, the ROD was issued.

Again, however, there was no Director then and Mr. Steed as Deputy Director was not authorized to decide protests. To reiterate: the Senate-confirmed Director had the exclusive duty, per 43 CFR §1610.5–2, above, to dismiss, deny or grant written protests. The ROD’s assertion that the “Director’s Office” resolved them and the Protest Report’s assertion that the “BLM Director” did it, both were false because there was no Director. The regulation does not allow an unoccupied “Director’s Office” to somehow resolve formal written protests. That “Director’s Office” terminology apparently was a charade that Mr. Steed and possibly others concocted.

FVRA has a clear provision forbidding lower, unconfirmed officials from doing what the “Office” did in resolving the protests. 5 USC §3348(b), below, provides in subsections (b)(1) and (2) that in the absence of a confirmed or properly-appointed “acting” official “the office shall remain vacant; and... only the head of such Executive agency may perform any function or duty of such office.” The “head” of the agency was you, so only you could have performed the duty of the vacant office to resolve those protests.

Mr. Steed also violated your January 29, 2019, Redlegation Order, which was in effect at the time of the Oregon ROD.⁵ You explicitly limited him as BLM Deputy Director (and your other delegees also) with the following language:

Sec. 4 Limitation. This delegation covers 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. The Secretary must perform any functions or duties required by statute or regulation to be performed only by the Senate-confirmed official occupying the position.

This Order language aimed to prevent FVRA violations of the type here, in which Mr. Steed improperly performed a function or duty of the office that was by regulation required of a Senate-confirmed Director. Unfortunately, your Section 4 language was unheeded both by Mr. Steed and yourself as Secretary.

Precisely the same template, pattern and terminology were used in the five other BLM Director's Protest Resolution Reports for the five other RODs approving the Greater Sage-Grouse Proposed Resource Management Plan Amendments and Final Environmental Impact Statements, at the weblinks below. That is, all of these decision documents contain the same charades and word games and suffer the same legal defects as do the two State of Oregon documents.

Colorado

Protest denial:

<https://www.blm.gov/sites/blm.gov/files/Northwest%20Colorado%20GRSG%20Protest%20Report%20%28March%2015%2C%202019%29.pdf>

ROD:

https://eplanning.blm.gov/epl-front-office/projects/lup/105596/168786/205429/2019_NWCO_GRSG_ROD-ARMPA_signed_2019-0314_web.pdf

Idaho

Protest denial:

<https://www.blm.gov/sites/blm.gov/files/Idaho%20GRSG%20Protest%20Report%20%28March%2015%2C%202019%29.pdf>

ROD:

<https://eplanning.blm.gov/epl-front-office/projects/lup/103344/168711/205330/IdahoRODandARMPAMarch2019.pdf>

Nevada/Northeastern California

Protest denial:

⁵ Secretary (Acting) of the Interior, Order No. 3345, Amendment No. 24, "Temporary Redlegation 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 .

<https://www.blm.gov/sites/blm.gov/files/Nevada%20and%20Northeastern%20California%20GRSG%20Protest%20Report%20%28March%2015%2C%202019%29.pdf>

ROD:

https://eplanning.blm.gov/epl-front-office/projects/lup/103343/169658/206228/NVCA_2019_ROD_ARMPA_FINAL_03_28_2019.pdf

Utah

Protest denial:

<https://www.blm.gov/sites/blm.gov/files/Utah%20GRSG%20Protest%20Report%20%28March%2015%2C%202019%29.pdf>

ROD:

https://eplanning.blm.gov/epl-front-office/projects/lup/103346/168792/205436/2019_ROD_and_Utah_Approved_GRSG_RMPA_FINAL_03-14-2019.pdf

Wyoming

Protest denial:

<https://www.blm.gov/sites/blm.gov/files/Wyoming%20GRSG%20Protest%20Report%20%28March%2015%2C%202019%29.pdf>

ROD:

https://eplanning.blm.gov/epl-front-office/projects/lup/103347/168776/205593/WY_ROD_03142019_signed.pdf

As a result of the improper actions done in the absence of a BLM Director all of the Protest Denials are void, that is, they have “no force or effect” under 5 USC §3348(d)(1), below. Further, the denials **cannot be ratified** under §3348(d)(2), that is, they must be re-done *ab initio* and determined by the correct official, who would be yourself until such time as a Director (or properly-appointed “acting” Director) is in place. To reiterate, you should indicate the void status of the following 2019 RODs and their underlying Protest Reports:⁶

- Northwest Colorado Greater Sage-Grouse ROD and Approved Resource Management Plan Amendment, signed by Colorado State Director Jamie E. Connell on March 14. This ROD amended six BLM land use plans with sage-grouse habitat in northwestern Colorado.

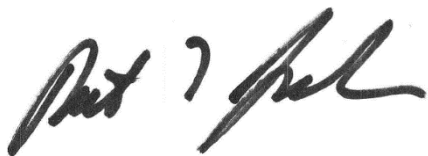
⁶ On Mar. 20, 2019, BLM published Notices of Availability of these RODs and stated that the Plan amendments were “effectively immediately” on the date each ROD was signed. 84 Fed. Reg. 10322–10330. See, Greater Sage-Grouse Plan Amendments webpage, at: <https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=renderDefaultPlanOrProjectSite&projectId=90121&dctmId=0b0003e880fb63b3> .

FVRA VIOLATIONS RE SAGE-GROUSE PLAN AMENDMENTS

- Idaho Greater Sage-Grouse ROD and Approved Resource Management Plan Amendment, signed by Acting Idaho State Director Peter J. Ditton on March 14. This ROD amended 24 BLM land use plans with sage-grouse habitat in Idaho.
- Nevada and Northeastern California Greater Sage-Grouse ROD and Approved Resource Management Plan Amendment, signed jointly by Nevada State Director Jon K. Ruby and California State Director Joseph Stout on March 15. This ROD amended three BLM land use plans with sage-grouse habitat in California and eight in Nevada.
- Oregon Greater Sage-Grouse ROD and Approved Resource Management Plan Amendment, signed by Acting Oregon/Washington State Director Theresa M. Hanley on March 15. This ROD amended eight BLM land use plans with sage-grouse habitat in Oregon.
- ROD and Approved Utah Greater Sage-Grouse Resource Management Plan Amendment, signed by Utah State Director Edwin L. Roberson on March 14. This ROD amended 14 BLM land use plans with sage-grouse habitat in Utah.
- Wyoming Greater Sage-Grouse Approved Resource Management Plan Amendment and ROD signed by Wyoming State Director Mary Jo Rugwell on March 14. This ROD amended ten BLM land use plans with sage-grouse habitat in Wyoming.

Please reply by indicating your intent to remedy the violations described immediately. If PEER does not receive that assurance we will file a complaint with the Inspector General and pursue other legal remedies to ensure compliance with FVRA and the underlying laws and regulations that BLM administers. 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 written in a cursive, flowing style.

Peter T. Jenkins, Senior Counsel
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pjenkins@peer.org

CC:

Casey Hammond, Principal Deputy Assistant Secretary - Land and Minerals Management

Senator Lisa Murkowski, Chair, Energy and Natural Resources Committee, Senate

Senator Joe Manchin, Ranking Member, Energy and Natural Resources Committee, Senate

Senator John Barrasso, Chair, Environment and Public Works Committee, Senate

Senator Tom Carper, Ranking Member, Environment and Public Works Committee, Senate

Rep. Raul Grijalva, Chair, Natural Resources Committee, House of Representatives

Rep. Rob Bishop, Ranking Member, Natural Resources Committee, House of Representatives

Rep. Frank Pallone, Chair, Energy and Commerce Committee, House of Representatives

Rep. Greg Walden, Ranking Member, Energy and Commerce Committee, House of Representatives

APPENDIX. APPLICABLE LAW

The Appointments Clause in the **U.S. Constitution, Article II, Section 2**, 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.*

The **Federal Vacancies Reform Act**, 5 USC §§3345-3349d, contains numerous detailed provisions. Most pertinent here is §3345(a) on “acting” officials:

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and

duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

5 USC §3348 provides (emphasis added):

(a) In this section—

(1) the term “action” includes any agency action as defined under section 551(13); and

(2) the term “function or duty” means any function or duty of the applicable office that—

(A) (i) is established by statute; and

(ii) is required by statute to be performed by the applicable officer (and only that officer);
or

(B) (i) (I) is established by regulation; and

(II) is required by such regulation to be performed by the applicable officer (and only that officer); and

(ii) includes a function or duty to which clause (i)(I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

(b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the office shall remain vacant; and

(2) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office), only the head of such Executive agency may perform any function or duty of such office.

(c) If the last day of any 210-day period under section 3346 is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

(d) (1) An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.

(2) An action that has no force or effect under paragraph (1) may not be ratified.

BLM regulation 43 CFR §1610.5–1, provides (emphasis added):

Resource management plan approval and administrative review.

(a) The proposed resource management plan or revision shall be submitted by the Field Manager to the State Director for supervisory review and approval. When the review is completed the State Director shall either publish the proposed plan and file the related environmental impact statement or return the plan to the Field Manager with a written statement of the problems to be resolved before the proposed plan can be published.

(b) No earlier than 30 days after the Environmental Protection Agency publishes a notice of the filing of the final environmental impact statement in the Federal Register, and pending final action on any protest that may be filed, the State Director shall approve the plan. **Approval shall be withheld on any portion of a plan or amendment being protested until final action has been completed on such protest.** Before such approval is given, there shall be public notice and opportunity for public comment on any significant change made to the proposed plan. The approval shall be documented in a concise public record of the decision, meeting the requirements of regulations for the National Environmental Policy Act of 1969.

§1610.5–2 provides (emphasis added):

Protest procedures.

(a) Any person who participated in the planning process and has an interest which is or may be adversely affected by the approval or amendment of a resource management plan may protest such approval or amendment. A protest may raise only those issues which were submitted for the record during the planning process.

(1) The protest shall be in writing and shall be filed with the Director. The protest shall be filed within 30 days of the date the Environmental Protection Agency published the notice of receipt of the final environmental impact statement containing the plan or amendment in the FEDERAL REGISTER. For an amendment not requiring the preparation of an environmental impact statement, the protest shall be filed within 30 days of the publication of the notice of its effective date.

(2) The protest shall contain: (i) The name, mailing address, telephone number and interest of the person filing the protest; (ii) A statement of the issue or issues being protested; (iii) A statement of the part or parts of the plan or amendment being protested; (iv) A copy of all documents addressing the issue or issues that were submitted during the planning process by the protesting party or an indication of the date the issue or issues were discussed for the record; and (v) A concise statement explaining why the State Director's decision is believed to be wrong.

(3) The Director shall promptly render a decision on the protest. The decision shall be in writing and shall set forth the reasons for the decision. The decision shall be sent to the protesting party by certified mail, return receipt requested.

(b) The decision of the Director shall be the final decision of the Department of the Interior.