



April 28, 2020

David Bernhardt, Secretary of the Interior
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

FEDERAL EXPRESS

Re: **Notice of Intent to Sue** on Bureau of Land Management (BLM) and National Park Service (NPS) Deputy Directors “exercising the authority of the Director”

Dear Secretary Bernhardt,

This is to notify you that the Public Employees for Environmental Responsibility (PEER) and Western Watershed Projects (WWP) intend to bring an action in Federal court for declaratory and injunctive relief if you continue to issue amended orders authorizing two Deputy Directors to exercise the authority of the Directors of the BLM and the NPS without compliance with the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345-3349d. Neither William Perry Pendley, who is playing the role of the BLM Director, nor David Vela, who is playing the role of the NPS Director, have been confirmed in their positions by the U.S. Senate nor appointed by President Trump as the “acting” Directors under FVRA. Further, the past orders by which you purported to give these two officials their authority contravened the Administrative Procedure Act (APA), 5 U.S.C. § 701, et seq.

As you know, by statute the BLM and NPS Directors require Senate confirmation after “advice and consent” under the Appointments Clause, Art. II, Sec. 2 of the Constitution. This separation of powers between the Executive and Legislative branches provides an essential “check and balance”. The process is intended to ensure that major bureau leaders are publicly vetted by the Senate in open nomination hearings for their competency and to root out extreme views and conflicts of interest.

The President is allowed under the FVRA to appoint “acting” officials into such positions, but only temporarily and under strict conditions. Yet, more than three years into his administration, President Trump has never named an acting BLM or NPS Director and neither Mr. Pendley nor Mr. Vela are otherwise qualified to be acting Directors under the FVRA’s conditions. The FVRA forbids lower unconfirmed officials like Pendley and Vela who are not properly acting from occupying offices that require Senate confirmation.

Further, President Trump has refused to nominate permanent candidates for the BLM and NPS Directorships for the Senate to consider. That fact, in combination with your and your predecessor's repeated redelegations that have purported over the last three years to allow various people to "exercise the authority of the Director," have improperly detoured around the Appointments Clause and FVRA ever since Mr. Trump's inauguration. Your current Temporary Redelegation Order, dated Apr. 3, 2020, which remarkably was the 31st amended Interior redelegation order during this Administration, allows Mr. Pendley and Mr. Vela to fill their respective Director offices until May 5th. **If you take any action effective after May 5th to re-name Mr. Pendley and Mr. Vela or anyone else who is not eligible under the FVRA to be the acting Directors of those two bureaus, then PEER and the WWP will promptly sue you and them.**

A recent U.S. District Court decision struck down several immigration restriction measures issued by Ken Cuccinelli whose title is comparable to Mr. Pendley's and Mr. Vela's: *Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services*.¹ He had never been confirmed by the Senate. Judge Randolph Moss ruled that Mr. Cuccinelli acted illegally in his position notwithstanding title manipulations that had aimed to give him the appearance of being FVRA-compliant when he promulgated the measures at issue in the lawsuit. Judge Moss also ruled that reliance on agency organic acts and redelegation provisions (such as you have pointed to in your own redelegation orders) are not substitutes for compliance with the Appointments Clause or the FVRA.

The case was a victory for our nation's Constitutional structure. Much of the reasoning that invalidated Mr. Cuccinelli's actions in his position applies to Mr. Pendley's and Mr. Vela's positions as well.

Mr. Pendley's tenure at BLM, which began on July 29, 2019, has been marked by extreme controversy over his policies, his conflicts of interest, and his forced move of the BLM Headquarters to remote Grand Junction, Colorado. This has led to strong calls for his resignation or removal.² Mr. Vela's NPS tenure, which began on Sept. 30, 2019, has perhaps "flown under the radar" compared to Mr. Pendley's until the recent months of the coronavirus outbreak, when the NPS's chaotic and inconsistent decisionmaking about Park unit closures has met high criticism from an array of affected interests, including unhappy Park gateway communities for which Vela's inactions have led to increased infection risks.

¹ *L.M.-M. v. Kenneth Cuccinelli II*, D.D.C., Civil Action No. 19-2676 (RDM). Memorandum Opinion and Order, March 1, 2020. <https://www.documentcloud.org/documents/6791555-L-M-M-et-al-Plaintiffs-v-KENNETH-T-CUCCINELLI-II.html>.

² See PEER Press Release of December 30, 2019, "Conservationists Call for Temporary BLM Lead William Perry Pendley to Step Down," at <https://www.peer.org/conservationists-call-for-temporary-blm-lead-william-perry-pendley-to-step-down/>, and see additional 21-group letter to Senate referenced in "Pendley retained as "acting" BLM deputy director over growing protest" *Missoula Current*, Jan. 3., 2020 at, <https://missoulacurrent.com/outdoors/2020/01/pendley-growing-protest/>.

Your redelegation orders for Mr. Pendley and Mr. Vela to date have falsely asserted that the need for the “temporary” redelegations is due to the “Presidential transition,” which now is long past more than three and one quarter years post-inauguration. Your redelegations also falsely assert they are necessitated by waiting for Senate confirmation, when Mr. Trump has offered the Senate no pending nominees to be the BLM or NPS Director. Your illegal redelegations are reviewable “agency actions” under the APA because they are rules describing the organization of Interior, BLM, and the NPS.

In short, your redelegation orders have detoured around the Constitution, contravened the FVRA, and been arbitrary and capricious, an abuse of discretion, and otherwise contrary to law, and are reviewable under the APA.³ Their effect has been to harm the interests of PEER and WWP and our members, including through the scores of BLM and NPS actions in which Pendley and Vela have improperly exercised the authority of the Director of their bureaus.

Please indicate your willingness to end the pattern of legal violations we have described. If you would like more information about this Notice of Intent to Sue, please feel free to contact us.

Sincerely,



Timothy Whitehouse, Executive Director, PEER



Erik Molvar, Executive Director, WWP

CC: BLM Deputy Director William Pendley
NPS Deputy Director David Vela

³ Additionally, Mr. Pendley lacks the basic qualifications to serve in the role of the Director under the BLM’s organic statute, the Federal Land Policy and Management Act, 43 USC §§1731(a), which requires the Director to “have a broad background and substantial experience in public land and natural resource management”. Lawyer Pendley lacks those management qualifications.