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S. HRG. 116–143

BERNHARDT NOMINATION

HEARING

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

TO

CONSIDER THE NOMINATION OF
THE HONORABLE DAVID BERNHARDT
TO BE SECRETARY OF THE INTERIOR

MARCH 28, 2019

Printed for the use of the
Committee on Energy and Natural Resources

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BERNHARDT NOMINATION

THURSDAY, MARCH 28, 2019

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The Committee met, pursuant to notice, at 10:02 a.m. in Room SD–366, Dirksen Senate Office Building, Hon. Lisa Murkowski, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

The CHAIRMAN. Good morning, everyone. The Committee will come to order. We are considering this morning the nomination of Mr. David Bernhardt to be the Secretary of the Interior.

Mr. Bernhardt, I welcome you back to the Committee again. You have been here numerous times. Thank you for the visit that we had last week. I know that you have had a chance to visit with many of the members, and I know they appreciate that time with you, as I certainly did. I also want to thank you for all you have done at the Department, for your willingness to serve in a new and a higher capacity, and for enduring what has become, I guess, an increasing slog through the nomination process—so thank you for that.

Senator Gardner will introduce Mr. Bernhardt here shortly, and then Mr. Bernhardt will give his opening statement. I will swear you in.

But I want to start off by explaining why I believe David Bernhardt is an excellent choice for this important position. Part of it is background. As a Colorado native and an avid sportsman, Mr. Bernhardt understands how federal land management decisions affect local communities. He has seen how federal policies impact people's access to and use of public land, and he recognizes the need to balance conservation with opportunities for economic development.

Another part of it is experience. We need experience around here. Mr. Bernhardt has served as Solicitor, as Deputy Secretary, and now as Acting Secretary of the Interior. He has proven his ability to lead the Department. He has built strong working relationships with those who are affected by its decisions. I believe there is no question that he is ready for the job and can handle everything that it entails.

These are crucial considerations, especially for those of us from western states. We all know the story around here, I talk about it a lot. Alaska has more federal land than any other, and the De-

partment of the Interior controls most of those acres. Back home, we often refer to the Department as our "landlord," not necessarily something that we enjoy, not in glowing terms. It has been part of our reality there. People in Alaska clearly recognize that the decisions that are made back here have a direct impact on them, their families, and their livelihoods.

But we have seen a change in that relationship with this Administration. I think we have gone from that landlord-tenant, 'can I hang a picture over here' type of a relationship to one that is based more on a working partnership, and I appreciate that a great deal. We have seen good progress in the State of Alaska with this Administration in several different areas—whether it is the NPR-A, whether it is the 1002, whether it is gaining access for a small community in remote Alaska—we have had a good partner there.

When I meet with Alaskans, the prevailing sentiment is that Interior is doing a good job, and that is a sea change from where we were just a few years ago. I think it helps to have some Alaskans on your team, which I greatly appreciate. You have Joe Balash, and you have Tara Sweeney as the Assistant Secretary. I think we also see the reflection of the work led by Secretary Zinke at the time when you were working with him as Deputy and basically the "Chief Operating Officer" there.

So Alaska is not alone in seeing the benefits. A lot of people in a lot of states are benefiting from better leadership at the Department, and that is why Mr. Bernhardt's nomination is supported by a wide range of stakeholder groups—ranging from the Alaska Federation of Natives to Ducks Unlimited and the Safari Club.

But for all the progress that we have made, we know that there is a lot of work ahead. We need to fully tap into our resource potential, we need to strengthen our mineral security, something I talk about a lot here on the Committee. We need to address the multi-billion-dollar maintenance backlog at our land management agencies, particularly the National Park Service. That is a concern that many, many of us have. We need forest management reforms to address the growing threat of wildfire, we need to lift decades-old Public Land Orders, we need to do more to address climate change and we have to account for our territories, which clearly have a variety of different needs. And that is only a partial list here.

So we will have an opportunity this morning to engage you in further questions. For members who have questions here this morning, I am here for as long as anybody else wants to be. Committee members will have their standard opportunity to submit questions for the record. I would ask that these questions be returned today by the close of business.

Mr. Bernhardt, I want to wrap up by thanking you for your willingness to continue to serve and to take on even more responsibility at the Department.

I also appreciate the work that you did, with our Committee and internally in the Administration to help so many members advance their priorities into law with the recently passed lands package. That was significant legislation for many of us on a host of different levels, and you really helped to facilitate that. So thank you so much for that.

This is your third nomination so you know the drill here. You know also that the nomination process has unfortunately become more difficult, perhaps more contentious, even for good and well-qualified individuals. But know that my intention is to move quickly to confirm you to this new role as soon as we possibly can.

With that, Senator Manchin, I will turn to you for your opening remarks.

STATEMENT OF HON. JOE MANCHIN III,
U.S. SENATOR FROM WEST VIRGINIA

Senator MANCHIN. Thank you, Madam Chairman, for holding the hearing today, and thank you, Mr. Bernhardt, for your willingness to serve and your courtesy in meeting with me in my office a few times and appearing before the Committee this morning. I want to welcome your children with you today. It is nice to have them in the audience, and I hope they will enjoy this experience.

As a former Governor, I have always believed that an executive is entitled to deference when selecting his or her team as long as the candidates are ethical and qualified.

Mr. Bernhardt, it is clear that you have the knowledge and experience to serve as Secretary. You know the Interior Department inside and out and are well versed in all the issues that come before it. I have reviewed your experience and qualifications. We have met on two occasions regarding your nominations for the Secretary role and discussed a variety of issues, including my concerns regarding offshore drilling, mitigation policies, and taxpayer fairness. I would also note that we had lengthy discussions about the importance of ensuring a culture at the Department of the Interior that reflects the highest level of ethical compliance and integrity. Your record has been scrutinized. And in light of the greater amount of responsibility and authority that comes with this job, I think that is only fair. It is not just about compliance with the law and the ethics regulations, it is about a culture of impartiality, fairness, and scientific integrity, and that starts with you, the example you set for the 70,000 employees that you will oversee at the Department of the Interior.

These principles are key to ensuring that a balance is struck between the environment and the safe and responsible use of our public lands. I would ask you to address these issues today before the Committee and commit to the highest standards of ethics, not just in the letter of the law, but truly, the spirit of the law.

If confirmed you will be the guardian of our nation's greatest natural treasures, a vast network of public lands, including our national parks, our monuments, and our historical sites. It is imperative that all of our citizen stakeholders that have interest in the conservation and use of our federal lands are able to engage with the Department, be recognized with impartiality, and access information regarding the Department's activities in a timely and transparent manner. I think that is particularly important in light of the expansive jurisdiction of the Interior Department.

Whether it be payments to miners for their healthcare benefits, processing permits for the privilege of energy production on federal lands, or ensuring the U.S. Geological Survey can conduct its critical work of collecting and analyzing data on our changing climate,

the Department of the Interior has a huge amount of responsibility and diverse jurisdiction.

In particular, I believe the Secretary of the Interior must prioritize and balance our resource needs with environmental protection and fairness for all public landowners, the American taxpayer. A perfect example of this is ensuring the Department is working with industry to accelerate reductions in venting and flaring of methane on public lands. We must also examine ways to update our outdated mining laws to ensure a fair return for our taxpayers. So I look forward to more conversations with the agencies on that and many other matters.

I firmly believe that producers and other users of our federal lands that have been granted the privilege of doing business on federally managed lands must be responsible for leaving those lands and, I repeat, leaving those lands in better condition than they found them. I believe that is a realistic expectation shared by most Americans that should be met.

I also urge you to prioritize the preservation of public lands and protect them for the benefit and enjoyment of our generation and future generations as your agency makes decisions regarding future energy production on federal land and on the Outer Continental Shelf.

I believe the taxpayers must be protected from permanent damage to the lands because these lands truly belong to the American people and support hunting, fishing, hiking, and many other outdoor recreation activities in communities across the country. That will require vigilance on your part, sir. Therefore, if you are confirmed I hope to work with you collaboratively to ensure that protections for our public lands are robust and enforced.

I would also like to address the importance of public lands and outdoor recreation in my home state. Beautiful West Virginia truly is wild and wonderful. We are home to the New River National Recreation Area, the Appalachian Forest, Coal, and Wheeling National Heritage Areas, not to mention Harper's Ferry and so many others. Programs like those administered by the Department of the Interior are key to ensuring our West Virginia way of life is preserved for generations to come. That is why I am a supporter of permanent funding for the Land and Water Conservation Fund (LWCF). Over $240 million in LWCF funds have been used to increase access in the Monongahela National Forest, Harper's Ferry, the New River Gorge National River, among others.

In fact, LWCF funds paid for every single public access point along the Lower and Middle Gauley River in West Virginia, an area used and over 50,000 people per year that enjoy the beautiful rapids that we have. And just this year, LWCF funds helped protect Summit Point Battlefield, the site of a significant Civil War battle. LWCF is a bipartisan program with national support. I must admit that I am concerned by the Administration's lack of support for this program, sir.

Furthermore, the deferred maintenance backlog is another major challenge that I think we both talked about. It is going to be facing you and the Department, and I look forward to hearing more on how you plan to address the growing backlog problems we are facing in restoring our parks.

In conclusion, I look forward to discussing these and other matters today during your confirmation hearing, sir. I believe you are qualified and have a great deal of experience. I am interested in learning more from you today, for your plans for the Department were you to be confirmed. I look forward to hearing how you would execute your responsibilities in a manner that assures the American people our public lands are not just being maintained but being improved for the benefit of generations to come.

So I want to thank you again. Thank you for being here, sir.

Madam Chairman.

The CHAIRMAN. Thank you, Senator Manchin.

I will now turn to Senator Gardner and would ask that, as the home state Senator, you be allowed the opportunity to introduce Mr. Bernhardt before the Committee. After that, I will swear you in and we will proceed.

STATEMENT OF HON. CORY GARDNER,
U.S. SENATOR FROM COLORADO

Senator GARDNER. Thank you, Chairman, and thank you, Ranking Member, for your remarks today.

It is my honor to introduce a fellow Coloradan, a Colorado native and my friend, David Bernhardt, as the nominee to be Secretary of the Interior to the Energy and Natural Resources Committee—this very important position for Colorado and indeed, this country.

Thank you for being here. Thanks for bringing your beautiful family who I have known for their entire lives. Thank you very much for the opportunity to have them all here today.

I appreciate the fact that you keep moving up in the agency. It means I do not have to really write a new speech, I just get to add a little bit more detail, including the fact that I believe, if our count is right, you will become the seventh Secretary of the Interior from the great State of Colorado. And seven is a very special number for the State of Colorado. So thank you very much, David, for your willingness to serve.

I have known you personally and professionally for over two decades. Your roots are deep both on the plains of Colorado and the Western slope.

We share a lot of common interests in rural development and saving small towns. My experience stems from growing up in the agricultural community of Yuma on the high plains. Mr. Bernhardt's formative years were spent on the Western slope of Colorado, an area that is a microcosm of all the things we cherish about our public lands.

We both began our public service, only one year apart from each other, working for Colorado State Representative Russell George, later becoming the Speaker of the House in the Colorado General Assembly.

Mr. Bernhardt worked with my wife, Jaime, at the Department of the Interior during the George W. Bush Administration.

Mr. Bernhardt's personal background and public and private sector professional experiences prove he is a strong voice for the West and extremely well qualified for the nomination to be Secretary. Extensive, extensive insight on Western water policy, natural resources policy, and Indian affairs, just to name a few.

Those that have worked with Mr. Bernhardt commend him for his integrity and his wealth of knowledge on the issues under the Department of the Interior's jurisdiction.

In 2008 after the Department reached the largest Indian water rights settlement in the nation's history, Secretary Kempthorne personally acknowledged Mr. Bernhardt's work as then Solicitor and stated, and I quote, "His effective coordination both within Interior as well as with the local, tribal and state Congressional leaders was essential to the success we celebrate today."

More recently, he worked to accommodate many Western states' requests for more flexibility under the Greater Sage Grouse RMP amendment. John Swartout, who as a Senior Policy Advisor ran point on the issue for Colorado's Governor John Hickenlooper, had this to say in December 2018 once the process was completed, "David Bernhardt is an honest man who puts all his cards on the table and keeps his word. I have worked with DOI for 25 years and David is one of the finest people I have ever worked with."

Dale Hall, the CEO of Ducks Unlimited, an organization that does more real conservation work on the ground than most of the groups that have the word conservation in their name, had this to say when Mr. Bernhardt's nomination for Secretary was announced, "I have known and worked with David Bernhardt for more than a decade and we are excited to continue to work with him as the new Secretary of the Interior. His integrity in following the law is beyond reproach. David Bernhardt is a champion of conservation and the right person for the job. We urge the Senate to swiftly confirm him."

Colleagues of his working for Representative Scott McInnis from Colorado, who represented your hometown, the hometown of Rifle, at the time in the House swore he worked 40 hours a day, 8 days a week. I think that was the right math he said.

Notably during Mr. Bernhardt's tenure in office, Congressman McInnis was the House author of the bill that led to the designation of the Great Sand Dunes National Monument to become a national park.

Having now worked at very senior levels in the Department of the Interior over the course of many years, there is zero question that Mr. Bernhardt is qualified to do this job. None. No question.

Along with Mr. Bernhardt's professional career, I believe it is important to fully understand his background or the foundation of his interest in public lands that further qualifies him for this role.

You grew up in a small town, on the outskirts of the Town of Rifle, Colorado, located in the Colorado's Western slope. Few places embody the spirit of our public lands more than the Town of Rifle, Colorado, this incredible area of our great state to lead this country as Secretary of the Interior.

Growing up in rural Colorado instilled in David the Western values and interests to this day that he brings to the job enjoying hunting, recreation, the outdoors, fishing, cherishing our great outdoors.

Rifle is located in Garfield County, an area where about 60 percent of the lands are protected federal public lands. Rifle was founded as a ranching community along the Colorado River. It retains that heritage today along with tremendous support for out-

door recreation including fishing, hiking, skiing, rafting, rock climbing, sits at the edge of the Piceance Basin, an area in Colorado that has vast amounts of natural gas energy resources.

You grew up in the oil shale boom and the bust that has made you more sensitive to the potential benefits and potential impacts both environmental and social. In the 1980's Rifle was hit by the state's oil shale crash, and you personally experienced some of the hard times the nation's rural communities often face.

Much like the Department of the Interior, itself, Rifle is a community that is a product of its public lands and Western heritage. Literally located within a few miles of the iconic Grand Mesa which is the world's largest flat top mountain, the flat top's wilderness, the Roan Plateau, that represents a home base among these public lands with virtually unmatched access to world class outdoor experiences which is why you have a passion for these issues.

Your previous experience at Department of the Interior allowed you to fix a problem in Colorado that for eight years during the Obama Administration was said could not be done, that it was unfixable. As a result, revenue owed to three counties in Colorado that had been sitting in an account for over a decade was distributed in early 2018.

David believes you do not just push problems off of your front porch to someone else, you find a solution to it and you fix it.

That previous experience includes prior to his current position being tapped to be Solicitor for the Department, to be confirmed by Solicitor by a voice vote by the U.S. Senate in 2006, earned bipartisan support during his confirmation process in the last Congress as Deputy Secretary.

Your integrity and ability are assets that should bolster this case for nomination and not distract from it. I hope my colleagues can keep this in mind as we conduct this hearing today.

I look forward to your testimony, Mr. Bernhardt, and I am a proud Coloradan that you are here today.

Thank you.

The CHAIRMAN. Thank you very much, Senator Gardner, and also for the little geography lesson there on Colorado. It was good for all of us.

Mr. Bernhardt, I would ask you to rise.

The rules of the Committee which apply to all nominees require that they be sworn in connection with their testimony. So raise your right hand, please.

Do you solemnly swear that the testimony you are about to give to the Senate Committee on Energy and Natural Resources shall be the truth, the whole truth and nothing but the truth?

Mr. BERNHARDT. I do.

The CHAIRMAN. Thank you. You may be seated.

Before you begin your statement, I will ask three questions addressed to each nominee that comes before the Committee.

First is will you be available to appear before this Committee and other Congressional committees to represent departmental positions and respond to issues of concern to the Congress?

Mr. BERNHARDT. Yes.

The CHAIRMAN. Are you aware of any personal holdings, investments or interests that could constitute a conflict or create an ap-

pearance of such a conflict should you be confirmed and assume the office to which you have been nominated by the President?

Mr. BERNHARDT. No.

The CHAIRMAN. Are you involved or do you have any assets held in blind trusts?

Mr. BERNHARDT. No.

The CHAIRMAN. At this point you may proceed with your opening statement. I believe you have family here with you. We welcome them to the Committee and are pleased that you are with us, even on a school day. We appreciate that and we appreciate your support of your father.

With that, Mr. Bernhardt, please proceed.

STATEMENT OF HON. DAVID BERNHARDT, NOMINATED TO BE SECRETARY OF THE INTERIOR

Mr. BERNHARDT. So, I have Katherine, who is in eighth grade and was willing to come today, and William, who is in tenth grade and was excited to come today.

[Laughter.]

And my wife is ill, so she wasn't able to be here today, but they're here and it's great.

The CHAIRMAN. Wonderful, welcome.

Mr. BERNHARDT. Chairman Murkowski, Senator Manchin, members of the Committee, good morning. I am humbled to appear here today as the President's nominee for the position of Secretary of the Interior.

It was an honor to be introduced by Senator Gardner. I deeply appreciate his support.

Today's hearing is the third time that I've appeared before this Committee as a nominee for a position within the Department of the Interior. During my service at the Department, both as the Deputy and as the Solicitor, I have worked with many of you and your staff. I have met with many of you in person and by phone on various issues that were actually of concern to you, and I will always make myself available to your request.

For me, there are few duties as important to the country as the varied missions of the Department of the Interior.

No one dedicates nearly a decade of their life to any organization unless they fundamentally believe in it. Even after holding nearly every single job within the immediate office of the Secretary, I catch my breath every time I walk into the Secretary's office. Perhaps you do that when you step on to the Senate Floor.

The reality is that I have spent over 15 years of a 25-year career in public service, most of that time at the Department of the Interior. In fact, I was recently told that of the 52 previous Interior Secretaries, only Oscar Chapman, who happens to be another lawyer from Colorado, who was promoted from Under Secretary to Secretary in 1949, had more experience at the Department than I do now sitting before you to be considered for the very same promotion.

I have a personal attachment to many of the places entrusted to the Department. I know and love the various bureaus' rich histories and their varied cultures. I appreciate that the people who work at Interior choose to do so because they believe in serving the

American people first. I treasure working with them. I've known many of them for over 20 years.

Interior's decisions impact livelihoods. They impact communities' futures and they impact people's very way of life. That reality will not be forgotten on my watch, if confirmed.

I have had the remarkable good fortune over the course of my career to work on many of the most complex issues affecting each of the Department's bureaus. I have a very clear understanding of the often conflicting, legal and policy issues that I will face, if confirmed, in balancing Interior's varied missions.

As Deputy Secretary my focus has been on organizational improvement and execution within the Department. Improvement efforts have included aggressively addressing workplace misconduct throughout the Department, beginning to fundamentally transform the ethics program across the bureaus and improving our business processes. I have also worked to thoughtfully execute the President's agenda in the Department.

By issuing a series of Executive Orders and Presidential Memorandums, the President has transparently provided us at Interior a very clear direction on his priorities. We have moved with dispatch to implement his vision.

One of the President's priorities is to strive to ensure a conservation legacy, second only to Theodore Roosevelt. Over the last two years we have opened or expanded hunting and fishing opportunities on over 380,000 acres of wildlife refuge at more than 30 refuges. At the same time, the Bureau of Land Management restored over 689,000 acres of prime sage bush habitat that is vital to many game species.

We are also working to reduce unnecessary regulatory burdens without sacrificing environmental outcomes. In doing so, we're taking actions to appropriately respect the regulatory role of the states. Through our effort and, honestly, also because of Congress' utilization of the Congressional Review Act, Interior's combined deregulatory cost savings for Fiscal Year 2017 and 2018 had a net present value of $3.69 billion. That's quite significant. In the last two years we've been in the top two and three in deregulatory efforts across the government.

If I receive your consent to this nomination, I will approach issues with an open mind. I will actively seek input and listen to varied views and perspectives to help ensure that the conclusions I draw are well informed.

When making decisions I strive to maintain a long-term view, and I often think of the guidance provided by Gifford Pinchot, President Roosevelt's Conservationist in Chief. As he laid out his mission for the newly created Forest Service he said, "When conflicting interests must be reconciled, the question shall always be answered from the standpoint of the greatest good of the greatest number and in the long run." This direction rings as true today as it did then.

I ask for your consent to the nomination, and I thank you for giving me the time.

[The prepared statement of Mr. Bernhardt follows:]

Statement of David Longly Bernhardt
Nominee for the Position of Secretary of the Department of the Interior

Before the Committee on Energy and Natural Resources
United States Senate

March 28, 2019

Chairman Murkowski, Senator Manchin, and Members of the Committee, good morning. I am humbled to appear here today as President Trump's nominee for the position of Secretary of the Department of the Interior.

This morning I am joined by members of my family: my wife Gena, my son William, and my daughter Katherine.

It was an honor to be introduced by Senator Gardner. He is a wonderful Senator for my home State of Colorado, and I deeply appreciate his support.

Today's hearing marks the third time I have appeared before this Committee as a nominee for a position within the Department of the Interior. During my service at the Department, as Deputy Secretary and previously as the Solicitor, I have worked with many of you or with your staff. I have met with many of you in person and by phone on various issues of concern to you. I will always make myself available to you upon request.

For me, there are few duties as important as managing the varied missions of the Department of the Interior.

I have had the privilege to work for three different Secretaries of the Interior over the course of nearly a decade of service in the Department. No one dedicates 10 years of their life to any organization unless they believe in it. My appreciation and affection for the Department of the Interior's overarching mission and the dedicated public servants who carry it out is real and deeply felt. To say it was humbling to meet with the President to discuss the Department's mission, and to then be entrusted with leading it, is a gigantic understatement.

I have an authentic attachment to many of the places managed by the Department of the Interior for the benefit of our own and future generations. I know and love the various bureaus' rich histories and their varied cultures. I believe that the people who work at Interior choose to do so because they are committed to serving the public first. I am passionate about the work we do, and I try to make our employees' operating environment better by listening to their suggestions for improvement and acting on those suggestions.

Some of you have heard my background before: I grew up in rural western Colorado near a town named Rifle and spent many summers on my grandparents' ranch in windswept southeastern Wyoming. You know that I love the outdoors and that I hunt and fish.

I was actually raised outside of Rifle to the east. In that part of my home county, there are four small communities lined west to east along a valley through which the Colorado River, the railroad, and now Interstate 70 run. The towns in that valley are Rifle, Silt, New Castle, and Glenwood Springs. These communities were rural and surrounded by a significant presence of lands managed by the Forest Service in the White River National Forest and by the Bureau of Land Management (BLM). I spent part of my youth in schools in each of these communities.

The culture, history, and economic activities in this region depended on both the development and utilization of natural resources and the conservation and recreation associated with those same natural resources. They still do. World-class hunting, gold medal trout fishing, robust energy development, incredible wildernesses areas, great skiing, OHV trails, and mountain biking are available there, all within a few miles of each other. It seems impossible to me that anyone could grow up in this valley along the Colorado River surrounded by forests and mountain peaks without developing a love and appreciation for the splendor of the outdoors and the wonder of the natural environment.

In many ways the history of this area exemplifies the changes that have occurred in similar communities surrounded by public lands across our country. Glenwood Springs was one of the early rural western communities to develop into a resort town. Local businesses formed a board of trade in 1903 focused on the opportunity presented by visiting tourists. By 1915, it was one of the most popular destinations in the State of Colorado. If Glenwood Springs sounds familiar to some of you, it may be because on July 6, 1994, 14 wildland firefighters lost their lives fighting the South Canyon fire on Storm King Mountain, just outside of Glenwood Springs. This town has remained a popular tourist area: skiing, rafting, hiking, kayaking, hunting, mountain biking, and every other form of outdoor recreation you can think of are important to the economy of Glenwood Springs.

The town of New Castle was originally a coal town until 86 miners lost their lives in the course of two explosions caused by methane gas in the late 1800s and early 1900s. Those tragedies ended coal mining in New Castle, but the coal fire that was caused by the explosions has been smoldering in those mountains ever since. It was, and is, a poignant reminder of a time in our history before common sense environmental or safety regulation.

On April 15, 1981, the father of one of my pee-wee football teammates perished in a mine explosion up valley that killed 15 miners at the Dutch Creek Mine No. 1. I will never forget how much he and his brothers missed not having a father as I went through junior high and high school with them. I think of them when I think of the consequences of the decisions we make when evaluating matters related to safety at the Department or on our public lands.

The town of Silt was known for agricultural production. Rifle was a ranching town that came to know the challenges of energy booms and busts. Today, oil and gas, recreation, tourism, and agriculture are the economic drivers in this valley along the Colorado River. Energy tax revenues have ensured that Rifle has a hospital that punches well above the weight one would expect in such a small town.

Accessible to visitors, the splendor of this part of western Colorado played an early and important role in our conservation history. For example, in 1919, nearby Trappers Lake was proposed for residential recreational development by the Forest Service. Art Carhart, the Forest Service's landscape architect, after completing a site inspection, explained in a memorandum:

> [t]here are a number of places with scenic values of such great worth that they are rightfully the property of all people. They should be preserved for all time for the people of the Nation and the world. Trappers Lake is unquestionably a candidate for that classification.

This memo was a first. The concept described by Art Carhart for Trappers Lake was the seed of the idea that would become enshrined in the law as the Wilderness Act. As a result, Trappers Lake is viewed by some as the "cradle of the American Wilderness." But for Art's actions, I would have never seen the site I saw when my parents took me there for the first time and every time thereafter.

I have had the remarkable good fortune over the course of my career to work on many of the most complex issues affecting each of Interior's diverse bureaus. I have a clear understanding of the often conflicting legal and policy issues that I face balancing the Department's varied missions. I strive to maintain a long-term view and often think of the guidance provided by Gifford Pinchot, President Theodore Roosevelt's conservationist in chief, as he laid out the mission for the newly created Forest Service: "Where conflicting interests must be reconciled, the question shall always be answered from the standpoint of the greatest good of the greatest number in the long run."

If I am confirmed, I will approach all issues with an open mind and a solemn sense of duty to serve the American people. I will actively seek input and listen to varied views and perspectives to help ensure that the conclusions I draw are well informed. In fact, during my tenure as Deputy Secretary, I have had more meetings with environmental, conservation, and sporting groups than any other type of external group. That is because I seek out those varied views, even when we may disagree.

The reality is that I have spent more than 15 years of a 25-year career in public service, and most of that time at the Department of the Interior. In fact, I was recently told that of the 52 previous Interior Secretaries, only Oscar Chapman, another lawyer from Colorado who was promoted from Under-Secretary to Secretary in 1949, had more experience at the Department than I do.

As Deputy Secretary my focus has been on improvement and execution. This has included: beginning to fundamentally transform the Department and bureau level ethics programs to ingrain a culture of ethical compliance and reduce workplace misconduct; driving forward on the direction and priorities provided by the President; improving our business processes; and carefully considering suggestions for improvement received from within the organization.

The reality is that the ethics program throughout the Department of the Interior has been sadly neglected for some time. When I returned to the Department, we began to transform the situation. This effort is a lot of work. It is not glamorous. For too long, the Office of Inspector

General and the Departmental Ethics Office recommended significant resource changes that had fallen on deaf ears. If you want an unvarnished examination of the types of challenges facing the Department's bureaus in ethics, I would encourage you to review the Inspector General's recent evaluation that the "National Park Service Misused Philanthropic Donor Donations," issued on March 13, 2019. I would also encourage you to review the Inspector General's Statement Summarizing the Major Management and Performance Challenges Facing the U.S. Department of the Interior for Fiscal Year 2018, which provides that Office's view on where the program stands.

Since the beginning of this administration, the Department has hired a total of 42 career, professional ethics advisors, including: a new Designated Agency Ethics Official; an Alternate Designated Agency Ethics Official; a Financial Disclosure Supervisor; an Ethics Education and Training Supervisor with the Departmental Ethics Office; and new Deputy Ethics Counselors at the National Park Service, BLM, and other bureaus and offices. We are making strides, but we have much work ahead of us. By the end of Fiscal Year 2019, we will have doubled the number of career ethics officials that the previous administration hired in its entire eight years.

At the same time, we have taken significant action to combat workplace misconduct. We have established a clear anti-harassment policy. We directed each bureau to develop an action plan to address its harassment-related issues. We are tracking their progress in implementing their plans. We are making it clear that harassment will not be tolerated. These efforts are also described in the Inspector General's Statement Summarizing the Major Management and Performance Challenges Facing the U.S. Department of the Interior for Fiscal Year 2018.

As Deputy Secretary, I have also worked hard to implement the President's agenda for the Department. The President has been incredibly clear with his direction and priority for the Department of the Interior. He has clearly expressed his vision by issuing a series of Executive Orders and Presidential Memoranda detailing his view of what the Department's goals should be, and the efforts we should undertake to achieve those goals, including:

- EO 13783 *Promoting Energy Independence and Economic Growth;*
- EO 13792 *Review of Designations Under the Antiquities Act;*
- EO 13795 *Implementing an America-First Offshore Energy Strategy;*
- EO 13807 *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects;*
- EO 13817 *A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals;*
- EO 13840 *Ocean Policy to Advance the Economic, Security, and Environmental Interests of the United States;*
- EO 13855 *Promoting Active Management of America's Forests, Rangelands, and other Federal Lands to Improve Conditions and Reduce Wildfire Risk;* and
- The Presidential Memorandum on *Promoting the Reliable Supply and Delivery of Water in the West.*

These orders and memoranda gave the Department very detailed and specific instruction on a number of issues, and thus have formed the foundation of Interior's objectives over the past 2 years. We have moved forward promptly to implement President Trump's priorities, and we will continue to do so.

One of the President's priorities is to ensure that conservation is pursued collaboratively with our State partners. We are making strides in this area. For example, Interior has worked with a bipartisan group of western States to reform the management plans for the Greater Sage-Grouse to ensure the species remains viable. Unlike the original 2015 plans, these plan amendments actually have the unanimous support of the Governors of Wyoming, Nevada, California, Idaho, Oregon, Utah, and Colorado. Likewise, BLM recently announced a cooperative project to protect over 617,000 acres of prime sagebrush habitat in Idaho by removing encroaching Western juniper trees. BLM is working with the State of Idaho to selectively treat and remove excess juniper that increase the risk of wildfire to prime Sage Grouse habitat. These are excellent examples of how cooperative conservation can and should be done.

We have followed through on the President's desire to make the public lands accessible to the American people. Hunting and fishing opportunities have been opened or expanded on over 381,000 acres of our national wildlife refuges.

If confirmed, I look forward to working with the Members of this Committee to craft a legislative solution that allows us to address the tremendous maintenance backlog we face at our national parks, national wildlife refuges, and Indian schools.

Keeping America safe and being a good partner to our sovereign Native American Tribes are also high priorities for the President. The Department has advanced those goals by launching the first-ever Joint Law Enforcement Task Force on Opioids focused on Indian Country. Led by Bureau of Indian Affairs Office of Justice Services, the task force partners with Federal, Tribal, State, and local law enforcement to conduct multi-month undercover operations to get drugs and dealers off the streets. The first year of the task force saw eight undercover operations resulting in the seizure of millions of dollars' worth of illegal drugs and hundreds of arrests.

Through my work over the years at Interior, I have come to know many leading voices in the Tribal community, and these interactions have enriched and enhanced my knowledge of Tribal culture, heritage, and concerns. True commitment to Tribal sovereignty requires the recognition that Tribes should be able to responsibly develop the natural resources on their lands. We fully respect that some Tribes will not want to develop their resources, but Tribes interested in enjoying the benefits of the resource wealth of their lands should be able to do so. This is what supporting self-determination looks like; it is appreciating that each Tribe is different, then looking at the policy framework in place to see if it reflects that appreciation.

President Trump's Executive Order promoting energy independence and economic growth set important priorities for the Department of the Interior to responsibly develop our domestic energy resources. Interior has been at the forefront of this effort, and we have generated over $16 billion in energy revenues in just 2 years. This revenue has come from a variety of sources, ranging from a record-setting onshore oil and gas lease sale of nearly $1 billion in New Mexico to a record-setting offshore wind lease sale of over $405 million in the Atlantic.

There is a lot of talk and a lot of opinions about energy development on public lands. Here are a couple of facts you might find interesting. BLM manages approximately 733,700,000 acres of

subsurface mineral estate. Of that amount, approximately 25,552,475 is leased for oil and gas, 458,000 is leased for coal. Approximately 122,170 of surface acreage rights-of-way have been granted for wind, and 31,932 surface acres granted for rights-of-way for solar energy development.

Today, acres under lease on the public lands for oil and gas are the lowest they have been since 1991, while energy production is stronger than ever. In Fiscal Year 2018, oil production from Federal and Indian lands accounted for about 24% of total U.S. production, a 21% increase over the previous year. We will continue to work to help responsibly and effectively supply the energy needed to power our economy nationwide and provide good-paying jobs for American workers.

In closing, I want to reiterate my deep affection for our public lands and for the mission of the Department of the Interior. If confirmed, I will tirelessly promote President Trump's goals for the Department of the Interior. I will do so within the confines of the lawful discretion that the Congress has given the Secretary, and I will do so with dedication and integrity. I will not shy away from making difficult decisions, but my approach will always be for the greatest good of the greatest number in the long run.

I request your consent to the President's nomination, and I look forward to your questions.

The CHAIRMAN. Thank you, Mr. Bernhardt. We appreciate your comments this morning.

Let's go ahead and begin with a round of questions.

I have noted in my opening statement, and this was reaffirmed by Senator Manchin as well as Senator Gardner, that in terms of qualifications, experience within the Interior Department, you really come to us with a set of qualifications and again, experience that we seldom see. I think it is unparalleled in terms of the time and the extent of your background in these areas.

I will begin my questions then with something that is not related to the experience, but maybe experience outside of the time that you worked within the Department.

You are not the first nominee who has worked somewhere else in the past and has had recusals as a result, but for whatever reason you seem to have outside groups working harder against your nomination than most anybody else we have had in front of us. I am sure we will hear some discussion about that today.

So at the outset, I will ask you how will you handle ethics and potential conflicts both for yourself and for the Department?

Mr. BERNHARDT. Thank you for that question.

I believe that public trust is a public responsibility and that maintaining an ethical culture is critical.

On a personal level I have fully complied with my ethics agreement, the ethics laws, and my ethics pledge and I will do so in the future.

I've actively sought and consulted with the Department's designated ethics officials for advice on particular matters involving clients, and I have implemented an incredibly robust screening process to ensure that I don't meet with former firm or former clients to participate in particular matters involving specific parties that I've committed to recuse myself from.

I believe that it's also important to recognize the Department's ethics responsibilities and role. The Department's ethics program for years has been subject to a great deal of criticism, a great deal of oversight and a lack of funding. If you look back at old reports, you'll see that the Inspector General and the Ethics Office both asked for additional resources and didn't get them over the last several years.

Here's the steps that we have taken. We have elevated the designated agency ethics official back up to directly reporting to the Solicitor, the third ranking person in the Department. That was something that Earl Devaney recommended in the mid–2000s that I implemented that somehow got de-elevated in the prior Administration.

We have hired extremely good leaders to come in and help lead a new ethics department and, as of today, we have hired 42 counselors within the Department.

And if you want to know what our problems really look like at Interior and the challenges we face in ethics, I would suggest that you read the recent Inspector General's report on philanthropy by the Park Service that was just out or the strategic plan that IG put out. She acknowledges in there that we are making tremendous efforts and strides in creating a better and more robust program. I know, I know how important and how devastating it is when folks

at the top act in an unethical manner. It affects the Department across the board. And we have implemented a number of things to begin to change that pathway. And I'm going to need your help to actually consolidate the ethics programs across the bureaus.

The CHAIRMAN. Thank you for that, Mr. Bernhardt. I think you will find that on this Committee we have had more occasions, unfortunately, than we would like to raise the issue of what is happening within the workplace in terms of misconduct and ethics issues. And as you point out, the impact then to the agency in terms of the morale, just the working environment, it must be addressed.

The National Park Service is, unfortunately, the agency that, time and time again, comes forward as an area that has to be addressed. And so, whether it is sexual misconduct, major ethical violations, knowing that you are shining a very serious spotlight on this is critically, critically important.

I am going to turn to Senator Manchin, but I understand you are going to defer.

Senator MANCHIN. I am going to defer to Senator Wyden because there are a lot of our members here who have other committees to go to. I am going to be here to the end.

The CHAIRMAN. Thank you.

Senator WYDEN. I thank my colleagues, both the Chair and Senator Manchin.

Mr. Bernhardt, you asked to come to my office to say that you were the guy who stood up for strong ethics at Interior during the George W. Bush years. And less than 48 hours ago, you told me in the Bush years you advised Julie McDonald, a notoriously corrupt Interior official, to clean up her act.

Ultimately, the Inspector General found McDonald politically meddled with the scientific conclusions of Fish and Wildlife endangered species reports and McDonald had to resign.

A few hours after you and I met, I read Interior Department documents obtained through a Freedom of Information Act request that show within the last two years you blocked the release of a Fish and Wildlife report with a new analysis of the dangerous effects of toxic chemicals. So you asked to come to my office to tell me your ethics are unimpeachable, but these brand-new documents I just saw make you sound like just another corrupt official.

Why would you come to my office to lie to me about your ethics?

Mr. BERNHARDT. Well Senator, with all due respect, the news article you're referring to is not even close to that actual story.

Senator WYDEN. I read the documents. Forget the news article, I read the documents.

Mr. BERNHARDT. And if you read those documents, you'll see that, I mean not the documents, but even in that article the Fish and Wildlife Service employee that's quoted there says everything was perfectly appropriate.

And let me tell you what the challenge is when I get a document. I make decisions based on exactly the same standards on every single thing that comes to my desk and here are my standards. Have we appropriately dealt with the facts and the information as we see it? That's a factual question. Have we dealt with the parameters of the law that we have? That's a legal question.

And then there's also at times a policy question. In this particular issue, there's no policy, but there is a very significant and important thing, you're dealing with some of the most difficult consultations on the planet. And when I read the document my reaction to it was this is really an interesting draft but it clearly didn't have any legal review. And in our world you can't ignore the law and come up with a scheme. You have to have it fit the law and the facts.

And so, I basically said, let's go kick it over to career lawyers, have them look at it and their assessment was exactly like mine. So what we decided is that the approach needed to be readdressed.

Senator WYDEN. My time is short.

Just like Julie McDonald, you meddled with the science. You inserted yourself in the scientific process and I would just ask, Madam Chair, for documents that show what I am saying is accurate and what Mr. Bernhardt is saying is not true, attest to that point.

I would ask unanimous consent the documents be put into the record.

Thank you, Madam Chair.

[Documents from Senator Wyden follow.]

Bernhardt/Interior Records:

1. Letter from Pesticide Industry to Interior asking Interior to kill the Fish and Wildlife pesticides report.

2. Email from Bernhardt to the FWS assistant director for endangered species who was the top official overseeing the assessment of the impact the pesticides have on endangered species. This is the first record of Bernhardt inserting himself in the scientific process.

3. Bernhardt Interior calendars showing multiple meetings and calls with that same FWS assistant director.

4. Bernhardt Interior calendar showing a meeting with EPA and White House officials specifically about ESA Section 7 - which is the section of the ESA that covers the role that the Interior Department plays in assessing the threat presented to endangered species by pesticides and other human activity.

5. Emails from Bernhardt showing he was involved in killing the FWS report on pesticides.

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000

www.wileyrein.com

April 13, 2017

David B. Weinberg
[redacted]2
DWeinberg@wileyrein.com

The Honorable Ryan Zinke
Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Re: "Final" Chlorpyrifos, Diazinon, and Malathion Biological Evaluations Sent by EPA to Fish and Wildlife Service on January 18, 2017

Dear Secretary Zinke:

We are writing on behalf of our clients Dow AgroSciences, LLC ("DAS"), Makhteshim Agan of North America, Inc., d/b/a ADAMA ("ADAMA"), and FMC Corporation ("FMC") (together, the "OP Registrants"), to request that you (1) instruct the Acting Director of the Fish and Wildlife Service ("FWS") to return to the U.S. Environmental Protection Agency ("EPA") three Biological Evaluations ("BEs") that EPA transmitted to FWS on January 18, 2017; (2) direct that any effort to prepare biological opinions based on them be set aside; and (3) direct legal counsel representing FWS in *Center for Biological Diversity v. U.S. Fish and Wildlife Service et al.*, No. 11-cv-5108 (N.D. Cal.) ("*CBD v. FWS*"), to meet and confer on a timely basis with counsel for the other parties to that case, as required by Paragraph 4(c)(1) of the Stipulation Amending Original Stipulated Settlement and Order approved by the Court on July 28, 2014 (the "Stipulated Settlement"), to discuss further activity in that case. *See* Stipulated Settlement, *CBD v. FWS*, Dkt. No. 87.

Our clients and their affiliates hold EPA registrations for products containing one or more of the organophosphate ("OP") pesticide active ingredients that are the subject of the BEs (chlorpyrifos, diazinon, and malathion). The BEs are documents from EPA required by the "Interim Approaches" adopted during the Obama Administration in an effort to resolve controversies regarding the relationship between pesticide registration activities under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") and activities of EPA and the

Departments of the Interior and Commerce under the Endangered Species Act ("ESA").[1]

Our clients believe that the Interim Approaches are fundamentally flawed and should be set aside. Drafts of the BEs were released for public review in April, 2016, and substantial comments submitted on those drafts explained the reasons for our clients' view and demonstrated the many flaws in the draft documents.

When EPA sent final versions of the BEs to FWS, the Agency conceded that it had not responded to most of the comments it had received. This is confirmed in the three reports from expert consultants to our clients that are enclosed with this letter. Those comments also demonstrate that EPA has not even correctly applied in the BEs the processes described as the Interim Approaches.

We will not belabor here the matters addressed in the enclosed reports. But some representative examples of the BEs' flaws include the following:

- A major lack of transparency necessary for evaluation and reproduction of results.
- Inclusion of proposed and candidate species that are not afforded protection under ESA.
- Many studies selected by EPA as sources of information on effects and exposure were not evaluated for data quality and relevance. When evaluated, many evaluations did not follow EPA's own study quality criteria. In addition, many scientifically valid, registrant-submitted studies were not evaluated by the Agency, with no explanation. This is not justified and is contrary to EPA's own guidance and the recommendations made by the National Academy of Sciences.
- Effects determinations were made assuming that product may be applied anywhere in the United States, without consideration of

[1] Interim Approaches for National-Level Pesticide Endangered Species Act Assessments Based on the Recommendations of the National Academy of Sciences April 2013 Report, *available at* https://www.epa.gov/sites/production/files/2015-07/documents/interagency.pdf.

distinctions between use patterns, timing of applications, locations of use, and presence of listed species and critical habitats.

- Compounding of conservatism in the assessment of exposure, resulting in unrealistically high and sometimes physically impossible estimates.

- Failure to consider appropriate lines of evidence, as recommended by the National Academy of Sciences in order to determine the likelihood of an effect occurring.

EPA sought to excuse its failure to properly revise the drafts or otherwise respond to comments by asserting that the revisions were precluded by a legal obligation to complete biological opinions based upon the BEs by December 31, 2017.[2] That position is incorrect. EPA is not bound by any such obligation.

EPA presumably based its assertion on stipulations entered in court cases by FWS and the National Marine Fisheries Service ("NMFS"). The one of those stipulations to which FWS was a party did express an intent to complete a nationwide OP biological opinion by December 31, 2017. *See CBD v. FWS* Stipulated Settlement at 3.[3] But it also expressly stated that FWS "is not obligated to" complete OP consultations by then, and provided that if there were to be a delay

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[2] Office of Chemical Safety and Pollution Prevention's Response to Comments on the Draft Biological Evaluations for Chlorpyrifos, Diazinon, and Malathion, at 2 (Jan. 17, 2017), *available at* https://www3.epa.gov/pesticides/nas/final/response-to-comments.pdf. In failing to "explain or support several assumptions critical to its conclusions," EPA violated the Fourth Circuit Court of Appeals' direction that an agency acting to implement the ESA must explain its analysis "with sufficient clarity" to allow stakeholders to determine whether the analysis is "the product of reasoned decisionmaking." *Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 707 F.3d 462, 464, 475 (4th Cir. 2013). For example, EPA relied on several data sets that it does not dispute are incomplete and/or inaccessible. But it never "cogently explain[ed] why." *Id.* at 473.

[3] The National Marine Fisheries Service entered into an analogous stipulation in May 2014 in which it agreed to complete an OP biological opinion by December 31, 2017. *See* Stipulation and Order to Amend the Stipulated Settlement Agreement Affirmed by this Court on August 1, 2008, *NW Coalition for Alternatives to Pesticides, et al. v. Nat'l Marine Fisheries Serv.*, No. 07-cv-01791 (W.D. Wash., May 21, 2014), Dkt. No. 50, at 6.

parties would meet and confer to discuss appropriate actions and, if necessary, petition the Court to resolve any dispute. *Id.* at 4-5.

We recently have written to EPA Administrator Pruitt asking that he withdraw from FWS the three BEs at issue. However, we urge that you not await that action. Instead, our clients respectfully request that you promptly return the BEs to EPA and direct that any effort to prepare biological opinions based on them be set aside. Our clients similarly request that once you, NMFS, EPA, and presumably the U.S. Department of Agriculture (which was a party to development of the "Interim Approaches") have determined how the new Administration is going to address the "Interim Approaches" and, more broadly, the issue of FIFRA-ESA integration, you direct the legal counsel representing FWS in *CBD v. FWS* to meet and confer on a timely basis with counsel for the other parties to that case to discuss appropriate further actions.

Thank you for your prompt attention to these requests.

Sincerely,

David B. Weinberg

Counsel to Dow AgroSciences, LLC; Makhteshim Agan of North America, Inc., d/b/a "ADAMA"; and FMC Corporation

Enclosures

Begin forwarded message:

From: David Bernhardt <dwbernhardt@ios.doi.gov>
Date: October 5, 2017 at 12:49:29 PM EDT
To: gary_frazer@fws.gov, DOI <todd_willens@ios.doi.gov>, greg_j_sheehan@fws.gov
Cc: Gareth Rees <gareth_rees@ios.doi.gov>
Subject: Pesticides

All: I apologize for the request, but I need to be updated on the status of consultations related to pesticides.

Please work with Gareth to schedule a briefing for mid-next week.

In addition, please provide me any briefing material -- that you have already generated -- you think might be useful for my preparation. I am at a baseline of virtually zero. I have been told we have a December court ordered deadline that we are not going to meet.

Thank you,
David

Sent from my iPhone

David Bernhardt

Wed Oct 11, 2017

All day Cathy - Annual Leave
Tue Oct 10, 2017 - Sat Oct 14, 2017
Video call:
[redacted]

Calendar: David Bernhardt
Created by: Catherine Gulac

9am - 9:30am Daily Scheduling & Communications Meeting
Where: Office of the Secretary
Calendar: [redacted]
Created by: Caroline Boulton
Who: David Bernhardt, Scott Hommel, Laura Rigas, Michael Argo, Downey Magallanes

9:30am - 11am
Bi-Weekly Meeting with Assistant Secretaries, Directors, & Advisors
Video call:
[redacted]

Where: 5160 Conference Room
Calendar: [redacted]
Created by: Caroline Boulton
Who:
Aaron Thiele, Laura Rigas, James Cason, Todd Wynn, Rick May, Lori Mashburn, Elinor Renner, Benjamin Cassidy, [redacted] gregory_sheehan@fws.gov, Austin Ewell, Scott Hommel, Natalie Davis, Jason Larrabee, John Tanner, John Tahsuda, Downey Magallanes, Leila Getto, Vincent Devito, Douglas Domenech, Gareth Rees, Micah Chambers, Andrea Travnicek, David Bernhardt, Daniel Jorjani, Katharine MacGregor, Alan Mikkelsen, Russell Roddy, Scott Cameron, Timothy Williams, Todd Willens, Greg Sheehan, Scott Angelle, Michael Argo, David Mihalic

11am - 11:30am
Meeting with KPMG auditors regarding the Statement on Auditing Standards
Where: Secretary's Conference Room
Calendar: [redacted]
Created by: Leila Getto
Who:
Olivia Ferriter, Christopher Stubbs, jasef-sargent@kpmg.com, Andrea Shorter, Douglas Glenn, Amy Holley, Kimberly McGovern, jhaueriii@kpmg.com, hkwilliams@kpmg.com, Downey Magallanes, David Bernhardt, mfreihofer@kpmg.com, Morgan Aronson, Scott Cameron, Mary Kendall, Teresa Hunter

1pm - 2pm Briefing with FWS
Video call:
[redacted]

Where: 6120
Calendar: [redacted]t
Created by: Catherine Gulac
Who:
Lois Wellman, Peg Romanik, Thomas Irwin, [redacted] Todd Willens, Craig Aubrey, Greg Sheehan, Mariagrazia Caminiti, Richard Goeken, Roslyn Sellars, David Bernhardt

David Bernhardt

2:30pm - 3pm Meeting with Comms
Video call:
[redacted]

Where: Room 6114
Calendar: David Bernhardt
Created by: Gareth Rees
Who: David Bernhardt, Russell Newell

3pm - 4pm Meeting with BLM
Video call:
[redacted]

Where: Room 6120
Calendar: David Bernhardt
Created by: Gareth Rees
Who:
Kevin Haugrud, David Bernhardt, Katharine MacGregor, Michael Nedd, Karen Hawbecker, Linda Thurn, Tracie Lassiter, Richard Cardinale, Mariagrazia Caminiti, Yolando Mack-Thompson, Brian Steed

4pm - 5pm DOI Operations Meeting - ASIA
Video call:
[redacted]

Where: Room 6120
Who:
Micah Chambers, Downey Magallanes, James Burckman, Gavin Clarkson, Gareth Rees, Bryan Rice, Anna Owens-Brown, Weldon Loudermilk, Scott Hommel, Hankie Ortiz, John Tahsuda, Charles Addington, James James, Michael Black, Margaret Creel, James Cason, Douglas Lords, Jason Thompson, Laura Rigas, Russell Newell, John Tanner, bart.stevens@bie.edu, tony.dearman@bie.edu, David Bernhardt
Going? Yes

5pm - 5:30pm Meeting with Downey
Video call:
[redacted]

Calendar: David Bernhardt
Created by: Gareth Rees

Thu Oct 12, 2017

All day Cathy - Annual Leave
Tue Oct 10, 2017 - Sat Oct 14, 2017
Video call:
[redacted]

Calendar: David Bernhardt
Created by: Catherine Gulac

8:30am - 9am Meeting with Elena Gonzalez
Video call:
[redacted]

Where: Room 6114
Calendar: David Bernhardt
Created by: Gareth Rees
Who: Elena Gonzalez, David Bernhardt

David Bernhardt

9:30am - 10am Depart B Ramp en route EEOB

Video call:

[redacted]

Calendar: David Bernhardt
Created by: Gareth Rees

10am - 11:30am October President's Management Council Meeting

Where: EEOB 430ABC
Calendar: dustin_s._brown@omb.eop.gov
Created by: David Bernhardt
Who:
Warren, Peter N. EOP/OMB, 'Arthur.McGlynn@treasury.gov', David Bernhardt, 'wwarren@usaid.gov', 'joseph.conaty@ed.gov', 'Tim.Horne@gsa.gov', Herbst, Ellen EOP, 'garry.p.reid.civ@mail.mil', Schneider, Grant M. EOP/OMB, 'kari.a.bingen.civ@mail.mil', 'SchurmanCJ2@state.gov', 'Hugler.Edward@DOL.GOV', 'Flynn.mike@epa.gov', 'jeff.rosen@dot.gov', Petrucci, Alexandra M. EOP/OMB, 'Victor.McCree@nrc.gov', 'david.tillotson1.civ@MAIL.MIL', 'mark.bradley@nara.gov', 'emily.murphy@gsa.gov', 'kathleen.mcgettigan@opm.gov', 'Claire.Grady@hq.dhs.gov', 'charles.phalen@nbib.gov', Field, Lesley A. EOP/OMB, Weichert, Margaret M. EOP/OMB, 'robert.carter@gsa.gov', Menasce, Flavio . EOP/OMB, Hanlon, Daniel EOP/OMB, 'david.eagles@hud.gov', Bussow, Mark A. EOP/OMB, 'jferrini@nsf.gov', 'matthew.moury@hq.doe.gov', 'thomas.bowman@va.gov', 'allie.coetzee@sba.gov', Lofthus, Lee EOP, 'Nancy.Berryhill@ssa.gov', 'Kody.Kinsley@TREASURY.GOV', 'charles.keckler@hhs.gov', Reger, Mark A. EOP/OMB, 'Dan.Brouillette@hq.doe.gov', 'William.evanina@ic.fbi.gov', Eanes, Matthew C., Graves, Margaret H. EOP/OMB, Cutts, Matthew D. EOP/OMB, Schneider, Grant, 'chip.fulghum@hq.dhs.gov', Nutt, Fred M. EOP/OMB, Fitzpatrick, John P. EOP/NSC, 'groberts@fbi.gov', 'ahunter@nasa.gov', 'mike.young@obpa.usda.gov', Mary Reding - M1X, 'KEVIN.HANRETTA@VA.GOV', 'Josie Beets - M1X'

11:30am - 12pm Depart EEOB en route DOI

Video call:

[redacted]

Calendar: David Bernhardt
Created by: Gareth Rees

12:30pm - 1pm Presentation of 20 Year Pin to Richard Cardinale

Video call:

[redacted]

Where: Room 6616 (ASLM Conference Room)
Calendar: David Bernhardt
Created by: Gareth Rees

1:30pm - 2pm Interview - Katie Tubb

Video call:

[redacted]

Where: Room 6114
Calendar: David Bernhardt
Created by: Gareth Rees
Who: Lori Mashburn, David Bernhardt

2pm - 2:45pm Meeting with Rep. Mark E. Amodei (NV-2)

Video call:

[redacted]

Where: Room 6120
Calendar: David Bernhardt
Created by: Gareth Rees
Who: Micah Chambers, David Bernhardt, Amanda Kaster

David Bernhardt

[redacted]
Video call:
[redacted]

Where: 6120
Calendar: [redacted]
Created by: Gareth Rees
Who:
Todd Willens, [redacted], David Bernhardt, Richard Goeken, Thomas Irwin, Roslyn Sellars, Craig Aubrey, Peg Romanik, Mariagrazia Caminiti, [redacted], Greg Sheehan, Lois Wellman

4pm - 5pm DOI Operations Meeting - ASLM
Video call:
[redacted]

Where: Room 6120
Who:
Gareth Rees, John Ruhs, Fred Cruise, Karla Cook, Walter Cruickshank, Laura Rigas, Casey Hammond, Russell Newell, James Cason, Patrick Braxton, Michael Barre, Margaret Schneider, Vincent Devito, John Tanner, Katharine MacGregor, Brian Steed, Linda Thurn, Jill Moran, Glenda Owens, Yolando Mack-Thompson, Cally Younger, Thomas Lillie, Scott Angelle, Micah Chambers, Downey Magallanes, Tracie Lassiter, Scott Hommel, Richard Cardinale, Michael Nedd, David Bernhardt
Going? Yes

5pm - 5:30pm
Meeting with Brian Ballard and Wallace Cheves, Skyboat Management on NC and SC Land Issues
Video call:
[redacted]

Where: Room 6120
Calendar: David Bernhardt
Created by: Gareth Rees

Fri Oct 13, 2017

All day Cathy - Annual Leave
Tue Oct 10, 2017 - Sat Oct 14, 2017
Video call:
[redacted]

Calendar: David Bernhardt
Created by: Catherine Gulac

All day Ivan - AWS Day
Fri Oct 13, 2017 - Sat Oct 14, 2017
Video call:
[redacted]

Calendar: David Bernhardt
Created by: Gareth Rees

David Bernhardt

5pm - 5:30pm Follow up call
Where: 3130A WJC-E (Call in number [redacted], access code [redacted])
Calendar: beck.nancy@epa.gov
Created by: David Bernhardt
Who: Gareth Rees, beck.nancy@epa.gov, Dourson, Michael, David Bernhardt, Baptist, Erik

5:30pm - 6:30pm Meeting/Briefing - VNF Change Rule
Video call:
[redacted]
Where: 6120
Created by: Catherine Gulac
Who:
Karen Hawbecker, Linda Thurn, Tracie Lassiter, Brian Steed, Katharine MacGregor, James Tichenor, Kevin Haugrud, Kathleen Benedetto, Peter Mali, Timothy Spisak, Gareth Rees, Christopher Rhymes, Richard Cardinale, David Bernhardt, Michael Nedd
Going? Yes

Thu Oct 26, 2017

9am - 9:30am Depart B Ramp en route 730 Jackson place
Video call:
[redacted]
Calendar: David Bernhardt
Created by: Gareth Rees
Who: Todd Willens, David Bernhardt

9:30am - 10:30am Meeting with White House Counsel and CEQ
Video call:
[redacted]
Where: 730 Jackson Place
Calendar: David Bernhardt
Created by: Gareth Rees
Who: Todd Willens, David Bernhardt

10:30am - 11am Daily Scheduling & Communications Meeting
Where: Office of the Secretary
Calendar: [redacted]
Created by: Caroline Boulton
Who:
David Bernhardt, Michael Argo, Downey Magallanes, [redacted] Scott Hommel, Laura Rigas

10:30am - 11am Depart Jackson Place en route DOI
Video call:
[redacted]
Calendar: David Bernhardt
Created by: Gareth Rees
Who: Todd Willens, David Bernhardt

David Bernhardt

10:30am - 11am **Meeting with Gary Frazer**
Video call:
[redacted]
Where: Room 6114
Calendar: **David Bernhardt**
Created by: Gareth Rees
Who: Todd Willens, Gary Frazer, David Bernhardt

11am - 12pm **Briefing with Fish and Wildlife Service**
Video call:
[redacted]
Where: Room 6114
Calendar: [redacted]
Created by: Gareth Rees
Who:
Todd Willens, Michael Gale, [redacted] Roslyn Sellars, David Bernhardt, Catherine Gulac, Thomas Irwin, Greg Sheehan

4pm - 5pm **DOI Operations Meeting - ASLM**
Video call:
[redacted]
Where: Room 6120
Who:
Richard Cardinale, Katharine MacGregor, Linda Thurn, David Bernhardt, Thomas Lillie, Brian Steed, John Tanner, Glenda Owens, Michael Barre, Scott Angelle, Tracie Lassiter, Yolando Mack-Thompson, Cally Younger, Laura Rigas, Micah Chambers, Patrick Braxton, Gareth Rees, Margaret Schneider, Russell Newell, Fred Cruise, Jill Moran, Casey Hammond, Michael Nedd, James Cason, Downey Magallanes, Vincent Devito, Scott Hommel, Karla Cook, John Ruhs, Walter Cruickshank
Going? Yes

Fri Oct 27, 2017

All day **Ivan - AWS Day**
Fri Oct 27, 2017 - Sat Oct 28, 2017
Video call:
[redacted]
Calendar: David Bernhardt
Created by: Gareth Rees

9am - 9:10am **Daily Scheduling & Communications Meeting**
Where: Office of the Secretary
Calendar: [redacted]
Created by: Caroline Boulton
Who:
Laura Rigas, Michael Argo, David Bernhardt, Scott Hommel, Downey Magallanes, Russell Newell, [redacted]

9:10am - 9:40am **Prebrief for Meeting with Administrator Rao**
Where: Secretary's Office
Calendar: [redacted]
Created by: Leila Getto
Who: Katharine MacGregor, Downey Magallanes, David Bernhardt

David Bernhardt

10am - 10:45am Bi-Weekly Meeting with Inspector General
Video call:
[redacted]
Where: Room 6114
Calendar: David Bernhardt
Created by: Gareth Rees
Who: Mary Kendall, David Bernhardt

11am - 11:30am Meeting with Elena Gonzalez and Sylvia Burns
Video call:
[redacted]
Where: Room 6114
Calendar: David Bernhardt
Created by: Gareth Rees
Who: David Bernhardt, Elena Gonzalez, Sylvia Burns

1:30pm - 2:30pm Meeting with Administrator Rao
Where: Secretary's Office
Calendar: [redacted]
Created by: Leila Getto
Who: Downey Magallanes, David Bernhardt, Katharine MacGregor, James Cason

3pm - 3:30pm [redacted]
Video call:
[redacted]
Where: Room 6114
Calendar: [redacted]
Created by: Gareth Rees
Who: [redacted], Todd Willens

3:30pm - 4pm Meeting with Micah Chambers
Video call:
[redacted]
Where: Room 6114
Calendar: David Bernhardt
Created by: Gareth Rees
Who: Todd Willens, David Bernhardt, Micah Chambers

Mon Oct 30, 2017

9:30am - 10am Weekly Check-In Call with Mike Catanzaro
Video call:
[redacted]
Where: Mike to call 202-208-6291
Calendar: David Bernhardt
Created by: Gareth Rees

10am - 10:30am Depart B Ramp en route EEOB
Video call:
[redacted]
Calendar: David Bernhardt
Created by: Gareth Rees

David Bernhardt

10:30am - 11:30am [redacted]
Where: EEOB SoW 230A (WAVES link in notes)
Calendar: magdelana.a.delahoyde@who.eop.gov
Created by: [redacted]
Who:
Brooke, Francis J. EOP/OVP, Catanzaro, Michael J. EOP/WHO, Starling, Ray A. EOP/WHO, stephen.vaden@ogc.usda.gov, Dourson, Michael, Domesle, Alexander R. EOP/CEQ, rebeckah.adcock@osec.usda.gov, Bonfitto, Jordan P. EOP/WHO, beck.nancy@epa.gov, Baptist, Erik, Prandoni, Christopher D. EOP/CEQ, juthmeier@doc.gov, David Bernhardt, Moran, John S. EOP/WHO, Todd Willens, Neumayr, Mary B. EOP/CEQ

11:30am - 12pm Depart EEOB en route DOI
Video call:
[redacted]
Calendar: David Bernhardt
Created by: Gareth Rees

12pm - 1pm Weekly Brown-Bag Check-in
Video call:
[redacted]
Where: Room 6114
Calendar: David Bernhardt
Created by: Gareth Rees
Who: Todd Willens, David Bernhardt, James Cason

1pm - 2pm Depart Office
Video call:
[redacted]
Calendar: David Bernhardt
Created by: Gareth Rees

2pm - 3pm (No title)
Video call:
[redacted]
Where: [redacted]
Calendar: David Bernhardt

3pm - 4pm Acting Assistant Secretaries weekly Meeting
Video call:
[redacted]
Where: Conf Rm 6120
Created by: Jean Parrish
Who:
Benjamin Cassidy, Thomas Irwin, Katharine MacGregor, Todd Willens, Douglas Domenech, Gareth Rees, Shirley Lewis, James Cason, John Tahsuda, Catherine Callaway, Andrea Travnicek, Downey Magallanes, Daniel Jorjani, Jason Larrabee, Lori Mashburn, Todd Wynn, Laura Rigas, Tracie Lassiter, Timothy Williams, Amanda Kaster, Roslyn Sellars, Mariagrazia Caminiti, Micah Chambers, Tameka Lewis-Robinson, Scott Cameron, David Bernhardt
Going? Yes

From: Frazer, Gary
To: Gina Shultz; Craig Aubrey; Patrice Ashfield; Richard Goeken; Peg Romanik; BENJAMIN JESUP; Nancy Brown-Kobli; Shawn Finley
Subject: Re: Draft letter to EPA requesting more information
Date: Thursday, November 9, 2017 9:35:50 AM
Attachments: request for more info from EPA AES edits clean DS edits.docx

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FYI only. Met with David this morning and discussed the revisions shown in the attached. I didn't find any to be problematic. He's going to share the revised draft within the interagency group that he's engaged with. Next steps will be informed by that discussion. -- GDF

Gary Frazer
Assistant Director -- Ecological Services
U.S. Fish and Wildlife Service
(202) 208-4646

On Wed, Nov 8, 2017 at 12:50 PM, Frazer, Gary <gary_frazer@fws.gov> wrote:
FYI. Just keeping you apprised of the status. -- GDF

Gary Frazer
Assistant Director -- Ecological Services
U.S. Fish and Wildlife Service
(202) 208-4646

--------- Forwarded message ---------
From: **Bernhardt, David** [redacted]ov>
Date: Wed, Nov 8, 2017 at 10:43 AM
Subject: Re: Draft letter to EPA requesting more information
To: "Frazer, Gary" <gary_frazer@fws.gov>

Gary: I have one sentence I wish to discuss with you tomorrow.

Thank you,
David

On Wed, Nov 8, 2017 at 9:58 AM, Frazer, Gary <gary_frazer@fws.gov> wrote:
David -- Attached is the draft letter to EPA. I made some changes to the draft that Rick shared yesterday, so I've attached both a clean version and one showing the changes from the draft I got from Rick.

I board a flight around 11a Eastern and land around 3p in the event you want to discuss. I'll be in the office tomorrow. -- GDF

Gary Frazer
Assistant Director -- Ecological Services

U.S. Fish and Wildlife Service
(202) 208-4646

David Longly Bernhardt
Deputy Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240
[redacted]

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Senator WYDEN. Now, I want to go into this conflict issue a bit more with the remainder of my time.

Mr. Bernhardt, I am not claiming that you are big oil's guy. The big oil lobbyists are making that claim. Your former clients in the oil and gas industry have been caught on tape crowing about how you are their guy at Interior.

I am thinking back to how Ryan Zinke sat in your seat and said nine times he would be like Teddy Roosevelt, but he left with an enormous ethical set of clouds.

I have not seen any evidence that you ever publicly objected to any of Zinke's activities, A. And B, there is an Inspector General report indicating that you have given the green light to some of them.

[The DOI OIG Report referred to follows:]

THE SECRETARY OF THE INTERIOR
WASHINGTON

DEC 3 1 2019

The Honorable Lisa Murkowski
Chairman, Committee on Energy
and Natural Resources
United States Senate
Washington, DC 20510

Dear Chairman Murkowski:

On March 28, 2019, I appeared before the Senate Energy and Natural Resources Committee for a confirmation hearing. During that hearing Senator Ron Wyden asserted that I had "lied," "meddled with science," and "improperly inserted [myself] into the scientific process." When I responded by rejecting those assertions, he requested and received consent that documents be inserted into the hearing record that he claimed "attest" to his position.

On December 9, 2019, the Department of the Interior's Inspector General delivered a Final Report titled *Report of Investigation: Alleged Improper Influence by the Secretary of the Interior in FWS's Scientific Process*. This report addresses the false and misleading allegations of improper political influence in the scientific process.

The Inspector General's report unequivocally demonstrates that my responses to Senator Wyden's false allegations were truthful and accurate. In addition, the report affirms that my actions were appropriate and carried out within the scope of my authority.

Senator Wyden's assertions were false and malicious. Therefore, given the inclusion of the documents within the record of the Committee hearing that Senator Wyden claimed supported his assertions, I request that the attached report be placed in the official file of the Committee. I further request that the report be included as an addendum to any printed report of the confirmation hearing.

To fail to take such action perpetuates Senator Wyden's false narrative despite an unequivocal factual record to the contrary.

Sincerely,

Secretary of the Interior

cc: The Honorable Joe Manchin III
Ranking Member

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 0 5 2019

The Honorable Mark L. Greenblatt
Inspector General
U.S. Department of the Interior
Washington, DC 20240

Dear Mr. Greenblatt:

I am writing in response to the Office of Inspector General's delivery on November 6, 2019, of a Final Report titled, "Report of Investigation: Alleged Improper Influence by the Secretary of the Interior in the FWS' Scientific Process." According to standard Department of the Interior (Department) procedures, I understand the Final Report will be transmitted to Congress on December 9, 2019. This letter acknowledges receipt.

The Department finds the investigatory conclusions in the Final Report affirm the appropriateness of the actions of the Secretary.

Any objective review of the false and misleading allegations of improper political interference that led to this investigation will recognize them to be wholly without merit. In the ongoing consultation by the U.S. Fish and Wildlife Service (FWS) under section 7 of the Endangered Species Act (ESA) regarding the Environmental Protection Agency's proposed re-registration of certain pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act, the Department has acted in full compliance with all legal requirements.

The Final Report expressly confirms the accuracy and truthfulness of the Secretary's March 28, 2019, confirmation hearing testimony on this matter by finding that his input on the legal framework of the FWS draft biological opinion is completely consistent with the views of career Department attorneys, and neither influenced nor altered the findings of career FWS scientists. Both the law and science play an important role in ESA consultations—a fact often not appreciated outside of the Department and, remarkably, ignored by the Members of Congress who demanded this investigation.

The Department also recognizes the Final Report's conclusion that there is "no evidence that [the Secretary] exceeded or abused his authority" in directing FWS to adopt a legally defensible approach to consultation. As you know, Article II of the United States Constitution vests the executive power in the President. Congress has expressly stated in law that the Secretary supervises all public business of the Department. In doing so, the Secretary oversees and is responsible for all business of the Department and its component agencies, including the FWS. The Secretary will continue robustly exercising this authority to ensure that the Department continues to follow the law on all issues that come before the Department.

Finally, the Department is committed to complying with the Administration's ethics pledge and all Federal ethics law and regulations; therefore, the fact that the Final Report finds no evidence of such inappropriate activity is unsurprising.

In line with these findings, the Department will ensure that all employees involved in the ongoing ESA consultation continue to comply with all applicable laws and regulations.

The Department considers this matter resolved.

Sincerely,

Todd D. Willens
Chief of Staff

INVESTIGATION

OFFICE OF
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR

INVESTIGATIVE REPORT OF ALLEGED IMPROPER INFLUENCE BY THE SECRETARY OF THE INTERIOR IN THE FWS' SCIENTIFIC PROCESS

This is a revised version of the report prepared for public release.

Report Number: 19-0434 Web Posting Date: December 10, 2019

SYNOPSIS

We initiated this investigation after receiving allegations that Secretary of the Interior David Bernhardt, when he was the Deputy Secretary, interfered with the U.S. Fish and Wildlife Service's (FWS') scientific process during an assessment of the effects of pesticides on endangered species. We investigated whether Bernhardt exceeded or abused his authority by influencing consultations between the FWS and the U.S. Environmental Protection Agency on the proposed registration or re-registration of three pesticides, and whether his involvement violated his ethics pledge or Federal ethics regulations.

We found that Bernhardt reviewed a draft FWS opinion on the potential biological effects that one of the three pesticides could have on endangered species, and he instructed the FWS team developing the opinion to change its method for determining the potential effects. This change has delayed the completion of the opinion, but we found no evidence that Bernhardt exceeded or abused his authority or that his actions influenced or altered the findings of career FWS scientists. We also found no evidence that Bernhardt's involvement in this matter violated his ethics pledge or Federal ethics regulations. We provided this report to the Chief of Staff for the Office of the Secretary for any action deemed appropriate.

DETAILS OF INVESTIGATION

We initiated this investigation based on congressional requests to investigate the circumstances surrounding Secretary of the Interior David Bernhardt's involvement, as Deputy Secretary, in the alleged delay of a U.S. Fish and Wildlife Service (FWS) biological assessment of the effects of pesticides on endangered species. Bernhardt's alleged involvement was outlined in a *New York Times* article.

We investigated the actions Bernhardt took during formal consultations that the FWS was conducting with the U.S. Environmental Protection Agency (EPA) to assess potential effects of several companies' proposed registration or re-registration of three pesticides—malathion, diazinon, and chlorpyrifos—on endangered species. We also analyzed whether anything Bernhardt did with relation to these consultations violated his ethics pledge or any Federal ethics regulations.

No Evidence That Bernhardt Improperly Influenced FWS Pesticide Consultations

The Endangered Species Act (ESA) directs all Federal agencies to work to conserve endangered and threatened species and to use their authorities to further the purposes of ESA Section 7, "Interagency Cooperation." ESA Section 7 is a mechanism by which Federal agencies ensure the actions they take, fund, or authorize do not jeopardize the existence of any species listed in the ESA.

Under ESA Section 7, a Federal agency must formally consult with the FWS when any action the agency proposes to take, fund, or authorize may affect listed species. During a formal consultation, the FWS and the agency proposing the action work together to determine whether the action would be likely to jeopardize the continued existence of endangered or threatened

species. As part of the consultation, the FWS issues a "biological opinion" document, in which it gives its opinion on whether the proposed activity would jeopardize the continued existence of species. In this case, the proposed activity was EPA determining whether to approve or disapprove the registration or re-registration for several companies to produce the named pesticides.

Bernhardt's Involvement in Draft Biological Opinion for Malathion

We interviewed a career FWS official, who stated the FWS developed a draft biological opinion on the pesticide malathion as part of consultations with the EPA on the EPA's review of the registration of the three pesticides. The official explained to us that during a consultation, the FWS evaluates all of the direct and indirect effects of a proposed action; in this case, he said, the FWS considered the direct effect to be the registration of the pesticide, which would allow it to be manufactured, and the indirect effects to be the impacts to protected species or habitats that were "reasonably certain" to occur when the pesticide was used. The official told us the EPA asked for consultations on the effects of the three pesticides in January 2017, and the FWS began drafting the biological opinion for malathion the same month. He said malathion was the first pesticide (out of the three) for which the FWS had drafted its biological opinion.

When we spoke with Bernhardt about his role in the consultation, he said he sent the career FWS official an email in the fall of 2017 telling the official he wanted to "get up to speed on the issue." [1] He said he did not remember why he made this request, but someone at the EPA or the Council on Environmental Quality might have told him about the consultation. Bernhardt said pesticide consultations were notable because they were "the most complex consultations on the planet," and therefore the agencies that conducted them often struggled to complete them.

Bernhardt told us he was "extremely troubled" when he reviewed the draft biological opinion for malathion because "a massive amount of work" had gone into the consultation process and the draft opinion was "completely inconsistent with our regulatory paradigm." According to Bernhardt, the FWS did not clearly convey where the pesticide would be used, how the use would occur, and what the effects of the use would be. He believed the FWS consultation team had struggled with how to analyze the potential effects on species, so the team had decided to base its analysis on the pesticide's approved usage (that is, the usage authorized by the EPA), rather than analyzing how it had actually been used in the years it had been on the market. In his opinion, he said, the team's approach did not "fall within the law."

Bernhardt said that after he reviewed the draft opinion in late 2017 he asked to meet with the attorneys who had worked on it and learned that the U.S. Department of the Interior's (DOI's) Office of the Solicitor (SOL) had received the draft opinion for legal review only about 2 weeks before he saw it. Bernhardt thought the FWS team's work on the consultation without earlier involvement by the SOL had been a "pathetic waste of energy, effort, and resources."

Bernhardt recalled that when the SOL attorneys did review the draft opinion, they agreed with him that the opinion should be based on actual past usage of the pesticide. He said he and the SOL attorneys discussed the need to find data on where the pesticide had been applied in the past

[1] Our review of emails for this investigation did not reveal this particular message.

and what the actual effects were on species so they could complete the biological opinion in a way that met the regulatory requirements.

The FWS official and a second career FWS official both told us they attended a meeting with Bernhardt after he reviewed the draft malathion opinion. The first official said Bernhardt asked relevant questions at the meeting about the work the FWS consultation team had done, including whether the indirect effects were reasonably certain to occur and the basis for the team's conclusion. The second official said Bernhardt expressed concerns during the meeting because the team's analysis was based on the pesticide's approved usage levels, not on its actual past usage.

The second FWS official also told us that in February 2018 Bernhardt asked the principals and staff from all of the agencies involved in the consultations, including the U.S. Department of Agriculture and the U.S. Department of Commerce's National Marine Fisheries Service, to meet at the FWS office. This official said that during the daylong meeting Bernhardt asked the agencies to collect data on past usage of all three pesticides. Afterward, the official said, the FWS formed work groups that collected the requested data until they felt they had exhausted all available data sources. The official later informed us that the work groups were in the process of incorporating the data they had collected on malathion into a new analysis for a new draft biological opinion.

No Evidence That Bernhardt's Actions Concerning Pesticide Consultations Were Improper

We found no evidence that Bernhardt exceeded or abused his authority or that his actions influenced or altered the findings of career FWS scientists. Our interviews of four current and former career SOL employees and six career FWS employees (including the two FWS officials referenced earlier in this report) who had been involved in the pesticide consultations confirmed that Bernhardt did not influence the consultations' scientific or biological aspects. All four of the SOL attorneys and four of the six FWS employees we asked said he influenced the legal interpretation of the ESA and the ESA's implementing regulations; none said, however, that they believed his influence was improper. In addition, none of these employees were aware of any formal DOI or FWS process for reviewing consultations or draft biological opinions. The SOL attorneys said that after they reviewed the draft biological opinion on malathion they agreed with Bernhardt's observations, and that he raised valid legal concerns.

We asked seven of the SOL and FWS employees whether a political appointee such as Bernhardt would typically become involved in a consultation; one SOL attorney said it was not the norm but not unusual, while two SOL attorneys and four FWS employees said it was unusual but not unprecedented. As an example, one of the FWS officials said that former Interior Secretary Sally Jewell became involved when the EPA was consulting the FWS on an action relating to rules governing the permitting of cooling water intake structures for industrial facilities.

In addition, all four of the SOL attorneys and five of the FWS employees we asked told us pesticide consultations were especially complex, difficult, and controversial. An FWS fish and wildlife biologist explained to us that one reason for this was that these consultations were determining the effects of pesticides, which can be used across the Nation, on all of the

endangered species listed in the ESA. The biologist said that no matter what the FWS did during the consultations it would be criticized, either for overestimating the effects on endangered species or for not being conservative enough with its estimates.

No Evidence That Bernhardt Violated Ethics Pledge or Ethics Regulations

We found that Bernhardt's involvement in the pesticide consultations did not constitute a conflict of interest. We confirmed that none of the companies the FWS had listed as registrants for the pesticides were former clients or otherwise on Bernhardt's recusal list. In addition, we did not find any evidence that Bernhardt's former employer, Brownstein Hyatt Farber Schreck, LLP, represented any of the registrants.

We interviewed DOI Designated Agency Ethics Official Scott de la Vega and a DOI ethics law and policy official, both of whom told us they did not know of any actions Bernhardt took during his involvement with the pesticide consultations or the draft biological opinion on malathion that violated his ethics pledge or any Federal ethics regulations. Both told us no one had ever raised questions or concerns with them about Bernhardt's involvement in the consultations, and de la Vega agreed with our finding that no conflicts of interest existed.

SUBJECT

David Bernhardt, Secretary of the Interior.

DISPOSITION

We provided this report to the Chief of Staff for the Office of the Secretary for any action deemed appropriate.

Report Fraud, Waste, and Mismanagement

Fraud, waste, and mismanagement in Government concern everyone: Office of Inspector General staff, departmental employees, and the general public. We actively solicit allegations of any inefficient and wasteful practices, fraud, and mismanagement related to departmental or Insular Area programs and operations. You can report allegations to us in several ways.

By Internet: www.doioig.gov

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Washington Metro Area: 202-208-5300

By Fax: 703-487-5402

By Mail: U.S. Department of the Interior
Office of Inspector General
Mail Stop 4428 MIB
1849 C Street, NW.
Washington, DC 20240

So I am going to close because my time is out. I think you are so conflicted that if you get confirmed you are going to have one of two choices. One, you are going to have to disqualify yourself from so many matters I don't know how you are going to spend your day. Or two, you are going to be making decisions that either directly or indirectly benefit former clients, regularly violating your ethics pledge.

And for colleagues for whom this is a new matter, I would urge you to take a look at the documents that have just come out from the Freedom of Information Act lawsuit because I think they make my point.

Thank you, Madam Chair.

The CHAIRMAN. Senator Gardner.

Senator GARDNER. Thank you, Madam Chair.

Already, with the first questions, we have seen attacks impugning the character of our nominee today.

I understand that people are going to have differences of opinions. I understand that people are going to vote no. But to attack the witnesses? This is why good people do not want to serve this country, because people on this Committee and others around this Capitol decide they can attack the witnesses and impugn their character.

Let me read you a quote from the Fish and Wildlife official that you are talking about, Senator Wyden. The top endangered species official at Fish and Wildlife Service said, "It was an entirely appropriate role. There was no arm twisting of any kind." He did not believe the change of direction was politically driven.

Now you are accusing our witness of being unethical, immoral, lying. If you want to get a friend in Washington, get a dog. I think that is what a Democratic president said, and I guess they are making true to it today.

Mr. Bernhardt, thank you again for being here.

I started talking about moving the BLM headquarters to the West at the end of the Obama Administration. Since I first mentioned it, a ground swell of bipartisan support in our home State of Colorado has formed, supporting moving the headquarters to Colorado, more specifically, Grand Junction, Colorado, in the Western slope. If you want a street address, I can provide that.

Grand Junction is situated in Mesa County, a county where 74 percent of the acres are federally managed. Ninety-nine percent of the land BLM manages is west of the Mississippi River. You would think that locating the headquarters of the agency somewhere in that footprint would simply be common sense.

In your testimony you alluded to the Trappers Lake Memo authored by Art Carhart. It stated that there are a number of places with scenic values of such great work that they are rightfully the property of all people. They should be preserved for all time for the people of the nation and the world. Trappers Lake is unquestionably a candidate for that classification.

There are many places deserving of such protection in the West. However, there are also many places, many of which are managed by the Bureau of Land Management, that are literally made for and opportunities for resource opportunities, for grazing, others for wheeling, for energy, much of it for all-of-the-above.

The problem is if you have never lived or visited in these areas in the Western U.S., you would not know that. You may be tempted to treat every public acre as if it should be a wilderness area or some other kind of designation.

That is why I believe it is important for the BLM to move out West so its employees live among the land they manage and can more readily see the practical impacts of the management decisions they make.

Can you provide an update for us on the status of the Department's reorganization and relocation plans?

Mr. BERNHARDT. So, we're—thank you very much for that question.

We're developing a business case for moving BLM west. We've just submitted our budget for 2020 which will, which contemplates a move west. And we'll be visiting with you and other Members of Congress to, hopefully, move west.

It's very interesting. When I was confirmed as Deputy Secretary, a Senate Democratic staffer gave me what was a job description of the Deputy Under Secretary that came through a committee hearing. And in that very committee hearing in 1936, the members said if you're going to add a Deputy, we want you to spend at least half your time in the west.

And I think with modern technology that's pretty easy for a bureau director to do. And as a matter of fact, most of them spend a lot of time in the west, and so I think their folks can too. It also adds an element of allowing us to get to places easier, more quickly, shorter flights which, and frankly, the quality of life of our employees will be fantastic too. So there's a lot of reasons to think about it, and we're trying it.

Senator GARDNER. Thank you, Mr. Bernhardt.

It is unfortunate, but not unexpected, that the very qualities that make you a supremely qualified candidate to serve as Secretary are being portrayed by detractors as strikes against you. Instead of being portrayed as a competent lawyer who represents clients zealously and ably, you are painted as compromised and in pockets of industry.

If the same standards had been applied to Sally Jewell, she would not have made it out of Committee. She was a former oil company employee who had most previously served as the CEO of one of the nation's premier outdoor recreational gear companies. That runs the gamut of issues the Secretary is required to balance when running the Interior Department. However, at the time they were portrayed in the press as assets that would help her responsibly guide the Department instead of a liability. Sally Jewell received 87 votes, 87 votes, Republicans and Democrats, when her nomination went to the Floor.

Janet Schneider was Assistant Secretary of Land and Minerals and served under Secretary Jewell during the Obama Administration. She came from a law firm, she was a lawyer, where she handled environment, land, and natural resource issues. Her conflict list submitted to ethics was very similar to the substances in yours. At the same time of Ms. Schneider's nomination, Secretary of the Interior Sally Jewell said, and I quote, "Janet's expertise in natural resource energy development and environmental law and policy

will enable us to continue to safely and responsibly expand America's conventional and renewable energy exploration and development under President Obama's all-of-the-above energy strategy. With experience in both the public and private sectors she will be an advocate for a balanced approach and a science-based decision-making process that both advances the President's key energy initiatives and promotes the conservation of our federal lands and natural resources."

Apparently your experience is not to be given the same consideration.

I am out of time, but I think there is an absolute double standard that is being applied here that private and public experience on one side of the aisle seems to be a benefit but private and public experience on the other side of the aisle seems to be a detriment. I get sick, and the American people get sick, of the double standards applied. You are more than well-qualified. You have dealt honestly and ably with every member of this Committee. If they look past the partisan politics, they will see your confirmation is absolutely in order.

Thank you, Mr. Bernhardt.

The CHAIRMAN. Thank you, Senator Gardner.

Senator Heinrich.

Senator HEINRICH. Thank you, Madam Chair.

Acting Secretary, as you are aware, New Mexico is one of the most productive oil and gas states in the nation; however, we also fiercely defend our history and our culture.

The Greater Chaco Canyon landscape is one of the most sensitive and important cultural landscapes in the nation, and it is eminently threatened by recent expanded oil and gas development. The BLM and the BIA have been working on a new land use plan for the area, but after five years we have yet to even see a draft produced. So local residents, tribal leaders, other community members, elected officials are all stuck reacting to announcement after announcement of proposed leases in the area.

Senator Udall and I have proposed legislation to permanently withdraw the federal minerals in the immediate vicinity of the park, and I certainly hope this Committee will work with us to move that legislation.

But as Secretary, you would also have the authority to withdraw this area from oil and gas development. Is that something you would be willing to consider through the NEPA process, withdrawing federal minerals around Chaco Cultural National Historic Park and would you be willing to come out to New Mexico and meet with the tribal leaders and other elected officials who have a strong interest and ties to this area?

Mr. BERNHARDT. First off, thank you very much for that question and, more importantly, thank you for giving me some time with you to visit yesterday.

First off, I would love to go to New Mexico and visit the site with you, that would be great, and meet with your constituents, more than happy to do that.

I do think that the planning process probably provides an opportunity to include some alternatives that would be conservation oriented, and I'd be happy to work with you and work with those de-

tails with you. But I'd like to get out there. Let's see the site, and then talk about it.

Senator HEINRICH. I appreciate your willingness to come out and see things with your own eyes. I think that is always helpful. It is certainly something that Secretary Zinke and I sometimes had some fairly exciting exchanges here.

[Laughter.]

But once we were able to go out and travel into a landscape, usually with a horse involved, things got more reasonable for some reason.

[Laughter.]

The Administration's budget request for next year, I was disappointed to see, included almost no funding for LWCF. And that was really despite this enormous ground swell of support, everyone being so excited about finally, permanently, reauthorizing that program.

I really worry that, you know, LWCF is one of the most critical tools that we have for expanded access to public lands for hunting and fishing, for all sorts of other uses as well. We have a lot of public lands that you can't legally access right now. You literally cannot get there by any means. And we have certainly been very successful at using that in New Mexico to open up areas to public access.

So talk to me about why there is no significant funding for this program if sportsmen's access on public lands are a priority for this Department?

Mr. BERNHARDT. Well, let me say first that we applaud Congress for permanently authorizing the Act. That was a consistent position the Department held, and we really appreciate that.

The budget, you know, my view of the budget is that it's a beginning of a discussion point to work through.

The other thing I think that hampered us a little in our own negotiation through the budget process internally, it would have been nice if that legislation had been authorized.

So I'm going to fight going into the next year, and we'll see where we come out. I'd like to work with the entire Committee this year to make things land in the right place.

The other thing we have done, and this is in our budget, is we've really invested in the mandatory spending side for the Restore Our Parks Act. And so, that was a positive.

The other thing is overall we had a net of plus $900 million. So compared to some other agencies, we fought pretty well internally, but we didn't get everything we wanted. And we'll fight hard for that. I think we have a little leverage.

The other thing I should let you know, all of you who worked so hard on the lands package, is I have taken a process that I used when I was a counselor to the Secretary to implement the Energy Policy Act which was quorum at the task force, specifically to implement the Act quickly and thoroughly. And we're applying that task force model. I signed a Secretarial Order yesterday to apply that very task force model to the implementation of the lands package so that we can expeditiously get ahead of all the 120 provisions that you have included in that.

Senator HEINRICH. One of the provisions that we would urge you to just take a look at as you are doing that would be the access provisions, because there is good language in the legislation to provide that.

Mr. BERNHARDT. There absolutely is.

Senator HEINRICH. Thank you.

The CHAIRMAN. Thank you, Senator Heinrich.

We appreciate that update on the Secretarial Order, because that is something that we would all like to see advancing.

Senator Lee.

Senator LEE. Thank you, Madam Chair. Thank you, Mr. Bernhardt, for your willingness to be considered for this important position.

I want to note at the outset you are someone who I first met, I think, 14 years ago or so. In my every interaction with you I have been impressed at the care that you have demonstrated to following the law, making sure that at every step in your in government you are following the standards that are expected of the Department and that are compelled by law. I have deep respect for that.

It is not always a fun or an easy task to be in that role. And in my every interaction with you and every action that you have undertaken that I have been able to observe, even from afar, you have impressed me as an administrator, as a legal mind and as a citizen who has an unusually compelling commitment to the rule of law and to sound public policy. I appreciate that about you.

You are someone who enjoys the support of groups of sportsmen, of outdoor recreationists, of wildlife groups and many others who advocate aggressively to make sure that they maintain access to public lands for the things that they want to use it for. Multiple use is, of course, an important part of our public lands management policy.

A lot of these people want to make sure that their interests are not overlooked and that they are taken into account. What would you do as far as adopting specific policies that could help ensure that the voices of those stakeholders who have great interest in and care a lot about our federal public lands, make sure that their voices are heard?

Mr. BERNHARDT. Well, we've taken one step last week, as a matter of fact, Senator. I really appreciate the question.

At the end of the day public access for folks to get out and use and utilize and enjoy our lands, whether it's for hunting and fishing, for backpacking, it's so critical. And one of the things I did is I issued an order to BLM that basically says simply, if you're thinking about disposing of a piece of land or you're thinking about exchanging a piece of land, before you can do that at all, you need to consider the public access benefit of that land so that that's treated just like other high priorities of FLPMA in analyzing that piece of property.

We have opened and we continue to open acreage for hunting and fishing, for additional lands. We are on a mission where we've taken and have 12 full-time folks in the Fish and Wildlife Service that are trying to coordinate to ensure that we have better hunting and fishing opportunities that our state law and our laws, our reg-

ulations are carefully constructed to not impede each other. And we're doing some great things with that. The reality is people love our lands and they enjoy them and the more folks out there, the better.

Senator LEE. Yes.

You have been nominated to a position that is involved in a lot of decisions that are sometimes controversial, and yet it is also a position in which there is a lot that makes people happy.

There is not a lot that makes the people happy about the Federal Government these days. We live in a day and age when Congress enjoys an institutional approval rating that hovers between 9 and 11 percent, making us slightly less popular than Fidel Castro in America.

[Laughter.]

Slightly more popular than the influenza virus which is inexplicably gaining on us.

[Laughter.]

One of the things about the Federal Government people still like, that still makes them happy with the Federal Government, in particular, is the National Park System. They like that. They enjoy it. They want to make sure that they continue to have access to their national parks and that the maintenance backlog doesn't interfere with their ability to access them.

What kinds of things do you have in mind to make sure that people will continue to be happy with at least that part of our government?

Mr. BERNHARDT. Well, what—the confirmation process is such an interesting opportunity to visit with all of you. And almost every member said the same thing to me and I think it gives us a lot of hope.

I think you have a real opportunity to build on the bipartisan success that you've had with this lands package by working with us and together on the Restore Our Parks package. That's something that we've proposed, and we manage about 76,000 constructed assets across the park system. I was in Acadia. You could actually look through a cinder block building and see the outside. Over 54 percent of our asset portfolio was constructed before 1966, and there is such a need to make a real investment there. So I'm really hopeful. Almost every member I met with brought it up. Love to work with you on it.

Senator LEE. Thank you, Mr. Bernhardt.

Thank you, Mr. Chair.

Senator GARDNER [presiding]. Thank you, Senator Lee.

Before I turn to Senator Hirono, I have here letters of support from several Colorado stakeholders including the Colorado Water Congress, Associated Governments of Northwest Colorado, the Colorado Farm Bureau and the Southern Ute Tribe, in support of the nomination of Mr. Bernhardt. I would just like to submit them for the record.

Senator MANCHIN. Without objection.

Senator GARDNER. Thank you.

[Letters of support of Mr. Bernhardt's nomination follow.]

ASSOCIATED GOVERNMENTS
OF NORTHWEST COLORADO
P.O. Box 593, Grand Junction, CO 81502

February 28, 2019

President Donald J. Trump
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. President:

Associated Governments of Northwest Colorado (AGNC) would like to thank you for your nomination of David Bernhardt as Secretary of the Interior. AGNC membership is made up of eight (8) county governments in Northwest Colorado and many of the municipalities therein.

Our counties host significant amounts of public lands which are home to massive amounts of natural resources including coal, natural gas and timber. Additionally, our region is home to one of the largest elk and deer herds in the country as well as many great fishing and rafting opportunities. Our counties have balanced resource development with recreation for more than 100 years and boast some of the cleanest air and water in the country.

Mr. Bernhardt grew up in this region of the state and is familiar with the balance of which we speak. He has held multiple positions at the Department of the Interior (DOI) as well as worked with the laws and regulations related to DOI in the private sector. He understands the complexities of the laws and regulations from both sides which, we believe, gives him a better perspective than most when it comes to the management of public lands. We believe there is nobody better suited to be the top manager of public lands in the U.S. than David Bernhardt.

As local governments, we appreciated Mr. Bernhardt's efforts to carry out the review and revision of management plans related to the greater sage grouse. He has listened to the local experts and has worked to develop a way forward regarding the habitat management for this species that is balanced and much more representative of a collaborative effort than the 2015 Record of Decision. Deputy Secretary Bernhardt has been straightforward with local governments and has declined to enter discussions that may potentially be construed as conflicting with his duties.

We appreciate your nomination of David Bernhardt for the position of Secretary of the Interior and we strongly encourage the Senate to confirm his nomination quickly so he can move on with the important work of properly managing the nation's public lands. If you have any questions, please contact our Executive Director, Bonnie Petersen at 970-665-1095 or by email at bonnie@agnc.org .

Sincerely,

Ray Beck
AGNC Chairman
Moffat County Commissioner

Andy Key
AGNC Vice-Chairman
Rangely Town Councilman

Copies to: Senator Michael Bennett
Senator Cory Gardner
Congressman Scott Tipton

Colorado Farm Bureau
9177 E Mineral Circle
Centennial, CO 80112

The Honorable Senator Cory Gardner
354 Russell Senate Office Building
Washington, DC 20510

March 11, 2019

Dear Senator Gardner,

On behalf of the nearly 25,000 members of the Colorado Farm Bureau, I strongly support the appointment of Interim Secretary, David Bernhardt to the U.S. Department of Interior (DOI). As Deputy, he has served the DOI well by expanding multiple uses to managed lands, modernizing the application of the ESA, streamlining NEPA and implementing outcome-based grazing.

We believe Bernhardt has a strong and accomplished history in various roles at the DOI. As a Colorado native, it is encouraging to see another statesman selected to serve in this administration. It should be incumbent upon the Colorado delegation to support a nominee with his expertise and talent that hails from home.

As current acting Secretary, Bernhardt has served in numerous leadership capacities with many different titles. Most importantly, Bernhardt understands the importance of timeliness when it comes to providing solutions and creative approaches in managing our national lands. The DOI needs to have leadership in place to face forthcoming challenges, such as catastrophic wildfires, more people entering into the world with fewer returning to the farms and more land coming under the management of federal agencies.

In his position leading DOI he will be vitally important to animal health, sustainability and prolonged uses of our natural resources.

DOI and the many agencies under it have vacant leadership roles that must be filled in order to coordinate rapid responses and management of lands and resources. Current needs include, animals grazing, fire mitigation, mineral exploration and much much more. We have waited far too long for critical appointments to be confirmed and we have reached a critical point where it is necessary that roles being filled in agencies so that decisions can be made.

For these reasons, we strongly urge the Senate to immediately confirm Acting Secretary Bernhardt as the new Secretary of the DOI. Please work with leadership to speed his confirmation through the Senate. We need him on the job at DOI, today. Please do not hesitate to contact me if you'd like to discuss my thoughts on this matter.

Sincerely,

Donald J. Shawcroft

Don Shawcroft
President

Colorado Water Congress
THE LEADING VOICE OF COLORADO'S WATER COMMUNITY

February 10, 2019

Senator Cory Gardner
United States Senate
Washington, D.C. 20510

Dear Senator Gardner,

On behalf of the Colorado Water Congress, we are writing to express our strong support for David Bernhardt to serve as Secretary of the Department of the Interior.

The Colorado Water Congress is the principal voice of Colorado's water community, and our Federal Affairs Committee fully supports Mr. Bernhardt's nomination. We have worked with Mr. Bernhardt on issues affecting our water supplies, storage, delivery and conservation, as well as some regulatory issues, while he worked on Capitol Hill and the Department of the Interior.

Mr. Bernhardt is highly qualified to serve in this position. From his roots in Western Colorado to his prior service as the Solicitor for the Department of the Interior and in many other capacities, Mr. Bernhardt has been a strong advocate for western water. Further, his thorough understanding of both the legislative process and natural resources law make him highly qualified to serve in this position.

Mr. Bernhardt has been a public servant committed to the meaning of the term. He believes in and practices straight talk, is inclusive in consideration of issues brought before him, and explores all available options on the path to finding workable solutions in the real world where government actions impact real people. He has earned the trust of many because of his ability to communicate effectively and decide fairly.

The Department would be well served to have someone with David's qualifications and personal integrity to this position. The Colorado Water Congress encourages the United States Senate to promptly confirm David Bernhardt's nomination so that the important work of the Department of the Interior can move forward.

Sincerely,

Douglas Kemper
Executive Director

Andy Colosimo
Federal Affairs Committee Chair

Chris Treese
Federal Affairs Committee Vice Chair

SOUTHERN UTE INDIAN TRIBE

February 5, 2019

U.S. Senator Cory Gardner
354 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Gardner,

The nomination of now acting Interior Secretary David Bernhardt to be the Secretary of the Interior has the full support of the Southern Ute Indian Tribe.

As you know, Mr. Bernhardt is a native Coloradan. The Southern Ute Indian Tribe has worked with him previously and firmly believes that his knowledge and experience make him a very good fit for the Department, which governs many issues of interest to us. We also believe he is committed to building strong working relationships that rely on good faith and respect among all interests at the table.

Our programs and initiatives intersect frequently with the work of the Bureau of Indian Affairs, and also with agencies like the Bureau of Land Management and the U.S. Fish and Wildlife Service. The Tribe believes that Mr. Bernhardt is well suited to manage those issues in a way that respects tribal sovereignty and provides opportunities for the Tribe which benefit our members economically and culturally.

As his confirmation hearings and the vote to confirm him as Secretary of the Interior come before the United States Senate, we encourage your support for Mr. Bernhardt to lead the Department of the Interior.

Thank you for your consideration.

Sincerely,

Christine Sage

Ms. Christine Sage, Chairman
Southern Ute Indian Tribal Council

P.O. Box 737 ✦ Ignacio, CO 81137 ✦ Phone: 970-563-0100

Senator GARDNER. Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman.

Mr. Bernhardt, I ask every nominee before any of the committees I sit on the following two questions to begin with.

The first is since you became a legal adult have you ever made unwanted requests for sexual favors or committed any verbal or physical harassment or assault of a sexual nature?

Mr. BERNHARDT. No, and as a father of a 13-year-old daughter I won't tolerate it.

Senator HIRONO. Thank you.

Have you ever faced discipline or entered into a settlement relating to this kind of conduct?

Mr. BERNHARDT. No.

Senator HIRONO. Mr. Bernhardt, in reviewing your testimony, obviously, we share a commitment to make public the lands accessible to the American people, to the sovereignty of Native American tribes, to combat workplace misconduct and a lot of your testimony went into that which I think is very much needed to develop a clear anti-harassment policy and also to address, as you just mentioned, the tremendous maintenance backlog. So we obviously agree on a number of aspects.

I wanted to point out two very specific things that relate to Hawaii that I would want to ask for your assistance and help in.

One is the USGS Hawaii Volcano Observatory which was completely destroyed, as you know, during the eruption, and we obviously need to rebuild that facility. There are discussions about building it outside of the island on which there are active volcanoes. So that does not seem to make a lot of sense. I would want to have your commitment that you will listen to the Congressional delegation as well as local stakeholders to put this observatory where the eruptions will likely occur.

Mr. BERNHARDT. So, I will——

Senator HIRONO. Good.

Mr. BERNHARDT. ——have to say that I will absolutely look into that.

Senator HIRONO. Let's do things that actually make common sense.

The second thing is that the USS Arizona Memorial, I hope you have had a chance to visit it, but there is ongoing dock repair at the memorial and there is no foot access to this repair. You can imagine the millions of people who are very disappointed, including the 2,000 or so World War II veterans who plan their visits to Hawaii based on going to this memorial. And so, the Park Service has moved the date for reopening of this dock a number of times. I would like to get your support for working with our delegation to give us monthly updates on what is going on. Why do we keep having to defer when the dock is going to be reopened?

Mr. BERNHARDT. So let me tell you a personal fact. My great uncle went down on the USS Arizona so I can assure you——

Senator HIRONO. Thank you.

Mr. BERNHARDT. ——there is no one in the Department of the Interior that's more interested in having that problem addressed than I am. And we will absolutely give you a monthly update.

Senator HIRONO. That is great. Thank you very much.

Mr. Bernhardt, you have frequently been paid to challenge the Endangered Species Act, right? So you are very familiar with the Endangered Species Act. You are just staring at me, yes?

Mr. BERNHARDT. I am certainly familiar with the Act, yes.

Senator HIRONO. Okay.

Do you think the Endangered Species Act goes too far in protecting species that do not appear to have any economic utility or benefit?

Mr. BERNHARDT. I certainly have never said that.

Senator HIRONO. So you do not believe that?

Mr. BERNHARDT. My view is that there—I've worked with the Endangered Species Act for nearly 30 years and I actually think there's—I think the Act has wonderful goals, wonderful objectives. I think there's some ambiguity in the Act that has caused us——

Senator HIRONO. Yes, I agree. Most Congressional acts do have ambiguities.

Mr. BERNHARDT. Yes, they do.

Senator HIRONO. And so, how you are oriented in reviewing those ambiguities.

So, you know, I would like to know why your agency is considering changing the species listing decisions to take out language that such decisions should be made, "without reference to possible economic or other impacts of such determination."

That means that in these listing decisions you want to be able to consider the economic impact of providing protections to endangered species. Isn't that the import of the change that you are contemplating?

Mr. BERNHARDT. Actually, no, because under the law, under the Endangered Species Act, when you are making a listing decision you can only consider five factors. Those factors are factors that do not include economics. So you cannot consider it for the listing decision itself. The question is, could there be other documentation within——

Senator HIRONO. Yes, I know, Mr. Bernhardt. You are not supposed to consider economic decisions, but you are now taking out that provision so that you will be able to consider economic decisions.

Mr. BERNHARDT. Although it may come out of the rule, and that's still under debate, but it may come out of the rule. It's in the statute. So, it can't. No one can do that. That would be illegal. So it has to be the five factors and that's it.

Senator HIRONO. Well, I certainly review your proposed rule much more clearly.

Mr. Chairman, I would like to enter into the record a September 12, 2018, letter that a number of us signed that expresses concerns regarding a number of rules changes being proposed by your Department, including well, there is a change that, as I mentioned about the economic considerations, a change that would limit the ability of the services to consider impact of climate change, rules to be changed that would rescind existing blanket protections for threatened species, two definitional changes, redefinitions in the proposal that would also make it a lot harder to protect endangered species.

So, I would like to have this letter entered into the record, Mr. Chairman.

Senator GARDNER. Without objection.

Senator HIRONO. Thank you.

[Letter regarding changes to the wording of the Endangered Species Act follows.]

United States Senate

WASHINGTON, DC 20510

September 12, 2018

The Honorable Ryan Zinke
Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

The Honorable Wilbur Ross
Secretary
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Dear Secretary Zinke and Secretary Ross:

We are writing to express our strong concerns regarding the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) proposed rules to amend the existing regulations for implementing sections 4 and 7 of the Endangered Species Act (ESA). The ESA is a highly successful[1], very popular[2] statute and has recovered iconic species such as the bald eagle and the humpback whale. We do not believe the proposed rules are consistent with the letter or the spirit of the law as Congress directed, and some of the included proposals could impair species conservation outcomes. Rather than expending limited agency resources on a regulatory overhaul of the ESA, we urge you to instead work with us to ensure adequate funding for the Services to better implement the ESA.

Section 4(b)(1)(A) of the ESA requires that species listing decisions be based solely on the best available science. After providing greater flexibility for economic considerations for critical habitat in the updates to the ESA in 1978, Congress was explicit in the 1982 amendments that listing decisions must be based solely on science. The FWS and NMFS rule to amend 50 CFR 424 proposes to remove the phrase "without reference to possible economic or other impacts of such determination" for species listing decisions. The proposed rule states that this change is only for the purpose of allowing economic impacts data to inform the public. However, conducting an economic impacts assessment, even for informational purposes, could improperly influence the listing process to the detriment of species and create pressure for the Services to minimize protections that science indicates are necessary to recover species.

The FWS and NMFS rule to amend 50 CFR 424 may also limit the ability of the Services to consider the impacts of climate change when deciding whether or not to list an imperiled species as threatened, as the FWS did when listing the polar bear[3]. The rule proposes that the term "foreseeable future" in the ESA "extends only so far into the future as the Services can reasonably

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[1] Charise Johnson, "The newly endangered species of the Trump era is the Endangered Species Act." NBC News, July 23, 2018.
[2] Jeremy Bruskotter, John Vucetich, Ramiro Berardo, "Support for the Endangered Species Act remains high as Trump administration and Congress try to gut it." The Conversation, July 20, 2016.
[3] U.S.Fish and Wildlife Service. 2016. Polar Bear (*Ursus maritimus*) Conservation Management Plan, Final. U.S. Fish and Wildlife, Region 7, Anchorage, Alaska. 104 pp.

determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable." Given this Administration's track record of climate denial and inaction[4], memorializing this approach in regulation would almost certainly result in fewer protections for imperiled species most impacted by climate change. This change is especially troubling as climate change is causing increasing "widespread and consequential" harm to species[5], including to commercially significant fish.[6]

The FWS rule to amend 50 CFR 17 to rescind existing "blanket 4(d)" protections for threatened species causes us additional concern. Currently, when FWS lists species as threatened, the blanket rule provides those species with protections under section 9 of the ESA unless the FWS finalizes a species-specific special rule. Section 9 of the ESA prohibits any activity that would harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect any endangered species. Under existing regulation, the FWS can and still does issue a special rule regarding the application of section 9 for threatened species, and with the blanket rule in place, there is no lapse in protection from the time a species is listed to the time a special rule is finalized. This is an important safeguard, and we believe it should remain in place. If the Administration seeks alignment between the Services, we encourage NMFS to adopt the blanket 4(d) rule.

Additionally, the FWS and NMFS proposal to amend 50 CFR 402 seeks public input on adding deadlines for the NMFS and FWS to consult informally with other agencies, in hopes of improving interagency cooperation. While we appreciate the need for substantive yet efficient review during consultation, this solicitation seems to be a solution in search of a problem. In a review of nearly 110,000 requests for consultation with federal wildlife agencies—including informal consultation—the median time was 14 days. Of approximately 10% of requests which required formal consultation, the average was 61 days.[7] By these metrics, the current system is working on a reasonable timeframe, and we urge the Administration to leave the creation of any arbitrary deadlines out of this rule.

Two redefinitions in the proposal to amend 50 CFR 402 invite clear steps backwards for conserving listed species and their habitats. First, the proposed redefinition of "destruction or adverse modification" of critical habitat will make it easier for species' critical habitat to be lost through death by a thousand cuts, even if no single action affects "the critical habitat as a whole." Second, the notion of redefining "environmental baseline" raises concerns. Undermining the integrity of the baseline could make it easier to bury the harm of actions by making tiny improvements appear much more beneficial than they are in reality. At a time when more

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[4] Harvard Environmental Law Program, Regulatory Rollback Tracker. Harvard Law School. Last updated: August 10, 2018.
[5] Christine Dell'Amore, "7 Species Hit Hard by Climate Change – Including One that's Already Extinct." *National Geographic*, April 2nd, 2014.
[6] Marlene Cimons, "Warming seas are robbing some fish of their vital sense of smell." *Popular Science*, August 3, 2018.
[7] Ryan Richards and Kyle Cornish, "The Endangered Species Act: Protecting America's Natural Heritage." *Center for American Progress*, January 9, 2018.

protective, not less protective, measures are warranted, these redefinitions would move us in exactly the wrong direction.

In March 2018, Congress passed and the President signed into law the Consolidated Appropriations Act of 2018. This statute set clear parameters regarding reinitiation of consultation under the ESA for U.S. Forest Service and Bureau of Land Management forest plans. These parameters were carefully negotiated and thus included in the Consolidated Appropriations Act of 2018 with bipartisan support. We are alarmed that the FWS and NMFS proposal to amend 50 CFR 402 also attempts to broaden the statutory parameters in direct contradiction with this recent law.

We urge you to reconsider and rework or rescind all of these short-sighted, unfounded proposals that will not improve the conservation of threatened and endangered species. Instead, because ESA recovery funding is less than 25% of what scientists say is necessary to protect species[8], we stand prepared to work with you to provide adequate funding for the Services to implement the ESA and improve species conservation outcomes.

In closing, scientists estimate that we could lose 75 percent of all species in the coming centuries[9], with potential for half of all species to be facing extinction in the next century[10]. Species' extinction is happening at a rate at least 100 times greater than what would be considered normal. In just the last 40 years, we have also lost half of all wild animals on our planet[11]. At this moment in history, we should be working to uphold and strengthen the ESA, not undercut it. Thank you for your consideration.

Sincerely,

Thomas R. Carper
U.S. Senator

Tom Udall
U.S. Senator

Chris Van Hollen
U.S. Senator

Christopher A. Coons
U.S. Senator

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[8] Leah Gerber, Proceedings of the National Academy of Sciences, 2015.
[9] Richard Monastersky, "Life – a status report." *Nature*, December 11th 2014.
[10] Robin McKie, "Biologists think 50% of species will be facing extinction by the end of the century." The Guardian, March 9th, 2017.
[11] John D. Sutter, "Sixth mass extinction: The era of 'biological annihilation'." CNN, July 11th, 2017

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Tammy Duckworth
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Mazie K. Hirono
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Bernard Sanders
U.S. Senator

Angus S. King, Jr.
U.S. Senator

Charles E. Schumer
U.S. Senator

Catherine Cortez Masto
U.S. Senator

Robert Menendez
U.S. Senator

Senator GARDNER. Senator Cassidy.

Senator CASSIDY. Mr. Bernhardt, thank you for being here. Thanks for putting your name up. I know that you are the most experienced nominee since the '40s and your exchange with my colleague, Senator Hirono, in which you so were clearly versed in the statute versus the rule on economic issues kind of reflects that training. So thank you for offering yourself.

Let me just make a plug for my—have my shoes in front of Gardner.

[Laughter.]

Let me just put a context here. As you and I both know with your experience, according to the Energy Information Administration, the Gulf of Mexico federal offshore oil production accounts for 17 percent of total U.S. crude oil production and the federal offshore natural gas production in the Gulf is about 5 percent of the total U.S. dry production, more than 45 percent of the total U.S. petroleum refining capacities along the Gulf Coast and 51 percent of the total U.S. natural gas processing employing thousands of hard-working Americans from many different states, the energy revenues not only fund the rebuilding of the Louisiana coastline but the LWCF which has broad support. So I just want to note that.

And as regards to revenue sharing, this is my first question. I have a headline here—Angus King is going to perk up—"Offshore Wind Bonanza Draws Bidding War in Record-Setting Sale" off the coast of New York.

[The information referred to follows:]

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Offshore Wind Bonanza Draws Bidding War in Record-Setting Sale

By Jennifer A. Dlouhy | December 13, 2018 6:48PM ET

Companies competed Thursday for the opportunity to install wind turbines in Atlantic waters off Massachusetts in an auction that shattered records even as it headed toward a second day of frenzied bidding.

After 24 rounds of sealed bidding, companies had already pledged $285 million toward the three offshore wind leases that are up for grabs -- more than six times the previous high-water mark: Norwegian energy company Equinor ASA's $42.47 million bid in 2016 for the rights to build an offshore wind farm near New York.

High bids in the offshore wind auction, set to resume Friday, also already eclipsed the $178 million the U.S. government collected in its August sale of offshore drilling rights in the Gulf of Mexico.

By Thursday evening, when Interior Department officials called an overnight halt to the auction, four companies were still vying for the territory, drawn by growing demand for renewable power in the Northeast U.S. and a chance at gaining a foothold in the nation's growing offshore wind market.

"The unprecedented interest in today's sale demonstrates that not only has offshore wind arrived in the U.S., but it is set to soar," said Randall Luthi, head of the National Ocean Industries Association.

Active Bidders

Some 19 companies were deemed qualified by the Interior Department to participate in the auction -- higher than in any of the previous seven competitive sales of wind leases in U.S. waters. The prospective bidders included units of established offshore wind developers and renewable power companies that have primarily focused on land as well as oil companies such as Equinor and Royal Dutch Shell Plc.

Eleven companies were actively bidding at the start of Thursday's sale, nearly twice the most-recent record, in 2016, when six developers competed for the New York offering. The Interior Department's Bureau of Ocean Energy Management, which is conducting the sale, will name participants after the auction ends, expected sometime Friday.

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The frenzy reflects growing interest in U.S. offshore wind, which has surged since 2016, when the nation's first such facility, a 30-megawatt facility development near Block Island, Rhode Island, went online.

"We've seen a massive uptick in momentum," said Nancy Sopko, director of offshore wind policy at the American Wind Energy Association. "Offshore wind in the U.S. went from an idea to a reality. Folks understand the U.S. is the next frontier for this technology."

Playing Catchup

Although the U.S. is a relative latecomer, it's making up for lost time. Wind developers are being lured to American waters by near-guaranteed demand, as coastal states ratchet up commitments to buy renewable electricity. For instance, in August, Massachusetts enacted a target for buying 1,600 megawatts of offshore wind.

"Looking up and down the East Coast -- and specifically in the Northeast -- we see states with huge commitments to buying this power," Sopko said. "That is driving incredible demand for this energy."

Declining installation costs and uncertainty about the timing of the next U.S. sale of an offshore wind lease also were feeding activity on Thursday.

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Analysts also describe growing investor confidence in the stability and predictability of the market, as President Donald Trump continues making territory available for new projects. The U.S. has held eight auctions of federal offshore wind rights since the Obama administration started competitive lease sales in 2013, including two under Trump.

Rising Demand

And the extent of offshore wind power is expected to surge over the next decade -- reaching 10,000 megawatts by 2030, compared to just 30 megawatts installed in the water today, according to Bloomberg New Energy Finance.

Companies are paying ever higher sums for the offshore development rights. Five years ago, Deepwater Wind's $3.8 million bid was enough to win two tracts for the Block Island project.

But as of Thursday evening, when bidding was paused, the leases were going for $93 million, $91 million and $101 million. The territory spans nearly 390,000 acres (157,800 hectares) south of the resort islands of Martha's Vineyard and Nantucket.

Bidding began Thursday morning at far more modest sums -- as low as $254,776 for one of the available leases -- before rapidly escalating. One company dropped out of bidding after the fifth round, when the total pledges hit $8 million. Another four companies had abandoned the auction by the end of the 13th round, when totals reached $77 million.

The higher prices reflect the transition to a more established market, said Tom Harries, an offshore wind analyst with Bloomberg NEF.

"Five years ago, you'd acquire a lease, and it would be more speculative -- you were speculating there would be a market at some point. And that's why there were fewer bidders and the prices were cheap," Harries said. "Now that there is a route to market for your project and somebody who is incentivized to buy your power, then prices will be higher and competition will be higher."

To keep momentum, industry experts say the Trump administration will need to schedule more offshore wind sales, beyond an auction of territory near New York slated for early 2020.

"Maintaining this tremendous level of interest from offshore wind developers requires a reliable inventory of regularly scheduled offshore wind sales and the ability to develop those resources," said Luthi, whose ocean industries group has pushed the government to conduct at least four sales annually. "The unprecedented interest in today's sale suggests that goal could easily be met and even surpassed," Luthi said.

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Companies with U.S. government qualification to participate in Thursday's auction include Avangrid Renewables LLC, which won the rights to build an offshore wind farm near North Carolina last year, EDF Renewables Development Inc., Cobra Industrial Services, Inc., EDPR Offshore North America LLC, EC&R Development LLC, Enbridge Holdings Green Energy LLC, Equinor Wind US LLC, Mayflower Wind Energy LLC and Vineyard Wind LLC.

--With assistance from Christopher Martin and Jordan Yadoo.

To contact the reporter on this story:
Jennifer A. Dlouhy in Washington at jdlouhy1@bloomberg.net

To contact the editors responsible for this story:
Jon Morgan at jmorgan97@bloomberg.net
Ros Krasny, John Harney

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We have been trying to get revenue sharing for all forms of energy, not just oil and gas, but also wind. I would like to expand that. Now frankly, there will be Louisiana companies that are putting down the platforms for those wind turbines and Republicans are about all-of-the-above. So, you know, I have an interest in this.

But what are your thoughts on expanding offshore revenue sharing for wind energy to states? I would specifically like this wind energy to go to fund coastal resiliency as rising sea levels are imperiling Maine, Louisiana, and eventually Nevada may be a coastal state. So just to throw that out there.

[Laughter.]

Mr. BERNHARDT. Well, there's certain—thank you for that question.

There are certainly a lot of discussions and thinking going into innovative ideas for coastal resiliency and the role that even public lands can play in those. And I think that's an area really worth people examining and thinking about over time.

Revenue sharing has been an issue that I've dealt with in various contexts, and my view is that there certainly is a burden to areas where we ask energy to come from and that we need to work to deal with that.

Senator CASSIDY. Now I will also point out that LWCF really benefits Western states, the big block states. LWCF revenues are derived off my coast and benefit people with no coastline. So I do think that if we could have something that would somehow benefit coastal states as most of our nation's population lives along the coast—if we can build a coastal resiliency fund, similar to LWCF—that will hopefully limit the damages of these storms that are impacting, for example, most recently Florida, but my State of Louisiana prominently.

Let me also ask. Now as I go through my state, which is trying to rebuild our coastline and that coastline has been lost because long ago Congress made the decision to channel the Mississippi River and we have lost the sediment that we need flowing through our bayous. We channeled that river for the benefit of inland ports, not Louisiana but inland ports. But the permitting process is so cumbersome, it may take 10 years to fund a project. And in the interim the geography is changed so much that the permit is now obsolete because the landscape has changed so much.

What do you think about permitting efficiency? Can we get that so as we create coastal efficiency, we are not paying consultants, we are paying for resiliency?

Mr. BERNHARDT. So I really appreciate that question.

In my opening statement I mentioned working on business processes. And irrespective of what one's policy views are, there's a lot that we can do better at the Department of the Interior.

And let me just give you one example. With our NEPA process we've done a number of things. I have career staff ask us, hey, can we have some timeline goals? Which seems reasonable, right? You want a timeline for a goal. If you have a deadline you work to the deadline. They also were interested in, we have some goals for page limits. So we've worked on those.

But more importantly what we did is I sat down with the state directors in BLM and I said hey, I have a process where a state

director sends a document to Washington. It's in Washington and it goes to like 50 or 40 people and then it comes to me to go to the Federal Register. And that process takes a really long time, like 199 days on average. And if you're doing that, I'm sorry to cut your time, if you're doing that three times for an EIS that's like 300 days to an EIS. We have consolidated our briefing schedule for Washington down to an average of 29 days for BLM. So if you're in the field and you've worked on a project and you got it done and it's a good job, it comes up to us and in 29 days it's in the Federal Register. That is a huge thing.

And what I'm going to get to spend the next two years doing, if I'm confirmed, is working on from the state director on down because there's just a lot of stuff in our system that just doesn't need to be there. Without modifying a single, environmental standard we can permit things much, much more expediently just by simply changing a few of our processes.

Senator CASSIDY. As I yield back, I will note I will finish where I started.

Your experience is the most experienced nominee since the '40s. It has been demonstrated that you understand that process and how to make it more efficient for the benefit of those who are trying to conserve and preserve.

I thank you, and I yield back.

The CHAIRMAN [presiding]. Thank you, Senator Cassidy.

Senator Cortez Masto.

Senator CORTEZ MASTO. Thank you.

Mr. Bernhardt, congratulations on the nomination. I know we met before in your previous hearing.

One of the areas that I want to focus on is the Interior Department's policy or initiative on the energy dominance policy. It appears that that policy extends to oil and gas but it does not extend to other forms of energy development on public lands such as solar, wind and geothermal.

I noted on just while you have been at the Department of the Interior a couple of things have already happened that make, imply, your support more so of the fossil fuel industry. You repealed the regulations on oil and gas hydraulic fracturing on public lands and rescinded the regulations preventing emissions of methane from oil and gas production on public lands. You rushed to prepare for an oil and gas lease sale in the Arctic National Wild Refuge, you proposed to open essentially the entire coast of our country to Outer Continental Shelf oil and gas development, you repealed the offshore oil and gas safety regulations put in place by the Obama Administration after the devastating BP Horizon disaster, and you opened vast areas of what had formerly been protected as part of the Grand Staircase Escalante and Bears Ears National Monuments to oil, gas and coal leasing. So I guess my question to you is why isn't the Department giving the same level of intensity to cleaner forms of energy development that it is giving to fossil fuel development? Can you address that please?

Mr. BERNHARDT. So, first off, I really appreciate the question.

I don't think I can name a policy where we've not treated like, for example, solar and wind equally fairly.

Senator CORTEZ MASTO. So what have you done? Can you just explain to me what you have done——

Mr. BERNHARDT. Sure.

Senator CORTEZ MASTO. ——to support a cleaner energy the same as you have done to support oil and gas?

Mr. BERNHARDT. So we have a number of renewable projects that are in our FAST-41 process which is an expedited NEPA review. We also have aggressively leased offshore wind areas on the East Coast.

I think we are moving at about the same flip. And so, I would really, and the process improvements I just talked about apply to everybody.

I'm just honestly not—I'm happy to look at that and see if the statistics line up and if they do, I'd love to talk to you about it because our position is not that one project should move faster than another. My position is we should move them all better and more effectively irrespective of, you know, type. We need to give people an answer and then move on.

Senator CORTEZ MASTO. So, and no, I appreciate that and I look forward to working with you.

But here is my other concern. Yesterday it was reported on CNN that during the 35-day government shutdown earlier this year, BLM, under your supervision, approved 267 drilling permits and 16 leases applied for by oil and gas companies. Two of your former lobbying clients are among the companies that received approval for this application. This was during a time that you recalled some, but not all furloughed workers, who regularly review these applications. It is also my understanding that such supporting staff that contribute to these application reviews such as those that review details concerned environmental and cultural resources remained furloughed during this period.

And on February 15th you were quoted in the Carlsbad Current Argus that work on oil and gas development continued and I quote, "Because the fees were still coming in. There's also safety. We need to keep things safe. We need to keep things going. I'm very comfortable with what we did during the lapse. We could do more next time."

I guess my question is what exactly was the safety component applied to your decision to continue with the oil and gas permitting during the furloughs and during the government shutdown?

Mr. BERNHARDT. You know, I really appreciate that question because that specific reference during the shutdown our BSEE, the Bureau of Safety and Environment, was continuing critical inspections and permitting on offshore vessels. And we did that, those activities throughout the continental shelf. And so, that was the safety issue I was specifically speaking about.

The reality is that the Department of the Interior has a very complex budgetary framework. And what that means, and this becomes important after people miss a couple paychecks, what that means is there was money to do certain things and not necessarily everything.

For example, the Park Service only receives one-year money. Other states, other bureaus receive multi-year money. So we've had

money that we had not obligated that we could spend and then fee revenue can be spent right away.

So I'd be happy to walk you through each of those accounts to show you what we did. But I made a decision during the shutdown that we were going to put people back to work because I could guarantee that they'd get paid. And I didn't know how long this was going to take.

I can tell you I had employees that were calling our ethics office to see if they could sell their plasma. And so, I made a decision to put folks to work that I could and that we had resources for.

Senator CORTEZ MASTO. I notice my time is out, and I will submit the rest of my questions for the record.

Thank you.

The CHAIRMAN. Thank you, Senator.

Senator Daines.

Senator DAINES. Thank you, Chair Murkowski.

Mr. Bernhardt, when you were before this Committee last time, pertaining to your nomination to be Deputy Secretary, we talked about the important role you had in balancing the multiple missions of the agency within the Department. I very much appreciate the balance that you bring to this very important job. In Montana, we say that is the balance between Merle Haggard and John Denver.

You have taken good leadership at the Department toward that end. In fact, just last week signing a Secretarial Order facilitating more public access to public lands for hunting and for fishing. By the way, we heard from Dr. Cassidy earlier. His complaints, Senator Gardner and myself, we have better elk hunting in Colorado and Montana. Let the record show that. You also took the allegations of sexual misconduct at the National Park Service very seriously. You took it head on protecting our National Park Service employees from workplace harassment. And even more specific to my state, you helped protect an area right outside of Yellowstone National Park, Paradise Valley. It is named that for a reason. You protected that from large scale mining.

In fact, we recently enacted the Yellowstone Gateway Protection Act that came through this Committee with my support with bipartisan support to permanently withdraw these lands from mineral development. But in October 2018 then-Secretary Zinke issued an Administrative Withdrawal that would protect this area for 20 years. So you all acted first in the 20-year protection followed by the legislation that allowed permanent protections, the longest time possible for any administrative action. I want to thank you for your leadership in that regard.

Could you share with this Committee about your work to help and prepare the implementation of that withdrawal and why you saw that as an important act to take?

Mr. BERNHARDT. Well, I really appreciate that.

That was actually, I went to Paradise Valley. That was my very first trip as Deputy Secretary at the Department, and I went out there. First, it's spectacular, it's location. I met with the community. And at the end of the day, as somebody from rural Colorado, I know that input from local communities is absolutely critical. We need to look at these on a case-by-case basis. We need to consider

the impacts that these decisions have on the livelihood of the folks who work there.

And you know, really at Interior we have opened hundreds of thousands of acres of refuges, of BLM lands to hunting and fishing. We have partnered with Fish and Game and state agencies to protect wildlife corridors for big game animals. I think that is something that's really important and I think as you work with the transportation bills and infrastructure bills, that's something we ought to really spend some time thinking about.

And I was really excited to sign that Secretarial Order you mentioned last week because the requirement that we think about access before we make a decision to transfer or exchange a piece of property is so important that very few people where I grew up own a nice ranch to go hunting on. They depend on an opportunity to go shoot an elk or a deer on public land. And if you take that away from them, that has a tremendous impact on their social, you know, their love for the outdoors and we just cannot allow that to happen.

Senator DAINES. You know, we pride ourselves, Mr. Bernhardt, in Montana. It is a state where you still can go down to Walmart and buy an elk tag over the counter and be at a trail head, public lands, within 30 minutes with the next generation of hunters here, kids, grandkids and so forth.

I want to shift gears and follow up with what Senator Heinrich talked about, LWCF, and he was just a great partner in moving that forward and getting permanent reauthorization with a 92 to 8 vote in the United States Senate.

You understand the value of public access to public lands. You understand the importance of locally-driven conservation that balances the needs of landowners. However, the President's proposed 2020 budget for the LWCF fund seems to signal otherwise.

LWCF is one of the greatest tools we have to give access to locked up public lands in the West. Seventy percent of our fishing accesses in Montana have been funded through the Land and Water Conservation Fund. We have over one and a half million acres in Montana of public lands that are inaccessible. LWCF also helps build playgrounds in cities and towns. They help multigenerational ranchers stay working their land, helps our local sawmills get a steady supply of timber. So it is a big deal in Montana.

We were disappointed. Frankly, I have to tell you this. When I saw the President's budget come out, it looked embarrassingly low on funding for LWCF. Can I get your view of that program?

Mr. BERNHARDT. Well first off, let me thank you personally because you're the one guy I could call and say, hey can you help push this along too. And I really appreciated that and appreciated everybody's support, but I really enjoyed visiting with you to get that permanent reauthorization done. I had the good fortune of joining many of you at the signing ceremony. And you know, here you guys have worked on this bipartisan effort, maybe the single largest and wide-ranging bill passed since the 1970s on these issues.

And you know, the signing is sort of pass the baton to us, if you will, to implement. And I will work very hard on our budget next

year, and I want to work with you on our budget this year. I'm a believer in the program, and I want to move it forward.

Senator DAINES. Okay. Thank you, Mr. Bernhardt.

The CHAIRMAN. Thank you, Senator Daines.

Senator Cantwell.

Senator CANTWELL. Thank you, Madam Chair.

Mr. Bernhardt, following on that same theme, I am disappointed in the firefighting budget as it relates to the Department of the Interior's part of that program. I am going to definitely be sending you a letter on that today, but we worked very hard in a bipartisan fashion to end fire borrowing. And so, we want to make sure that the President's FY2020 budget proposal, which basically reverses course on that or at least doesn't move us forward as it relates to the budget, that you are going to be an advocate on moving forward on the principles that we passed here in Congress to end fire borrowing and make huge investments in the types of fuel reduction and investment we need to see.

Mr. BERNHARDT. Well, I really appreciate that question.

Unfortunately, we haven't had a chance to meet yet and visit. I know we have one meeting scheduled. And I'd love to talk to you about that issue because from my perspective we're in a little different place, at least with Interior's budget and fire, that we actually feel like we got the additional $300 million. So I'd love to have the discussion with you, understand it and am happy to work with you on the issue. We all have a commitment to make sure that we're actively addressing those issues in the proper way, so I'd be happy to visit with you about it.

Senator CANTWELL. Okay.

Do you support what we did in ending fire borrowing and putting resources toward fuel reduction?

Mr. BERNHARDT. I absolutely support putting resources toward fuel reduction.

Senator CANTWELL. And?

Mr. BERNHARDT. And the borrowing.

Senator CANTWELL. Thank you.

Alright, Mr. Bernhardt, I wanted to talk to you about the Arctic National Wildlife Refuge (ANWR) and obviously you have an important role here to play. I want to ask about, specifically, the coastal plain of the refuge is typically one of the greatest concentrations of polar bear dens across the Alaskan Arctic coastline and the Southern Beaufort Polar Bear population would be one of the most impacted by drilling. I am concerned that they are, you are, rushing to move forward on this, you know, to drill in the Arctic Wildlife Refuge.

So my questions are do you believe the Endangered Species Act and ANILCA, the Alaska National Interest Lands Conservation Act, and the National Wildlife Refuge System Act apply to the National Arctic Wildlife Refuge? Do those laws apply to the Arctic National Wildlife Refuge?

Mr. BERNHARDT. I wasn't—certainly the Endangered Species Act does and the Marine Mammal Protection Act does and both of those are acts that really protect polar bears and those are the primary acts that we look to in addressing polar bear issues. And they both would apply to any activities that happen in the 1002 area.

Senator CANTWELL. And the ESA?

Mr. BERNHARDT. What's that?

Senator CANTWELL. And the ESA?

Mr. BERNHARDT. Absolutely, the ESA.

Senator CANTWELL. Okay.

A memo was written by Dr. Patrick Lemons, Chief of Marine Mammal Management, U.S. Fish and Wildlife Service office in Alaska detailing numerous areas where the Interior Department does not have enough information about polar bears to determine whether or not the Arctic National Wildlife Refuge drilling would harm or kill polar bears or destroy designated critical habitat. Are you aware of this memo?

Mr. BERNHARDT. I'm generally aware of the memo.

Senator CANTWELL. Okay.

Can you—do you believe in the analysis? The Interior Department scientists apparently shared this memo because they believe the science in some of that information might be being suppressed. Do you believe in the analysis conducted by the Department scientist and incorporated into that EIS? If you don't know the answer, you can give me an answer later, but I want to know whether you believe in the science that was part of that.

Mr. BERNHARDT. So when we look at ANWR, and we spent a lot of time on this, you know, first off you start, there's a ton of studies that were done in the '80s, but more recently the Fish and Wildlife Service completed a comprehensive conservation plan for ANWR in 2015 which really, I think, had over 2,500 pages of documents, 57 pages of literature citations. And then in 2018 I asked the U.S. Geological Survey to create a summary of anything that was an update to that. So I feel very confident that our entire record includes everything possible for ANWR in terms of things that are already available.

I think the memo that you are speaking to goes to studies, to studies——

Senator CANTWELL. Can you share that information you were just—can you share with us that information, correspondence or documents so that we can see that too?

Mr. BERNHARDT. I'll bring it to our meeting and we can talk through it, yeah, of course.

Senator CANTWELL. Thank you.

I think, you know, my concerns here are that I think we are rushing. Now we had a debate. Obviously, my viewpoint failed, but I did not think the drilling was consistent with the other goals of a wildlife refuge. I definitely disagreed on that point.

As a steward of our lands, I hope that you are going to use these oversight responsibilities as it relates to managing the wildlife refuge and not ignoring those responsibilities as you look to moving forward.

I am sure much of this is going to end up in a big legal dispute, but I think for you to help us by being transparent on how you are meeting the goals of those other relevant acts as it relates to managing a wildlife refuge will be very important for people in the United States.

Thank you very much.

Thank you, Madam Chair.

The CHAIRMAN. Thank you, Senator Cantwell.

Senator McSally.

Senator MCSALLY. Thank you, Madam Chair.

Mr. Bernhardt, good to see you again. Thanks for being here, and I really appreciate all your leadership on so many issues that matter to Arizona.

I want to talk a little bit about sexual harassment issues in the National Park Service. Unfortunately, Grand Canyon National Park has been ground zero for the issues across the board in the National Park Service. In a recent survey nearly 39 percent of Park Service employees said they experienced sexual harassment.

But when I see what is, you know, what is going on in Grand Canyon National Park over the years, it is atrocious. It sounds like a bunch of frat boys that think they can just get away with an environment of toxicity and harassment and bullying and you are very familiar with this.

The Grand Canyon Park Superintendent, Christine Lehnertz, was brought in to clean house, the first-ever female superintendent and unfortunately I know a little bit about going into a good ole boy network and trying to change the environment. Unfortunately, she then came under some allegations last year that she has been completely exonerated from but now she has resigned.

I am really concerned about the message that that sends to the harassers and the bully-ers that somehow you can try to derail progress, you can derail a female leader and maybe they can get back to business as usual. I am concerned about the Grand Canyon National Park, the culture, and the leadership there. Across the Park Service, for sure, but specifically the future of this leader, what has happened to her and what is going to happen at Grand Canyon National Park to make sure that people are treated with honor and respect and dignity and they are serving that regard and that harassment and bullying and the types of behavior that was happening there is not going to be tolerated and leaders who come into change it are not going to be pushed away.

Mr. BERNHARDT. I really appreciate the question.

First, on a personal side I was very disappointed that she just resigned, and I know that the Deputy Director of the Park Service was disappointed in that and that's a personal choice.

Let me tell you what we have done. We have dramatically revised our anti-harassment policy. We have hired anti-harassment coordinators. We've reprioritized funding. I have basically required every single bureau to bring me an anti-harassment plan, handed that plan to experts, had the experts go through it, come back to me and tell me what needed to be tweaked and then say, implement it and we're watching you.

The IG, in about a month, will have an evaluation of that, and I imagine there will be some, you know, people doing better, some people doing worse.

That park that you mentioned, in particular, we're going to have a good person there.

Senator MCSALLY. Okay.

Mr. BERNHARDT. And I, look, what I've told the management side is if they don't deal with these issues themselves, I'm dealing with the management. And because what really happens is these things

just get shoved under the, you know, they're shoved away because they're hard to work with.

We've dramatically changed the way we handle personnel in the Solicitor's Office, and we're going after that. I cannot have an environment where I have to think that if Katie wanted to work, my daughter wanted to work, at Park Service, that's threatening. That's—it's unacceptable.

Senator MCSALLY. Exactly.

Mr. BERNHARDT. We're dealing with it.

Senator MCSALLY. Well, I appreciate it.

The policies matter, and I appreciate you bringing all that into order, but ultimately this is about leadership and it is about your managers up and down the chain and, I think, the culture as well and holding people accountable and then making sure that you are training and promoting those who are the right leaders and that you are holding the leadership accountable, like you have talked about.

So I definitely want to follow up and maybe we need to go visit and see what is going on up there. Let's do that. I will invite you. Let's do that together.

Mr. BERNHARDT. That would be great.

Senator MCSALLY. I want to follow up also on water. Water is life in Southwestern Arizona. I know you have a long and distinguished background in Western water issues, and we are dealing with a number of them to include the DCP and other things.

I really appreciate this Administration's strong commitment to Western water through the Drought Contingency Plan, the California Central Valley Water Memo and just commonsense regulations.

Can you discuss plans for the upcoming year and how you will keep focused on Western water issues?

Mr. BERNHARDT. Well, you know, I'll be very candid with you, I think we have the best commissioner for the Bureau of Reclamation in history.

Senator MCSALLY. I agree.

Mr. BERNHARDT. And so, I don't have to worry when I go to bed at night at Interior, I don't worry a lot about water because Brenda has it under control. I have her back. I think she's doing, Brenda Burman is the Commissioner, and I think she's doing a tremendous job. Our Assistant Secretary, Tim Petty, for Water and Science, is doing a tremendous job. I think we have a great team. We've just added Pat Weaver.

We're firing on all cylinders there and, you know, my job right now with Brenda is just to stay out of her way.

Senator MCSALLY. Great.

An Arizonan, I will note.

Thank you, Madam Chairwoman, I appreciate it.

The CHAIRMAN. Thank you, Senator.

Senator King.

Senator KING. Thank you, Madam Chair.

First, Mr. Secretary Designate, I want to thank you for coming to Maine last week for visiting Acadia National Park which is a beautiful place anytime of year, for discussing with me the future of the Katahdin Woods monument, for the commitment that you

made to work with us on solidifying that, the future of that monument and the budgetary, the funds that are in the budget. So I appreciate that.

Mr. BERNHARDT. Well, thank you very much.

You know, I really want to make sure that we move promptly, get that plan in place. And if I was, you know, what I really—Acadia is fantastic and I really enjoyed the opportunity there. Maybe we'll come up this summer and go to Katahdin, because I think everybody should and we ought to be getting there as quickly as we can.

Senator KING. I hope you will. And as I understand it, if we get that management plan done, we have——

Mr. BERNHARDT. You're rock solid. You're rock solid today. The Park Service is there. You're part of the Park Service.

Senator KING. Thank you.

My next question is, and I think you said this but I want to just nail it down on the record, you and the Administration are going to help us, support us and push on the Restore Our Parks Act, is that correct?

Mr. BERNHARDT. Absolutely.

Senator KING. I do have a suggestion that we made before in this Committee that we fund the Restore Our Parks Act alphabetically.

[Laughter.]

Mr. BERNHARDT. By state or by park?

Senator KING. Oh no, by park.

[Laughter.]

Acadia. Sorry about Zion, Madam Chair, but anyway.

More serious question about offshore drilling. As you know the former secretary created quite a stir a little over a year ago talking about all the coasts are going to be open to offshore drilling. There was some dispute about Florida.

Here is my concern. NOAA is moving some regulatory changes that appear, they are talking about streamlining. We do not really know what they are going to say, but it appears it could limit states' abilities to affect these decisions through the Coastal Zone Management Act. BOEM is part of that process.

Can you comment on your view of the state's role through the Coastal Zone Management Act or just generally in this process?

Mr. BERNHARDT. Well, I can't. I'd be happy to look at it and get back to you on the NOAA issue because I'm just not familiar with that. I'm sorry.

Mr. BERNHARDT. I can comment on our planning process, and our planning process involves extensive input from the states. As a matter of fact, it has special notification provisions for when we talk to states. And I can assure you that, you know, we listen to states. And so, we'll have a lot of dialogue with them.

Senator KING. The case of our State of Maine, I can tell you we have a Governor, a legislature, and a bipartisan Congressional delegation that is, to use your term, rock solid, against offshore drilling or testing.

So here is the dilemma I have. We are talking about your confirmation, your vote may come up in the next several weeks. If a member of the New England delegation votes for your confirmation

and then you move for offshore drilling, I don't know if I can go home again.

Mr. BERNHARDT. I completely appreciate that.

You know, the dynamic I have here is the President issued a very clear Executive Order, and that order says do a review and then it says give full consideration to including lease sales on an annual basis in each planning area.

So, you know, we're at the very beginning of our process. We went out with the draft. We need to go out with a new proposal and so——

Senator KING. I am worried about the timing. This all started a year ago and we were told there would be a draft last fall, and we still have not seen it.

Mr. BERNHARDT. Well, I'd be very clear with you and say that I don't know what the timing is because it's not done to a point where they've wanted to bring it to me yet. So I don't have it yet. But I don't think it's going to happen immediately, and I'm happy to work with people to figure that out.

Senator KING. Do you think the position of the states, as expressed through their elected leadership, will be of significant consideration?

Mr. BERNHARDT. It—well, there's three factors that we have to look at under the law, and that's exact—that is one big one.

The entire planning process is supposed to do this. Start out big and winnow down to an area that we have for a five-year plan. And so, we're at like step one, not step seven. And so, we just have to work through that process.

Senator KING. Can I get your personal assurance here today that the position of the state, its Congressional delegation, will be a major consideration in making this decision?

Mr. BERNHARDT. Absolutely. Absolutely. It's required.

Senator KING. Thank you.

Thank you, Madam Chair.

The CHAIRMAN. Thank you, Senator King.

Senator Alexander.

Senator ALEXANDER. Thank you, Mr. Chair.

Mr. Bernhardt, welcome. You seem to be surviving your confirmation hearing pretty well.

I noticed a question about even ended treatment of different forms of energy. I am wondering this. I noticed that the Department fined the Exxon Corporation $7,000 a bird for migratory birds that were killed by exposure to hydrocarbons in the Midwest.

I wonder if you are fining wind developers $7,000 a bird for birds, migratory birds, killed by wind turbines which could be also described as Cuisinarts in the sky.

[Laughter.]

Mr. BERNHARDT. Yeah, so, we've——

Senator ALEXANDER. I mean, are you applying an equal treatment for wind for, you know, bird killing by windmills?

Mr. BERNHARDT. They are certainly being applied equally today.

Senator ALEXANDER. Let me ask you a few questions about continuity.

Secretary Zinke was a good friend to the Great Smoky Mountain National Park which is your most visited park. It is up to 11.5 mil-

lion visitors a year, partly because of the opening of the new Foothills Parkway.

I am going to mention three quick items that I do not even have much discussion with you on and then I want to also mention the Restore Our Parks Act.

One is the Foothills Parkway which you and I have discussed. It has produced, I think, one of the most, if not the most, beautiful drive anywhere in the Eastern United States along the edge of the Smokies. It is a 33.5 mile right-of-way which the state gave to the Federal Government, the Park Service, years ago.

And we are exploring with local communities and the state and the conservation fund and the Smoky Mountain Park Service ways to use that right-of-way for mountain bike trails or hiking trails while we are seeing whether the road will be built.

So, I have enthusiasm for that and I just want to make sure that—Secretary Zinke knows about it. He has visited it. I want to make sure that you will continue to be aware of it and interested in it as we work with the Park Service and the conservation fund.

Mr. BERNHARDT. I can promise you we won't lose a step.

Senator ALEXANDER. Good, thank you.

Number two, when Secretary Zinke visited the park, and this gets to the maintenance issue that Senator King talked about, he visited the Look Rock Campground up on Chilhowee Mountain and said that he would provide $2 million to open it. It has been closed five years for thousands of families who camp and visit there. I hope you will check on the progress toward fixing the roads to the bathrooms so that park can be opened.

Mr. BERNHARDT. I'll look into it today.

Senator ALEXANDER. I would appreciate that.

Now, third on the Restore Our Parks Act, that has an extraordinary amount of support, 35 Senate co-sponsors on the new bill this year. We are all in agreement about it. The Chairman and Ranking Member moved it along through the Committee last year. Strong support in the House. The President is supporting it. The Office of Management and Budget, you and Secretary Zinke did.

It has the opportunity to be the most important piece of legislation to help our National Park System at least since the 1960s, because it has the capacity to cut in half the maintenance backlog at the Smokies and the other 416 or 17 parks.

So my question for you is are you going to continue to push the Restore Our Parks Act and what can we do and what can you do to make sure that this becomes a law?

There are not many issues before the Congress today that had such broad bipartisan and popular support.

Mr. BERNHARDT. Well, you know, that's a wonderful point.

Every and in each of my individual meetings that bill came up which I think is a good sign that there is really, you're right, there's a lot of support for it. So I think we need to figure out how to build on that and maybe talk to the House. And I'm happy to row as hard as I can.

Senator ALEXANDER. Well, I hope you will and I hope you will continue to work with the sponsors of the bill, Senators Portman, King, Warner, I, others and Senators Murkowski and Cantwell as we try to schedule its passage in the Senate.

It may have something to do with the Land and Water Conservation Fund at the same time. But in any event, I would like to keep it at the top of the list.

Mr. BERNHARDT. Yes, sir.

Senator ALEXANDER. Thank you, Madam Chairman.

The CHAIRMAN. Thank you, Senator Alexander. Obviously a priority around here, and we appreciate you raising it.

Senator Manchin.

Senator MANCHIN. Thank you, Madam Chairman. I wanted to wait until the end here to make sure all my colleagues were able to get their questions in.

Mr. Bernhardt, climate change is a priority to this Committee. We are working very hard, and my focus working with the Chairman and her staff is on seeking pragmatic solutions for energy innovation as well as adaptation and mitigation on our public lands.

At your confirmation hearing two years ago, you testified that you take the science as we find it, whatever it is. But then you added, you believe that you should take the science and put it in a paradigm in the Administration's policy perspective. And I know you are put in a tough position on this.

Is that still your view, that while you are willing to look at the science, are you able to push back if the Administration is going against the science that has been produced? Do you feel like you have input with our help?

Mr. BERNHARDT. So, first off, I really appreciate that question.

Here's the one thing I can assure you. I'm not a wallflower. If I've got a view, they're going to hear it.

Here's where I am. I recognize that climate is changing and man is contributing to that. But even if you look at the fourth assessment, what you'll see and this is what our scientists tell us, what you'll see is the largest uncertainty about projecting future climate is projecting future climate conditions that the largest uncertainty is what the level of GHG is actually going to be going forward because it's based on a number of things—economics, technology, political structures, demographics—and those are all really difficult for folks to predict.

And so what our scientists have told us is when we're making a decision and we have to be really spot-on on this because if I look at the prior Administration, every day, even today, we lost a climate case, a case regarding how we analyze climate.

We need to recognize that there's what our scientists say is recognize that there's no one single model or one single scenario that's right.

Senator MANCHIN. Well, they can——

Mr. BERNHARDT. It's best to use these multiple models, think it through, multiple scenarios and then look at that range of possibilities and then make your decision in accordance with that.

Senator MANCHIN. Yes, sorry, I want to move on to a few other things.

Mr. BERNHARDT. I'm sorry.

Senator MANCHIN. No problem at all, but I understand. I come from West Virginia. I have a lot of deniers in my state. I have a lot of people understand that it is climate change, and we can do

something. We don't have to do something drastic. We can do something basically. I am not for eliminating. I am for innovating.

Mr. BERNHARDT. Roger that.

Senator MANCHIN. I am in innovation.

Mr. BERNHARDT. And that drives that——

Senator MANCHIN. But basically, it is a global climate, not just North American or U.S. climate. We have to address this and we have to do it in a pragmatic way.

Alaska and West Virginia being heavy lifters, we know we have to step up to the plate.

Mr. BERNHARDT. That's right.

Senator MANCHIN. Now, with that being said, quickly, they talked about offshore. Here is what befuddles me. We have 6 percent of the Outer Continental Shelf currently available for leasing. The proposal I think you all are recommending is the one with the 90 percent under the direction of the Administration.

The only thing I can see is they want to basically be able to export because our demand and our consumption does not pair up with this at all. I think that Senator King is sharing a little bit. There is nobody on the Atlantic Coast that wants you to start drilling. Not one governor that I know of, not one Congressperson or Senator, Democrat or Republican.

And we don't have a need for it because basically the growth we have had, the EIA states the Lower 48 onshore production continues to be the main source of growth.

Now we are up to producing 11.9 million barrels a day as of February 2019. And they are saying that EIA is now predicting U.S. crude oil production continues to set annual records through 2027 and remains greater than 14 million barrels a day through 2040. But yet, the companies want to continue to go out there and start punching holes in the most drastic weather conditions we have, which is the Atlantic Coast.

So we are asking, sir, please work with the governors. And being a former Governor, we have to answer to every one of our constituents every day, to all of our Senators and Congresspeople. This is really, really serious for all of us.

Mr. BERNHARDT. I appreciate that, sir, and I commit to working with the governors on it.

We're at the beginning of the process. And I don't think Secretary Zinke ever thought that the entire 90, you know, everywhere would be ultimately leased, it would eventually be winnowed down. So, I don't think he was thinking that. And so, I think we'll work with you.

Senator MANCHIN. I am going to take liberty on a couple questions, Madam Chairman, if you will allow me?

Two things real quick.

AML, abandoned mine land, has done so many good things in restoring land. As I have said, we must leave the land better than we started. AML, we don't have anything in the West. They do hard rock mining. They just leave it helter skelter. That has to stop. We have got to be good stewards and make them responsible.

But AML is supposed to run out in 2021. I want to make sure that you feel strongly enough about that to support continuation of AML funds.

Mr. BERNHARDT. We'll work with you on that.

Senator MANCHIN. Okay.

Last, sir, I think you deserve a right to explain. I have a lot of my colleagues asking about recusal, your recusal. You have, I think you have been under recusal now for nearly two years, it runs out this August.

You might want to explain your thought process on recusal, how it affects your job and things of this sort and what you think needs to be done there? And they have been asking me to ask you would you continue your recusal since so many of your clients are going to be working directly with this agency?

Mr. BERNHARDT. Well, I really appreciate that question.

And you know, I've had time to think about that question since we visited a little bit earlier in the week.

And you know, my perspective is that in the 1990s the Office of Government Ethics came up with the idea of a one-year period from the day you entered government, when you entered public service, to ensure that there was no bias for your dealings on particular matters involving specific parties for that year just to take away the appearance of impropriety or appearance of bias. And bias can go either way.

Obviously, the prior Administration extended that for certain things to two years. Some things were one year, but some things were two. And the President kept it at two as well.

And so, I'm now at the point where in a few months these recusals will run out for some things. Some things they've already run off. And you know, when I think about this one of the things I really think about is that I have a very particular skill set, strength, creativity, judgment that I'm basically handcuffed and not in the game for the American people if I'm not, if I am recusing myself. And I don't think that is really the best strategy.

So my view is follow that responsibility through the period of time and then get in and be on the American team and win for the American team. I'm actually pretty good at going up against these guys, and I don't have any problem with doing that. And so, you know, I would say you want your A quarterback playing for your team.

Senator MANCHIN. Thank you.

Madam Chairman, thank you for the indulgence there.

The CHAIRMAN. Thank you, Senator Manchin.

Let's turn to Senator Barrasso.

Senator BARRASSO. Thank you, Madam Chairman.

Mr. Bernhardt, congratulations on your nomination. I really appreciated the opportunity to meet with you earlier this week to discuss your vision for the Department under your leadership.

You know, over the past two years you have been instrumental in developing many important policies at Interior. You have been a champion of American energy dominance, simplifying complex reviews that have caused analysis paralysis prior to that. You developed policy that recognizes the need for responsible multiple use of our nation's public lands. I really look forward to more of this good work on your part and the Interior Department's in the future.

In terms of communicating with Congress and the states during your nomination hearing for the current job you have, in 2017 you

emphasized your desire to work with stakeholders in developing policies, specifically identifying states and local communities as partners.

You know, over the last couple of weeks Interior has taken a number of actions that directly impact the way that states and state land managers will work with Interior and other agencies. So, should you be confirmed, how are you going to make sure that you are communicating consistently with your state partners who are going to help you develop policies to address the real, on-the-ground needs?

Mr. BERNHARDT. Well, I'm reaching out to all of the governors. I've visited with all of them. And the one thing I will tell you, there's not a thing going out under my name going forward that folks don't know about before it goes out.

Senator BARRASSO. You know the Department has issued several critical pieces of guidance and rules that improve the management of federal land. I realize there is some discretion afforded to on-the-ground managers who implement the policies to ensure the policies are effective at the state and the local level.

As Secretary, how will you communicate with BLM state directors and field office staff because there is no one nominated and confirmed as BLM director right now, to ensure that they clearly understand the intent of the Washington office?

Mr. BERNHARDT. Well, one of the things I've done is I've gone to the state director's offices themselves. I've been to Wyoming's and told them what I thought our policy should be. And if we have a field office that's out of kilter, I'll have a discussion with them. I have no problem with engaging directly to explain clearly where we need to go.

Senator BARRASSO. Great.

Mr. BERNHARDT. And we're working good with the Governor on some really innovative ideas, I think, that would allow the state to play a bigger role and facilitate a more streamlined process.

Senator BARRASSO. Former Secretary Zinke made commitments to me, to a number of other members of the House and the Senate to take administrative action to lower the royalty rate on soda ash. The proposed rule has not moved forward yet. So our natural soda ash producers continue to be undercut by cheap Chinese synthetics and continue to hope that the commitment from the previous Secretary will be realized. Will you commit to take the necessary actions to lower the soda ash royalty rate?

Mr. BERNHARDT. I'm working on that proposed rule as we speak.

Senator BARRASSO. I want to talk about some court decisions that are out there. Decisions made by Interior are no stranger to the courtroom.

Last October a court reinstated the threatened status of the grizzly bear in the Greater Yellowstone ecosystem under the Endangered Species Act. Last week the D.C. District Court ruled that the Bureau of Land Management did not adequately consider greenhouse gas emissions under NEPA. The District Court of Colorado issued a similar decision just yesterday.

Also yesterday a case was filed in the District Court in Idaho challenging the contents of the sage grouse records of decision and

plan amendments, alleging violations of NEPA and other land management views.

While these cases consider different questions, they do represent areas where courts have historically been divided. As Secretary, how do you plan to develop durable policy in a time where litigation seems to be the first response?

Mr. BERNHARDT. Well, you know, ideally you would say that greater collaboration leads to less litigation. And that's really what you'd think, but our numbers don't necessarily show that. And if you go back and look at the number of protests and you go back to like the '90s and then move through, we're now at about 88 percent protest for lease sales. So, we really need to think about those types of things.

I've spent—I had the attorneys do an analysis a couple days ago to explain to me how much money we've lost in lawyer fees for climate cases that we lost in the prior Administration, and we're approaching a million bucks in fees.

And so we have to do a really good job of articulating what exactly we're doing and how we're doing it and recognize where the courts are so that we can beat it.

The reality, the sage grouse case you mentioned today, actually it's a challenge that was filed to the 2015 plan in 2016. They've gone in and amended their complaint. So they didn't like the prior Administration's plan. They don't like our plan which I think probably tells you where you're going to end up with those types of things.

Senator BARRASSO. Thank you.

Thank you, Madam Chairman.

The CHAIRMAN. Thank you, Senator Barrasso.

We are going to turn to Senator Hoeven, but I understand that you, Senator Lee, would like just a moment here?

Senator LEE. Yes, I would like to offer for the record a letter signed by Scott de la Vega, who is the Department of the Interior's Director of its Office of Ethics Compliance.

Mr. de la Vega prepared an exhaustive report, quite lengthy, led by a four-page letter in which he explains and concludes that the Acting Secretary's conduct has complied with all applicable laws, regulations, ethical rules and other legal material that might be binding here. This is in response to a letter received from Senators Warren and Blumenthal. I have reviewed this and conclude that it confirms what I know about this top-quality nominee, who I know to be a man of upstanding character. I offer that for the record.

The CHAIRMAN. Thank you, Senator Lee, that entire report will be included as part of the Committee record. We thank you for your review and its introduction.

[Letter from the Office of Ethics Compliance follows.]

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

March 25, 2019

The Honorable Elizabeth Warren
United States Senate
317 Hart Senate Office Bldg.
Washington, DC 20510

The Honorable Richard Blumenthal
United States Senate
706 Hart Senate Office Bldg.
Washington, DC 20510

Dear Senator Warren and Senator Blumenthal:

Thank you for your letter of February 26, 2019 regarding your expressed concerns of the actions of the Acting Secretary of the Department of the Interior (Department or DOI). Your letter references an article published by the *New York Times* on February 12, 2019 discussing the Acting Secretary's legal practice prior to joining the Department as Deputy Secretary in August 2017. Specifically, you asked about the Acting Secretary's involvement with the Central Valley Project (CVP) in California and whether his actions, "violated his ethics pledge and federal conflict of interest regulations by participating in decisions that directly affect a former client." As discussed below, we have found the Acting Secretary's actions have complied with all applicable ethics laws, rules and other obligations, including the requirements of President Trump's Executive Order 13770 entitled, "Ethics Commitments by Executive Branch Appointees" (Jan. 28, 2017) (Ethics Pledge).

As an initial matter, I would like to take this opportunity to inform you and your colleagues of recent developments and improvements with the DOI ethics program that will enhance our ability to prevent conflicts of interest at all levels of the Department. Since our arrival at the Department in April 2018, Deputy Director Heather Gottry and I have overhauled an ethics office that was previously characterized by both DOI employees and numerous Inspector General reports as passive and ineffectual. With the strong support of the Acting Secretary, we have spearheaded a long-overdue build-out of the Departmental Ethics Office (DEO) as well as the ethics programs of the various Bureaus and Offices throughout the Department.

Our top priority as non-partisan, career ethics officials, is to prevent conflicts of interest at the DOI and ensure that DOI employees are aware of and comply with all applicable ethics laws and standards. We understand the importance of our program in helping the American people have trust and confidence in the lawful and proper administration of the Department.

Please know that my office takes all credible allegations of potential ethics violations by any DOI employee very seriously and allegations against senior officials are an extremely high priority. Consequently, when the *New York Times* published its article, I immediately sought to understand the facts and carefully analyzed the applicable legal authorities. We note that the Acting Secretary also immediately requested that my office look into this matter and to examine the prior ethics advice and counsel he had received.

Of critical importance, we note that the Acting Secretary does not have any financial conflicts of interest related to either his former client, Westlands Water District, or the CVP generally. As reflected in his Ethics Agreement, dated May 1, 2017, and his Ethics Recusal memorandum, dated August 15, 2017, the Acting Secretary was required under 5 C.F.R. § 2635.502 to recuse for one year (until August 3, 2018) from participating personally and substantially in any "particular matters involving specific parties" in which Westlands Water District was a party or represented a party. Because Westlands Water District is an agency or entity of a state or local government it is excluded from the requirements of paragraph 6 of the Ethics Pledge. Additionally, consistent with U.S. Office of Government Ethics (OGE) guidance, it was determined that the law the Acting Secretary had lobbied on for Westlands Water District, Public Law 114-322, should not be categorized as a "particular matter" because the law addressed a broad range of issues and topics. Therefore, because he did not lobby on a "particular matter" for Westlands Water District, he was not required to recuse himself under paragraph 7 of the Ethics Pledge either from "particular matters" or "specific issue areas" related to Public Law 114-322. Accordingly, the Acting Secretary's recusal related to Westlands Water District ended on August 3, 2018, and was limited in scope to "particular matters involving specific parties" under 5 C.F.R. § 2635.502.

I have enclosed the transmittal e-mail from me to the Acting Secretary with a detailed memorandum attached wherein the DEO consolidates and memorializes prior ethics advice and guidance on certain issues involving the CVP. Of particular importance for a legal analysis of the scope of the Acting Secretary's recusals related to Westlands Water District, the memorandum analyzed and categorized certain issues involving the CVP and related State Water Project as "matters," "particular matters of general applicability," and "particular matters involving specific parties." As I state in the transmittal e-mail, these legal categorizations are critical in determining whether an official complies with the various ethics rules. As reflected in the memorandum, we determined that both the Notice of Intent to Prepare a Draft EIS and the development of a 2019 Biological Assessment are appropriately categorized as "matters," not "particular matters." Our determinations are supported by Federal law and OGE opinions and though the matters involved may sound like "particular matters" or "specific issue areas," they are legally broad matters outside the scope of 5 C.F.R. § 2635.502. As noted above, the Acting Secretary's lobbying on behalf of Westlands Water District on Public Law 114-322 was not categorized as a "particular matter" and did not require an additional recusal under paragraph 7 of the Ethics Pledge. Therefore, the Acting Secretary was not required under either 5 C.F.R. § 2635.502 or the Ethics Pledge to recuse from participation in either the Notice of Intent to Prepare a Draft EIS or the development of a 2019 Biological Assessment. Attached, for your convenience, please find the legal reference materials addressed in the memorandum – I believe our interpretation and application of the relevant legal authorities is both reasonable and prudent.

I have advised the Acting Secretary, at his request, that he and his staff should continue to consult with the DEO prior to participating in any matter that is potentially within the scope of his Ethics Agreement, Ethics Recusal memorandum, the Ethics Pledge, or any other ethics law or regulation. Additionally, to eliminate any potential for miscommunication, I have instructed my staff that all ethics guidance to the Acting Secretary be in writing prior to his participation in a decision or action that reasonably appears to come within the purview of his legal ethics obligations.

In closing, and to be responsive to your final requests, the DEO has not issued any authorizations or ethics waivers to the Acting Secretary or other Interior officials on the topics you raised, nor have we referred any matters to the IG on these topics. It is worth noting that the Acting Secretary meets with me and my senior staff frequently and that I have a standing meeting with him once a week to discuss any significant ethics issues at the DOI. Pursuant to the Acting Secretary's direction, my senior staff also meets with his scheduling staff and other top officials twice a week, at a minimum, to ensure we are aware of who the Acting Secretary is meeting with and the issues he will be discussing. These efforts, supported by the Acting Secretary and his staff, are designed to ensure his compliance with applicable ethics rules and protect the integrity of the Department's programs and operations. My experience has been that the Acting Secretary is very diligent about his ethics obligations and he has made ethics compliance and the creation of an ethical culture a top priority at the Department.

If you have any other questions or concerns, please do not hesitate to contact me.

Sincerely,

Scott A. de la Vega
Director, Departmental Ethics Office and
Designated Agency Ethics Official

Enclosure

de la Vega, Scott <scott.delavega@sol.doi.gov>

Legal Categorization of CVP/SWP Issues

1 message

de la Vega, Scott <scott.delavega@sol.doi.gov> Tue, Feb 19, 2019 at 8:03 PM
To: David Bernhardt <dwbernhardt@ios.doi.gov>
Cc: Daniel Jorjani <daniel.jorjani@sol.doi.gov>, Heather Gottry <heather.gottry@sol.doi.gov>, "McDonnell, Edward" <edward.mcdonnell@sol.doi.gov>
Bcc: Scott de la Vega <scott.delavega@sol.doi.gov>

Acting Secretary Bernhardt:

Recently, you requested that my office examine prior ethics advice and counsel you had received from the Departmental Ethics Office (DEO) in regards to issues, decisions, and/or actions pending at the DOI involving the Central Valley Project (CVP) and the State Water Project (SWP) in California. You have also asked for my recommendations on any additional best practices to implement to fully ensure that you are in compliance with your Ethics Agreement, Executive Order 13770 (the "Ethics Pledge"), and all other ethics laws and regulations.

Attached, please find a detailed memorandum wherein the DEO reviews and explains the prior guidance you have received from this office and, of utmost importance, categorizes CVP and SWP issues as "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties." These legal categorizations are critical in determining whether an official complies with the various ethics rules. Reports that conflate these categories are sometimes confusing, however, the legal analysis and conclusion that Public Law 114-322 is not a "particular matter" and that both the Notice of Intent to Prepare a Draft EIS and the development of a 2019 Biological Assessment are "matters," not "particular matters" are supported by Federal law and Office of Government Ethics opinions. Consequently, these broad matters are outside the scope of paragraph 7 of the Ethics Pledge despite colloquially sounding like a "specific issue area."

Going forward, you and your staff should continue to consult with my office in advance of your participation in any matter that is potentially within the scope of your Ethics Agreement, the Ethics Pledge, or any other ethics laws or regulations. In addition, to eliminate any potential for miscommunication, misunderstanding or error, I have instructed my staff that all guidance to you be in writing before you decide to participate in a decision or action that reasonably appears to come within the purview of your legal ethics obligations. The implementation of these two recommendations will facilitate addressing any future question raised by your participation in a "matter," "particular matter of general applicability," or a "particular matter involving specific parties."

Finally, I am attaching reference materials that highlight many of the concepts discussed in the memorandum. Please let me know if you have any questions or would like to discuss any of these issues further and thank you for your conscientious approach to ethics compliance.

Scott A. de la Vega

Director, Departmental Ethics Office

& Designated Agency Ethics Official

Office of the Solicitor

U.S. Department of the Interior | MIB 5309

(O) (202) 208-3038

(C) (202) 740-0359

scott.delavega@sol.doi.gov

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6 attachments

- **Legal Categorization Memo CVP 2.19.19.pdf**
  1203K
- **LA-17-03.pdf**
  190K
- **Copy of LA-17-03 Webinar.pdf**
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United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

MEMORANDUM

TO: Scott A. de la Vega, Director, Departmental Ethics Office & Designated Agency Ethics Official

FROM: Heather C. Gottry, Deputy Director for Program Management and Compliance, Departmental Ethics Office & Alternate Designated Agency Ethics Official

Edward McDonnell, Deputy Director for Ethics Law and Policy, Departmental Ethics Office

DATE: February 19, 2019

RE: Ethics Guidance on How to Categorize Issues, Decisions, and/or Actions Pending at DOI and Involving the Central Valley Project and State Water Project as "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties"

This memorandum consolidates and memorializes prior ethics advice and guidance provided by the Department Ethics Office (DEO) about whether issues, decisions, and/or actions pending at the U.S. Department of the Interior (DOI) involving the Central Valley Project (CVP), and coordination of operations with the State Water Project (SWP) should be categorized as "matters," "particular matters of general applicability," or "particular matters involving specific parties" pursuant to the definitions of those terms in ethics regulations and guidance from the Office of Government Ethics (OGE). 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.201; 5 C.F.R. § 2641.201(h)(1)-(2); OGE DO-06-029, *"Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"* (Oct. 4, 2006) (OGE DO-06-029). As a general matter, while it is clear that there are many broad policy determinations impacting the entire CVP and/or SWP that would not constitute either "particular matters of general applicability" or "particular matters involving specific parties," case-by-case factual analysis and ethics review will be required in most circumstances in order to determine whether an issue, decision, or action involving the CVP and/or SWP and pending before the DOI should be categorized as a "matter," "particular matter of general applicability," or "particular matter involving specific parties". This categorization will in turn govern whether certain DOI employees may participate in the issue, decision, or action involving the CVP and/or SWP and pending before the DOI, or whether they are required to disqualify themselves or recuse from participation pursuant to 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the requirements of paragraphs 6 and 7 of Executive Order 13770

entitled, "Ethics Commitments by Executive Branch Appointees" (Jan. 28, 2017) (Ethics Pledge).

This memorandum first provides background information on the CVP and the SWP. Second, the memorandum provides a summary of the applicable and governing legal definitions of "matters," "particular matters of general applicability", or "particular matters involving specific parties" found in the ethics regulations and other OGE guidance. Third, this memorandum applies these definitions to the deliberations and discussions that resulted in the publication of a *Notice of Intent to Prepare a Draft Environmental Impact Statement, Revisions to the Coordinated Long-Term Operation (LTO) of the CVP and the SWP, and Related Facilities* (*Draft EIS NOI*) in the Federal Register on December 29, 2017, or the DOI process that resulted in the *Reinitiation of Consultation on the Coordinated LTO of the CVP and SWP, Final Biological Assessment* (*2019 BA*), dated January 2019, in order to determine whether they should be categorized as "matters," "particular matters of general applicability," or "particular matters involving specific parties" as defined in the ethics regulations. Finally, this memorandum provides general guidance on how the DEO categorizes issues, decisions, and/or actions involving the CVP and/or SWP pending before the DOI as "matters," "particular matters of general applicability," or "particular matters involving specific parties."

I. Background of the CVP and SWP

As set forth in *2019 BA*, Congress authorized the U.S. Bureau of Reclamation (Reclamation)[1] to develop the CVP for the public good of delivering water and generating power, while providing flood protection to downstream communities and protecting water quality for water users within the system.[2] *2019 BA* at 1.1.1., 1-3. In its authorization to Reclamation, Congress envisioned that the CVP would be composed of a large, complex project integrated across multiple watersheds that Reclamation would operate to ensure the most beneficial use of water released into the system. *Id.*

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[1] Reclamation's mission is to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public. *2019 BA* at 1-1. Reclamation is the largest wholesale water supplier in the United States, and the nation's second largest producer of hydroelectric power. *Id.* Its facilities also provide substantial flood control, recreation, and fish and wildlife benefits. *Id.* In California, Reclamation operates the CVP in coordination with the State of California Department of Water Resources' (DWR) operation of the SWP. *Id.* The mission of the DWR is to manage the water resources of the State of California, in cooperation with other agencies, to benefit the state's people and to protect, restore, and enhance the natural and human environment. *Id.*

[2] The Rivers and Harbors Act of 1935 authorized Reclamation to take over the CVP from the State of California and its initial features were authorized for construction. In 1992, Public Law 102-575 included Title 34, the Central Valley Project Improvement Act (CVPIA) that refined water management for the CVP. *2019 BA* at 1.1.1, 1-4. The CVPIA added fish and wildlife mitigation, protection, and restoration as a project purpose with the same priority as water supply, and also added fish and wildlife enhancement as a project purpose with the same priority as power generation. *Id.* In addition, the CVPIA prescribed a number of actions to improve conditions for anadromous fish and provided for other fish and wildlife benefits. The Secretary of the Interior assigned the primary responsibility for carrying out the many provisions of CVPIA to Reclamation and the U.S. Fish and Wildlife Service (USFWS).

Currently, Reclamation operates the CVP consistent with the CVP's federally authorized purposes, which include: river regulation; improvement of navigation; flood control; water supply for irrigation and municipal and industrial uses; fish and wildlife mitigation, protection, and restoration; power generation; and fish and wildlife enhancement. *Id.* at 1.1.1, 1-4. The CVP consists of 20 dams and reservoirs that together can store nearly 12 million acre-feet (MAF) of water. *Id.* at 1-1. Reclamation holds over 270 contracts and agreements for water supplies that depend upon CVP operations. *Id.* Through operation of the CVP, Reclamation delivers water in 29 of California's 58 counties. *Id.* The CVP serves farms; homes, and industry in California's Central Valley as well as the major urban centers in the San Francisco Bay Area; it is also the primary source of water for much of California's wetlands. In addition to delivering water for farms, homes, factories, and the environment, the CVP produces electric power and provides flood protection, navigation, recreation, and water quality benefits. While the CVP's facilities are spread out over hundreds of miles, the CVP is financially and operationally integrated by the DOI as a single large water project.

The SWP is a water storage and delivery system of reservoirs, aqueducts, powerplants, and pumping plants operated by the State of California.[3] *2019 BA* at 1-1. Its main purpose is to store and distribute water to 29 urban and agricultural water suppliers in Northern California, the San Francisco Bay Area, the San Joaquin Valley, the Central Coast, and Southern California. Of the contracted water supply, 70 percent goes to urban users and 30 percent goes to agricultural users.

In 1986, Congress directed the Secretary of the Interior to execute the Coordinated Operations Agreement (COA) between the CVP and SWP. *2019 BA* at 1.1.1, 1-4. The COA between the U.S. Government and the State of California was signed by DWR and Reclamation in 1986. The COA defined CVP and SWP facilities and their water supplies, coordinated operational procedures between the DOI and the State of California, identified formulas for sharing joint responsibility between the DOI and the State of California for meeting Delta standards (such as those in D-1485), identified how unstored flow is shared between the CVP and SWP, and established a framework for exchange of water and services between the projects between the CVP and SWP. *Id.* In 1999, the California State Water Resources Control Board issued D-1641, obligating the CVP and SWP to the 1995 Bay-Delta Water Quality Control Plan. Revised in 2000, D-1641 provided standards for fish and wildlife protection, municipal and industrial water quality, agricultural water quality, and Suisun Marsh salinity. *Id.*

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[3] The Burns-Porter Act, approved by the California voters in November 1960 (Water Code [Wat. Code] §§ 12930–12944), authorized issuance of bonds for construction of the SWP. DWR's authority to construct state water facilities or projects is derived from the Central Valley Project Act (CVPA) (Wat. Code § 11100 et seq.), the Burns-Porter Act (California Water Resources Development Bond Act) (Wat. Code §§ 12930–12944), the State Contract Act (Pub. Contract Code § 10100 et seq.), the Davis-Dolwig Act (Wat. Code §§ 11900–11925), and special acts of the State Legislature. *2019 BA* at 1.1.1, 1-4. In 1978, the SWRCB issued Water Rights Decision 1485 (D-1485). D-1485 required spring outflow and set salinity standards in the Delta while setting standards for the diversion of flows into the Delta during winter and spring. *Id.*

The complex and varied activities of DOI with respect to the CVP and SWP are governed by a variety of laws, including the Water Infrastructure Improvements for the Nation Act (WIIN Act) (Pub. L. 114–322, 130 Stat. 1628). Section 4001 of the WIIN Act directs the Secretary of the Interior and the Secretary of Commerce to provide the maximum quantity of water supplies practicable to CVP contractors and SWP contractors by approving, in accordance with federal and applicable state laws, operations or temporary projects to provide additional water supplies as quickly as possible, based on available information. Consistent with authorizations and directions provided by Congress, the DOI routinely analyzes and takes action on a wide variety of both macro and micro operational and programmatic issues, decisions, and/or actions involving the operation of the CVP and coordination with the SWP.

II. Applicable Legal Definitions of "Matters," "Particular Matters of General Applicability," and "Particular Matters Involving Specific Parties"

For purposes of analyzing under ethics laws, regulations, and rules whether and to what extent a DOI employee is required to recuse from participating in a policy, operational and/or programmatic issue, decision, and/or action involving the operation of the CVP and coordination with the SWP depends on whether it is categorized as a matter, particular matter of general applicability, or particular matter involving specific parties. These are terms of art with established meanings defined in ethics laws and regulations as well as guidance from the OGE. 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.201; 5 C.F.R. § 2641.201(h)(1)-(2); OGE DO-06-029, *"Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"* (Oct. 4, 2006).

A. Definition of "Matter"

In the context of the ethics statutes and regulations, the unmodified term "matter" can refer to virtually all Government work from the broadest to the most narrow issue, decision, and/or action. OGE DO-06-029 at 10-11. The broad definition of "matter" also includes any "particular matter", including "particular matters of general applicability" or "particular matters involving specific parties." *Id* at 11. However, if an issue, decision, and/or action pending at the DOI can be categorized as a "particular matter of general applicability" or a "particular matter involving specific parties" then there are specific recusal and disqualification requirements that will apply to a DOI employee's participation in the issue, decision, and/or action in question. Such recusal and disqualification requirements may arise if a DOI employee has a financial interest that could be directly and predictably effected by the issue, decision, and/or action, if the DOI employee has a "covered relationship" (such as former employer, former client, spousal employer, *etc.*) with one of the parties involved in the issue, decision, and/or action, or if the DOI employee lobbied on the same particular matter prior to employment with the DOI. These recusal and disqualification requirements will generally not apply if the issue, decision, and/or action is not categorized as either a "particular matter of general applicability" or a "particular matter involving specific parties."

While the term "matter" is not affirmatively defined in the ethics regulations, for purposes of determining whether the specific recusal and disqualification requirements which apply to "particular matters of general applicability" or "particular matters involving specific

parties" are applicable to an issue, decision, and/or action pending at the DOI, a working definition can be derived from examples in the ethics regulations of the types of issues, decisions, and/or actions that OGE does not consider to be "particular matters of general applicability" or "particular matters involving specific parties." 5 C.F.R. § 2635.402(b)(3)(Ex. 1)(regulations changing the manner in which depreciation is calculated is not a particular matter, nor is the Social Security Administration's consideration of changes to its appeal procedures for disability claimants); 5 C.F.R. § 2641.201(h)(2)(Ex. 3)(formulation of policies for a nationwide grant program for science education programs targeting elementary school children is not a particular matter).

Therefore, we apply the generally accepted definition that the consideration of broad policy options that are directed to the interests of a large and diverse group of persons, such as health and safety regulations applicable to all employers or a legislative proposal for tax reform would not qualify as either "particular matters of general applicability" or "particular matters involving specific parties." 5 C.F.R. § 2635.402(b)(3). Hereinafter, for purposes of the analysis and discussion in this memorandum, the term "matter" is used to describe the consideration of broad policy options that are directed to the interests of a large and diverse group of persons.

Therefore, if an issue, decision, and/or action pending at the DOI is (1) broad and (2) directed to the interests of a large and diverse group of persons, then the recusal and disqualification requirements found in ethics laws, regulations, and rules for "particular matters of general applicability" and "particular matters involving specific parties" would not apply, and a DOI employee will generally be able to fully participate in the issue, decision, and/or action.[4]

B. Definition of "Particular Matter"

The term "particular matter" means any matter that involves "deliberation, decision, or action that is focused on the interests of specific persons or a discrete and identifiable class of persons." 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.103(a)(1).[5] The term "particular matter", however, "does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons." 5 C.F.R. § 2635.402(b)(3). Based on this definition it is clear that "particular matters" may include matters that do not involve specific parties and are not "limited to adversarial proceedings or formal legal relationships." Van Ee v. EPA, 202 F.3d 296, 302 (D.C. Cir. 2000) (Van Ee).[6]

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[4] The term "matter" is found in the one-year post-employment restrictions in 18 U.S.C. § 207(c) and (d) for "senior employees" and "very senior employees." Therefore, those restrictions will be applicable even to issues, decisions, and/or actions at the DOI that are (1) broad and (2) directed to the interests of a large and diverse group of persons. 5 C.F.R. § 2635.402(b)(3).

[5] Please note that for purposes of the Ethics Pledge, the term "particular matter" has the same meaning as set forth in 18 U.S.C. § 208, and 5 C.F.R. § 2635.402(b)(3). Ethics Pledge, Sec. 2(r).

[6] In Van Ee, the D.C. Circuit construed 18 U.S.C. § 205(a)(2), which bars executive branch employees and others from "act[ing] as agent or attorney" for others "before any department, agency, [or] court" in connection with certain "covered matters" in which "the United States is a party or has a direct and substantial interest." The D.C. Circuit concluded that 18 U.S.C. § 205(a)(2) does not prohibit the communications which the plaintiff in the case, a career employee, proposed to make:

The term "particular matter" generally covers two categories of matters: "(1) those that involve specific parties, and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession." OGE DO-06-029 at 8. These two types of particular matters are generally referred to as "particular matters involving specific parties" and "particular matters of general applicability," and the definitions of each type of "particular matter" is discussed further below starting with the broader category of "particular matter of general applicability."

1. Definition of "Particular Matter of General Applicability"

A "particular matter of general applicability" is broader than a "particular matter involving specific parties." 5 C.F.R. § 2641.20(h)(2). A "particular matter of general applicability" does not involve specific parties, but is a matter that focuses on the interests of a discrete and identifiable class, such as a particular industry or profession. *See* OGE DO-06-029 at 8. Examples of "particular matters of general applicability" includes rulemaking, legislation, or policy-making, as long as it is narrowly focused on a discrete and identifiable class such as a particular industry or profession. For instance, a "particular matter of general applicability" at the DOI might include a regulation prescribing safety standards for operators of oil rigs in the Gulf of Mexico or a regulation applicable to all those who have grazing permits on DOI public lands. On the other hand, a land use plan covering a large geographic area and affecting a number of industries (*e.g.*, agriculture, grazing, mining, timber, recreation, wind, solar, and/or geothermal power generation, *etc.*) would not generally constitute a "particular matter of general applicability" but, rather, would still fall within the broader definition of "matter," as it constitutes a broad policy directed to the interests of a large and diverse group of persons.

2. Definition of "Particular Matter Involving Specific Parties"

The narrowest type of matter under the ethics laws, regulations, and rules is a "particular matter involving specific parties." Depending on the grammar and structure of the particular statute or regulation, the wording may appear in slightly different forms, but OGE has advised that the meaning remains the same, focusing primarily on the presence of specific parties.[7] OGE

> We hold that § 205 is inapplicable to Van Ee's uncompensated communications on behalf of public interest groups in response to requests by an agency at which he is not employed for public comment on proposed environmental impact statements related to land-use plans; these proceedings lack the particularity required by the statute, will not result in a direct material benefit to the public interest groups, and do not create a real conflict of interest or entail an abuse of position by Van Ee.

Van Ee, 202 F.3d at 298-99. In reaching this conclusion, the D.C. Circuit analyzed the components required in order for an agency issue, action, and/or decision to be categorized as a "particular matter." This analysis is not limited to 18 U.S.C. § 205, but rather it provides guidance on how to categorize agency issues, actions, and/or decisions for other ethics statutes and regulations, including, but not limited to 18 U.S.C. § 203, 18 U.S.C. § 207, 18 U.S.C. § 208, and 5 C.F.R. § 2635.502.

[7] For example, in the post-employment statute, the phrase "particular matter . . . which involved a specific party or parties" is used. 18 U.S.C. § 207(a)(1), (a)(2). Similar language is used in 18 U.S.C. §§ 205(c) and 203(c), which describe the limited restrictions on representational activities applicable to

DO-06-029 at 10-11. As set forth in 5 C.F.R. § 2641.201(h)(1), a particular matter involving specific parties "typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case." Legislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability are not particular matters involving specific parties. 5 C.F.R. § 2641.201(h)(2). The regulations further advise that "[i]nternational agreements, such as treaties and trade agreements, must be evaluated in light of all relevant circumstances to determine whether they should be considered particular matters involving specific parties; relevant considerations include such factors as whether the agreement focuses on a specific property or territory, a specific claim, or addresses a large number of diverse issues or economic interests." *Id.; see also* OGE DO-06-029 at 2-5.

Additionally, in its preamble to the final rule implementing 5 C.F.R. part 2641, the OGE stated that "OGE does not necessarily equate 'Government program' with 'particular matter involving specific parties.' For one thing, some Government programs are not even, in and of themselves, particular matters involving specific parties. For example, a Government program to understand the causes of a particular disease is not, in and of itself, a particular matter involving specific parties, even though the program may involve several grants, contracts or cooperative agreements all designed to support or implement different aspects of the overall program. *See, e.g., OGE Informal Advisory Letter* 80 x 9; 5 C.F.R. § 2637.201(c)(1) (Ex. 4)." *Post-Employment Conflict of Interest Restrictions Action: Final Rule*, 73 Fed. Reg. 36168, 36177 (June 25, 2008).

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special Government employees. In contrast, 18 U.S.C. § 208 generally uses the broader phrase "particular matter" to describe the matters from which employees must recuse themselves because of a financial interest. However, even this statute has one provision, dealing with certain Indian birthright interests, that refers to particular matters involving certain Indian entities as "a specific party or parties." 18 U.S.C. § 208(b)(4); *see OGE Informal Advisory Letter 00 x 12*. OGE has also issued certain regulatory exemptions, under 18 U.S.C. § 208(b)(2), that refer to particular matters involving specific parties. 5 C.F.R. § 2640.202(a), (b). Additionally, the distinction between "particular matters involving specific parties" and broader types of particular matters (*i.e.*, those that have general applicability to an entire class of persons) is crucial to several other regulatory exemptions issued by OGE under 18 U.S.C. § 208(b)(2). 5 C.F.R. §§ 2640.201(c)(2), (d); 2640.202(c); 2640.203(b), (g). OGE has used similar language in various other rules. Most notably, the provisions dealing with impartiality and extraordinary payments in subpart E of the Standards of Ethical Conduct for Employees of the Executive Branch refer to particular matters in which certain persons are specific parties. 5 C.F.R. §§ 2635.502; 2635.503. OGE also uses the phrase to describe a restriction on the compensated speaking, teaching and writing activities of certain special Government employees. 5 C.F.R. § 2635.807(a)(2)(i)(4). The Ethics Pledge states that for purposes of paragraphs 6 and 7 the term "particular matter involving specific parties" will be defined as set forth in 5 C.F.R. § 2641.201(h) "except that it shall also include any meeting or other communication relating to the performance of one's official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties." Ethics Pledge, Sec. 2(s).

III. Analysis of Whether the *Draft EIS NOI* or *2019 BA* Should Be Categorized as "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties"

A. The *Draft EIS NOI* is a "Matter"

On December 29, 2017, Reclamation published the *Draft EIS NOI*[8] which set forth Reclamation's intent to prepare a programmatic environmental impact statement for analyzing potential modifications to the continued LTO of the CVP, for its authorized purposes, in a coordinated manner with the SWP, for its authorized purposes. *Draft EIS NOI*, 82 Fed. Reg. 61789 (Dec. 29, 2017). Reclamation proposed to evaluate alternatives that maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements; and to augment operational flexibility by addressing the status of listed species. *Id.* Reclamation sought suggestions and information on the alternatives and topics to be addressed and any other important issues related to the proposed action. *Id.*

After review, the DEO has determined that the discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI* do not constitute a "particular matter" (either a "particular matter involving specific parties" or a "particular matter of general applicability") and, therefore, DOI employees would not be required to recuse from participation in the *Draft EIS NOI* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge. This decision is consistent with prior DEO analysis and

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[8] Under the National Environmental Policy Act (NEPA), codified at 42 C.F.R. §4321 *et seq.*, a Federal agency must prepare an environmental impact statement (EIS) if it is proposing a major federal action significantly affecting the quality of the human environment. In this case, Reclamation and DWR propose to continue the long-term operation of the CVP and SWP to maximize water supply delivery and optimize power generation consistent with applicable laws, contractual obligations, and agreement; and to increase operational flexibility by focusing on non-operational measures to avoid significant adverse effects. Reclamation and DWR propose to store, divert, and convey water in accordance with existing water contracts and agreements, including water service and repayment contracts, settlement contracts, exchange contracts, and refuge deliveries, consistent with water rights and applicable laws and regulations. The proposed action includes habitat restoration that would not otherwise occur and provides specific commitments for habitat restoration.

The EIS process begins with publication of a Notice of Intent (NOI), stating the agency's intent to prepare an EIS for a particular proposal. The NOI is published in the Federal Register, and provides some basic information on the proposed action in preparation for the scoping process. The NOI provides a brief description of the proposed action and possible alternatives. It also describes the agency's proposed scoping process, including any meetings and how the public can get involved. The NOI will also contain an agency point of contact who can answer questions about the proposed action and the NEPA process. The scoping process is the best time to identify issues, determine points of contact, establish project schedules, and provide recommendations to the agency. The overall goal is to define the scope of issues to be addressed in depth in the analyses that will be included in the EIS.

interpretations of Environmental Impact Statements and is supported by the decision of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in Van Ee.

As discussed in Van Ee, whether an administrative proceeding is a "particular matter" is determined by the nature and focus of the governmental decision to be made or action to be taken as a result of the proceeding. Van Ee, 202 F.3d at 309. Only where the decision is focused on a probable particularized impact on discrete and identifiable parties is the proceeding considered a particular matter. *Id.* In Van Ee, the D.C. Circuit examined whether the public comment phase on a proposed EIS related to land use plans was a "particular matter," and determined that because the focus of the decision to be made by the agency following the public comment phase on the proposed EIS was not on the interests of particular groups or individuals, the public comment phase of a proposed EIS on a land use plan did not constitute a "particular matter." *Id.*

In this instance, Section VIII of the *Draft EIS NOI* identifies the following purposes: (1) to advise other agencies, CVP and SWP water users and power customers, affected tribes, and the public of Reclamation's intention to gather information to support the preparation of an EIS; (2) to obtain suggestions and information from other agencies, interested parties, and the public on the scope of alternatives and issues to be addressed in the EIS; and (3) to identify important issues raised by the public related to the development and implementation of the proposed action. *Draft EIS NOI*, 82 Fed. Reg. at 61791. Similar to the facts underlying the D.C. Circuit's decision in Van Ee, the deliberations and discussions leading up to the publication of the *Draft EIS NOI* and the potential impact of the EIS itself was not focused on the interests of a discrete and identifiable class of persons and, accordingly, it should not be categorized as a "particular matter" but rather as a "matter" as defined above.

In Van Ee, the D.C. Circuit noted the types of proposed actions generally set forth in EISs are focused on diverse sets of interests, such as how to reconcile or balance recreational, conservation, and commercial interests in a land use plan covering considerable territory. Van Ee, 202 F.3d at 309. Similarly, Section II of the *Draft EIS NOI*, notes that Reclamation intends to analyze potential modifications to the LTO of the CVP, in a coordinated manner with the SWP, to achieve the following goals:

- Maximize water supply delivery, consistent with applicable law, contracts and agreements, considering new and/or modified storage and export facilities.
- Review and consider modifications to regulatory requirements, including existing Reasonable and Prudent Alternative actions identified in the Biological Opinions issued by the USFWS and NMFS in 2008 and 2009, respectively.
- Evaluate stressors on fish other than CVP and SWP operations, beneficial non-flow measures to decrease stressors, and habitat restoration and other beneficial measures for improving targeted fish populations.
- Evaluate potential changes in laws, regulations and infrastructure that may benefit power marketability.

Draft EIS NOI, 82 Fed. Reg. at 61790. Additionally, Section III of the *Draft EIS NOI* states: "[t]he purpose of the action considered in this EIS is to continue the operation of

the CVP in a coordinated manner with the SWP, for its authorized purposes, in a manner that enables Reclamation and California Department of Water Resources to maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements; and to augment operational flexibility by addressing the status of listed species." *Id.*

Sections II and III of the *Draft EIS NOI* establish that the discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI*, focused on the broad policy option of remedying reduced availability of water for delivery south of the Delta by continuing operation of the CVP in a coordinated manner with the SWP in a manner that enables Reclamation and DWR to maximize water deliveries and optimize marketable power generation, consistent with applicable laws, contractual obligations, and agreements, while augmenting operational flexibility by addressing the status of listed species.

These discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI* did not focus on the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case; or on the interests of a discrete and identifiable class of persons. Therefore, they are not appropriately categorized as "particular matters" as defined in 5 C.F.R. § 2635.402(b)(3), 5 C.F.R. § 2640.103(a)(1), 5 C.F.R. § 2641.201(h)(1) ("particular matters involving specific parties"), or 5 C.F.R. § 2641.201(h)(2) ("particular matters of general applicability"). Rather, they were focused on the broad policy of restoring, at least in part, water supply, in consideration of all of the authorized purposes of the CVP as discussed in greater detail above. Accordingly, the discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI*, are appropriately categorized as "matters" and do not trigger the specific recusal and disqualification requirements that are applicable when an issue, decision, and/or action pending at the DOI is a "particular matter of general applicability" or a "particular matter involving specific parties." Consistent with this, DOI employees would not be required to recuse from participation in the *Draft EIS NOI* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

B. The *2019 BA* is a "Matter"

On August 2, 2016, Reclamation and DWR[9] requested reinitiation of Section 7 consultation under the Endangered Species Act of 1973 (ESA), codified at 16 U.S.C. § 1531 *et*

[9] While 5 C.F.R. § 2641.201(h)(1) includes "application" as an example of a "particular matter involving specific parties," in this case, DWR should not be considered an applicant as the word is traditionally defined. While DWR was listed as an applicant for the reinitiation of Section 7 consultation in 2016, they are not included as an author of the *2019 BA*. Indeed, based on available information, DWR is not applying for a specific permit or license to carry out an activity through the consultation process. Instead, DWR, along with BOR, requested reinitiation of formal consultation under Section 7 of the ESA on the continued operation of the CVP and the SWP, both of which are massive water projects serving multiple purposes throughout a large portion of the State of California. Further, under the consultation process set forth in Section 7 of the ESA, only federal agencies can request consultation from the USFWS and the NMFS to review the impacts proposed significant federal action. 16 U.S.C. § 1536. Accordingly,

seq., with the United States Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) on the Coordinated LTO of the CVP and SWP.[10] *2019 BA* at 1-1. The USFWS accepted the reinitiation request on August 3, 2016, and the NMFS accepted the reinitiation request on August 17, 2016. *Id.* The *2019 BA* supports Reclamation's consultation under Section 7 of the ESA, and documents the potential effects of the proposed actions[11] to provide

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identification of DWR as part of the "application" for the reinitiation request does not act to convert the *2019 BA* into a "particular matter involving specific parties."

[10] As codified in 16 U.S.C. § 1531, the purpose of the ESA is to protect and recover imperiled species and the ecosystems upon which they depend. It is administered by the USFWS and the NMFS. The USFWS has primary responsibility for terrestrial and freshwater organisms, while the responsibilities of NMFS are mainly marine wildlife such as whales and anadromous fish, such as salmon. Under the ESA, species may be listed as either endangered or threatened. "Endangered" means a species is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. § 1532(6). "Threatened" means a species is likely to become endangered within the foreseeable future. 16 U.S.C. § 1532(20). All species of plants and animals, except pest insects, are eligible for listing as endangered or threatened. For the purposes of the ESA, Congress defined species to include subspecies, varieties, and, for vertebrates, distinct population segments.

The ESA directs all Federal agencies to work to conserve endangered and threatened species and to use their authorities to further the purposes of the ESA. Section 7 of the ESA, called "Interagency Cooperation," is the mechanism by which Federal agencies ensure the actions they take, including those they fund or authorize, do not jeopardize the existence of any listed species or adversely modify or destroy critical habitats. 16 U.S.C. § 1536. Under Section 7, Federal agencies must consult with the USFWS (and/or NMFS as appropriate) when any action the agency carries out, funds, or authorizes (such as through a permit) *may affect* a listed endangered or threatened species. This process often begins as informal consultation. *Id.* A Federal agency, in the early stages of project planning, approaches the USFWS (and/or NMFS as appropriate) and requests informal consultation. Discussions between the agencies may include what types of listed species may occur in the proposed action area, and what effect the proposed action may have on those species. If it appears that the agency's action may affect a listed species, that agency may then prepare a biological assessment to assist in its determination of the project's effect on a species. 16 U.S.C. § 1536(c).

When a Federal agency determines, through a biological assessment or other review, that its action is *likely to adversely affect* a listed species, the agency submits to the USFWS (and/or NMFS as appropriate) a request for formal consultation. During formal consultation, the USFWS (and/or NMFS as appropriate) and the agency share information about the proposed project and the species likely to be affected. Formal consultation may last up to 90 days, after which the USFWS (and/or NMFS as appropriate) will prepare a biological opinion on whether the proposed activity will *jeopardize* the continued existence of a listed species. The USFWS (and/or NMFS as appropriate) has 45 days after completion of formal consultation to write the opinion. Please note that these timeframes may be extended upon agreement between the action agency and the services the USFWS (and/or NMFS as appropriate).

[11] The proposed action analyzed in the *2019 BA* centers on a Core Water Operation that provides for Reclamation and DWR to operate the CVP and SWP for water supply and to meet the requirements of State Water Resources Control Board (SWRCB) Water Right Decision 1641 (D-1641), along with other project purposes. *2019 BA* at 1-2. The Core Water Operation consists of operational actions that do not require subsequent concurrence or extensive coordination to define annual operation. *Id.* The proposed action also includes conservation measures designed to minimize or reduce the effects of the action on listed species. *Id.* In addition, the *2019 BA* and resulting consultation evaluates actions that will require

operational flexibility for the CVP and SWP, large-scale government programs that divert, store, and convey water throughout California for various purposes, on federally listed endangered and threatened species that have the potential to occur in the action area and critical habitat for these species. *Id.* It also fulfills consultation requirements for the Magnuson-Stevens Fishery Conservation and Management Act of 1976 for Essential Fish Habitat. *Id.*

As set forth in the *2019 BA*, several factors resulted in Reclamation requesting reinitiation of consultation under the ESA, including the apparent decline in the status of several listed species, new information related to recent multiple years of drought, and the evaluation of best available science. https://www.usbr.gov/mp/bdo/lto.html. The coordinated long-term operations of the CVP and SWP are currently subject to 2008 and 2009 biological opinions issued pursuant to Section 7 of the ESA. *2019 BA* at 1.1.2, 1-4-5. Each of these biological opinions included Reasonable and Prudent Alternatives to avoid the likelihood of jeopardizing the continued existence of listed species, or the destruction or adverse modification of critical habitat that were the subject of consultation. *Id.* In the *2019 BA*, Reclamation proposes to maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements, and to augment operational flexibility by addressing the status of listed species. https://www.usbr.gov/mp/bdo/lto.html.

After review, the DEO has determined that the *2019 BA* should not be categorized as either a "particular matter involving specific parties" or a "particular matter of general applicability," but rather as a "matter" as defined for purposes of this memorandum. Therefore, DOI employees would not be required to recuse from participation in the *2019 BA* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge. This decision is consistent with prior DEO analysis and interpretations of Biological Assessments (BAs) and Biological Opinions issued pursuant to the requirements of the ESA, and is supported by the decision of the D.C. Circuit in Van Ee.

Generally, a BA is a compilation of the information prepared by or under the direction of a Federal agency as part of its Section 7 consultation concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation of potential effects of the action on such species and habitat. 16 U.S.C. § 1536(c). A BA evaluates the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determines whether any such species or habitat are likely to be adversely affected by the proposed actions and is used in determining whether formal consultation or a conference is necessary. *Id.*

The *2019 BA* analyzes and includes as an environmental baseline, the past and present impacts of all federal, state, and private actions and other human activities in the action area, the anticipated impacts of all proposed federal projects in the action area that have already undergone formal or early Section 7 consultation, and the impact of certain state or private actions that are contemporaneous with the consultation in process, including the past and present

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further development and may change during repeated implementation as more information becomes available (*i.e.*, "adaptive management"). Adaptively managed actions will require additional coordination prior to implementation through program-specific teams established by Reclamation and DWR with input and participation from partner agencies and stakeholders. *Id.*

impacts of CVP and SWP operations under 2008 and 2009 biological opinions. *2019 BA* at 3-1-21. The BA also analyzes the effects of multiple physical, hydrological, and biological alterations that have negatively affected the species and habitat considered in the consultation with the USFWS and NMFS, including past, present, and ongoing effects of the existence of the CVP structures, as well as disconnected floodplains and drained tidal wetlands, levees, gold and gravel mining, gravel, timber production, marijuana cultivation, large woody debris, alterations to address effects, fish passage, spawning and rearing habitat augmentation, tidal marsh restoration, *etc. Id.* The *2019 BA* also sets forth a series of proposed actions that – if implemented – will work to maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements, and to augment operational flexibility while minimizing impact to listed species. *2019 BA* at 4-1-62; 5-1-498; 6-1-4.

Additionally, applying the D.C. Circuit's decision in Van Ee, BAs generally may not even constitute "particular matters," let alone "particular matters involving specific parties." As noted by the D.C. Circuit in Van Ee: "...whether an administrative proceeding is a 'particular matter' . . . is determined by the nature and focus of the governmental decision to be made or action to be taken as a result of the proceeding. Only where the decision is focused on a probable particularized impact on discrete and identifiable parties [is it a particular matter]." Van Ee, 202 F.3d at 309. As discussed above, the *2019 BA* is not focused on a probable particularized impact on discrete and identifiable parties. Instead, the *2019 BA* evaluates the potential effects of the action on a number of listed and proposed species and designated and proposed critical habitats, and determines whether any such species or habitat are likely to be adversely affected by the proposed actions and is used in determining whether formal consultation or a conference is necessary. *Id.* Moreover, the numerous proposed actions that the *2019 BA* discusses will work together to provide additional operational flexibility for the continued operation of the CVP and SWP, both of which, as described above in greater detail, are federal and state government projects that are enormous in geographical extent and impact on the people, wildlife, and environment of California. As a result, the proposed actions under review in the *2019 BA* take into account and have the potential to impact a wide and diverse sets of interests, and the *2019 BA* analyzes how to reconcile or balance recreational, conservation, and commercial interests in the operation of the CVP and SWP.

Accordingly, even though some of the issues, decisions, and actions undertaken by the DOI with respect to the preparation, development, drafting, discussion, and submission of the *2019 BA* may have a discernible impact on the interests of certain identifiable parties, the overall impact and focus of the proposed actions and decisions to be made are of a much broader nature, including the avoidance of jeopardizing the continued existence of a listed species and the destruction or adverse modification of designated critical habitat in connection with the continued operation of the CVP and the SWP. Consistent with this, the DOI's work on the *2019 BA* did not focus on the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case; or on the interests of a discrete and identifiable class of persons. Therefore, it is not appropriately categorized as a "particular matter" as defined in 5 C.F.R. § 2635.402(b)(3), 5 C.F.R. § 2640.103(a)(1), 5 C.F.R. § 2641.201(h)(1) ("particular matters involving specific parties"), or 5

C.F.R. § 2641.201(h)(2) ("particular matters of general applicability"). The *2019 BA* considered a wide range of diverse issues related to and the interests of the environmental, agricultural, industrial, municipal, business, academic, and recreational sectors. As result, the DOI's work on the *2019 BA* involved multifaceted discussions among representatives of those numerous sections and industries in a process that more closely resembles legislative policymaking than contracting, litigation, or negotiations. The issues, decisions, and actions undertaken by the DOI with respect to the preparation, development, drafting, discussion, and submission of the *2019 BA* are therefore appropriately characterized as a "matter" as defined for purposes of this memorandum, and DOI employees would not be required to recuse from participation in the *2019 BA* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

IV. Guidance On Assessing Whether Issues, Decisions, and/or Actions Involving the CVP and/or SWP Are "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties"

As set forth in greater detail above, the DEO has determined that both the *Draft EIS NOI* and the *2019 BA* are appropriately categorized as "matters" as defined in this memorandum. It is important to note that as work on the *Draft EIS NOI* and the *2019 BA* continues, it is possible that certain aspects of each, such as the implementation of certain underlying actions, interpretation of specific requirements, or the application of decisions on one sector, could develop into "particular matters of general applicability" or "particular matters involving specific parties." This, in turn, can implicate the recusal or disqualification requirements of 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

Accordingly, DOI employees should not assume that the conclusions of this memorandum are applicable to every EIS or BA, or to the entire lifecycle of either the *Draft EIS NOI* or the *2019 BA* at the DOI. Further, while the CVP and SWP projects taken as a whole at DOI are "matters" as defined in this memorandum, DOI employees should not conclude that each issue, decision, and/or action that impacts the CVP or SWP are also "matters." Instead, the DEO recommends that DOI employees assess whether the issues, decisions, and/or actions that they undertake with respect to the CVP and the SWP are best categorized as;

- broad policy options that are directed to the interests of a large and diverse group of persons;
- an issue, decision, and/or action focused on the interests of a discrete and identifiable class, such as a particular industry or profession; or
- a specific proceeding affecting the legal rights of certain parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.

In order to assist DOI employees in categorizing their work on CVP and SWP issues, decisions, and/or actions pending before the DOI, the DEO has prepared the chart below as a general reference guide. It sets forth the three general categories under the ethics laws and regulations and includes examples of certain issues, decisions, and/or actions involving the CVP

and SWP that could potentially be categorized as "matters," "particular matters of general applicability," or "particular matters involving specific parties."

CATEGORIES	EXAMPLES
"Matters" as defined in this memorandum • Broad policy options that are directed to the interests of a large and diverse group of persons	• *Draft EIS NOI* [as described above] • *2019 BA* [as described above] • Issue, decision, and/or action that impacts all industries and sectors involved with the CVP and/or SWP • CVP-wide operational and programmatic policy decisions
"Particular Matters of General Applicability" • Issue, decision, and/or action focused on the interests of a discrete and identifiable class, such as a particular industry or profession	• Issue impacting only the agricultural industry involved with the CVP and/or SWP • Decision limited only to hydroelectric power generators • Action focused only on municipal water issues • Anything that impacts an entire sector and/or industry or a subset of sectors and/or industries involved with and impacted by the CVP and/or SWP
"Particular Matters Involving Specific Parties" • Specific proceeding affecting the legal rights of certain parties or an isolatable transaction or related set of transactions between identified parties	• CVP Water Contracts • Litigation • Settlement Agreements • Permit for a specific party or parties • Specific request from individual(s) or entity(ies)

In every case, the categorization of issues, decisions, and/or actions will depend on the specific facts involved, and the DEO is available to provide specific guidance and assistance in making such determinations.

V. Conclusion

This memorandum reflects the current analysis and guidance of the DEO on how the types of issues, decisions, and/or actions involving the CVP and the DOI's coordination of operations with the SWP, should be categorized as "matters," "particular matters of general applicability," or "particular matters involving specific parties" pursuant to the definitions of those terms in ethics regulations and guidance from the OGE. As discussed in greater detail above, the DEO has determined that both the *Draft EIS NOI* and the *2019 BA* are "matters" as defined in this memorandum and, as such, DOI employees would not be required to recuse from participation in either the *Draft EIS NOI* or the *2019 BA* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

While there are other similar broad policy determinations impacting the entire CVP and/or SWP that would not constitute either "particular matters of general applicability" or "particular matters involving specific parties," the DEO notes that case-by-case factual analysis and ethics review will be required in many, if not most, circumstances in order to determine the appropriate categorization of issues, decisions, and/or actions undertaken at the DOI with respect to the CVP and the SWP. The DEO is available to provide further ethics guidance on this and other issues upon request.

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

March 20, 2017
LA-17-03

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
General Counsel

SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires "appointees" to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President's office OGE's prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on these discussions, this Legal Advisory identifies the parts of OGE's issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance.

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE's prior guidance on Executive Order 13490 is applicable to Executive Order 13770 to the extent that it addresses language common to both executive orders. Therefore, all substantive legal interpretations in the following Legal Advisories are applicable to Executive Order 13770: DO-09-005, DO-09-007, DO-09-010, DO-09-014, DO-09-020, DO-10-003, and LA-12-10. The following Legal Advisories remain valid in part, as specified in annotations that now appear in the versions posted on OGE's website: DO-09-003, DO-09-011, DO-10-004, and LA-16-08. For the convenience of ethics officials and employees, an enclosed table highlights certain language common to both executive orders and references prior guidance that is applicable to Executive Order 13770.

II. Paragraph 7: "Specific Issue Area"

Executive Order 13770 prohibits an appointee from participating in any particular matter on which the appointee lobbied during the two-year period before being appointed or in the "specific issue area" in which that particular matter falls. *See* E.O. 13770, sec. 1, par. 7; E.O. 13490, sec. 1, par. 3. The Counsel to the President's office has advised OGE that, as used in Executive Order 13770, the term "specific issue area" means a "particular matter of general applicability," and OGE has accepted the Administration's interpretation of this term. Although "specific issue" and "general issue area" are used in the context of the Lobbying Disclosure Act (LDA), the term "specific issue area" is not used in that context. *See* E.O. 13770, sec. 2; *see also*

2 U.S.C. §§ 1602, 1603(b)(5), 1604(b)(2). Although the term "specific issue area" appeared in Executive Order 13490, it was not defined in any guidance issued during the eight years in which that executive order remained in effect.

OGE has issued guidance distinguishing two types of particular matters: "particular matters involving specific parties" and "particular matters of general applicability." *See* 5 C.F.R. § 2640.102(l)-(m); *see also* OGE Inf. Adv. Op. 06 x 9 (2006). The latter is broader than the former. *Id.* This difference in breadth is relevant in determining the scope of the recusal, as illustrated in the following example:

> An appointee was a registered lobbyist during the two-year period before she entered government. In that capacity, she lobbied her agency against a proposed regulation focused on a specific industry. Her lobbying was limited to a specific section of the regulation affecting her client. Her recusal obligation as an appointee is not limited to the section of the regulation on which she lobbied, nor is it limited to the application of the regulation to her former client. Instead, she must recuse for two years from development and implementation of the entire regulation, subsequent interpretation of the regulation, and application of the regulation in individual cases.

III. Paragraphs 1 and 3: Post-Government Employment Lobbying Restrictions

The ethics pledge under Executive Order 13770 establishes two post-Government employment lobbying restrictions. The restriction in paragraph 1 of the ethics pledge prohibits a former appointee, for five years after terminating employment with an executive agency, from engaging in lobbying activities "with respect to" that agency. *See* E.O. 13770, sec. 1, par. 1. The restriction in paragraph 3 of the ethics pledge establishes the same restriction "with respect to" any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration. *See id.*; E.O. 13770 sec. 1, par. 3; sec. 2(c).

Executive Order 13770 relies partly on the definition of "lobbying activities" in the Lobbying Disclosure Act (LDA). *See* E.O. 13770, sec. 2(n). The LDA defines that term to include both "lobbying contacts" and behind-the-scenes efforts in support of such contacts. 2 U.S.C. § 1602(7). The LDA's definition of "lobbying contacts" is limited to certain types of communications and excludes 19 types of communications. 2 U.S.C. § 1602(8). Executive Order 13770 specifically excludes additional types of communications. *See* E.O. 13770, sec. 2(n).

For purposes of paragraph 1, lobbying activities are deemed to be carried out "with respect to" an agency only to the extent that they involve the following:

> (a) Any oral or written communication to a covered executive branch official of that agency; or

(b) Efforts that are intended, at the time of performance, to support a covered lobbying contact to a covered executive branch official of that agency.

For purposes of paragraph 3, the prohibition on lobbying activities "with respect to" a covered executive branch official or non-career Senior Executive Service appointee extends to non-career Senior Executive Service appointees. Therefore, lobbying activities in paragraph 3 involve the following:

(a) Any oral or written communication to a covered executive branch official or non-career Senior Executive Service appointee; or

(b) Efforts that are intended, at the time of performance, to support a covered lobbying contact to a covered executive branch official or non-career Senior Executive Service appointee of that agency.

For the convenience of ethics officials and employees, an enclosed table compares the post-Government employment lobbying restrictions in paragraphs 1 and 3.

Attachments

Applicability of Prior Guidance to Executive Order 13770
Attachment to LA-17-03

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Section 1. *Ethics Pledge.* Every appointee in every executive agency appointed on or after January 20, 2017, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee: As a condition, and in consideration, of my employment in the United States Government in an appointee position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:	Signing requirement ("appointee"): E.O. 13770, sec. 1 E.O. 13490, sec. 1 Definition of appointee: E.O. 13770, sec. 2(b) E.O. 13490, sec. 2(b)	Whether the following categories of employees are considered "appointees" for the purpose of signing the ethics pledge: • Acting officials and detailees: DO-09-010 • Appointees, generally: DO-09-003, DO-09-010 • Career officials appointed to confidential positions: DO-09-010 • Career Senior Executive Service (SES) members given Presidential appointments: DO-09-010 • Excepted service, generally: DO-09-010 • Foreign Service, similar positions: DO-09-010 • Holdover appointees: DO-09-010 • Individuals appointed to career positions: DO-09-003 • IPA detailees: DO-09-020 • Schedule C employees with no policymaking role: DO-09-010 • Special Government Employees (SGEs): DO-09-005, DO-09-010 • Temporary advisors/counselors pending confirmation to Presidentially appointed, Senate-confirmed (PAS) positions: DO-09-005 • Term appointees: DO-09-010
	Signing requirement ("shall sign"): E.O. 13770, sec. 1 E.O. 13490, sec. 1	When the ethics pledge must be signed: • Holdover appointees: DO-09-010, DO-09-014 • Nominees to PAS positions: DO-09-005 • Non-PAS who have already been appointed: DO-09-005 • Non-PAS who may be appointed in the future: DO-09-005 • Temporary advisors/counselors pending Senate confirmation to PAS positions: DO-09-005
Sec. 1, par. 2: If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions.	Restriction on communicating with employees of former agency: E.O. 13770, sec. 1, par. 2 E.O. 13490, sec. 1, par. 4	Guidance on the restriction: DO-10-004, LA-16-08 *Note: Ethics officials and employees may continue to rely on DO-10-004 regarding the substance of the restriction. Note, however, that the duration of this restriction in E.O. 13770 is one year and commences when the individual ceases to be a senior employee, whereas the duration of the corresponding restriction in E.O.13490 was two years, commencing when the appointee moves to a position that is not subject to the Pledge.*
Sec. 1, par. 5: I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee.	Prohibition on accepting gifts from registered lobbyists, lobbying orgs: E.O. 13770, sec. 1, par. 5 E.O. 13490, sec. 1, par. 1	Guidance on the lobbyist gift ban: DO-09-007, DO-10-003, LA-12-10 Relationship to 5 C.F.R. 2635, subpart B (Gifts from Outside Sources): DO-09-007, DO-10-003
	Definition of "gift": E.O. 13770, sec. 2(k) E.O. 13490, sec. 2(c)	Guidance on the following terms: • "Gift": DO-09-007 • "Solicited or accepted indirectly:" DO-09-007 Treatment of official speeches, accompanying staff: DO-10-003
	Definition of "registered lobbyist or lobbying organization": E.O. 13770, sec. 2(w) E.O. 13490, sec. 2(e)	Guidance on the term, "registered lobbyist or lobbying organization": DO-09-007 Treatment of the following: • 501(c)(3) organizations: DO-09-007, LA-12-10 • Clients of lobbyists/lobbying firms: DO-09-007 • Institutions of higher education: LA-12-10 • Media organizations: DO-09-007, LA-12-10

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Sec. 1, par. 6: I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.	Revolving door ban (incoming appointees): E.O. 13770, sec. 1, par. 6 E.O. 13490, sec. 1, par. 2	Guidance on the revolving door ban (incoming appointees): DO-09-011, DO-09-020 Relationship to impartiality regulations: DO-09-011
	Definition of "directly and substantially related to my former employer or former clients": E.O. 13770, sec. 2(d) E.O. 13490, sec. 2(k)	Guidance on the term, "directly and substantially related to": DO-09-011
	Definition of "former client": E.O. 13770, sec. 2(i) E.O. 13490, sec. 2(j)	Guidance on the term, "former client": DO-09-011 Treatment of the following: • Discrete, short-term engagements/*de minimis*: DO-09-011 • Federally funded research and development centers: DO-09-011 • Government entities: DO-09-011 • Nonprofit organizations: DO-09-011 • Service as a consultant: DO-09-011 • State or local colleges and universities: DO-09-011
	Definition of "former employer": E.O. 13770, sec. 2(j) E.O. 13490, sec. 2(i)	Guidance on the term, "former employer": DO-09-011 Treatment of the following: • Federally funded research and development centers: DO-09-011 • Government entities: DO-09-011 • State or local colleges and universities: DO-09-011 • Nonprofit organizations: DO-09-011
	Definition of "particular matter involving specific parties": E.O. 13770, sec. 2(s) E.O. 13490, sec. 2(h)	Guidance on the term, "particular matter involving specific parties": DO-09-011, DO-09-020 Treatment of the following: • Consultation with experts: DO-09-011 • Meetings, other communications: DO-09-011 • Official speeches: DO-09-020 • Open to all interested parties/multiplicity of parties: DO-09-011 • Rulemakings/regulations: DO-09-011

Paragraphs 1 and 3 in Executive Order 13770
Attachment to LA-17-03

	Paragraph 1	Paragraph 3
Basic Prohibition	I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency. E.O. 13770, sec. 1, par. 1.	In addition to abiding by the limitations of paragraphs 1 and 2, I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration. E.O. 13770, sec. 1, par. 3.
Length of Restriction	5 years. E.O. 13770, sec. 1, par. 1.	Remainder of the Administration. E.O. 13770, sec. 1, par. 3
Commencement of Restriction	Termination of employment as an appointee. E.O. 13770, sec. 1, par. 1.	Termination of government service. E.O. 13770, sec. 1, par. 3

Restricted Activity	Lobbying activities, as defined in the Lobbying Disclosure Act, but excluding certain types of communications. E.O. 13770, sec. 2(n). The term "lobbying activities" includes "lobbying contacts" and behind-the-scenes efforts in support of such contacts. 2 U.S.C. § 1602(7).
	• "Lobbying contacts" are limited to written or oral communications with covered officials that are made on behalf of a client. 2 U.S.C. § 1602(8)(A).
	  o The term "lobbying activities" as defined in E.O. 13770 does not include communications and appearances with regard to: a judicial proceeding; a criminal or civil law enforcement inquiry, investigation, or proceeding; or any agency process for rulemaking, adjudication, or licensing, as defined in and governed by the Administrative Procedure Act, as amended, 5 U.S.C. 551 et seq.
	  o The definition of "lobbying contact" includes 19 exceptions listed at 2 U.S.C. § 1602(8)(B). 2 U.S.C. § 1602(8)(B)(i)-(xix)
	  ▪ For example, the definition excludes "a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered executive branch official." 2 U.S.C. § 1602(8)(B)(v).
	• The term "client" means any person or entity that employs or retains another person for financial or other compensation to conduct lobbying activities on behalf of that person or entity. 2 U.S.C. § 1602(2).
	• An activity is considered a "lobbying activity" whether or not a former appointee is required to register as a lobbyist. Therefore, there is no minimum requirement to engage in lobbying activities before the restrictions apply (*i.e.*, no 20% service threshold). *See* E.O. 13770, sec. 2(n).	

With Whom Appointees are Restricted From Engaging in Lobbying Activities	Covered executive branch officials <u>at the former appointee's former agency</u>. E.O. 13770, sec. 1, par. 1 ("with respect to that agency"). • A communication to or appearance solely before a covered legislative branch official is not a lobbying activity "with respect to" the former appointee's former agency. *Id.* • With respect to those appointees to whom component designations are applicable, "agency" means the separate and distinct component agencies designated in accordance with 18 U.S.C. § 207(h). E.O. 13770, sec. 2(e).	Covered executive branch officials <u>throughout the executive branch</u>. E.O. 13770, sec. 1, par. 3. Non-career senior executive service appointees <u>throughout the executive branch</u>. E.O. 13770, sec. 1, par. 3.
	Covered executive branch officials are: • The President; • The Vice President; • Any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President; • Any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order; • Any member of the uniformed services whose pay grade is at or above O–7 under section 201 of title 37; and • Any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2)(B) of title 5. See E.O. 13770, sec. 2(c); 2 U.S.C. § 1602(3).	

LA-17-03: Guidance on Executive Order 13770

U.S. Office of Government Ethics
Advanced Practitioner Webinar
Thursday, April 27, 2017

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LA-17-03: Guidance on E.O. 13770

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

March 20, 2017
LA-17-03

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
General Counsel

SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires "appointees" to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President's office OGE's prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on these discussions, this Legal Advisory identifies the parts of OGE's issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance.

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE's prior guidance on Executive Order 13490 is applicable to

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What is Covered in LA-17-03?
(Past Guidance)

- Elaboration on Guidance in LA-17-02
  - Extent to which past guidance is applicable to EO 13770
  - Extent to which past guidance is NOT applicable or NOT relevant to EO 13770

3

What is Covered in LA-17-03?
(New Guidance)

- LA-17-03 also addresses recusal obligations for recent lobbyists (pledge paragraph 7)
- Post-government employment restrictions
  - 5-year restriction under pledge paragraph 1
  - Administration-length restriction under pledge paragraph 3
  - Citations to – but not interpretations of – the Lobbying Disclosure Act (LDA)

4

What is Not Covered in LA-17-03?

- Section 3 of the new Executive Order concerning pledge waivers
- Paragraph 4 concerning post-government restrictions and the Foreign Agents Registration Act of 1938
- Paragraph 8 concerning employment decisions
- The continued applicability of EO 13490

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Language Common to E.O. 13770 and E.O. 13490

6

LA-17-02: Executive Order 13770

"With respect to Executive Order 13770, ethics officials and employees may continue to rely on OGE's prior guidance regarding Executive Order 13490 to the extent that such guidance addresses language common to both orders."

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LA-17-03: Guidance on E.O. 13770

SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires "appointees" to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President's office OGE's prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on those discussions, this Legal Advisory identifies the parts of OGE's issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance.

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE's prior guidance on Executive Order 13490 is applicable to Executive Order 13770 to the extent that it addresses language common to both executive orders. Therefore, all substantive legal interpretations in the following Legal Advisories are applicable to Executive Order 13770: DO-09-005, DO-09-007, DO-09-010, DO-09-014, DO-09-020, DO-10-003, and LA-12-10. The following Legal Advisories remain valid in part, as specified in annotations that now appear in the versions posted on OGE's website: DO-09-003, DO-09-011, DO-10-004, and LA-16-08. For the convenience of ethics officials and employees, an enclosed table highlights certain language common to both executive orders and references prior guidance that is applicable to Executive Order 13770.

II. Paragraph 7: "Specific Issue Area"

Executive Order 13770 prohibits an appointee from participating in any particular matter on which the appointee lobbied during the two-year period before being appointed or in the "specific issue area" in which that particular matter falls. *See* E.O. 13770, sec. 1, par. 7; E.O. 13490, sec. 1, par. 3. The Counsel to the President's office has advised OGE that, as used in Executive Order 13770, the term "specific issue area" means a "particular matter of general applicability," and OGE has accepted the Administration's interpretation of this term. Although "specific issue" and "general issue area" are used in the context of the Lobbying Disclosure Act

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Example:

DO-09-010: Who Must Sign the Ethics Pledge?

Note: All substantive legal interpretations in this advisory are applicable to Executive Order 13770, sec. 1. *See* LA-17-02 and LA-17-03.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 16, 2009
DO-09-010

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Who Must Sign the Ethics Pledge?

The Office of Government Ethics (OGE) has received numerous questions concerning

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Example:

DO-09-011: Revolving Door Ban—All Appointees Entering Gov't

NOTE: All substantive legal interpretations in this advisory concerning Pledge paragraph 2 (E.O. 13490) and the terms used in Pledge paragraph 2 are applicable to Executive Order 13770, sec. 1, par. 6. All substantive legal interpretations pertaining to waivers of the Ethics Pledge are not applicable to Executive Order 13770, sec. 3. *See* LA-17-02 and LA-17-03.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 26, 2009
DO-09-011

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Ethics Pledge: Revolving Door Ban--All Appointees Entering Government

Executive Order 13490 requires any covered "appointee" to sign an Ethics Pledge that

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4/26/2017

Example:

DO-10-004: FAQs on Post-Employment under the Ethics Pledge

Note: Please see the attached addendum for the applicability of substantive legal interpretations in this advisory to Executive Order 13770. *See also* LA-17-02 and LA-17-03.

Addendum (March 20, 2017)
DO-10-004: Post-Employment Under the Ethics Pledge: FAQs

The following substantive legal interpretations in this advisory are **applicable** to Executive Order 13770:

- Part A. Post-employment cooling-off period. See E.O. 13770, sec. 1, par. 2
  - Q2. Which appointees are subject to the restriction
  - Q3. How the restriction affects very senior employees
  - Q4. Which officials may not be contacted under this restriction
  - Q5. Applicability of exceptions under 18 U.S.C. § 207(c) to the restriction
- Part B. Post-employment lobbying ban. See E.O. 13770, sec. 1, par. 3
  - Q1. Relationship of the lobbying ban to other restrictions
  - Q2. Whether the lobbying ban applies to appointees who are not senior employees
  - Q5. Duration of the lobbying ban
  - Q11. Whether exceptions to the restriction exist

The following substantive legal interpretations in this advisory are **applicable in part** to Executive Order 13770, to the extent that they address the core questions listed below. However, because the post-employment ban in Executive Order 13490 restricts "lobbying," while the corresponding ban in Executive Order 13770 contains "lobbying activities," the substantive legal interpretations of

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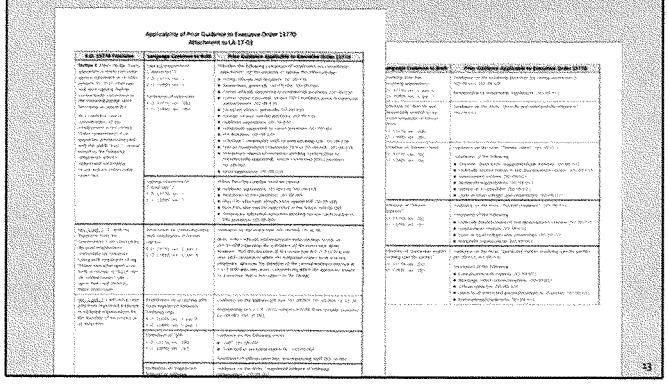
02/26/2009

DO-09-010: Who Must Sign the Ethics Pledge?

OGE identifies the categories of officials who must sign the Ethics Pledge required by Executive Order 13490 and those who are not required to sign. [The guidance in this advisory was modified in 2017 by legal advisories LA-17-02 and LA-17-03.]

4/26/2017

Attachment to LA-17-03



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Language Common to Both

E.O. 13370, sec. 1, par. 6

I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

E.O. 13490, sec. 1, par. 2

I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

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4/26/2017

Language Common to Both

E.O. 13370, sec. 2(b)

"Appointee" means every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

E.O. 13490, sec. 2(b)

"Appointee" shall include every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

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Attachment to LA-17-03

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Section 1. *Ethics Pledge.* Every appointee in every executive agency appointed on or after January 20, 2017, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee: As a condition, and in consideration, of my employment in the United States Government in an appointee position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law.	Signing requirement ("appointee") E.O. 13770, sec. 1 E.O. 13490, sec. 1 Definition of appointee E.O. 13770, sec. 2(b) E.O. 13490, sec. 2(b)	Whether the following categories of employees are considered "appointees" for the purpose of signing the ethics pledge: • Acting officials and detailees: DO-09-010 • Appointees, generally: DO-09-003, DO-09-010 • Career officials appointed to confidential positions: DO-09-010 • Career Senior Executive Service (SES) members given Presidential appointments: DO-09-010 • Excepted service, generally: DO-09-010 • Foreign Service, similar positions: DO-09-010 • Holdover appointees: DO-09-010 • Individuals appointed to career positions: DO-09-003 • IPA detailees: DO-09-020 • Schedule C employees with no policymaking role: DO-09-010 • Special Government Employees (SGEs): DO-09-005, DO-09-010 • Temporary advisors/counselors pending confirmation to Presidentially appointed, Senate confirmed (PAS) positions: DO-09-005 • Term appointees: DO-09-010
	Signing requirement ("shall sign") E.O. 13770, sec. 1 E.O. 13490, sec. 1	When the ethics pledge must be signed: • Holdover appointees: DO-09-010, DO-09-014 • Nominees to PAS positions: DO-09-005 • Non-PAS who have already been appointed: DO-09-005 • Non-PAS who may be appointed in the future: DO-09-005 • Temporary advisors/counselors pending Senate confirmation to PAS positions: DO-09-005

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Paragraph 7:
Particular Matter & Specific Issue Area

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment . . .
I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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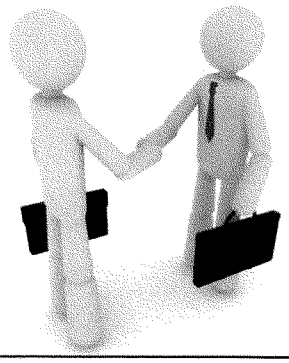
Paragraph 7

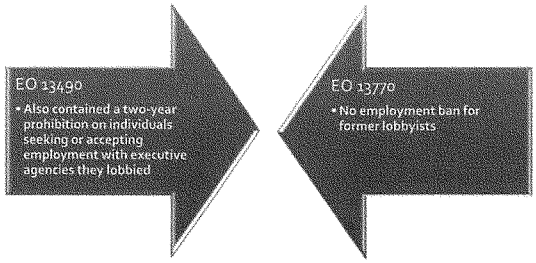


If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

20

Paragraph 7: Specific Issue Area

"Specific issue area" is not defined in LDA or Executive Orders 13490 or 13770



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Paragraph 7: PMGA

As used in Executive Order 13770, the term "specific issue area" means a "**particular matter of general applicability**"

If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 6, I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

Lobbied on:	→	Recusal:
Particular Matter	→	Same Particular Matter

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

Lobbied on:	→	Recusal:
Particular Matter	→	Same Particular Matter
Matter	→	No Recusal to that Matter

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 6, I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Ethics Pledge: Restrictions for Incoming Appointees

Paragraph 6 *Not limited to registered lobbyists*	I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.
Paragraph 7 *Limited to registered lobbyists*	If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraphs 1 and 3:

Post-Employment Lobbying Activity Restrictions

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Ethics Pledge: Post-Employment Restrictions

Paragraph 1	I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.
Paragraph 2	If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with appointees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions.
Paragraph 3	I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.
Paragraph 4	I will not, at any time after the termination of my employment in the United States Government, engage in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2017, would require me to register under the Foreign Agents Registration Act of 1938, as amended.

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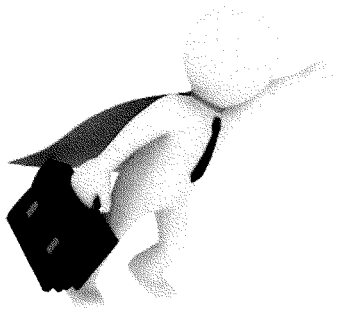
Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions



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Paragraph 1

I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.

30

Paragraph 3

I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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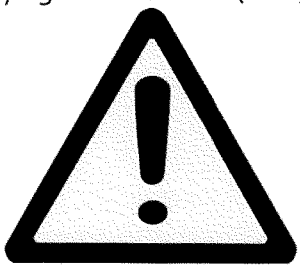
Restricted Activity

- Engage in a "lobbying activity" as defined by the Lobbying Disclosure Act (LDA)



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Engage in a Lobbying Activity

You engage in a "**lobbying activity**" if you:

- Make a lobbying contact
  - Written or oral communications
  - With covered executive or legislative branch officials
  - On behalf of a client
  - For financial or other compensation
  - 19 exceptions

OR

- Engage in behind-the-scenes efforts in support of such lobbying contact

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Paragraph 1: "With respect to" that agency

A lobbying activity occurs "with respect to" that agency if the activity involves :

- A communication to a covered executive branch official at that agency *(component designations may be available)*

OR

- Efforts intended, at the time of performance, to support such a communication to a covered executive branch official at that agency

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Paragraph 3: "With respect to" certain officials

A lobbying activity occurs "with respect to" certain officials if the activity involves :

- A communication to a covered executive branch official or non-career SES

OR

- Efforts intended, at the time of performance, to support such a communication to a covered executive branch official or non-career SES

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency = Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Paragraph 3: Examples

- Write to various exec branch officials seek support for his client's research
- Assist his client in preparing for a meeting with one of the officials
- Assist his client in understanding grant application process and guidelines that agency established for research projects
- Request the status of an action affecting his client.

I agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

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Paragraph 1: Examples

Write to a covered executive branch official at NIH to seek support for his client's research

Assist his client in preparing for a meeting with the FDA official

Contact covered legislative branch official to discuss pending legislation that could affect NIH research projects

I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.

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LA-17-03: Guidance on Executive Order 13770

U.S. Office of Government Ethics
Advanced Practitioner Webinar
Thursday, April 27, 2017

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NOTE: All substantive legal interpretations in this advisory concerning Pledge paragraph 2 (E.O. 13490) and the terms used in Pledge paragraph 2 are applicable to Executive Order 13770, sec. 1, par. 6. All substantive legal interpretations pertaining to waivers of the Ethics Pledge are not applicable to Executive Order 13770, sec. 3. *See* LA-17-02 and LA-17-03.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 26, 2009
DO-09-011

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Ethics Pledge: Revolving Door Ban--All Appointees Entering Government

Executive Order 13490 requires any covered "appointee" to sign an Ethics Pledge that includes several commitments. 74 Fed. Reg. 4673 (January 26, 2009). OGE Memorandum DO-09-003 explains the definition of appointee, describes the commitments included in the Pledge, and provides a Pledge Form to be used for appointees.[1] The purpose of the present memorandum is to advise ethics officials on how to implement paragraph 2 of the Pledge, "Revolving Door Ban--All Appointees Entering Government."

Paragraph 2 of the Pledge requires an appointee to commit that he or she will not, for a period of two years following appointment, participate in any particular matter involving specific parties that is directly and substantially related to his or her former employer or former clients, including regulations and contracts. Exec. Order No. 13490 sec. 1(2). To help agencies implement this requirement, OGE is providing the following explanation of the phrases that comprise paragraph 2 of the Pledge and of how paragraph 2 interacts with existing impartiality regulations.

Understanding the Meaning of the Terms that Comprise Paragraph 2 of the Pledge

"Particular matter involving specific parties"

In order to determine whether an appointee's activities concern any particular matters involving specific parties, ethics officials must follow the definition of that phrase found in section 2(h) of the Executive Order. That definition incorporates the longstanding interpretation of particular matter involving specific parties reflected in 5 C.F.R. § 2641.201(h). However, it also expands the scope of the term to include any meeting or other communication with a former employer or former client relating to the performance of the appointee's official duties, unless

[1] https://www.oge.gov/Web/oge.nsf/Resources/DO-09-003:+Executive+Order+13490,+Ethics+Pledge.

the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties. The purpose of this expansion of the traditional definition is to address concerns that former employers and clients may appear to have privileged access, which they may exploit to influence an appointee out of the public view.[2]

The expanded party matter definition has a two-part exception for communications with an appointee's former employer or client, if the communication is: (1) about a particular matter of general applicability and (2) is made at a meeting or other event at which participation is open to all interested parties. Although the exception refers to particular matters of general applicability, it also is intended to cover communications and meetings regarding policies that do not constitute particular matters. An appointee may participate in communications and meetings with a former employer or client about these particular or non-particular matters if the meeting or event is "open to all interested parties." Exec. Order No. 13490 sec. 2(h). Because meeting spaces are typically limited, and time and other practical considerations also may constrain the size of meetings, common sense demands that reasonable limits be placed on what it means to be "open to all interested parties." Such meetings do not have to be open to every comer, but should include a multiplicity of parties. For example, if an agency is holding a meeting with five or more stakeholders regarding a given policy or piece of legislation, an appointee could attend such a meeting even if one of the stakeholders is a former employer or former client; such circumstances do not raise the concerns about special access at which the Executive Order is directed. Additionally, the Pledge is not intended to preclude an appointee from participating in rulemaking under section 553 of the Administrative Procedure Act simply because a former employer or client may have submitted written comments in response to a public notice of proposed rulemaking.[3] In any event, agency ethics officials will have to exercise judgment in determining whether a specific forum qualifies as a meeting or other event that is "open to all interested parties," and OGE is prepared to assist with this analysis.

"Particular matter involving specific parties...including regulations"

Because regulations often are cited as examples of particular matters that do not involve specific parties, OGE wants to emphasize that the phrase is not intended to suggest that all rulemakings are covered. Rather, the phrase is intended to serve as a reminder that regulations sometimes may be particular matters involving specific parties, although in rare circumstances. As OGE has observed in connection with 18 U.S.C. § 207, certain rulemakings may be so focused on the rights of specifically identified parties as to be considered a particular matter

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2 Note, however, that the expanded definition of party matter is not intended to interfere with the ability of appointees to consult with experts at educational institutions and "think tanks" on general policy matters, at least where those entities do not have a financial interest, as opposed to an academic or ideological interest. See Office of Legal Counsel Memorandum, "Financial Interests of Nonprofit Organizations," January 11, 2006 (distinguishing between financial interests and advocacy interests of nonprofits); http://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/05/29/op-olc-v030-p0064.pdf; cf. 5 C.F.R. § 2635.502(b)(1)(v)(Note)(OGE impartiality rule does not require recusal because of employee's political, religious or moral views).

3 For other reasons discussed below, however, rulemaking sometimes may constitute a particular matter involving specific parties, albeit rarely

involving specific parties.[4] Such rulemakings likewise are covered by paragraph 2.

"Directly and substantially related to"

The phrase "directly and substantially related to," as defined in section 2(k) of the Executive Order, means only that the former employer or client is a party or represents a party to the matter. Ethics officials should be familiar with this concept from 5 C.F.R. § 2635.502(a).

"Former employer or former client"

In order to determine who qualifies as an appointee's former employer or former client, ethics officials must follow the definitions of each phrase found in section 2(i) and 2(j), respectively, of the Executive Order. In effect, the Executive Order splits the treatment of former employer found in the impartiality regulations into two discrete categories, "former employer" and "former client," and removes contractor from the definition of either term. *See* 5 C.F.R. §§ 2635.502(b)(1)(iv), 2635.503(b)(2).

Former Employer

For purposes of the Pledge, a former employer is any person for whom the appointee has, within the two years prior to the date of his or her appointment, served as an employee, officer, director, trustee, or general partner, unless that person is an agency or entity of the Federal Government, a state or local government, the District of Columbia, a Native American tribe, or any United States territory or possession. Exec. Order No. 13490, sec. 2(i). While the terms employee, officer, director, trustee, or general partner generally follow existing ethics laws and guidance, OGE has received questions about the scope of the exclusion for government entities from the definition of former employer, specifically with regard to public colleges and universities. The exclusion for state or local government entities does extend to a state or local college or university.[5]

OGE also has received several questions about whether the definition of former employer includes nonprofit organizations. Consistent with the interpretation of similar terms in other ethics rules and statutes, the definition of former employer in the Executive Order covers

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[4] *See, e.g.*. 73 Fed. Reg. 36168, 36176 (June 25, 2008); *see also* OGE Informal Advisory Letter 96 x 7, n.1.

[5] *See* OGE Informal Advisory Opinion 93 x 29 n.1 where OGE held that for purposes of applying the supplementation of salary restrictions in 18 U.S.C. § 209, the exception for payments from the treasury of any state, county, or municipality included a state university. OGE cautions, however, that the exclusion for state and local entities may not extend to all entities affiliated with a state or local college or university. OGE notes that some colleges and universities may create mixed public/private entities in partnership with commercial enterprises. Such entities should not automatically be considered as falling within the exclusion, but rather should be examined on a case-by-case basis to determine whether they should be viewed as instrumentalities of state or local government for the purposes of the Executive Order.

nonprofit organizations.[6] Moreover, it includes nonprofit organizations in which an appointee served without compensation, provided of course that the appointee actually served as an employee, officer, director, trustee, or general partner of the organization. Thus, for example, the recusal obligations of Pledge paragraph 2 would apply to an appointee who had served without pay on the board of directors or trustees of a charity, provided that the position involved the fiduciary duties normally associated with directors and trustees under state nonprofit organization law. This does not include, however, purely honorific positions, such as "honorary trustee" of a nonprofit organization. It also does not include unpaid positions as a member of an advisory board or committee of a nonprofit organization, unless the position involved fiduciary duties of the kind exercised by officers, directors or trustees, or involved sufficient supervision by the organization to create a common law employee-employer relationship (which is not typical, in OGE's experience).

Former Client

For purposes of the Pledge, a former client means any person for whom the appointee served personally as an agent, attorney, or consultant within two years prior to date of appointment. Exec. Order No. 13490 sec. 2(j). A former client does not include a client of the appointee's former employer to whom the appointee did not personally provide services. Therefore, although an appointee's former law firm provided legal services to a corporation, the corporation is not a former client of the appointee for purposes of the Pledge if the appointee did not personally render legal services to the corporation. Moreover, based on discussions with the White House Counsel's office, OGE has determined that the definition of former client is intended to exclude the same governmental entities as those excluded from the definition of former employer. Thus, for example, an appointee who had provided legal services to the Department of Energy would not be prohibited from participating personally in particular matters in which the Department is a party.

In addition, the term former client includes nonprofit organizations. However, a former client relationship is not created by service to a nonprofit organization in which an appointee participated solely as an unpaid advisory committee or advisory board member with no fiduciary duties. Although a former client includes any person whom the appointee served as a "consultant," OGE has not construed the term consultant, as used in analogous provisions of the Ethics in Government Act and the Standards of Ethical Conduct, to include unpaid, non-fiduciary advisory committee members of a nonprofit organization. *See* 5 U.S.C. app. § 102(a)(6)(A)(disclosure of consultant positions); 5 C.F.R. § 2635.502(b)(1)(iv)(covered relationship as former consultant). Likewise, former client does not include a nonprofit organization in which an appointee served solely in an honorific capacity.

[6] For similar reasons, Federally-funded research and development centers (FFRDCs), whether nonprofit or for profit, are intended to be included in the definitions of former employer and former client for purposes of paragraph 2 of the Pledge.

The definition of former client specifically excludes "instances where the service provided was limited to a speech or similar appearance." Exec. Order No. 13490, sec. 2(j). In addition to excluding all activities that consist merely of speaking engagements, this provision is intended to exclude other kinds of discrete, short-term engagements, including certain de minimis consulting activities. Essentially, the Pledge is not intended to require a two-year recusal based on activities so insubstantial that they are not likely to engender the kind of lingering affinity and mixed loyalties at which the Executive Order is directed. The exclusion for speaking and similar engagements was added to emphasize that the provision focuses on services that involved a significant working relationship with a former client. Therefore, the exclusion is not limited to speeches and speech-like activities (such as serving on a seminar panel or discussion forum), but includes other activities that similarly involve a brief, one-time service with little or no ongoing attachment or obligation. In order to determine whether any services were de minimis, ethics officials will need to consider the totality of the circumstances, including the following factors:

- the amount of time devoted;
- the presence or absence of an ongoing contractual relationship or agreement;
- the nature of the services (e.g., whether they involved any representational services or other fiduciary duties); and
- the nature of compensation (e.g., one-time fee versus a retainer fee).

For example, the recusal obligation of Pledge paragraph 2 would not apply to an appointee who had provided consulting services on a technical or scientific issue, for three hours on a single day, pursuant to an informal oral agreement, with no representational or fiduciary relationship.[7] On the other hand, an appointee who had an ongoing contractual relationship to provide similar services as needed over the course of several months would be covered. In closer cases, OGE believes ethics officials should err on the side of coverage, with the understanding that waivers, under section 3 of the Order, remain an option in appropriate cases.

The Relationship of Paragraph 2 of the Pledge to the Existing Impartiality Regulations

Paragraph 2 of the Pledge is not merely an extension of the existing impartiality requirements of subpart E of the Standards of Ethical Conduct, although in some circumstances the restrictions of the Pledge and the existing impartiality restrictions could align. The effect of any overlap is that all of the relevant restrictions apply to the appointee and should be acknowledged in the appointee's ethics agreement and considered when granting a waiver or authorization under either set of restrictions.

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[7] Note that appointees still will have a covered relationship for one year after they provided any consulting services, under the OGE impartiality rule, 5 C.F.R. § 2635.502(b)(1)(iv). Therefore, the OGE rule may require an appointee to recuse from certain matters (or obtain an authorization, as appropriate), even if the Pledge does not extend the recusal for an additional year. Indeed, the presence of the OGE rule as a "fall-back" was a factor in the decision to exclude certain de minimis consulting services from the Pledge in the first place.

Paragraph 2 of the Pledge and Impartiality Regulations Differ and Overlap

An appointee's commitments under paragraph 2 of the Pledge both overlap and diverge from the existing impartiality regulations in important ways depending upon the facts of each appointee's circumstances. The following highlights some of the key areas in which paragraph 2 of the Pledge and the existing impartiality restrictions differ. In addition, OGE has developed a chart as a quick reference tool to identify the key differences among the existing impartiality regulations and paragraph 2 of the Pledge. *See* **Attachment 1.**

Paragraph 2 of the Pledge is at once more expansive and more limited than the existing impartiality restrictions found at 5 C.F.R. §§ 2635.502, 2635.503. For example, an appointee is subject to impartiality restrictions based on his covered relationships with a much broader array of persons[8] than to the restrictions of paragraph 2, which are limited to the appointee's former employer and former clients. Thus, for instance, if the appointee has served as a contractor, but not in any of the roles described in the definitions of former employer or former client in the Executive Order, then the appointee may have recusal obligations under 5 C.F.R. §§ 2635.502 and 2635.503, but not under Pledge paragraph 2. Conversely, Pledge paragraph 2 is more expansive than the definition of covered relationship in section 2635.502 because the Pledge provision looks back two years to define a former employer or former client and it imposes a two-year recusal obligation after appointment, both of which are considerably broader than the one-year focus of section 2635.502(b)(1)(iv). Pledge paragraph 2 also is more expansive in that the recusal obligation may apply to certain communications and meetings that do not constitute particular matters involving specific parties as that phrase is used in sections 2635.502 and 2635.503.[9]

On the subject of recusal periods alone, ethics officials will need to be especially attentive to the possible variations, as it may be possible for as many as three periods to overlap. For example, an appointee could have: a one-year recusal, under 5 C.F.R. § 2635.502, from the date she last served a former employer; a two-year recusal, under section 2635.503, from the date she received an extraordinary payment from that same former employer; and a two-year recusal with respect to that former employer, under Pledge paragraph 2, from the date of her appointment.

Specific Recusals under Paragraph 2 of the Pledge are Not Required to be Memorialized in an Appointee's Ethics Agreement.

Executive Order 13490 does not require recusals under paragraph 2 of the Pledge to be addressed specifically in an appointee's ethics agreement, unlike recusals under paragraph 3 of

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[8] See definition of "covered relationship" at 5 C.F.R. § 2635.502(b)(1).

[9] *Compare* Exec. Order No. 13490, sec. 2(h)(definition broader than post-employment regulation); *with* 5 C.F.R. § 2635.502(b)(3)(defining particular matter involving specific parties solely by reference to post-employment regulations).

the Pledge. *See* Exec. Order No. 13490 sec. 4(a).[10] However, if an appointee will have a written ethics agreement addressing other commitments, OGE requires that the following language be inserted in that written ethics agreement in order to ensure that the appointee is aware of her commitments and restrictions under both her ethics agreement and the Pledge.

> Finally, I understand that as an appointee I am required to sign the Ethics Pledge (Exec. Order No. 13490) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this and any other ethics agreement.

Written ethics agreements will continue to address section 2635.502 and 2635.503 issues separately using the model provisions from OGE's "Guide to Drafting Ethics Agreements for PAS Nominees." Thus, regardless of paragraph 2 of the Pledge, the one-year "covered relationship" under the OGE impartiality rule remains in effect and may require an appointee to recuse from certain matters, even if the Pledge does not extend the recusal for an additional year. *See* 5 C.F.R. § 2635.502(b)(1)(iv).

The Pledge and Impartiality Regulations Waiver Provisions

Designated Agency Ethics Officials have been designated to exercise the waiver authority for the Ethics Pledge, under section 3 of Executive Order 13490, in addition to their existing role in the issuance of impartiality waivers and authorizations. DAEOgram DO-09-008; 5 C.F.R. §§ 2635.502(d), 2635.503(c). Generally, it is expected that waivers of the various requirements of the Pledge will be granted sparingly. *See* OGE DAEOgram DO-09-008. Although paragraph 2 clearly adds new limits on the revolving door, those limits are not intended to bar the use of qualified appointees who have relevant private sector experience in their fields of expertise. Therefore, at least where the lobbyist restrictions of paragraph 3 of the Pledge are not implicated, OGE expects that DAEOs will exercise the waiver authority for paragraph 2 in a manner that reasonably meets the needs of their agencies. In this regard, DAEOs already have significant experience in determining whether authorizations under 5 C.F.R. § 2635.502(d) are justified, and DAEOs should use similar good judgment in decisions about whether to waive paragraph 2 of the Pledge. Of course, any such waiver decisions still must be made in consultation with the Counsel to the President. Exec. Order No. 13490, sec. 3. Additional details on the standards for issuing a waiver of provisions of Pledge paragraph 2, as well as on issues related to the interaction of the waiver provisions of the impartiality regulations and relevant paragraphs of the Pledge, are reserved for future guidance.

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[10] An ethics agreement is defined as "any oral or written promise by a reporting individual to undertake specific actions in order to alleviate an actual or apparent conflict of interest," such as recusal from participation in a particular matter, divestiture of a financial interest, resignation from a position, or procurement of a waiver. 5 C.F.R. § 2634.802.

ATTACHMENT 1

OGE developed the following table as a quick reference tool to highlight the main differences between paragraph 2 of the Pledge and existing impartiality regulations. It is not intended to be a substitute for thorough analysis, but we hope you find it useful.

		5 C.F.R. § 2635.502	5 C.F.R. § 2635.503	Paragraph 2 of the Pledge
Relationship:	Former Employer	Any person which the employee served, within the last year, as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; no exclusion for governmental entities (other than Federal)	Any person which the employee served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; no exclusion for governmental entities (other than Federal)	Two years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner; contractor and consultant omitted from list (although consultant added below under former client); is not a former employer if governmental entity
	Former Client	Clients of attorney, agent, consultant, or contractor covered same way as former employer, under 5 C.F.R. § 2635.502(b)(1)(iv)	Clients of attorney, agent, consultant, or contractor covered same way as former employer, under 5 C.F.R. § 2635.503(b)(2)	Two years prior to date of appointment served as an agent, attorney, or consultant. Is not former client if: • Only provided speech/similar appearance (including de minimis consulting) • Only provided contracting services other than as agent, attorney, or consultant • Served governmental entity
	Business and Personal/ Covered Relation-ship	In addition to former employers/ clients discussed above, includes various current business and personal relationships, as listed in 5 C.F.R. § 2635.502(b)(1)	No equivalent concept	No equivalent concept
Prohibition:	May not participate in particular matter involving specific parties if:	Reasonable person with knowledge of facts would question impartiality	Extraordinary payment from former employer	Includes communication by former employer or former client unless matter of general applicability or non-particular matter and open to all interested parties
Length of recusal:		1 year from the end of service	2 years from date of receipt of payment	2 years from date of appointment

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Letter to a Designated Agency Ethics Official
dated February 10, 2005

This is in response to your letter of February 9, 2005, in which you inquire whether the deliberations of the President's Advisory Panel on Federal Tax Reform would constitute particular matters for purposes of 18 U.S.C. § 208. The first meeting of the Panel is scheduled for February 16, and the need for a prompt resolution of the question is apparent. Your letter follows up on earlier telephone conversations in which my Office advised that the proposed work of the Panel, as described to us, did not constitute a particular matter or particular matters within the meaning of the conflict of interest statute. We continue to be of the same view.

Pursuant to Executive Order 13369 (January 7, 2005), the Panel is charged with producing a single report that will address a range of "revenue neutral policy options" for legislative reform of the Federal tax system. The contemplated scope of the report is quite broad, as indicated by the three guiding principles in the Executive order: the options should "(a) simplify Federal tax laws to reduce the costs and administrative burdens of compliance with such laws; (b) share burdens and benefits of the Federal tax structure in an appropriately progressive manner while recognizing the importance of homeownership and charity in American society; and (c) promote long-run economic growth and job creation, and better encourage work effort, saving, and investment, so as to strengthen the competitiveness of the United States in the global marketplace." Executive Order, § 3. The Executive order only prescribes that "at least one option submitted by the Advisory Panel should use the Federal income tax as the base for its recommended reforms." *Id.* Consistent with this broad mandate, your letter indicates that Panel deliberations are expected "to focus on a wide range of tax matters--including both matters that have the potential to affect all taxpayers (*e.g.*, the alternative minimum tax and the compliance burdens for large, small and individual taxpayers) as well as matters that specifically and uniquely affect taxpayers comprised of

industry sectors (*e.g.*, depletion allowance for the oil and gas industries)."

As you know, section 208(a) prohibits employees from participating personally and substantially in any "particular matter" in which they have a personal or imputed financial interest. Under the interpretive regulations issued by the Office of Government Ethics, "[t]he term 'particular matter' includes only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." 5 C.F.R. § 2640.103(a)(1). The phrase generally is understood to include matters of general applicability that are narrowly focused on the interests of a discrete industry, such as the meat packing industry or the trucking industry. *E.g.*, 5 C.F.R. § 2640.103(a)(1) (example 3); 5 C.F.R. § 2635.402(b)(3) (example 2). However, the term does not extend to the "consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons." § 2640.103(a)(1).

The work of the Panel, as described above, fits comfortably within the latter exclusion for consideration of broad policy options directed to the interests of a large and diverse group of persons. Indeed, the Panel's report is expected to address issues affecting every taxpayer in the United States. In this regard, the matter is analogous to example 8 following section 2640.103(a)(1), in which the consideration of a legislative proposal for broad health care reform is held not to be a particular matter because it is intended to affect every person in the United States. However, your letter refers to the preamble discussion of this example in the final rule and indicates that it suggests that the larger legislative proposal may be broken down into different constituent parts that might be viewed as separate particular matters in their own right. 61 *Fed. Reg.* 66830, 66832 (December 18, 1996). You note that some of the many tax policy options to be considered by the Panel will focus more narrowly on discrete industries and question whether the language in the preamble means that the consideration of these options should be treated as separate particular matters, apart from the overall report.

It was not OGE's intention that example 8 and the preamble should be read as requiring that broad legislative proposals of this type be fractionated into separate provisions or issues for purposes of identifying particular matters. Such an approach would prove little, since the consideration of most matters of

broad public policy can be carved up into successively finer and more focused parts: after all, much of policymaking inevitably involves the consideration of how different aspects of an overall proposal will affect different constituencies in a pluralistic democracy. Nor do we think it would be workable to employ a variation of what one court has criticized as an "elastic approach" to identifying particular matters, which is contingent on the part of the overall matter in which the particular individual happened to be involved. *Van Ee v. EPA*, 202 F.3d 296, 309 (D.C. Cir. 2000).[1] It would not be logical to conclude that an employee could participate in considering the overall legislative proposal but not its constituent parts.

In any event, the text of example 8 does not state that work on the broad health care proposal must be divided up into separate particular matters. It simply indicates that "consideration *and implementation, through regulations,* of a section of the health care bill" that limits prices for prescription drugs would be a particular matter that is focused on the pharmaceutical industry. § 2640.103(a)(1) (example 8) (emphasis added); *see also* 60 *Fed. Reg.* 47208, 47210 (September 11, 1995) (preamble to proposed rule) (broad policy matters may *later* become particular matters when implemented in a way that distinctly affects specific persons or groups of persons). At most, the preamble language indicates only that there may be *other* conceivable situations where a narrowly focused provision in a larger legislative proposal should not be viewed as merely an integral part of the broader policy deliberations. Although OGE has not had occasion to render any opinions on such situations, an example might be (depending on the facts) a private relief bill that becomes attached to a larger legislative vehicle focused on an unrelated subject.

Apart from example 8, the OGE regulations contain another example that appears to be almost indistinguishable from the work of the Panel. Example 5 following section 2640.103(a)(1) states that "deliberations on the general merits of an omnibus bill such as the Tax Reform Act of 1986 are not sufficiently

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[1] *Van Ee* involved the use of the same phrase, "particular matter," in a related conflict of interest statute, 18 U.S.C. § 205. In interpreting the same regulatory definition of particular matter discussed above, the Court in that case criticized the Government for focusing on "aspects of the [Government matter] that might ultimately affect specific groups or individuals, rather than upon the overall focus of the proceeding itself." 202 F.3d at 309.

focused on the interests of specific persons, or a discrete and identifiable group of persons to constitute participation in a particular matter." As my Office explained in our earlier telephone conversations, the Tax Reform Act of 1986 itself contained numerous provisions, which, if considered alone, might have constituted separate particular matters, such as specific tax provisions for the oil, gas and pharmaceutical industries. *See* Pub. L. 99-514, October 22, 1986. However, the inclusion of such topics simply as components of a much more global tax reform proposal meant that the Tax Reform Act, like the comprehensive tax reform deliberations of the new Panel, must be viewed as too broadly focused to be considered a particular matter.

If you have any further questions about this matter, feel free to contact my Office.

Sincerely,

Marilyn L. Glynn
Acting Director

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

October 4, 2006

DO-06-029

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: "Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"

Perhaps no subject has generated as many questions from ethics officials over the years as the difference between the phrases "particular matter involving specific parties" and "particular matter." These phrases are used in the various criminal conflict of interest statutes to describe the kinds of Government actions to which certain restrictions apply. Moreover, because these phrases are terms of art with established meanings, the Office of Government Ethics (OGE) has found it useful to include these same terms in various ethics rules. A third term, "matter," also has taken on importance in recent years because certain criminal post-employment restrictions now use that term without the modifiers "particular" or "involving specific parties."

It is crucial that ethics officials understand the differences among these three phrases. OGE's experience has been that confusion and disputes can arise when these terms are used in imprecise ways in ethics agreements, conflict of interest waivers, and oral or written ethics advice. Therefore, we are issuing this memorandum to provide guidance in a single document about the meaning of these terms and the distinctions among them.

Because the three phrases are distinguished mainly in terms of their relative breadth, the discussion below will proceed from the narrowest phrase to the broadest.

Particular Matter Involving Specific Parties

The narrowest of these terms is "particular matter involving specific parties." Depending on the grammar and structure of the particular statute or regulation, the wording may appear in slightly different forms, but the meaning remains the same, focusing primarily on the presence of specific parties.

1. Where the Phrase Appears

This language is used in many places in the conflict of interest laws and OGE regulations. In the post-employment statute, the phrase "particular matter . . . which involved a specific party or parties" is used to describe the kinds of Government matters to which the life-time and two-year representational bans apply. 18 U.S.C. § 207(a)(1), (a)(2). Occasionally, ethics officials have raised questions because section 207 includes a definition of the term "particular matter," section 207(i)(3), but not "particular matter involving specific parties"; however, it is important to remember that each time "particular matter" is used in section 207(a), it is modified by the additional "specific party" language.[1]

In addition to section 207(a), similar language is used in 18 U.S.C. §§ 205(c) and 203(c). These provisions describe the limited restrictions on representational activities applicable to special Government employees (SGEs) during their periods of Government service.[2]

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[1] For a full discussion of the post-employment restrictions, see OGE DAEOgram DO-04-023, at https://www.oge.gov/Web/oge.nsf/Resources/DO-04-023:+Summary+of+18+U.S.C.+§+207.

[2] These restrictions on SGEs are discussed in more detail in OGE DAEOgram DO-00-003, at https://www.oge.gov/Web/oge.nsf/Resources/DO-00-003:+Summary+of+Ethical+Requirements+Applicable+to+Special+Government+Employees.

As explained below, 18 U.S.C. § 208 generally uses the broader phrase "particular matter" to describe the matters from which employees must recuse themselves because of a financial interest. However, even this statute has one provision, dealing with certain Indian birthright interests, that refers to particular matters involving certain Indian entities as "a specific party or parties." 18 U.S.C. § 208(b)(4); see OGE Informal Advisory Letter 00 x 12. Moreover, OGE has issued certain regulatory exemptions, under section 208(b)(2), that refer to particular matters involving specific parties. 5 C.F.R. § 2640.202(a), (b). Likewise, the distinction between particular matters involving specific parties and broader types of particular matters (i.e., those that have general applicability to an entire class of persons) is crucial to several other regulatory exemptions issued by OGE under section 208(b)(2). 5 C.F.R. §§ 2640.201(c)(2), (d); 2640.202(c); 2640.203(b), (g).

Finally, OGE has used similar language in various other rules. Most notably, the provisions dealing with impartiality and extraordinary payments in subpart E of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) refer to particular matters in which certain persons are specific parties. 5 C.F.R. §§ 2635.502; 2635.503. OGE also uses the phrase to describe a restriction on the compensated speaking, teaching and writing activities of certain SGEs. 5 C.F.R. § 2635.807(a)(2)(i)(4).

2. What the Phrase Means

When this language is used, it reflects "a deliberate effort to impose a more limited ban and to narrow the circumstances in which the ban is to operate." Bayless Manning, Federal Conflict of Interest Law 204 (1964). Therefore, OGE has emphasized that the term "typically involves a specific

proceeding affecting the legal rights of the parties, or an isolatable transaction or related se t of transactions between identified parties." 5 C.F.R. § 2640.102(1).[3] Examples of particular matters involving specific parties include contracts, grants, licenses, product approval applications, investigations, and litigation. It is important to remember that the phrase does not cover particular matters of general applicability, such as rulemaking, legislation, or policy-making of general applicability.[4]

Ethics officials sometimes must deci de when a particular matter first involves a specific party. Many Government matters evolve, sometimes starting with a broad concept, developing into a discrete program, and eventually involving specific parties. A case-by-case analysis is required to determine at which stage a particular matter has sufficiently progressed to involve

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[3] This definition, found in OGE's regulations implementing 18 U.S.C. § 208, differs slightly from the definition found in the regulations implementing a now-superseded version of 18 U.S.C. § 207, although this is more a point of clarification than substance. Specifically, the old section 207 regulations referred to "identifiable" parties, 5 C.F.R. § 2637.201(c)(1), whereas the more recent section 208 rule refers to "identified" parties. As explained in the preamble to OGE's proposed new section 207 rule: "The use of 'identified,' rather than 'identifiable,' is intended to distinguish more clearly between particular matters involving specific parties and mere 'particular matters,' which are described elsewhere as including matters of general applicability that focus 'on the interests of a discrete and identifiable class of persons' but do not involve specific parties. [citations omitted] The use of the term 'identified,' however, does not mean that a matter will lack specific parties just because the name of a party is not disclosed to the Government, as where an agent represents an unnamed principal." 68 Feder al Register 7844, 7853-54 (February 18, 2003).

[4] Usually, rulemaking and legislation are not covered, unless they focus narrowly on identified parties. See OGE Informal Advisory Opinions 96 x 7 ("rare" example of rulemaking that involved specific parties); 83 x 7 (private relief legislation may involve specific parties).

specific parties. The Government sometimes identifies a specific party even at a preliminary or informal stage in the development of a matter. E.g., OGE Informal Advisory Letters 99 x 23; 99 x 21; 90 x 3.

In matters involving contracts, grants and other agreements between the Government and outside parties, the general rule is that specific parties are first identified when the Government first receives an expression of interest from a prospective contractor, grantee or other party. As OGE explained recently in Informal Advisory Letter 05 x 6, the Government sometimes may receive expressions of interest from prospective bidders or applicants in advance of a published solicitation or request for proposals. In some cases, such matters may involve specific parties even before the Government receives an expression of interest, if there are sufficient indications that the Government actually has identified a party. See OGE Informal Advisory Letter 96 x 21.

Particular Matter

Despite the similarity of the phrases "particular matter" and "particular matter involving specific parties," it is necessary to distinguish them. That is because "particular matter" covers a broader range of Government activities than "particular matter involving specific parties." Failure to appreciate this distinction can lead to inadvertent violations of law. For example, the financial conflict of interest statute, 18 U.S.C. § 208, generally refers to particular matters, without the specific party limitation. If an employee is advised incorrectly that section 208 applies only to particular matters that focus on a specific person or company, such as an enforcement action or a contract, then the employee may conclude it is permissible to participate in other particular matters, even t hough the la w prohibits such participation.

1. Where the Phrase Appears

In addition to 18 U.S.C. § 208, several other statutes and regulations use the term "particular matter." [5] The representational restrictions applicable to current employees (other than SGEs), under 18 U.S.C. §§ 203 and 205, apply to particular matters.[6] As mentioned above, section 207 also contains a definition of "particular matter." [7] However, where the phrase is used in the post-employment prohibitions in

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[5] The relevant language in 18 U.S.C. § 208(a) is "a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter" (emphasis added).

[6] The prohibition in 18 U.S.C. § 205(a)(2) actually uses the phrase "covered matter," but that term is in turn defined as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter," 18 U.S.C. § 205(h)(emphasis added).

[7] The definition in 18 U.S.C. § 207(i)(3) provides: "the term 'particular matter' includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." This language differs slightly from other references to "particular matter" in sections 203, 205 and 208, in part because the list of matters is not followed by the residual phrase "or other particular matter." However, OGE does not believe that the absence of such a general catch-all phrase means that the list of enumerated matters exhausts the meaning of "particular matter" under section 207(i)(3). The list is preceded by the word "includes," which is generally a term of enlargement rather than limitation and indicates that matters other than those enumerated are covered. See Norman J. Singer, 2A Sutherland on Statutory Construction 231-232 (2000).

section 207(a)(1) and (a)(2), it is modified by the "specific parties" limitation.[8]

The phrase "particular matter" is used pervasively in OGE's regulations. Of course, the term appears throughout 5 C.F.R. part 2640, the primary OGE rule interpreting and implementing 18 U.S.C. § 208. Similarly, it is used in 5 C.F.R. § 2635.402, which is the provision in the Standards of Conduct that generally deals with section 208. The phrase also is used throughout subpart F of the Standards of Conduct, which contains the rules governing recusal from pa rticular matters affecting the financial interest of a person with whom an employee is seeking non-Federal employment. 5 C.F.R. §§ 2635.601-2635.606. Moreover, the phrase appears in the "catch-all" provision of OGE's impartiality rule, 5 C.F.R. § 2635.502(a)(2). See also 5 C.F.R. 2635.501(a).[9] Various other regulations refer to "particular matter" for miscellaneous purposes. E.g., 5 C.F.R. § 2635.805(a)(restriction on expert witness activities of SGEs); 5 C.F.R. § 2634.802(a)(1)(written rec usals pursuant to ethics agreements).

2. What the Phrase Means

Although different conflict of interest statutes use slightly different wording, such as different lists of examples of particular matters, the same standards apply for determining what is a particular matter under each of the relevant statutes

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[8] At one time, the post-employment "cooling-off" restriction for senior employees in 18 U.S.C. § 207(c) applied to particular matters, but the language was amended (and broadened) in 1989 when Congress removed the adjective "particular" that had modified "matter." See 17 Op. O.L.C. 37, 41-42 (1993).

[9] Generally, section 2635.502 focuses on particular matters involving specific parties, as noted above. However, section 2635.502(a)(2) provides a mechanism for employees to determine whether they should recuse from other "particular matters" that are not described elsewhere in the rule. In appropriate cases, therefore, an agency may require an employee to recuse from particular matters that do not involve specific parties, based on the concern that the employee's impartiality reasonably may be questioned under the circumstances.

and regulations. See 18 Op. O.L.C. 212, 217-20 (1994). Particular matter means any matter that involves "deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." 5 C.F.R. § 2640.103(a)(1)(emphasis added). It is clear, then, that particular matter may include matters that do not involve parties and is not "limited to adversarial proceedings or formal legal relationships." Van Ee v. EPA, 202 F.3d 296, 302 (D.C. Cir. 2000).

Essentially, the term covers two categories of matters: (1) those that involve specific part ies (described more fully above), and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession. OGE regulations sometimes refer to the second category as "particular matter of general applicability." 5 C.F.R. § 2640.102(m). This category can include legislation and policymaking, as long as it is narrowly focused on a discrete and identifiable class. Examples provided in OGE rules include a regulation applicable only to meat packing companies or a regulation prescribing safety standards for trucks on interstate highways. 5 C.F.R. §§ 2640.103(a)(1)(example 3); 2635.402(b)(3)(example 2). Other examples may be found in various opinions of OGE and the Office of Legal Counsel, Department of Justice. E.g., OGE Informal Advisory Letter 00 x 4 (recommendations concerning specific limits on commercial use of a particular facility); 18 Op. O.L.C. at 220 (determinations or legislation focused on the compensation and work conditions of the class of Assistant United States Attorneys).

Certain OGE rules recognize that particular matters of general applicability sometimes may raise fewer conflict of interest concerns than particular matters involving specific

parties.[10] Therefore, while both categories are included in the term "particular matter," it is often necessary to distinguish between these two kinds of particular matters. Of course, in many instances, the relevant prohibitions apply equally to both kinds of particular matters. This is the case, for example, in any application of 18 U.S.C. § 208 where there is no applicable exemption or waiver that distinguishes the two.

It is important to emphasize that the term "particular matter" is not so broad as to include every matter involving Government action. Particular matter does not cover the "consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons." 5 C.F.R. § 2640.103(a)(1). For example, health and safety regulations applicable to all employers would not be a particular matter, nor would a comprehensive legislative proposal for health care reform. 5 C.F.R. § 2640.103(a)(1)(example 4), (example 8). See also OGE Informal Advisory Letter 05 x 1 (report of panel on tax reform addressing broad range of tax policy issues). Although such actions are too broadly focused to be particular matters, they still are deemed "matters" for purposes of the restrictions described below that use that term.

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[10] As noted above, OGE's imparti ality rule generally focuses on particular matters involving specific parties. See OGE Informal Advisory Letter 93 x 25 (rulemaking "would not, except in unusual circumstances covered under section 502(a)(2), raise an issue under section 502(a)"). Furthermore, as also discussed above, several of the regulatory exemptions issued by OGE under 18 U.S.C. § 208(b)(2) treat particular matters of general applicability differently than those involving specific parties. The preamble to the original proposed regulatory exemptions in 5 C.F.R. part 2640 explains: "The regulation generally contains more expansive exemptions for participation in 'matters of general applicability not involving specific parties' because it is less likely that an employee's integrity would be compromised by concern for his own financial interests when participating in these broader matters." 60 Federal Register 47207, 47210 (September 11, 1995). Of course, Congress itself has limited certain conflict of interest restrictions to the core area of particular matters that involve specific parties. E.g., 18 U.S.C. § 207(a)(1), (a)(2).

A question that sometimes arises is when a matter first becomes a "particular matter." Some matters begin as broad policy deliberations and actions pertaining to diverse interests, but, later, more focused actions may follow. Usually, a particular matter arises when the deliberations turn to specific actions that focus on a certain person or a discrete and identifiable class of persons. For example, although a legislative plan for broad health care reform would not be a particular matter, a particular matter would arise if an agency later issued implementing regulations focused narrowly on the prices that pharmaceutical companies could charge for prescription drugs. 5 C.F.R. § 2640.102(a)(1)(example 8). Similarly, the formulation and implementation of the United States response to the military invasion of an ally would not be a particular matter, but a particular matter would arise once discussions turned to whether to close a particular oil pumping station or pipeline operated by a company in the area where hostilities are taking place. 5 C.F.R. § 2640.102(a)(1)(example 7).

Matter

The broadest of the three terms is "matter." However, this term is used less frequently than the other two in the various ethics statutes and regulations to describe the kinds of Government actions to which restrictions apply.

1. Where the Phrase Appears

The most important use of this term is in the one-year post-employment restrictions applicable to "senior employees" and "very senior employees." 18 U.S.C. § 207(c), (d). In this context, "matter" is used to describe the kind of Government actions that former senior and very senior employees are prohibited from influencing through contacts with employees of their former agencies (as well as contacts with Executive Schedule officials at other agencies, in the case of very senior employees). The unmodified term "matter" did not appear in these provisions until 1989, when section 207(c) was amended to replace "particular matter" with "matter" and section 207(d) was first enacted. Pub. L. No. 101-194, § 101(a), November 30, 1989. OGE also occasionally uses the term "matter" in ethics regulations, for example, in the description of teaching,

speaking and writing that relates to an employee's official duties. 5 C.F.R. § 2635.807(a)(2)(E)(1).

2. What the Phrase Means

It is clear that "matter" is broader than "particular matter." See 17 Op. O.L.C. at 41-42. Indeed, the term is virtually all-encompassing with respect to the work of the Government.[11] Unlike "particular matter," the term "matter" covers even the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons. Of course, the term also includes any particular matter or particular matter involving specific parties.

Nevertheless, it is still necessary to understand the context in which the term "matter" is used, as the context itself will provide some limits. In 18 U.S.C. § 207(c) and (d), the post-employment restrictions apply only to matters "on which [the former employee] seeks official action." Therefore, the only matters covered will be those in which the former employee is seeking to induce a current employee to make a decision or otherwise act in an official capacity.

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[11] A now-repealed statute, 18 U.S.C. § 281 (the predecessor of 18 U.S.C. § 203), used the phrase "any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter" (emphasis added). One commentator noted that the term "matter" in section 281 was "so open-ended" that it raised questions as to what limits there might be on the scope. Manning, at 50-51. Manning postulated that some limits might be inferred from the character of the matters listed before the phrase "or other matter." Id. at 51. Whatever the force of this reasoning with respect to former section 281, the same could not be said with respect to 18 U.S.C. § 207(c) or (d), as neither of these current provisions contains an exemplary list of covered matters.

The CHAIRMAN. Let's turn to Senator Hoeven.

Senator HOEVEN. Thank you, Madam Chairman. Thanks for holding the hearing, and Secretary Bernhardt, thanks for being here, thanks for coming by and visiting with me, both now and previously and for your service. We appreciate it very much.

We have BLM lands. We have national parks. We have a large native population. We would like you to come to North Dakota.

My first question is would you come out to our great and beautiful state for a visit?

Mr. BERNHARDT. Absolutely.

Senator HOEVEN. Thank you. I look forward to that.

Mr. BERNHARDT. Preferably during pheasant season.

Senator HOEVEN. Yes, exactly, that is phenomenal, just phenomenal.

I am working on some legislation regarding minerals. As you know we have incredible energy development out there and we need to work on BLM lands on the permitting process. And there are a number of ways to do it, adequate resources for your field offices and you have some tremendous people out there that we have worked with. They have come up with some innovative ideas too. They are tremendous.

But we need to make sure they have adequate resources in the field offices, and then we also need legislation in cases where you don't have any surface ownership, just mineral ownership, and we have legislation to do that that would expedite the permitting process in a sound environmentally responsible way.

I would ask if you would be willing to work with me on that?

Mr. BERNHARDT. I sure would. It lines up with exactly what we're trying to do, Senator.

Senator HOEVEN. Good.

Deferred maintenance backlog in the park. In Theodore Roosevelt National Park we have, as you know, we are working on a presidential library out there. We want your help with that. You and I have talked about that. I would ask, one, are you willing to help us with that? Obviously Teddy Roosevelt spent a lot of time out there—incredible, beautiful Badlands, that is just amazing.

So not only that project, but the other is the deferred maintenance backlog. We are working with Lamar Alexander and others to address the deferred maintenance backlog in our national parks, really critical, obviously. I know you support it but would like you on the record on both those issues.

Mr. BERNHARDT. We are absolutely behind that. It's part of our budget, and we'll work with you on it.

Senator HOEVEN. I believe we have a real chance to get it, and it is so important for our national parks.

Also, I chair the Indian Affairs Committee and would ask that you come to our Committee and testify. Are you willing to do that?

Mr. BERNHARDT. Of course, sir.

Senator HOEVEN. Okay.

One of the pieces of legislation we passed recently is the Tribal Energy Resource Act. It gives tribes more control on their reservations over energy development, how they do it, traditional, renewable, whatever it is they want to do with self-determination. Please talk about how you can interact with them on that issue, please?

Mr. BERNHARDT. Well, we—I'm familiar with that legislation and I think that it really is the logical next step to self-determination. And we want to work with the tribes that are interested in utilizing that authority. We would really like to work to have some successes with them.

I think it lines up policy wise, spot on with where the Administration is and we'd like to work with tribes that are interested in that to see if we can have some successes.

Senator HOEVEN. Yes, I mean, it really does. It is about jobs. It is about opportunity. It is about self-determination, all things that, I think, are very good in terms of working with our Native population.

Mr. BERNHARDT. Absolutely.

Senator HOEVEN. Last area. I just recently had a field hearing in Bismarck and we have five reservations in our state, some we share with South Dakota. We have more tribes than that and we had tremendous representation from the tribal chairman, the tribal councils and others as well as our state leaders, the governor, our delegation and so forth.

One of the things we really focused on was more law enforcement, particularly BIA law enforcement agents on the reservation to help with safety and protecting women and children and across the board, greater safety on the reservation. And it really came to the floor the need for more law enforcement officers, particularly BIA law enforcement officers.

And as we listened to, like I say, tribal leaders testify, as well as the BIA, they said if you can recruit somebody from your geographic region not only are you more likely to convince them to go into law enforcement, but they are more likely to come and stay and continue because they are from the area.

And so, one of the things we need is more training centers or more opportunity to have training centers around the country. For example, in our case, our state would put resources into it and that would reduce the federal cost to train the law enforcement officers. Not only would we be able to recruit more, we would retain them and it would cost less in terms of the federal cost share. This is something we need to do, and I would ask for your help in that. I know the Administration has initiatives in this area, particularly addressing violence against women and children on the reservation.

Mr. BERNHARDT. That's right.

Senator HOEVEN. It plays right into that as well as legislation we are trying to pass my Survive Act to provide more resources to help in this area. It is a big subject but it can have an impact in Indian Country and please touch on that.

Mr. BERNHARDT. So, number one, our Assistant Secretary for Indian Affairs is completely focused on the missing and exploited category, and we're working like crazy on this.

What you're bringing up with this training, I think, is a great idea. And I think we actually went back to the office after we visited a little bit and thought we can also get some justice money involved I bet too.

So we could bring together an interaction of folks because if we can keep law enforcement in an area, if we can recruit them, train

them and then keep them in that area, we'd be much better off than where we recruit folks, they come in for a training for a few years and then they go to some other area because they're just not familiar with the area. So I'd like to work with you on that.

Senator HOEVEN. Well, I was very encouraged when you came in the other day and talked about wanting to take a leadership role in this area.

I know for our Chairman this is a priority, something she has worked on and is working on right now. And it is not only the legislation that she is working on, it is bringing more resources through the Survive Act, it is the law enforcement piece. And for the Administration's initiative and for you to be willing to take a lead role in this, I think you can really have an impact.

Mr. BERNHARDT. And I think, you know, we're really pushing it and I think Tara's done a great job. I think we have a real opportunity to do something in this space that's unique and it fits. So I want to work with you on that.

Senator HOEVEN. Thank you, I appreciate it.

The CHAIRMAN. Thank you, Senator Hoeven.

I appreciate you bringing that up because that is a significant issue, and I have had a level of engagement with the Assistant Secretary as well. I am very encouraged by the focus coming out of the Administration in working with us on these matters. It is long past time to address them.

I have just a couple more quick matters, and then we will wrap up. I appreciate your time this morning, Mr. Bernhardt, and the level and the detail to which you have responded to colleagues' questions here. It is greatly appreciated.

Just very, very quickly here. I noted in my opening statement that you have received the endorsement of the Alaska Federation of Natives. I think that is significant, certainly considering, again, the very unique relationship between Alaska's tribes and the Federal Government and through the Alaska Native Claims Settlement Act of 1971. We are coming up on our 50th anniversary here.

But we recognize that many of the commitments that were made under ANCSA remain unfulfilled. That is something that we try to chip away at, but it has been frustrating at times as we felt that the pace has just been very, very slow.

Just very briefly, your commitment to ensuring that the Federal Government's commitments to Alaska Natives under ANCSA will be met and what you can do to ensure that we see more meaningful consultation with Native Americans, not only in Alaska but around the country. This is an area of concern that I continue to hear. There is a level of inconsistency with what consultation is and does and means. Some agencies are better than others. But again, it is making sure that this is more than just a check the box exercise. So, just very briefly, if you would.

Mr. BERNHARDT. Well, first off, and you're largely responsible for this, we have the best Indian Affairs hallway that we've had in a very long time. Tara, John, Mark—it's an incredible group. They're talented. They're doing great things in the way they've separated BIA and BIE.

So one of the things we're doing is making sure that the other agencies understand consultation a little better. But we are com-

pletely committed. I have an A team, and I'll do whatever they ask in terms of helping them.

The CHAIRMAN. Well, I appreciate you giving them that latitude, that flexibility to really build this up because I do believe you have extraordinary experts in place. Of course, in Alaska, we are very proud of Tara Sweeney and all that she is doing there.

Within the lands package there was a provision that we were able to include that we were very pleased that the President actually singled it out when we were there at the signing for the ceremony in the Oval Office. It related to the Alaska Native Veterans Lands Allotment.

One of the provisions, again, that we looked to, we have been working on for decades and finally we will see an opportunity for those who served us in Vietnam to be able to receive their native allotments that they were unable to take opportunity while they were serving.

And I think it is fair to say we have been kind of tempering the expectations because we know there is now a process that needs to unfold in order to implement that program. I would ask you and your team there to be working aggressively to try to advance implementation with regard to the native allotments. It has been a long time in coming and I think it is a fair statement to say that many who have been waiting are anxious and eager to understand what their next steps will be. So I would like your commitment to be working on that.

Mr. BERNHARDT. Absolutely. It did not go unnoticed to me that the President specifically mentioned that.

The CHAIRMAN. Yes.

Mr. BERNHARDT. And you know, we just formed yesterday this task force for implementation. I'll sit down with Joe or, sorry, the Assistant Secretary from Land and Minerals. We'll figure out what we need to do and we'll move toot sweet. One of the task force's jobs is to come back to me in 30 days with a schedule, so I'll work on that and the Assistant Secretary will and we'll get back to you.

The CHAIRMAN. Great. I appreciate that as well.

That was one of those initiatives that Secretary Zinke singled out and said we have to make some headway on and working with him, working with Senator Sullivan and you on this and the others, it is greatly appreciated.

Finally, I just want to make sure that we have clarified for the record here some of the issues that were raised earlier by a couple colleagues.

I appreciate that there were some hard questions for you here, but it must be exceptionally hard to sit in a committee, to sit where you are and to have it, not only be suggested, but to be stated that you have lied. That is very difficult. I think it is unnecessary.

We can take hard questions around here, but I want to make sure that you have an opportunity, a final opportunity, to just respond very clearly, because it is my understanding that the Office of Government Ethics has completed the review process for your nomination and found you to be in good standing. Is that a correct statement?

Mr. BERNHARDT. That is correct.

The CHAIRMAN. It is also my understanding that Interior's designated agency ethics official has determined that you will and this is in quotes, "be in compliance with the conflicts of interest laws and regulations that will apply if you're confirmed as Secretary." Is that also correct?

Mr. BERNHARDT. That is correct.

The CHAIRMAN. So I am very satisfied with these answers but is there anything else that you would like to add for the record this morning to any concerns that were raised or statements made by members that you believe deserve a response?

Mr. BERNHARDT. Well, I certainly didn't lie to the Senator.

The CHAIRMAN. Thank you.

Mr. BERNHARDT. Thank you.

The CHAIRMAN. Mr. Bernhardt, thank you for being here this morning. Thank you for your willingness to serve. Thank you to your family who are there to back you.

Again, I appreciate all that you have done prior to this time in giving guidance, giving counsel and truly helping us move in a direction that is positive for this country.

I look forward to a rapid confirmation through the process and to see you put in full capacity as Secretary of the Interior.

With that, the Committee stands adjourned.

[Whereupon, at 12:12 p.m. the hearing was adjourned.]

APPENDIX MATERIAL SUBMITTED

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Question from Chairman Murkowski

Question: Mr. Bernhardt, as you know, the Interior Department conducted oil exploration in the National Petroleum Reserve-Alaska (NPR-A), leaving behind well sites in need of environmental remediation. As we discuss increased development in the NPR-A, which I fully support, I think it's important that the federal government complete the clean-up of these "legacy wells." If you are confirmed as Secretary, will you commit to working with me to develop a plan to expedite the cleanup of all remaining wells?"

Response: Yes, I look forward to working closely with you to identify the resources necessary to expedite the clean-up of these legacy wells. The Bureau of Land Management will complete an update to the 2013 Legacy Well Strategic Plan during this fiscal year, and the BLM is also actively coordinating with the U.S. Army Corps of Engineers to determine whether the NPR-A or specific well sites are eligible for environmental remediation by the USACE as Formerly Used Defense Sites.

Nomination of David Bernhardt
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Questions from Ranking Member Manchin

Question 1: Hardrock Mining Fees.

The General Mining Law of 1872 continues to mandate the existing patent-claim structure for hard rock mining on Federal lands in the west. Because of this, the Federal government does not collect a royalty for hardrock mining. This just doesn't make sense to me. Furthermore, the way hardrock mining is done today has changed significantly compared to when the law was enacted. I understand coal mining is much different from hardrock mining, but the Federal government has collected a royalty for taxpayers from coal production on Federal lands for decades. For the most part, these funds are shared evenly between the state where the operation took place and the Federal government. It strikes me as fair that taxpayers get a share of the profits in exchange for the privilege of being granted access to conduct operations on Federal lands.

(a) Do you agree it is time to reform the Mining Law? What are your thoughts and concerns?

Response: I believe that most programs, including the General Mining Law of 1872, could be modernized and improved. If confirmed I would look forward to assisting Congress in any effort that ensures that the American public receives an appropriate return for resource development that takes place on federal lands.

(b) Do you support instituting a royalty on hardrock mining?

Response: I support ensuring that the American public receives an appropriate return for resource development that takes place on federal lands. What form that takes in the context of hardrock mining has been the subject of debate for several decades in Congress. I stand ready to assist you and the Committee as you explore changes to the General Mining Law of 1872.

Question 2: Land and Water Conservation Fund.

Both the Senate and the House recently voted to permanently reauthorize the Land and Water Conservation Fund by huge bipartisan majorities in the public lands bill that President Trump signed into law earlier this month. Yet for the past two years, and again in the FY2020 budget proposal, the Administration has proposed drastic cuts in spending for the LWCF program. This year's budget proposal proposes to spend only $8 million on federal land acquisition and no appropriated funds for the LWCF state grant program. These levels are recommended despite the $900 million permanent authorization for the federal and state LWCF programs.

(a) Will you commit to support use of the LWCF?

Response: Yes, I am a supporter of the LWCF and will continue to work with Congress to move this important program forward.

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(b) Will you support legislation to make the LWCF available for spending without annual appropriation?

Response: I would be happy to engage in discussions with the Committee on different and creative ways to implement the LWCF.

(c) Will you support some form of permanent funding?

Response: This is a matter for Congress. I stand ready to assist your deliberations in any way I can. The recently achieved permanent reauthorization was a step forward. I would be happy to engage in discussions with the Committee on different and creative ways to implement the LWCF.

Question 3: Conservation in Parks.

The National Park Service Organic Act states that the "fundamental purpose" of the national parks "is to conserve the scenery and the natural and historic objects and the wildlife," and to provide for their enjoyment "in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." In its Management Policies, the National Park Service has said that "when there is a conflict between conserving resources and values and providing for enjoyment of them, <u>conservation is to be predominant</u>."

I have concerns that the appropriate balance was not struck during the shutdown. By keeping the national parks open during the recent government shutdown without adequate staff to protect park resources, it seems public access was prioritized over conservation of park resources. You kindly discussed the shutdown with me during our meetings.

(a) Can you please elaborate on those decisions for the committee as well? And share with us some lessons learned?

Response: As you note, the National Park Service has a dual mission, to conserve park resources and provide for their enjoyment. As we discussed during the lapse in appropriation on the phone, I took action to strike an appropriate balance between these two objectives. In my opinion, the National Park Service's initial contingency plan was not achieving those dual purposes in a lengthy period of lapse.

Using retained fees collected under the Federal Lands Recreation Enhancement Act (FLREA), the NPS, in accordance with law, was able to address issues with restrooms and sanitation, trash collection, road maintenance, campground operations, law enforcement and emergency operations, and basic visitor services. Excepted staff that worked on specified allowable activities under FLREA were paid. While many of the smaller sites around the country remained closed, use of these funds allowed the American public to safely visit many of our national parks while providing these treasures additional protection and allowing NPS to meet its dual mandate. Importantly, the use of FLREA funds allowed continued visitor access to some park

units, contributing to the economies of the respective gateway communities. It also meant that those employees who were providing these services were assured that they would receive a timely paycheck, an assurance that was comforting to some.

Congress, in the Fiscal Year 2019 Further Additional Continuing Appropriations Act (Public Law 116-5) that extended appropriations through February 15, 2019, explicitly made such funds cover the prior period during the lapse. Pursuant to this direction, the NPS was able to move obligations incurred during the appropriations lapse from the FLREA fee account to the account for which the charges were originally planned, including the NPS operating account, where most of these obligations would have been charged. The actions taken under these provisions, which were confirmed by the Office of Management and Budget, allowed NPS to fully restore FLREA balances to pre-lapse levels.

I hope that we will not be faced with another lapse of appropriations. However, I believe that this action provides critical direction for similar situations in the future. First, our national parks should not be made the public face of another lapse in funding, and we will be prepared to use these fees, as available, immediately for appropriate staffing, basic services, and other bureau needs in accordance with the authorities provided by law. In addition, we have modified our contingency plans for the NPS and for the other relevant bureaus to ensure that in the event of a future lapse, we are prepared to use these fees for these allowable purposes.

(b) Do you believe that where there is a conflict between public enjoyment and conservation of park resources, the law requires the National Park Service to give priority to resource conservation?

Response: I believe that the law requires that the National Park Service meet its dual mandate, and that it cannot be arbitrary in its actions in a way that ignores either mandate.

Question 4: Public Engagement at BLM.

I believe we can and should be taking a hard look at simplifying, streamlining, and making improvements to the permitting processes for oil and gas leasing on public lands. We can do so in a way that provides for robust public engagement on these important decisions. The Bureau of Land Management issued an instruction memorandum in February 2018 that changed the way the agency conducts land use planning and lease parcel reviews. The changes give BLM the option of soliciting public comments in the NEPA review process, where before it was required. It also reduced the protest period from 30 days and instead imposed a 10-day deadline for public protests of proposed lease sales. Furthermore, BLM issued this memo without any public notice. I understand the courts have prevented the implementation of the memo in parts of the country with sage grouse habitat; however, it is the guidance used by federal land managers in other regions.

This 10-day period strikes me as a bit short especially for those rural areas where BLM operates. It is harder for citizens to access have the same level of resources, such as high speed internet, in order to actually weigh in with their concerns.

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(a) What was the reason for reducing the protest period while you also accelerated oil and gas lease parcel reviews?

(b) Do you agree that robust public input is an important part of the BLM decision making process that ensures fairness for those most closely affected who deserve to have an honest chance of airing their grievances?

Response to a and b: The Department values meaningful public participation and an efficient environmental review process in the implementation of its onshore oil and gas program. The BLM observed a trend regarding protests over the past several years in which the percentage of parcels protested from the original sale notice had increased dramatically. This 10 day period is in addition to multiple opportunities for public participation and engagement through the BLM planning process under FLPMA and NEPA processes.

Question 5: Sportsmen and Recreation.

As avid sportsmen, you and I both know the value of hunting and fishing in terms of a way of life but also in terms of dollars to the economies of rural towns. Hunting contributes $270 million to the economy in West Virginia and supports 5,000 jobs. Last month, Senator Murkowksi and I were able to get several long awaited sportsmen provisions included in the Public Lands package, and these were enacted into law two weeks ago. And just last week, you signed Secretarial Order 3733—directing the Bureau of Land Management to consider public access for outdoor recreation, which includes hunting, fishing, and target shooting, in any Federal land transactions. These are important victories that have been long sought by our sportsmen and sportswomen, and I want to do more and would like to discuss with you what you think should be next.

(a) Will you work with us to develop and enact additional legislation that would make it easier for outfitters and the public to access our Federal lands, in addition to securing full funding for the Land and Water Conservation Fund?

Response: As discussed at my hearing, increasing access to outdoor recreation opportunities is a priority for me and for the Department. Outdoor recreation opportunities provide physical and mental health benefits and allow Americans to more fully experience our public lands and waterways. Recreation also creates jobs and economic benefits for local communities. The LWCF has been a powerful tool in increasing recreation opportunities, particularly for states and local communities. If confirmed, I will stand ready to assist Congress in efforts to work on legislation that provides for easier access for outfitters and the public to our federal lands, and I would be happy to engage in discussions with the Committee on different and creative ways to implement the LWCF.

(b) Do you have specific ideas on what should be done regarding outdoor recreation in order to create new jobs, particularly in rural communities?

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Response: Outdoor recreation access and facilities are often insufficient to support recreation based tourism in our public land locked rural communities. We should work with state and private partners to develop and maintain recreation access facilities and infrastructure such as multi-use trails, roads, parking lots, boat ramps, entrance stations, and other forms of infrastructure associated with access to recreation sites. For example, the Bureau of Reclamation has an excellent track record in that regard as it seeks out and maintains partnerships with non-Federal government entities such as states, counties, cities, and irrigation districts for recreation opportunities associated with lands and waterways under its jurisdiction. More can and will be done to streamline the processes relating to recreation permitting activities. We want these public recreation resources to be accessible and to present economic opportunities to the gateway communities that surround them.

Question 6: Outer Continental Shelf Production.

The U.S. is producing 11.9 million barrels per day as of February 2019. The Energy Information Administration (EIA) is now predicting that U.S. crude oil production continues to set annual records through 2027 and remains greater than 14 million barrels per day through 2040. The EIA states that Lower 48 onshore production continues to be the "main source of growth in total US crude oil production." Not offshore. About 6% of the Outer Continental Shelf is currently available for leasing. The Bureau of Ocean Energy Management is proposing to open approximately 90% of the OCS. This is an extraordinary increase in access for oil production. And it seems out of alignment with the large amounts of production and the opportunities already available.

Given the administration's push to increase oil and gas production in the OCS, can you tell me today if you anticipate the crude oil that will be produced will be primarily produced for domestic use or for export?

Response: I have no anticipation in either direction. It would be my hope that we are never dependent on foreign sources of oil from unstable regimes in the future. Petroleum production resulting from OCS leasing under the Bureau of Ocean Energy Management's 2019-2024 plan would likely not begin to be realized for several years, given the approximately 7 to 10-year timeframe from leasing to development. Between now and then many onshore reservoirs currently under production will become depleted. Accordingly, other discoveries of oil, including in the OCS, could be needed to offset the loss in production from current oil and gas operations in order to prevent a reduction in overall U.S. production levels.

Question 7: Solicitor's Opinion on Migratory Birds.

On March 28, 2019, Senator Van Hollen sent you a follow-up letter (attached) about your role in Solicitor's Opinion (M-37050) on the Migratory Bird Treaty Act (MBTA). The Solicitor's Opinion, or M-Opinion, on the MBTA was released on December 22, 2017, without any public or scientific input or environmental analysis, abruptly removing

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longstanding protections for migratory birds. Please clarify in writing your role in the M-Opinion and the relationship with the Independent Petroleum Association of America (IPAA), and explain how you intend to ensure industry operators implement best practices so that migratory birds do not suffer unnecessary harm.

Response: On December 22, 2017, after reviewing the text, history, and purpose of the MBTA, the Solicitor issued M-37050, which takes into account the positions of various Federal Courts of Appeals.

M-Opinions are issued by the Solicitor and they are some of the most important and serious work undertaken by the Office of the Solicitor. This important legal guidance is to be based on the law, not outside influence. The work to develop an opinion is a thoughtful and studious exercise.

I did not personally review the research or the prior case law before M-37050 was issued. However, I reviewed a draft and possibly drafts of this legal opinion, that would become the legal guidance for the entire Department.

I certainly informed the drafters that I thought they had done a good job analyzing an important legal question.

It is my personal opinion that the direction and need for the Office of the Solicitor to issue an M-Opinion on the Migratory Bird Treaty Act and its application was the direct result of an M-opinion issued on January 10, 2017, which was suspended very early in the Trump Administration. It is my view that the opinion should not have been issued as the Solicitor was walking out the door, a Solicitor who would not be burdened by the responsibility of implementation and defense of that position, particularly in light of contrary case law in multiple Federal Courts of Appeals. Obviously, a broad and diverse set of interests care about the scope of lawful authority of the Migratory Bird Treaty Act and its overall application. Many have views on it, and Congress can impose any liability standard it would like to affirmatively impose.

I was unaware of meetings IPAA had at the Department of the Interior on the MBTA issue until I saw references to such meetings in the media. I have neither a personal or professional relationship with the IPAA or its employees.

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Questions from Senator Wyden

Question 1: Public lands are truly one of America's shining features -- they provide multiple uses for the American public and are economic engines, particularly in the rural west. The Department of the Interior is the nation's largest land management agency, and is a critical agency for timber towns and ranching communities in every corner of Oregon. However, there has been talk of privatizing these public lands.

Will you commit to not selling off public lands in the United States, and to work to expand recreational access to lands managed by the Department of the Interior?

Response: I have previously indicated my opposition to the sale or wide scale transfer of federal lands. My views have not changed. There are some situations in which commitments have previously been made, inholdings need to be swapped or exchanged, or land banks are well situated to address the needs of growing urban areas. These decisions should be reviewed on a case by case basis. With regard to public access, as I indicated at my hearing last week I believe that access to our public lands for hunting, fishing, and recreating, is critically important. I recently issued a Secretarial Order that requires that before the Bureau of Land Management exchanges or disposes of any land, they must first consider what impact the disposal or exchange of land will have on public access.

Question 2: Please outline your views on the recreation economy in the U.S., and explain your views on the economic potential recreation holds for rural communities.

Response: I have said before that the Department manages about 1 of every 5 acres of land in the United States, supporting almost every aspect of the American economy. Millions of Americans access the lands we manage every year, to hunt, fish, camp, ride and carry out other recreational activities. The Department of Commerce Bureau of Economic Analysis has reported that the outdoor recreation economy accounted for 2.2 percent, $412 billion, of current-dollar GDP in 2016. Recreation visits to Bureau of Land Management and National Park Service lands alone support more than 350,000 jobs. These are numbers that have a significant economic impact many rural communities.

Under President Trump's leadership, the Department has made significant progress to improve the management of our public lands in a way that grows the economy. I talked about several of these things at my hearing. This Administration has opened access to previously unavailable or restricted public lands for all types of recreation; added hundreds of miles to the national recreation trails system; increased access to hundreds of thousands of acres of National Wildlife Refuge land for hunting and fishing; added new NPS sites; and is exploring public/private partnerships to identify new recreation opportunities on public lands so more Americans can enjoy our land. I am also making implementation of the recently enacted bipartisan public lands package a priority.

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Question 3: I know how well-versed you are in the laws and policies governing the Department's responsibilities to protect wildlife species. In that context, I was surprised by your comment during our meeting that the BLM's revisions of critically important sage-grouse plans in six states amounted to nothing more than a "sanding of rough edges." I am pleased to see the Department work with Governor Brown of Oregon to uphold the hard work and collaborative efforts of farmers and ranchers in Oregon, and keep the Obama-era plans largely intact in my state.

However, it deeply concerns me that your rollback of protections *elsewhere* may well spur a need to list the species as threatened or endangered *everywhere*. And whether or not you recognize and agree with that concern, I want to make sure the Department under your leadership will meet its responsibilities to manage the sagebrush ecosystem for more than just oil and gas development; to keep the sage-grouse off the endangered species list, to protect the traditional way of life in rural states, and to be transparent with this Committee.

As we consider your nomination, how can we be assured that the BLM will comprehensively monitor impacts of federal-lands oil and gas activity on the sage-grouse and the sagebrush ecosystem, and that Congress will be kept informed of those impacts?

Response: Protecting sage-grouse habitat remains a priority for the Department of the Interior. BLM budgeted approximately $60 million for sage-grouse habitat in 2018 and remains committed to similar funding levels. In each sage-grouse state, governors committed to the goals of either "no net loss" or "net conservation gain" which are reflected in our land use plans. States continue to invest significant resources for sage-grouse conservation. Each Resource Management Planning Amendment was narrowly tailored to align with state plans and contains extensive restrictions and requirements for oil and gas activity. Our goal is to maintain a healthy, working landscape for wildlife and for people. The Department will continue to work in cooperation with western governors and state wildlife agencies to achieve these conservation goals.

Question 4: Can you assure us that the Fish and Wildlife Service will complete a full and unbiased sage-grouse status review in 2020, on time and with all the resources the Service requires, so we can know whether listing becomes necessary as the BLM's revised land-use plans are implemented?

Response: Our state fish and wildlife agency partners are taking the lead in assessing the range-wide status of greater sage-grouse. We are assisting them in their efforts and remain committed to the success of the species.

Question 5: A year ago, Secretary Zinke sat before this Committee for a hearing on the Department's 2019 budget, and I pointed out that promises your former boss made to this Committee during *his* confirmation hearing were immediately and consistently broken as

evidenced by the budgets he brought us. The issue I highlighted then was the Land and Water Conservation Fund, a vital program that secures outdoor recreation lands and access, wildlife habitat, historic sites, and other irreplaceable assets for the American people — which Mr. Zinke promised us he would fully support before basically zeroing it out in his budgets. Now, we recently passed, and the President just three weeks ago signed, landmark legislation permanently reauthorizing LWCF. At the time you noted your own and the administration's support for this popular program — even though I see that the budget you submitted the very next week contained even LESS than zero for LWCF, with proposed spending and rescissions that would cut the program by a net *105 percent.*

What would you do as Secretary to provide *actual* support for LWCF instead of lip service?

Response: I support the Land and Water Conservation Fund, and applaud Congress for permanently reauthorizing this fund as part of the John D. Dingell Jr. Conservation, Management and Recreation Act, which became law just three weeks ago. It is my understanding that LWCF has only been fully funded by Congress twice since its enactment in 1965. Whatever funding level Congress chooses for this program, the Department under my leadership will faithfully execute the goals of LWCF.

Question 6: The Bureau of Reclamation is a key player in the Klamath Basin and for decades has worked to help stakeholders negotiate a Basin-wide solution to ongoing water challenges. Are you familiar with the water-related challenges of Klamath, and the current state-of-play in the Basin?

Response: I have a general familiarity with the Klamath issues.

Question 7: Will you commit to working with me and the other members of the Oregon delegation, and to support the Bureau of Reclamation and their efforts to help solve this complex problem in the Klamath Basin?

Response: It is my general understanding that the Bureau of Reclamation is already working with the Congressional delegation.

Question 8: Controlling the 10-year average cost of fires by freezing it at a certain level, like Congress did when they passed my legislation last year -- the Wildfire Disaster Funding Act -- will result in savings for the Department of the Interior that can then be used to accomplish additional hazardous fuels treatments, forest resiliency work, and increasing the timber program.

Will you commit to using the savings created by the implementation of the Wildfire Disaster Funding Act to accomplish forest restoration and fuels treatments?

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Response: I am committed to supporting active forest management, and I am working to implement Secretarial Order 3372, titled "Reducing Wildfire Risks on Department of the Interior Lands through Active Management." Active management is critical to reducing the intensity and number of wildfires, to supporting healthy forests and rangelands, and to protecting homes and important infrastructure. The Administration submitted its FY 2020 budget request and the targeted forest management reform proposals that accompany that request.

Question 9: I'm sure you're aware of the situation that unfolded at the Malheur National Wildlife Refuge in Harney County, Oregon, in 2016. Federal officials coordinated closely with county and state officials to ensure that the community was safe, and the rule of law preserved. However, incidents like this, led by extremists, compromise our public lands and terrify both the public and land managers responsible for maintaining access to these public lands.

If you are confirmed as the Secretary of Interior, you will be in charge of managing National Wildlife Refuges, Wilderness Areas, and recreation lands, in an era where hostility toward federal lands and federal officials is rampant, particularly in rural areas.

What will you do to ensure the protection of not only our incredible public lands that have been set aside by Republican and Democratic Presidents and Congresses, but also the protection of your employees, like the employees at the Malheur Refuge, who are not just federal employees, but Oregonians?

Response: As we fulfill our mission to conserve and manage the Nation's natural resources and cultural heritage, the safety of our employees and our visitors is of paramount importance. The Department is home to over 4,000 federal law enforcement officers. Their duties are as varied as our bureaus' missions. To ensure the continued protection of employees and visitors, the FY 2020 budget increases funding for law enforcement and health and safety programs across the board.

Question 10: Oregonians and all West Coast residents are becoming increasingly concerned about the next major earthquake, which has become a matter of "when" and not "if." Preparation is key, and even just a few seconds of warning is enough to take steps to prevent casualties and mitigate destruction. In a few seconds, supplies of oil, natural gas, and chemicals can be turned off, trains and cars can be slowed or stopped, sensitive data can be secured, and people can get to safe places. This is a bipartisan priority and we need to get warning systems finished. Failing to prepare for these events is not an option, and could have dire consequences for West Coast populations. Given the importance of this technology to provide the kind of warning that exists for hurricane, winter storms, and other extreme events, how would you, if confirmed, work with USGS to ensure ShakeAlert becomes fully operational for the west coast?

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Response: Should I be confirmed, I will work to ensure the U.S. Geological Survey continues to prioritize making science and technology available to protect communities from natural hazards, including earthquakes. I appreciate the importance of and the USGS's role in providing reliable early warning systems in protecting people and property from these and other natural hazards. The USGS has committed to improving the fundamental earthquake monitoring infrastructure to ensure that early warning will eventually be possible where it is needed. In the FY 2020 budget the Earthquake Hazards program is funded at $64.3 million and prioritizes funding to maintain robust national earthquake monitoring and reporting capabilities, including $8.2 million for operations and maintenance of existing ShakeAlert Earthquake Early Warning systems in conjunction with State and local partners.

Question 11: Can you assure us that the annual budgets you would propose would back up your stated commitments with actual conservation and maintenance dollars?

Response: You have my commitment that the annual budgets that I will propose, should I be confirmed, will further the President's priorities and, in that context, will comprise funding and programs consistent with the best interests of the Department and its missions.

Question 12: Originally established in 2000 and recently reauthorized in 2016, the Fisheries Restoration and Irrigation Mitigation Act (FRIMA) provides funding in the Pacific Northwest (Oregon, Washington, Idaho, Montana and now California) to carry out fish passage projects and screen irrigation channels to reduce fish mortality. This program was recently reauthorized, but authorized funding was drastically reduced. In fact, since its inception, the program has only received $13.1 million in appropriations, with the last round of funding occurring in fiscal year 2017. Are you familiar with this program, and would you support funding for the implementation of this critical program that benefits farmers and fish?

Response: The Department of the Interior values the role of FRIMA to directly support irrigation districts in addressing fish screening and passage. This aids in securing water delivery in association with aquatic conservation, to benefit multiple interests. I would be glad to work with Congress on this program as we weigh multiple demands on the Federal budget.

Question 13: I value science-based decisions in determining land management outcomes. Recent news reports suggest you may feel otherwise. If confirmed, how will you ensure Interior uses the best science in making transparent land management and policy decisions?

Response: Science plays a critical role in our decision making process as does the law. Within the Department of the Interior over the last two years, the number of formal complaints of breach of scientific integrity have decreased. In addition, to further our application of well-grounded science, I have appointed a career scientist to serve as the Science Advisor to the Acting

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Secretary/Deputy Secretary, and if I am confirmed, he will continue to serve in the Immediate Office of the Secretary. There is no question that scientific integrity should underpin agency actions. As I have stated, my view is that an agency's decisions should be predicated on the best information, including an evaluation of science and application of the law.

I believe when scientific data is evaluated on its merits and used as a basis to make legal and policy decisions that incorporate the science, conflicts will be reduced and those decisions will be reliable and legally sound. I believe when the Department picks and chooses between data, it is obligated to articulate a reason why it has done so, and it must be able to connect its conclusions to the facts it finds in a rational manner.Secretary Order 3369 last September promotes open science. This Order is intended to ensure that the Department of the Interior bases its decisions on the best available science and provides the American people with enough information to thoughtfully and substantively evaluate the data, methodology, and analysis used by the Department to inform its decisions.

Question 14: Explain your views on how the Department of the Interior can do more to advance clean energy development on public lands?

Response: I recognize the role renewable energy can play in U.S. energy security and economic growth. For instance, in December, the Department shattered the record for offshore wind leasing, garnering a total of $405 million for wind leasing areas off the coast of Massachusetts. By streamlining our processes and reducing paperwork, all within our statutory responsibilities and without compromising important environmental standards, renewable energy projects will enjoy greater permitting efficiency. This is how we have advanced clean energy development on public lands in the past two years and how I believe we can continue to do so.

Question 15: The state of Oregon is vehemently opposed to offshore drilling occurring off the coast of Oregon. If confirmed, how do you intend to incorporate state input when determining where to site offshore oil and gas exploration?

Response: The Outer Continental Shelf Lands Act prescribes the major steps involved in developing the program, including extensive opportunities for public comment and specific opportunities for input from states. The Department, through the Bureau of Ocean Energy Management, seeks a wide array of input during this process from all stakeholders, including affected states, in the process to determine the size, timing and location of leasing activity on the OCS. Additional public meetings will occur after the publication of the Proposed Program and Draft Programmatic Environmental Impact Statement. If confirmed, I will ensure the states and the public have every opportunity to have their views heard and considered as the Department moves forward with developing the National OCS Program.

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16: Do you believe American taxpayers should get a fair return on all natural resources development on public lands?

Response: I believe that American taxpayers should receive fair market value for public resources.

Question 17: Reports show that natural gas companies are venting and flaring hundreds of millions of dollars of methane. The former Methane Rule was designed to reduce the need for flaring, and ensure royalties are paid for gas otherwise vented into the atmosphere or burned off.

Do you believe that the Department's rollback of the methane rule is fair to taxpayers?

Response: Yes, it is my opinion and belief that the government should not issue an unlawful rule. The former Bureau of Land Management Methane Rule imposed many requirements that overlapped with the EPA's regulatory authority and state authorities under the Clean Air Act. Of note, 99% of federal oil and gas production in 10 states is subject to state regulatory provisions regarding venting and flaring of methane.

Question 18: There are a number of tribes in Oregon, and around the country, that were terminated and then subsequently restored who now face significant challenges in securing law enforcement funding through self-determination contracts. They are not currently eligible for funding for basic operations, and yet in many cases are spending significant Tribal resources to provide law enforcement services on their reservations as well as for the larger community. In both the FY18 and FY19 Appropriations bills there was language requiring BIA to work with affected Tribes to assess their law enforcement needs and to submit a report detailing the amounts necessary to provide sufficient law enforcement capacity for these Tribes. Congress has still not received this report.

Will you ensure that BIA completes a comprehensive report detailing the tribes affected, as well as their needs, in a timely manner?

Response: If confirmed, I expect the Bureau of Indian Affairs to comply with its statutory requirements, including completing reports required by Congress. Ensuring adequate law enforcement resources and training in Indian Country is an important responsibility for the Department met by the BIA's Office of Justice Services. They have the lead for the Department on the Opioid Reduction Task Force and in training tribal police and first responders.

Question 19: The Oregon congressional delegation is increasingly concerned about the management of the Chemawa Indian School in Salem, Oregon. Responses to our inquiries have been near impossible to extract from the Department, and incomplete when delivered. School staff, who are also my constituents, have been directed not to communicate with

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congressional offices. If confirmed, what steps will you personally take to provide transparency to the issues facing Chemawa?

Will you commit to developing a Chemawa-specific plan to improve the school's performance, its treatment of students and staff, and management of the land surrounding the school?

Response: I am committed to achieving the mission of the Bureau of Indian Education (BIE) to provide a culturally relevant, high-quality education that prepares Indian students with the knowledge, skills, and behaviors needed to flourish in the opportunities of tomorrow, become healthy and successful individuals, and lead their communities and sovereign nations to a thriving future that preserves their unique cultural identities. I also sincerely appreciate your same commitment to our students attending Chemawa Indian School.

It should not have taken until March 15th to receive a formal written reply to the Oregon Delegation's letter dated June 8, 2018. I assure you that DOI as a whole, and Indian Affairs specifically, is committed to reducing internal bureaucratic review processes that inhibit our ability to communicate with all of our stakeholders in a timely manner. Both myself and the entire Indian Affairs senior leadership team are actively working to address the challenges highlighted in the Oregon Delegation's letter.

With regard to school staff communicating with congressional offices, we are working to insure our school staff understand the appropriate internal procedures to respond to inquiries from Congress. This is done to make sure that we can provide fulsome, accurate information to Congress, while at the same time making sure that children under our care do not inadvertently have personal, private information disclosed.

With regard to school improvement, we recently provided the entire Oregon Delegation with a copy of Chemawa's School Improvement Plan which specifically outlines the strategies currently being undertaken by school leadership to ensure students receive a quality education. As additional evidence of our commitment to addressing the challenges faced by Chemawa, in the month of March alone Ms. Tara Sweeney, Assistant Secretary for Indian Affairs, Mr. Mark Cruz, Deputy Assistant Secretary for Policy and Economic Development for Indian Affairs and Mr. Tony Dearman, Director of the Bureau of Indian Education, have made onsite visits to Chemawa, meeting with school leaders, students, and staff. Additionally in March, Mr. John Tahsuda, Principal Deputy Assistant Secretary for Indian Affairs, met with Senator Merkley, Congressman Schrader and Congresswoman Bonamici, and your staff at Chemawa pursuant to your request.

The Department remains committed to increasing the ability of the BIE to improve its services to Indian students, including those attending Chemawa, and I look forward to working with you to ensure that the important mission of the BIE is successfully achieved.

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Question 20. I am concerned about the recent reassignment of significant numbers of BIA staff and positions from Washington, DC to New Mexico. Will you confirm how many federal positions within the BIA have been reassigned from the Washington, DC area to other regions within the last two years?

How does this compare to other agencies within the Department?

Response: The Office of Trust Services (OTS) relocation plan is part of the Bureau of Indian Affairs (BIA) commitment to streamline processes and delivery of services in pursuit of efficiency, while maintaining a focus on cost-savings efforts and fulfilling the BIA mission. This plan is in line with the President's Reorganization Executive Order 13781 (EO) and the Director of Management and Budget Memorandum dated April 12, 2017, but is not associated with the Departmental reorganization. By redirecting staff and funding to its field offices where the technical knowledge and experience is located relative to tribal and individual trust assets, OTS' work can best be supported and its mission achieved.

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Questions from Senator Cantwell

Question 1: Impact of Arctic Drilling on Endangered Polar Bears

I am very concerned that in the apparent rush to jam through Arctic drilling while President Trump is still in office, the Department has ignored its legal obligations to conduct a meaningful analysis of the impacts polar bears will suffer due to industrial development in the pristine Arctic Refuge.

Mr. Bernhardt, do you believe the Endangered Species Act (ESA), the Alaska National Interest Land Conservation Act (ANILCA), and National Wildlife Refuge System Administration Act (Refuge Act) apply to the National Arctic Wildlife Refuge?

Mr. Bernhardt, since polar bears are listed as a threatened species under the ESA, ANILCA and the Refuge Act both require the Secretary to manage the Arctic Refuge primarily to conserve habitat, does the Department of Interior have a legal obligation to provide for conservation of polar bear species within the Refuge?

Mr. Bernhardt, a memo written by Dr. Patrick Lemons, Chief of Marine Mammals Management at the U.S. Fish and Wildlife Service office in Anchorage Alaska details numerous areas where the Interior Department does not have enough information about polar bears to determine whether or not Arctic Refuge drilling will harm or kill polar bears or destroy designated critical habitat. Can you confirm that the analysis conducted by these Department scientists were incorporated into the Draft EIS?

Mr. Bernhardt, will you commit to sharing with the Committee all relevant correspondence that can document the use of this scientific information, how it was incorporated into the Department's deliberations, and any directive Interior Department agencies received from the Secretary or Deputy Secretary of the Interior?

Mr. Bernhardt, last month, the BLM said that they will forgo new seismic studies in Arctic Refuge this winter due to questions raised about the impacts of testing on local polar bear populations. I understand that the firm that was supposed to do the seismic testing, SAExploration, also believed their activities would likely harm arctic refuge polar bears, because they petitioned the U.S. Fish and Wildlife Service for a takings permit. Are you aware that seismic drilling was likely to kill polar bears, primarily through heavy machinery crushing mother bears and their cubs in undetected dens? Is the Department of Interior, at any level, considering authorizing the lethal taking of polar bears during any phase of Arctic Refuge Drilling?

Mr. Bernhardt, the Interior Department seems to be in such a rush to start drilling they are overriding the concerns of their career scientists. You are ignoring the promises made by Senate boosters of arctic drilling that it would be conducted under strict environmental reviews.

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You are increasing the likelihood that the Department will not properly follow appropriate environmental laws and just end up tying up this effort in the courts. DOI is even going so far as declaring they will proceed with leasing this year, even without seismic testing, despite the fact that this lack of data will lower lease sales and force successful bidders to conduct their own exploration work before drilling, further delaying oil production in the Refuge. Have you personally directed in any way how the lease sale NEPA process has proceeded, including the schedule, public review, and comment period for the Draft EIS?

Mr. Bernhardt, are you okay with proceeding with Arctic Refuge drilling even if it could seriously harm endangered polar bear populations in the area that are already in alarming decline and facing the perils of melting ice they depend on for their food and life cycle?

Response: I disagree with the factual premises of your question, and I will not approve any leasing program which the Department's environmental analysis determines is inconsistent with the significant legal protections that exist for the polar bear. As I indicated in my response to you on this matter at my confirmation hearing, I will bring to our meeting the information we discussed. In general, however, the Department and the Bureau of Land Management are complying with the requirements of the authorizing legislation, the Tax Cuts and Jobs Act of 2017, the National Environmental Policy Act, and other relevant statutes, as we move toward conducting lease sales and providing for responsible development of these important resources.

The Bureau of Land Management has been successfully managing polar bear impacts over the course of the last four decades in implementing the oil and gas leasing program for the nearby National Petroleum Reserve in Alaska, and is applying that experience to the ANWR Coastal Plain in coordination with biologists from the Fish and Wildlife Service and U.S. Geological Survey. The analysis in the Draft Coastal Plain Leasing EIS incorporates the substantial body of known and relevant scientific literature on the polar bear, including literature published by Department biologists and Dr. Lemons.

Question 2: Climate Science

On November 23, 2018, thirteen federal agencies, including the Department of Interior, with input from hundreds of government and non-governmental experts, jointly issued the Congressionally- mandated quadrennial National Climate Report.

Mr. Bernhardt, do you agree or disagree with the finding from the National Climate Report that *"Climate change is transforming where and how we live and presents growing challenges to human health and quality of life, the economy, and the natural systems that support us."*

Mr. Bernhardt, do you agree or disagree with the finding from the National Climate Report that *"There are no credible alternative human or natural explanations supported by the observational evidence."*

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Mr. Bernhardt, do you agree or disagree with the finding from the National Climate Report that *"Future impacts and risks from climate change are directly tied to decisions made in the present."*

Mr. Bernhardt, as the Energy and Natural Resources Committee grapples with how to best undertake our responsibility to respond to this pending crisis, how do you think the Interior Department can help us craft these urgently needed policies?

Mr. Bernhardt, as someone very familiar with the fossil fuel industry, how soon do you think we need to wean ourselves from fossil fuels before we really start getting hit with the effects of climate change and the extreme weather it brings?

Response: As I indicated at my hearing in response to a similar question, I recognize that the climate is changing, man is contributing to that change, and the science indicates there is uncertainty in projecting future climate conditions. The Department of the Interior's role is to follow the law in carrying out our responsibilities using the best science. Congress has not directed us to regulate carbon emissions. The laws governing Interior - such as the Federal Land Policy and Management Act - require us to manage our onshore federal resources on the basis of multiple use and sustained yield, which includes energy development. We are carrying out that statutory mission and will do so until Congress directs us differently.

Question 3: Interior Department's Climate Policy

Mr. Bernhardt, you signed Secretarial Order 3360, which deleted the Department's 2012 climate policy. What is the current climate policy of the Interior that has taken the place of Secretarial Order 3360?

Mr. Bernhardt, do you agree or disagree with the requirement in Order 3360 that the Department should "use the best available science to increase understanding of climate change impacts [and] inform decision-making?"

Mr. Bernhardt, do you agree or disagree with the requirement in Order 3360 that the Department should "integrate climate change adaptation strategies into its policies, planning, programs and operations?"

Mr. Bernhardt, with the deletion of the Department's 2012 climate policy, what ensures can you provide that the Department is using the best available science to coordinate appropriate responses to climate change impacts we are increasingly seeing on the public lands that the Interior Department is responsible for?

Mr. Bernhardt, did your personal views on climate change and the role of human activity in causing it influence your decision to delete the Department's 2012 climate policy?

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Response: Secretary's Order 3360, which I signed on December 22, 2017, rescinded several policies and documents that were based on authorities revoked by the President, as a result of Executive Order 13783, and the Secretary, through Secretary's Order 3349. I agree that the climate is changing and that man has an effect, and that the Department's role is to follow the law in carrying out our responsibilities using the best science. We do evaluate the climate impacts of proposed actions. The USGS scientists have told me there is no "best" climate model, that each has its strengths and weaknesses. My personal views have played no role in the rescission of the 2012 policy.

Question 4: USGS Resource Assessment & Scientist Resignations

I would like to better understand why two top scientists from the U.S. Geological Survey, Dr. Murray Hitzman and Dr. Larry Meinert resigned a little over a year ago. In his resignation letter, Dr. Hitzman said he was protesting USGS providing the final results of the energy assessment for the National Petroleum Reserve to Secretary Zinke several days in advance of the information's public release.

Mr. Bernhardt, did Secretary Zinke request to see the final results of that assessment before its public release?

Mr. Bernhardt, did you also request to see those results before they were released?

I understand that the USGS scientific integrity policy states that these assessments are not disclosed to anyone prior to release because they can move financial markets, resulting in unfair advantages or the perception of an unfair advantage.

Mr. Bernhardt, do you believe that the Secretary is not covered by the scientific integrity policy when it says these reports should not be shared ahead of time?

Response: The Scientific Integrity Office for the Office of the Secretary did not view the review of data to be inconsistent with the scientific integrity policy. In fact, the Department's scientific integrity officer and a career scientist that I have subsequently appointed to serve as science advisor to the Acting Secretary and Deputy Secretary, said:

> I do not believe that current or proposed practices for the notification of DOI leadership constitutes a loss of scientific integrity. I do not see the issue outlined as one of scientific integrity. In fact, at no time was USGS asked to change or alter any of the findings for the assessment.

The Director of the U.S. Geological Survey acts under the authority of the Secretary of the Interior, who is ultimately responsible for the management and oversight of the Department and its bureaus. The Department's leadership thus has the authority to review data, draft reports, or other publications, and a responsibility to be knowledgeable about Interior information that will be released to the public. As a general rule, I take the longstanding position of the Office of the

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Solicitor. It is my view then and now that employee policies included in Departmental manuals do not restrict the Secretary of the Interior. The Secretary of the Interior can change a departmental manual whenever he wants because he possesses the authority to do so.. Moreover, in regard to this particular matter, I have been informed that the USGS had also determined that it needed to change its policy before any issue arose on this particular assessment.

Question 5: BLM Assessment of Oil and Drilling Operations

A GAO report released on March 11 found that BLM was inadequately staffed to assess oil and gas drilling operation on federal lands during the analyzed period of 2012 to 2016.

Mr. Bernhardt, are you aware this GAO report, do you agree with its findings, and if you do you think these inspection shortfalls resulted in any avoidable environmental degradation on public lands?

Mr. Bernhardt, do you believe the inspection shortfalls found by GAO investigators still exist? If so, what are you plans to address this situation? What level of funding would be needed to fully found these staffing needs and how does that level compare to the President's FY 2020 Budget Request?

Response: I am aware of the GAO report, and that the report concluded that the BLM did not conduct periodic internal control reviews of its field offices in accordance with current guidance at the time. The BLM is revising its policy regarding internal control reviews of the inspection and enforcement program that will ensure the BLM conducts adequate internal control reviews. Since FY 2016, the BLM has completed 100 percent of its high-priority drilling inspections and improved how they are tracked. In FY 2019, the inspection and enforcement program is funded at $48.4 million. The President's FY 2020 Budget requests $48.9 million for the program.

Question 6: Recusals From Former Lobbying Clients
Numerous public interest groups have raised concerns about your role in crafting policy changes that may have benefited or may be benefitting former clients while you served as counsel at Brownstein Hyatt Farber Schreck LLP.

Mr. Bernhardt, can you provide a list of those all your former clients and is this list identical to the entities or organizations on the note card you reportedly carry with you listed your former clients?

Mr. Bernhardt, if you are confirmed, do you plan to continue to recuse yourself from participating in particular matters affecting any of these former clients for your entire tenure as Secretary of Interior?

Response: Information regarding former clients is contained in the Statement for Completion by Presidential Nominees that I completed and submitted for this nomination and my previous

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

nomination to be Deputy Secretary of the Department of the Interior. In addition, my 278, which was also submitted to the committee contains a list of former clients. However, for the Department of the Interior, my participation in certain particular matters involving specific parties is limited by my existing recusals, so it is the most relevant document to address your question. I have included my recusal along with some supplemental information from the Office of Government Ethics that may be helpful to your query. As I stated at my hearing, I am fully committed to following all ethics laws, regulations, and the ethics pledge. I will also continue to consult with the career ethics experts within the Department of the Interior, and seeking the guidance of career ethics experts. In addition, I am committed to not participating in any particular matter on which I lobbied or in the specific issue area in which that particular matter falls, as determined by the ethics pledge.

Attachment to Response
to Sen. Cantwell
Question 6

THE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON

AUG 1 5 2017

To: Secretary
Acting Solicitor
Acting Assistant Secretaries
Acting Bureau Directors
Associate Deputy Secretary
Chief of Staff
Deputy Chief of Staff
Designated Agency Ethics Official (DAEO)

From: Deputy Secretary

Subject: Ethics Recusal

The purpose of this letter is to inform you that in accordance with my ethics agreement (attached) of May 1, 2017, as required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(l), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former employer or client of mine is a party or represents a party for a period of one year after I last provided service to that employer or client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

As a Trump Administration political appointee, I have signed the Ethics Pledge (Exec. Order No. 13770) and I understand that I will be bound by the requirements and restrictions therein in addition to the commitments that I have made in this and any other ethics agreement. Accordingly, I will not participate personally and substantially, for two years after appointment, in any particular matter involving specific parties in which a former employer or client of mine is or represents a party, if I served that employer or client during the two years prior to my appointment,

unless first authorized to participate, pursuant to Section 3 of Exec. Order No. 13770. Moreover, this two-year prohibition forbids my participation in any meeting or other communication with these entities unless (1) there are five or more different stakeholders present and (2) no particular matters involving specific parties are discussed.

I am aware that I am prohibited by 30 U.S.C. § 1211(f) from holding a financial interest in any surface or underground coal mining operation. Additionally, I am aware that my position is subject to the prohibitions against holding any financial interest in federal lands or resources administered or controlled by the Department of the Interior extended to me by supplemental regulation 5 C.F.R. § 3501.103.

In addition to a copy of my ethics agreement, I have attached a list of my current recusals under the Ethics Pledge and 5 C.F.R. § 2635.502. This list will be updated as necessary. Additionally, to facilitate the implementation of best ethics practices, I have included a document entitled "Guidance for Recusal Analysis" to assist in screening matters before the Department to determine whether they are subject to my recusal requirements.

Particular matters involving specific parties, in which an entity included in my list of current recusals is a party or represents a party, are not to be referred to me and are to be resolved without my participation. Such matters include, but are not limited to, litigation, permits, grants, licenses, and agreements. Anyone having a question about my recusal agreement should bring the matter to the attention of Assistant Deputy Secretary Willens for a determination. In order to help ensure that I do not inadvertently participate in matters from which I should be recused, he will seek the assistance of an agency ethics official as appropriate. Matters from which I am recused will be appropriately delegated for handling. If you have any questions, please be reminded that ethics advice must come from the DAEO or designee acting on the DAEO's behalf, as only a designated ethics official can make ethics determinations on which Department employees may authoritatively rely for safe harbor.

In consultation with an agency ethics official, I will revise and update this memorandum whenever that is warranted by changed circumstances. In the event of any changes to this screening arrangement, I will provide you a copy of the revised screening arrangement memorandum.

Attachments

May 1, 2017

Melinda Loftin
Designated Agency Ethics Official
and Director, Ethics Office
U.S. Department of the Interior
1849 C Street, NW, MS 7346
Washington, DC 20240

Dear Ms. Loftin:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Deputy Secretary of the Department of the Interior.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

Upon confirmation, I will withdraw from the partnership of Brownstein Hyatt Farber and Schreck, LLP, and all related entities. Pursuant to the 2012 Equityholders Agreement of Brownstein Hyatt Farber and Schreck, LLP, and BHFS-E PC, I will receive a *pro rata* partnership distribution based on the value of my partnership interests for services performed in 2017 through the date of my withdrawal. This payment will be based solely on the firm's earnings through the date of my withdrawal from the partnership. I currently have a capital account with the firm. If the firm will not refund the account before I enter into Federal service, I will forfeit the account. For a period of one year after my withdrawal, I also will not participate personally and substantially in any particular matter involving specific parties in which I know the firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

My term with the Virginia Board of Game and Inland Fisheries has expired and I have resigned from my position with the Center for Environmental Science Accuracy and Reliability. For a period of one year after termination of my position with each of these entities, I will not participate personally and substantially in any particular matter involving specific parties in

which I know that entity is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

I will divest my interest in the T. Rowe Price Virginia Tax-Free Bond Fund, within 90 days of my confirmation. Until I have completed this divestiture, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of any holding of the T. Rowe Price Virginia Tax-Free Bond Fund that is invested in the Virginia municipal bonds sector, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

If I have a managed account or otherwise use the services of an investment professional during my appointment, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the exemption at 5 C.F.R. § 2640.201(a), or obligations of the United States.

I understand that I may be eligible to request a Certificate of Divestiture for qualifying assets and that a Certificate of Divestiture is effective only if obtained prior to divestiture. Regardless of whether I receive a Certificate of Divestiture, I will ensure that all divestitures discussed in this agreement occur within the agreed upon timeframes and that all proceeds are invested in non-conflicting assets.

If I am confirmed as Deputy Secretary of the Department of the Interior, I am aware that I am prohibited by 30 U.S.C. § 1211(f) from holding a financial interest in any surface or underground coal mining operation. Additionally, I am aware that my position is subject to the prohibitions against holding any financial interest in federal lands or resources administered or controlled by the Department of the Interior extended to me by supplemental regulation 5 C.F.R. § 3501.103.

I understand that as an appointee I will be required to sign the Ethics Pledge (Exec. Order no. 13770) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this ethics agreement.

I will meet in person with you during the first week of my service in the position of Deputy Secretary in order to complete the initial ethics briefing required under 5 C.F.R. § 2638.305. Within 90 days of my confirmation, I will document my compliance with this ethics agreement by notifying you in writing when I have completed the steps described in this ethics agreement.

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,

David L. Bernhardt

David Bernhardt

List of Recusals[1]

1. Ethics Pledge Recusals

Until August 3, 2019, absent a waiver under Section 3 of Executive Order No. 13770, I am recused from particular matters involving specific parties in which any of the following entities either is a party or represents a party to the matter. Such matters include, but are not limited to, litigation, permits, grants, licenses, applications, and agreements. For the purposes of the Ethics Pledge, this also prohibits my participation in any meeting or other communication with these entities unless (1) there are five or more different stakeholders present and (2) no particular matters involving specific parties are discussed.

Active Network LLC

BHFS-E PC

Brownstein Hyatt Farber and Schreck, LLP

Cadiz, Inc.

Center for Environmental Science Accuracy and Reliability (CESAR)

Cobalt International Energy

Eni Petroleum, North America

Halliburton Energy Services, LLC

Hudbay

Independent Petroleum Association of America (IPAA)

Klees, Don (individual)

National Ocean Industry Association (NOIA)

Noble Energy Company LLC

NRG Energy Inc.

Rosemont Copper Company

[1] Note that the scopes of the recusal requirements for the Ethics Pledge and 5 C.F.R. § 2635.502 are not the same. Accordingly, the lists of recusals for the Ethics Pledge and 5 C.F.R. § 2635.502 are not identical.

August 15, 2017

Sempra Energy

Statoil Gulf Services LLC

Statoil Wind LLC

Targa Resources Company LLC

Taylor Energy Company LLC

UBE PC

U.S. Oil and Gas Association

2. 5 C.F.R. § 2635.502 Recusals

Until the date indicated for the specific entity, unless first authorized to participate by the DAEO under 5 C.F.R. § 2635.502(d), I am recused from particular matters involving specific parties in which any of the following entities either is a party or represents a party to the matter. For the purposes of 5 C.F.R. § 2635.502, such matters include, but are not limited to, litigation, permits, grants, licenses, applications, and agreements.

Active Network LLC	8-1-18
BHFS-E PC	8-1-18
Brownstein Hyatt Farber and Schreck, LLP	8-1-18
Cadiz, Inc.	5-1-18
Center for Environmental Science Accuracy and Reliability (CESAR)	3-24-18
Cobalt International Energy	8-1-18
Eni Petroleum, North America	8-1-18
Forest County Potawatomi Community	3-1-18
Garrison Diversion Irrigation District	8-1-18
Halliburton Energy Services, LLC	7-29-18
Hudbay	8-1-18

Klees, Don (individual)	8-1-18
National Ocean Industry Association (NOIA)	7-29-18
Noble Energy Company LLC	12-1-17
NRG Energy Inc.	8-1-18
Rosemont Copper Company	8-1-18
Santa Ynez River Water Conservation District, Improvement District No. 1	11-1-17
Sempra Energy	4-1-18
Statoil Gulf Services LLC	8-1-18
Statoil Wind LLC	8-1-18
Targa Resources Company LLC	8-1-18
Taylor Energy Company LLC	7-29-18
UBE PC	8-1-18
U.S. Oil and Gas Association	7-29-18
Westlands Water District	8-1-18

Guidance for Recusal Analysis

In his ethics agreement, the Deputy Secretary agreed that, for one year after his withdrawal from his firm, he would not participate personally and substantially in any particular matter involving specific parties in which he knows his former firm is or represents a party, unless authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). He also agreed not to participate personally and substantially in any particular matter involving specific parties in which he knows a former client of his is or represents a party for a period of one year after he last provided service to that client, unless he is first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d)." In addition, per the Ethics Pledge, the Deputy Secretary agreed that he will not for a period of two years from the date of his appointment participate in any particular matter involving specific parties in which a former employer or client of his is or represents a party, if he served that former employer or client during the two years prior to his appointment, absent a waiver under Section 3 of Executive Order No. 13770. This includes recusal from any meeting or other communication with such a former employer or client unless (1) there are five or more different stakeholders present and (2) no particular matters involving specific parties are discussed

To assist the Deputy Secretary in complying with his ethics agreement and the Ethics Pledge, sufficient information needs to be secured before the Deputy Secretary participates in a matter to determine whether the matter meets the criteria described above.

To determine whether the Deputy Secretary may participate in a given matter, we must first determine whether that "matter" is a broad policy directed to the interests of a large and diverse group of persons or one of the two types of "particular matters" -- a "particular matter of general applicability" or a "particular matter involving specific parties."

In the context of the ethics rules, the unmodified term "matter" refers to virtually all Government work. It includes the consideration of broad policy options that are directed to the interests of a large and diverse group of persons. For instance, health and safety regulations applicable to all employers or a legislative proposal for tax reform. It also includes more narrowly defined "particular matters."

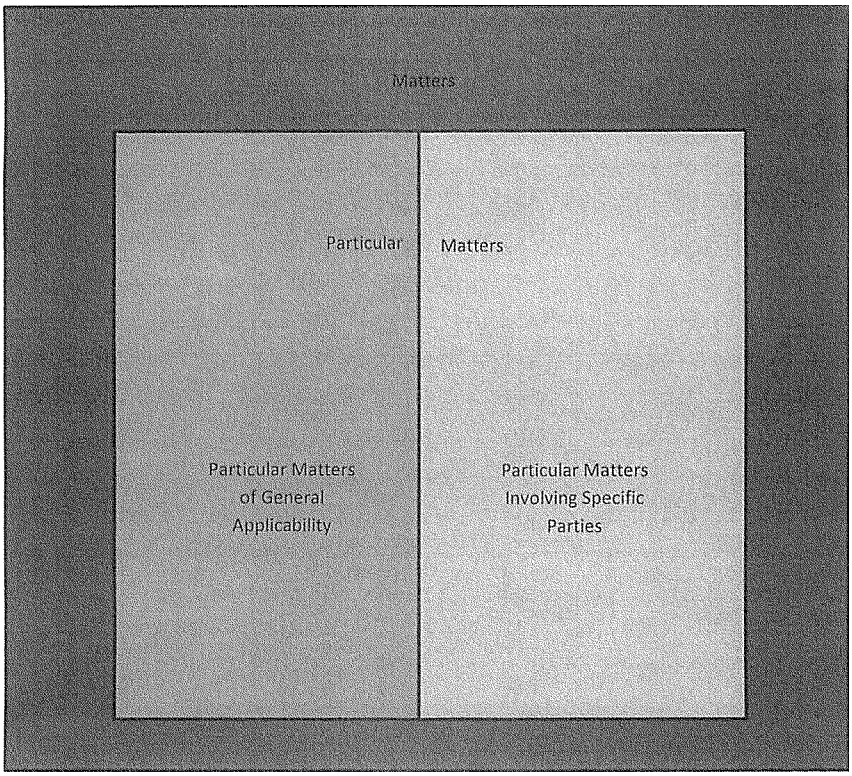
The term "particular matter" means any matter that involves deliberation, decision, or action that is focused on the interests of (1) specific persons <u>or</u> (2) a discrete and identifiable class of persons. These two types of particular matters are defined separately as "particular matters involving specific parties" and "particular matters of general applicability." (See attached diagram.)

A "particular matter involving specific parties" typically involves a specific proceeding affecting the legal rights of the parties, or an isolatable transaction or related set of transactions between <u>identified parties</u>." Examples include contracts, grants, licenses, investigations, litigation, and partnership agreements. This is the narrowest type of matter.

A "particular matter of general applicability" does not involve specific parties but at least focuses on the interests of a discrete and identifiable class, such as a particular industry or profession. Examples include rulemaking, legislation, or policy-making of general applicability that affect a particular industry or profession. For instance, a regulation prescribing safety standards for operators of oil rigs in the Gulf of Mexico or a regulation applicable to all those who have grazing permits on DOI public lands. On the other hand, a land use plan covering a large geographic area and affecting a number of industries (*e.g.,* agriculture; grazing; mining; timber; recreation; wind, solar, and/or geothermal power generation; etc.) would not constitute a "particular matter of general applicability" but, rather, would still fall within the broader definition of "matter," as it constitutes a broad policy directed to the interests of a large and diverse group of persons.

To assist the Deputy Secretary in complying with his ethics recusal requirements, one must gather sufficient information regarding a matter before the Department to determine whether the matter constitutes a particular matter involving specific parties, a particular matter of general applicability, or falls into the category of broad policy options that are directed to the interests of a large and diverse group of persons. In the event that a determination is made that the matter before the Department constitutes the narrowest type of matter, a particular matter involving specific parties, one must then reference the Deputy Secretary's List of Recusals to determine whether he is recused from participating in that matter.

Attachment


Matters
Particular
Matters
Particular Matters
of General
Applicability
Particular Matters
Involving Specific
Parties

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

October 4, 2006

DO-06-029

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: "Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"

Perhaps no subject has generated as many questions from ethics officials over the years as the difference between the phrases "particular matter involving specific parties" and "particular matter." These phrases are used in the various criminal conflict of interest statutes to describe the kinds of Government actions to which certain restrictions apply. Moreover, because these phrases are terms of art with established meanings, the Office of Government Ethics (OGE) has found it useful to include these same terms in various ethics rules. A third term, "matter," also has taken on importance in recent years because certain criminal post-employment restrictions now use that term without the modifiers "particular" or "involving specific parties."

It is crucial that ethics officials understand the differences among these three phrases. OGE's experience has been that confusion and disputes can arise when these terms are used in imprecise ways in ethics agreements, conflict of interest waivers, and oral or written ethics advice. Therefore, we are issuing this memorandum to provide guidance in a single document about the meaning of these terms and the distinctions among them.

Because the three phrases are distinguished mainly in terms of their relative breadth, the discussion below will proceed from the narrowest phrase to the broadest.

Particular Matter Involving Specific Parties

The narrowest of these terms is "particular matter involving specific parties." Depending on the grammar and structure of the particular statute or regulation, the wording may appear in slightly different forms, but the meaning remains the same, focusing primarily on the presence of specific parties.

1. Where the Phrase Appears

This language is used in many places in the conflict of interest laws and OGE regulations. In the post-employment statute, the phrase "particular matter . . . which involved a specific party or parties" is used to describe the kinds of Government matters to which the life-time and two-year representational bans apply. 18 U.S.C. § 207(a)(1), (a)(2). Occasionally, ethics officials have raised questions because section 207 includes a definition of the term "particular matter," section 207(i)(3), but not "particular matter involving specific parties"; however, it is important to remember that each time "particular matter" is used in section 207(a), it is modified by the additional "specific party" language.[1]

In addition to section 207(a), similar language is used in 18 U.S.C. §§ 205(c) and 203(c). These provisions describe the limited restrictions on representational activities applicable to special Government employees (SGEs) during their periods of Government service.[2]

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[1] For a full discussion of the post-employment restrictions, see OGE DAEOgram DO-04-023, at https://www.oge.gov/Web/oge.nsf/Resources/DO-04-023:+Summary+of+18+U.S.C.+§+207.

[2] These restrictions on SGEs are discussed in more detail in OGE DAEOgram DO-00-003, at https://www.oge.gov/Web/oge.nsf/Resources/DO-00-003:+Summary+of+Ethical+Requirements+Applicable+to+Special+Government+Employees.

As explained below, 18 U.S.C. § 208 generally uses the broader phrase "particular matter" to describe the matters from which employees must recuse themselves because of a financial interest. However, even this statute has one provision, dealing with certain Indian birthright interests, that refers to particular matters involving certain Indian entities as "a specific party or parties." 18 U.S.C. § 208(b)(4); see OGE Informal Advisory Letter 00 x 12. Moreover, OGE has issued certain regulatory exemptions, under section 208(b)(2), that refer to particular matters involving specific parties. 5 C.F.R. § 2640.202(a), (b). Likewise, the distinction between particular matters involving specific parties and broader types of particular matters (i.e., those that have general applicability to an entire class of persons) is crucial to several other regulatory exemptions issued by OGE under section 208(b)(2). 5 C.F.R. §§ 2640.201(c)(2), (d); 2640.202(c); 2640.203(b), (g).

Finally, OGE has used similar language in various other rules. Most notably, the provisions dealing with impartiality and extraordinary payments in subpart E of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) refer to particular matters in which certain persons are specific parties. 5 C.F.R. §§ 2635.502; 2635.503. OGE also uses the phrase to describe a restriction on the compensated speaking, teaching and writing activities of certain SGEs. 5 C.F.R. § 2635.807(a)(2)(i)(4).

2. What the Phrase Means

When this language is used, it reflects "a deliberate effort to impose a more limited ban and to narrow the circumstances in which the ban is to operate." Bayless Manning, Federal Conflict of Interest Law 204 (1964). Therefore, OGE has emphasized that the term "typically involves a specific

proceeding affecting the legal rights of the parties, or an isolatable transaction or related se t of transactions between identified parties." 5 C.F.R. § 2640.102(1).[3] Examples of particular matters involving specific parties include contracts, grants, licenses, product approval applications, investigations, and litigation. It is important to remember that the phrase does not cover particular matters of general applicability, such as rulemaking, legislation, or policy-making of general applicability.[4]

Ethics officials sometimes must deci de when a particular matter first involves a specific party. Many Government matters evolve, sometimes starting with a broad concept, developing into a discrete program, and eventually involving specific parties. A case-by-case analysis is required to determine at which stage a particular matter has sufficiently progressed to involve

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[3] This definition, found in OGE's regulations implementing 18 U.S.C. § 208, differs slightly from the definition found in the regulations implementing a now-superseded version of 18 U.S.C. § 207, although this is more a point of clarification than substance. Specifically, the old section 207 regulations referred to "identifiable" parties, 5 C.F.R. § 2637.201(c)(1), whereas the more recent section 208 rule refers to "identified" parties. As explained in the preamble to OGE's proposed new section 207 rule: "The use of 'identified,' rather than 'identifiable,' is intended to distinguish more clearly between particular matters involving specific parties and mere 'particular matters,' which are described elsewhere as including matters of general applicability that focus 'on the interests of a discrete and identifiable class of persons' but do not involve specific parties. [citations omitted] The use of the term 'identified,' however, does not mean that a matter will lack specific parties just because the name of a party is not disclosed to the Government, as where an agent represents an unnamed principal." 68 Feder al Register 7844, 7853-54 (February 18, 2003).

[4] Usually, rulemaking and legislation are not covered, unless they focus narrowly on identified parties. See OGE Informal Advisory Opinions 96 x 7 ("rare" example of rulemaking that involved specific parties); 83 x 7 (private relief legislation may involve specific parties).

specific parties. The Government sometimes identifies a specific party even at a preliminary or informal stage in the development of a matter. E.g., OGE Informal Advisory Letters 99 x 23; 99 x 21; 90 x 3.

In matters involving contracts, grants and other agreements between the Government and outside parties, the general rule is that specific parties are first identified when the Government first receives an expression of interest from a prospective contractor, grantee or other party. As OGE explained recently in Informal Advisory Letter 05 x 6, the Government sometimes may receive expressions of interest from prospective bidders or applicants in advance of a published solicitation or request for proposals. In some cases, such matters may involve specific parties even before the Government receives an expression of interest, if there are sufficient indications that the Government actually has identified a party. See OGE Informal Advisory Letter 96 x 21.

Particular Matter

Despite the similarity of the phrases "particular matter" and "particular matter involving specific parties," it is necessary to distinguish them. That is because "particular matter" covers a broader range of Government activities than "particular matter involving specific parties." Failure to appreciate this distinction can lead to inadvertent violations of law. For example, the financial conflict of interest statute, 18 U.S.C. § 208, generally refers to particular matters, without the specific party limitation. If an employee is advised incorrectly that section 208 applies only to particular matters that focus on a specific person or company, such as an enforcement action or a contract, then the employee may conclude it is permissible to participate in other particular matters, even t hough the la w prohibits such participation.

1. Where the Phrase Appears

In addition to 18 U.S.C. § 208, several other statutes and regulations use the term "particular matter." [5] The representational restrictions applicable to current employees (other than SGEs), under 18 U.S.C. §§ 203 and 205, apply to particular matters.[6] As mentioned above, section 207 also contains a definition of "particular matter." [7] However, where the phrase is used in the post-employment prohibitions in

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[5] The relevant language in 18 U.S.C. § 208(a) is "a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter" (emphasis added).

[6] The prohibition in 18 U.S.C. § 205(a)(2) actually uses the phrase "covered matter," but that term is in turn defined as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter," 18 U.S.C. § 205(h)(emphasis added).

[7] The definition in 18 U.S.C. § 207(i)(3) provides: "the term 'particular matter' includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." This language differs slightly from other references to "particular matter" in sections 203, 205 and 208, in part because the list of matters is not followed by the residual phrase "or other particular matter." However, OGE does not believe that the absence of such a general catch-all phrase means that the list of enumerated matters exhausts the meaning of "particular matter" under section 207(i)(3). The list is preceded by the word "includes," which is generally a term of enlargement rather than limitation and indicates that matters other than those enumerated are covered. See Norman J. Singer, 2A Sutherland on Statutory Construction 231-232 (2000).

section 207(a)(1) and (a)(2), it is modified by the "specific parties" limitation.[8]

The phrase "particular matter" is used pervasively in OGE's regulations. Of course, the term appears throughout 5 C.F.R. part 2640, the primary OGE rule interpreting and implementing 18 U.S.C. § 208. Similarly, it is used in 5 C.F.R. § 2635.402, which is the provision in the Standards of Conduct that generally deals with section 208. The phrase also is used throughout subpart F of the Standards of Conduct, which contains the rules governing recusal from pa rticular matters affecting the financial interest of a person with whom an employee is seeking non-Federal employment. 5 C.F.R. §§ 2635.601-2635.606. Moreover, the phrase appears in the "catch-all" provision of OGE's impartiality rule, 5 C.F.R. § 2635.502(a)(2). See also 5 C.F.R. 2635.501(a).[9] Various other regulations refer to "particular matter" for miscellaneous purposes. E.g., 5 C.F.R. § 2635.805(a)(restriction on expert witness activities of SGEs); 5 C.F.R. § 2634.802(a)(1)(written rec usals pursuant to ethics agreements).

2. What the Phrase Means

Although different conflict of interest statutes use slightly different wording, such as different lists of examples of particular matters, the same standards apply for determining what is a particular matter under each of the relevant statutes

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[8] At one time, the post-employment "cooling-off" restriction for senior employees in 18 U.S.C. § 207(c) applied to particular matters, but the language was amended (and broadened) in 1989 when Congress removed the adjective "particular" that had modified "matter." See 17 Op. O.L.C. 37, 41-42 (1993).

[9] Generally, section 2635.502 focuses on particular matters involving specific parties, as noted above. However, section 2635.502(a)(2) provides a mechanism for employees to determine whether they should recuse from other "particular matters" that are not described elsewhere in the rule. In appropriate cases, therefore, an agency may require an employee to recuse from particular matters that do not involve specific parties, based on the concern that the employee's impartiality reasonably may be questioned under the circumstances.

and regulations. See 18 Op. O.L.C. 212, 217-20 (1994). Particular matter means any matter that involves "deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." 5 C.F.R. § 2640.103(a)(1)(emphasis added). It is clear, then, that particular matter may include matters that do not involve parties and is not "limited to adversarial proceedings or formal legal relationships." Van Ee v. EPA, 202 F.3d 296, 302 (D.C. Cir. 2000).

Essentially, the term covers two categories of matters: (1) those that involve specific part ies (described more fully above), and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession. OGE regulations sometimes refer to the second category as "particular matter of general applicability." 5 C.F.R. § 2640.102(m). This category can include legislation and policymaking, as long as it is narrowly focused on a discrete and identifiable class. Examples provided in OGE rules include a regulation applicable only to meat packing companies or a regulation prescribing safety standards for trucks on interstate highways. 5 C.F.R. §§ 2640.103(a)(1)(example 3); 2635.402(b)(3)(example 2). Other examples may be found in various opinions of OGE and the Office of Legal Counsel, Department of Justice. E.g., OGE Informal Advisory Letter 00 x 4 (recommendations concerning specific limits on commercial use of a particular facility); 18 Op. O.L.C. at 220 (determinations or legislation focused on the compensation and work conditions of the class of Assistant United States Attorneys).

Certain OGE rules recognize that particular matters of general applicability sometimes may raise fewer conflict of interest concerns than particular matters involving specific

parties.[10] Therefore, while both categories are included in the term "particular matter," it is often necessary to distinguish between these two kinds of particular matters. Of course, in many instances, the relevant prohibitions apply equally to both kinds of particular matters. This is the case, for example, in any application of 18 U.S.C. § 208 where there is no applicable exemption or waiver that distinguishes the two.

It is important to emphasize that the term "particular matter" is not so broad as to include every matter involving Government action. Particular matter does not cover the "consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons." 5 C.F.R. § 2640.103(a)(1). For example, health and safety regulations applicable to all employers would not be a particular matter, nor would a comprehensive legislative proposal for health care reform. 5 C.F.R. § 2640.103(a)(1)(example 4), (example 8). See also OGE Informal Advisory Letter 05 x 1 (report of panel on tax reform addressing broad range of tax policy issues). Although such actions are too broadly focused to be particular matters, they still are deemed "matters" for purposes of the restrictions described below that use that term.

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[10] As noted above, OGE's imparti ality rule generally focuses on particular matters involving specific parties. See OGE Informal Advisory Letter 93 x 25 (rulemaking "would not, except in unusual circumstances covered under section 502(a)(2), raise an issue under section 502(a)"). Furthermore, as also discussed above, several of the regulatory exemptions issued by OGE under 18 U.S.C. § 208(b)(2) treat particular matters of general applicability differently than those involving specific parties. The preamble to the original proposed regulatory exemptions in 5 C.F.R. part 2640 explains: "The regulation generally contains more expansive exemptions for participation in 'matters of general applicability not involving specific parties' because it is less likely that an employee's integrity would be compromised by concern for his own financial interests when participating in these broader matters." 60 Federal Register 47207, 47210 (September 11, 1995). Of course, Congress itself has limited certain conflict of interest restrictions to the core area of particular matters that involve specific parties. E.g., 18 U.S.C. § 207(a)(1), (a)(2).

A question that sometimes arises is when a matter first becomes a "particular matter." Some matters begin as broad policy deliberations and actions pertaining to diverse interests, but, later, more focused actions may follow. Usually, a particular matter arises when the deliberations turn to specific actions that focus on a certain person or a discrete and identifiable class of persons. For example, although a legislative plan for broad health care reform would not be a particular matter, a particular matter would arise if an agency later issued implementing regulations focused narrowly on the prices that pharmaceutical companies could charge for prescription drugs. 5 C.F.R. § 2640.102(a)(1)(example 8). Similarly, the formulation and implementation of the United States response to the military invasion of an ally would not be a particular matter, but a particular matter would arise once discussions turned to whether to close a particular oil pumping station or pipeline operated by a company in the area where hostilities are taking place. 5 C.F.R. § 2640.102(a)(1)(example 7).

Matter

The broadest of the three terms is "matter." However, this term is used less frequently than the other two in the various ethics statutes and regulations to describe the kinds of Government actions to which restrictions apply.

1. Where the Phrase Appears

The most important use of this term is in the one-year post-employment restrictions applicable to "senior employees" and "very senior employees." 18 U.S.C. § 207(c), (d). In this context, "matter" is used to describe the kind of Government actions that former senior and very senior employees are prohibited from influencing through contacts with employees of their former agencies (as well as contacts with Executive Schedule officials at other agencies, in the case of very senior employees). The unmodified term "matter" did not appear in these provisions until 1989, when section 207(c) was amended to replace "particular matter" with "matter" and section 207(d) was first enacted. Pub. L. No. 101-194, § 101(a), November 30, 1989. OGE also occasionally uses the term "matter" in ethics regulations, for example, in the description of teaching,

speaking and writing that relates to an employee's official duties. 5 C.F.R. § 2635.807(a)(2)(E)(1).

2. What the Phrase Means

It is clear that "matter" is broader than "particular matter." See 17 Op. O.L.C. at 41-42. Indeed, the term is virtually all-encompassing with respect to the work of the Government.[11] Unlike "particular matter," the term "matter" covers even the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons. Of course, the term also includes any particular matter or particular matter involving specific parties.

Nevertheless, it is still necessary to understand the context in which the term "matter" is used, as the context itself will provide some limits. In 18 U.S.C. § 207(c) and (d), the post-employment restrictions apply only to matters "on which [the former employee] seeks official action." Therefore, the only matters covered will be those in which the former employee is seeking to induce a current employee to make a decision or otherwise act in an official capacity.

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[11] A now-repealed statute, 18 U.S.C. § 281 (the predecessor of 18 U.S.C. § 203), used the phrase "any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter" (emphasis added). One commentator noted that the term "matter" in section 281 was "so open-ended" that it raised questions as to what limits there might be on the scope. Manning, at 50-51. Manning postulated that some limits might be inferred from the character of the matters listed before the phrase "or other matter." Id. at 51. Whatever the force of this reasoning with respect to former section 281, the same could not be said with respect to 18 U.S.C. § 207(c) or (d), as neither of these current provisions contains an exemplary list of covered matters.

LA-17-03: Guidance on Executive Order 13770

U.S. Office of Government Ethics
Advanced Practitioner Webinar
Thursday, April 27, 2017

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LA-17-03: Guidance on E.O. 13770

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

March 20, 2017
LA-17-03

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
General Counsel

SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires "appointees" to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President's office OGE's prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on these discussions, this Legal Advisory identifies the parts of OGE's issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance.

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE's prior guidance on Executive Order 13490 is applicable to

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What is Covered in LA-17-03?
(Past Guidance)

- Elaboration on Guidance in LA-17-02
  - Extent to which past guidance is applicable to EO 13770
  - Extent to which past guidance is NOT applicable or NOT relevant to EO 13770

3

What is Covered in LA-17-03?
(New Guidance)

- LA-17-03 also addresses recusal obligations for recent lobbyists (pledge paragraph 7)
- Post-government employment restrictions
  - 5-year restriction under pledge paragraph 1
  - Administration-length restriction under pledge paragraph 3
  - Citations to – but not interpretations of – the Lobbying Disclosure Act (LDA)

4

What is Not Covered in LA-17-03?

- Section 3 of the new Executive Order concerning pledge waivers
- Paragraph 4 concerning post-government restrictions and the Foreign Agents Registration Act of 1938
- Paragraph 8 concerning employment decisions
- The continued applicability of EO 13490

5

Language Common to E.O. 13770 and E.O. 13490

6

LA-17-02: Executive Order 13770

"With respect to Executive Order 13770, ethics officials and employees may continue to rely on OGE's prior guidance regarding Executive Order 13490 to the extent that such guidance addresses language common to both orders."

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LA-17-03: Guidance on E.O. 13770

SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires "appointees" to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President's office OGE's prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on those discussions, this Legal Advisory identifies the parts of OGE's issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance.

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE's prior guidance on Executive Order 13490 is applicable to Executive Order 13770 to the extent that it addresses language common to both executive orders. Therefore, all substantive legal interpretations in the following Legal Advisories are applicable to Executive Order 13770: DO-09-005, DO-09-007, DO-09-010, DO-09-014, DO-09-020, DO-10-003, and LA-12-10. The following Legal Advisories remain valid in part, as specified in annotations that now appear in the versions posted on OGE's website: DO-09-003, DO-09-011, DO-10-004, and LA-16-08. For the convenience of ethics officials and employees, an enclosed table highlights certain language common to both executive orders and references prior guidance that is applicable to Executive Order 13770.

II. Paragraph 7: "Specific Issue Area"

Executive Order 13770 prohibits an appointee from participating in any particular matter on which the appointee lobbied during the two-year period before being appointed or in the "specific issue area" in which that particular matter falls. *See* E.O. 13770, sec. 1, par. 7; E.O. 13490, sec. 1, par. 3. The Counsel to the President's office has advised OGE that, as used in Executive Order 13770, the term "specific issue area" means a "particular matter of general applicability," and OGE has accepted the Administration's interpretation of this term. Although "specific issue" and "general issue area" are used in the context of the Lobbying Disclosure Act

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Example:

DO-09-010: Who Must Sign the Ethics Pledge?

Note: All substantive legal interpretations in this advisory are applicable to Executive Order 13770, sec. 1. *See* LA-17-02 and LA-17-03.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 16, 2009
DO-09-010

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Who Must Sign the Ethics Pledge?

The Office of Government Ethics (OGE) has received numerous questions concerning

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Example:

DO-09-011: Revolving Door Ban—All Appointees Entering Gov't

NOTE: All substantive legal interpretations in this advisory concerning Pledge paragraph 2 (E.O. 13490) and the terms used in Pledge paragraph 2 are applicable to Executive Order 13770, sec. 1, par. 6. All substantive legal interpretations pertaining to waivers of the Ethics Pledge are not applicable to Executive Order 13770, sec. 3. *See* LA-17-02 and LA-17-03.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 26, 2009
DO-09-011

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Ethics Pledge: Revolving Door Ban--All Appointees Entering Government

Executive Order 13490 requires any covered "appointee" to sign an Ethics Pledge that

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4/26/2017

Example:

DO-10-004: FAQs on Post-Employment under the Ethics Pledge

Note: Please see the attached addendum for the applicability of substantive legal interpretations in this advisory to Executive Order 13770. *See also* LA-17-02 and LA-17-03.

Addendum (March 20, 2017)
DO-10-004: Post-Employment Under the Ethics Pledge: FAQs

The following substantive legal interpretations in this advisory are **applicable** to Executive Order 13770:

- Part A. Post-employment cooling-off period. See E.O. 13770, sec. 1, par. 2
  - Q2. Which appointees are subject to the restriction
  - Q3. How the restriction affects very senior employees
  - Q4. Which officials may not be contacted under this restriction
  - Q5. Applicability of exceptions under 18 U.S.C. § 207(c) to the restriction
- Part B. Post-employment lobbying ban. See E.O. 13770, sec. 1, par. 3
  - Q1. Relationship of the lobbying ban to other restrictions
  - Q2. Whether the lobbying ban applies to appointees who are not senior employees
  - Q5. Duration of the lobbying ban
  - Q11. Whether exceptions to the restriction exist

The following substantive legal interpretations in this advisory are **applicable in part** to Executive Order 13770, to the extent that they address the core questions listed below. However, because the post-employment ban in Executive Order 13490 restricts "lobbying," while the corresponding ban in Executive Order 13770 restricts "lobbying activities," the substantive legal interpretations of

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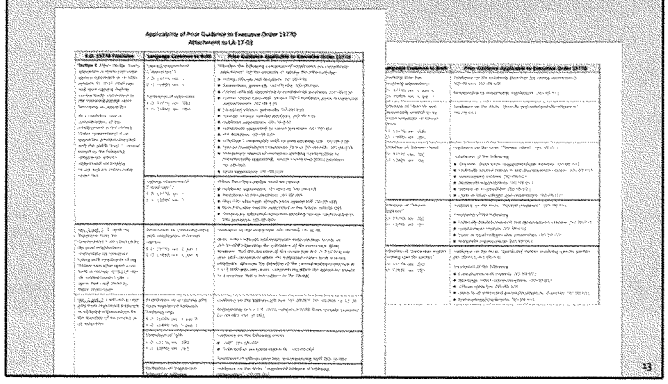
02/26/2009

DO-09-010: Who Must Sign the Ethics Pledge?

OGE identifies the categories of officials who must sign the Ethics Pledge required by Executive Order 13490 and those who are not required to sign. [The guidance in this advisory was modified in 2017 by legal advisories LA-17-02 and LA-17-03.]

4/26/2017

Attachment to LA-17-03



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Language Common to Both

E.O. 13370, sec. 1, par. 6

I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

E.O. 13490, sec. 1, par. 2

I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

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Language Common to Both

E.O. 13370, sec. 2(b)

"Appointee" means every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

E.O. 13490, sec. 2(b)

"Appointee" shall include every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

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Attachment to LA-17-03

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Section 1. *Ethics Pledge.* Every appointee in every executive agency appointed on or after January 20, 2017, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee: As a condition, and in consideration, of my employment in the United States Government in an appointee position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law.	Signing requirement ("appointee") E.O. 13770, sec. 1 E.O. 13490, sec. 1 Definition of appointee E.O. 13770, sec. 2(b) E.O. 13490, sec. 2(b)	Whether the following categories of employees are considered "appointees" for the purpose of signing the ethics pledge: • Acting officials and detailees: DO-09-010 • Appointees, generally: DO-09-003, DO-09-010 • Career officials appointed to confidential positions: DO-09-010 • Career Senior Executive Service (SES) members given Presidential appointments: DO-09-010 • Excepted service, generally: DO-09-010 • Foreign Service, similar positions: DO-09-010 • Holdover appointees: DO-09-010 • Individuals appointed to career positions: DO-09-003 • IPA detailees: DO-09-020 • Schedule C employees with no policymaking role: DO-09-010 • Special Government Employees (SGEs): DO-09-005, DO-09-010 • Temporary advisors/counselors pending confirmation to Presidentially appointed, Senate confirmed (PAS) positions: DO-09-005 • Term appointees: DO-09-010
	Signing requirement ("shall sign") E.O. 13770, sec. 1 E.O. 13490, sec. 1	When the ethics pledge must be signed: • Holdover appointees: DO-09-010, DO-09-014 • Nominees to PAS positions: DO-09-005 • Non-PAS who have already been appointed: DO-09-005 • Non-PAS who may be appointed in the future: DO-09-005 • Temporary advisors/counselors pending Senate confirmation to PAS positions: DO-09-005

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Paragraph 7:
Particular Matter & Specific Issue Area

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment . . .
I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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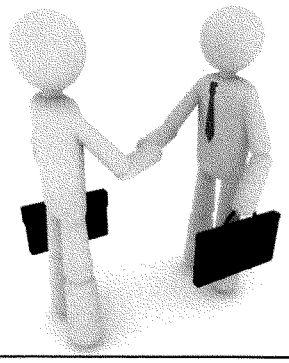
Paragraph 7



If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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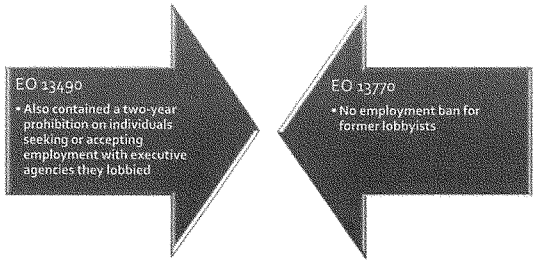
Paragraph 7: Specific Issue Area

"Specific issue area" is not defined in LDA or Executive Orders 13490 or 13770



21

Paragraph 7: PMGA

As used in Executive Order 13770, the term "specific issue area" means a "**particular matter of general applicability**"

If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 6, I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

22

Paragraph 7

Lobbied on:	→	Recusal:
Particular Matter	→	Same Particular Matter

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

23

Paragraph 7

Lobbied on:	→	Recusal:
Particular Matter	→	Same Particular Matter
Matter	→	No Recusal to that Matter

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 6, I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Ethics Pledge: Restrictions for Incoming Appointees

Paragraph 6 *Not limited to registered lobbyists*	I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.
Paragraph 7 *Limited to registered lobbyists*	If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraphs 1 and 3:

Post-Employment Lobbying Activity Restrictions

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Ethics Pledge: Post-Employment Restrictions

Paragraph 1	I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.
Paragraph 2	If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with appointees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions.
Paragraph 3	I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.
Paragraph 4	I will not, at any time after the termination of my employment in the United States Government, engage in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2017, would require me to register under the Foreign Agents Registration Act of 1938, as amended.

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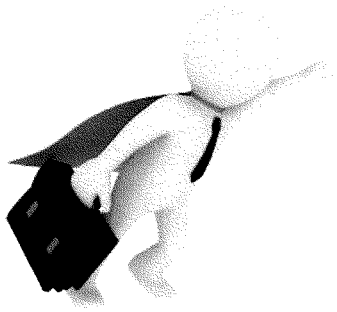
Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions



29

Paragraph 1

I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.

30

Paragraph 3

I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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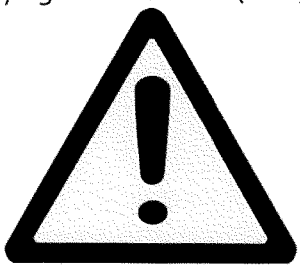
Restricted Activity

- Engage in a "lobbying activity" as defined by the Lobbying Disclosure Act (LDA)



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Engage in a Lobbying Activity

You engage in a "**lobbying activity**" if you:

- Make a lobbying contact
  - Written or oral communications
  - With covered executive or legislative branch officials
  - On behalf of a client
  - For financial or other compensation
  - 19 exceptions

OR

- Engage in behind-the-scenes efforts in support of such lobbying contact

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Paragraph 1: "With respect to" that agency

A lobbying activity occurs "with respect to" that agency if the activity involves :

- A communication to a covered executive branch official at that agency *(component designations may be available)*

OR

- Efforts intended, at the time of performance, to support such a communication to a covered executive branch official at that agency

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Paragraph 3: "With respect to" certain officials

A lobbying activity occurs "with respect to" certain officials if the activity involves :

- A communication to a covered executive branch official or non-career SES

OR

- Efforts intended, at the time of performance, to support such a communication to a covered executive branch official or non-career SES

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency = Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Paragraph 3: Examples

- Write to various exec branch officials seek support for his client's research
- Assist his client in preparing for a meeting with one of the officials
- Assist his client in understanding grant application process and guidelines that agency established for research projects
- Request the status of an action affecting his client.

I agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

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Paragraph 1: Examples

Write to a covered executive branch official at NIH to seek support for his client's research

Assist his client in preparing for a meeting with the FDA official

Contact covered legislative branch official to discuss pending legislation that could affect NIH research projects

I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.

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LA-17-03: Guidance on Executive Order 13770

U.S. Office of Government Ethics
Advanced Practitioner Webinar
Thursday, April 27, 2017

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Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Question 7: Land and Water Conservation

For more than 50 years, the Land and Water Conservation Fund has been one of the most powerful tools we have available to preserve and ensure access to America's most iconic landscapes. It is a tool that has created or expanded thousands of treasured hunting, fishing and hiking opportunities and it has protected our cultural heritage. That's why the Land and Water Conservation Fund is supported by hundreds of organizations from around the country representing sportsmen, conservationists, veterans and outdoor enthusiasts from all backgrounds. In fact, according to a recent Western States Survey, more than 80 percent of people supported reauthorizing the LWCF.

Mr. Bernhardt, do you think Congress should directly and fully fund the Land and Water Conservation Fund at its authorized level so it is not subject to future appropriations?

Mr. Bernhardt, if Congress appropriated the fully authorized $900 for the Land and Water Conservation Fund for fiscal year 2020, how would the Department of the Interior use those funds?

Mr. Bernhardt, how would funding at the full level compare to what the LWCF would accomplish under the President's FY 2020 budget request?

Response: I support the Land and Water Conservation Fund, and applaud Congress for permanently reauthorizing this fund as part of the John D. Dingell Jr. Conservation, Management and Recreation Act, which became law just three weeks ago. I would be happy to engage in discussions with the Committee on different and creative ways to implement the LWCF.

Question 8: Offshore Drilling

Last year, your predecessor Secretary Zinke directed the Bureau of Ocean Energy Management to develop the National Outer Continental Shelf Oil and Gas Leasing Program for 2019-2024. The program would attempt to allow oil and gas drilling in over 90 percent of U.S. coastal waters, including off the Washington state coastline. This is unprecedented and along with many of my colleagues, I have heard from communities and businesses throughout my state and they are extraordinarily concerned about the impacts offshore drilling with have on local economies. In fact, local legislators, governors, businesses, and others affected by these decisions told Secretary Zinke and the Department of Interior that they do not want to expand offshore drilling activities on coasts—especially in the Pacific.

Mr. Bernhardt, do you support opening any or all waters off the coat of Washington state to offshore drilling and gas exploration, development of production?

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Mr. Bernhardt, do you value public comment on proposed Department of the Interior activities? How do you plan to weigh and incorporate public comments on the National Outer Continental Shelf Oil and Gas Leasing Program for 2019-2024?

Mr. Bernhardt, if there is Congressional opposition, opposition from a state's Governor and the State is under a federal offshore drilling moratorium until 2022, will you commit to removing that state from the National Outer Continental Shelf Oil and Gas Leasing Program for 2019-2024?

Response: In formulating an Outer Continental Shelf leasing program, the Outer Continental Shelf Lands Act (OCSLA) requires the Secretary of the Interior, through the Bureau of Ocean Energy Management, to set a schedule of proposed lease sales that indicates the size, timing, and location of leasing activity that "best meets national energy needs." The OCSLA also specifically requires the Secretary to invite and consider comments from the Governors of any affected state. Comments from the public, governors, Members of Congress, tribes, and stakeholders are an integral part of Program development. The governing statute provides multiple opportunities for participation though public meetings, scoping meetings, and open houses. In addition, if confirmed, I will be happy to meet with governors, Members, and other interested parties affected by the development of offshore energy whether it be in the form of fossil fuels or renewable energy.

Question 9: North Cascades Grizzly Bear Recovery

Last year, former Secretary Zinke visited Washington state and on Friday March 22, 2018, former Secretary Zinke publicly stated his support for Grizzly Bear Restoration in North Cascades National Park and the surrounding ecosystem. A quote from former Secretary Zinke in a U.S. Department of the Interior press release stated:

"Restoring the grizzly bear to the North Cascades ecosystem is the American conservation ethic come to life," **said Secretary Zinke.** ***"We are managing the land and the wildlife according to the best science and best practices. The loss of the grizzly bear in the North Cascades would disturb the ecosystem and rob the region of an icon. We are moving forward with plans to restore the bear to the North Cascades, continuing our commitment to conservation and living up to our responsibility as the premier stewards of our public land."***

According to a poll conducted by Tulchin Research, found that 81% of those who were pulled agree that "the State of Washington should make every effort to help grizzly nears recover and prevent their disappearance."

The Federal Government has invested over $1 million dollars over four years in North Cascades Grizzly Recovery and the work is not complete.

Congressional Report language in the 2019 Consolidated Appropriations Act stated:

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The Conferees direct the Service to work with ranchers, conservation groups, local governments, and other local partners to reduce conflicts between grizzly bears and livestock. These efforts should draw upon lessons learned with the Wolf Livestock Loss Demonstration Program to improve conservation outcomes while limiting effects to agricultural producers. Not less than 30 days after the date of enactment of this Act, and for a duration of not less than 90 days, the Service and the National Park Service are directed to re-open the public comment period regarding the draft environmental impact statement with proposed alternatives for the restoration of grizzly bears to the North Cascades Ecosystem. Any member of the public in attendance at any of the associated public forums and wishing to voice their opinion must be afforded the opportunity to do so.

Mr. Bernhardt, can you describe at what stage is the current North Cascades Grizzly Bear Environmental Impact Statement (EIS)?

Response: The National Park Service and Fish and Wildlife Service held a public comment period on the draft EIS with proposed alternatives for the restoration of grizzly bears to the North Cascades Ecosystem in early 2017 and received over 126,000 comments. In accordance with the Congressional Report language, the two bureaus are preparing to reopen the comment period to allow additional opportunity for public input.

Mr. Bernhardt, when will the Department re-open the public comment period on the North Cascades Grizzly Bear EIS? Will the Department host additional public meetings? When and where will these public meetings occur?

Response: In accordance with the Congressional Report language, the National Park Service and Fish and Wildlife Service are preparing to reopen the comment period to allow additional opportunity for public input. I expect the notice to be published in the coming weeks, and for public meetings to be held shortly thereafter.

Mr. Bernhardt, following the additional public comment period, will the Department finalize the North Cascades Grizzly Bear EIS? What is the timeline for finalizing the EIS?

Response: Following the additional public comment period, the next steps for the National Park Service and Fish and Wildlife Service include review of comments received; preparation of a final EIS (which will include written responses to public comments); issuance of the final EIS; and issuance of a final Record of Decision. The timeline for that process will depend on the number of public comments received and the scope of those comments.

Mr. Bernhardt, do you support your predecessor's statement on the need to restore the grizzly bear in the North Cascades ecosystem?

Response: I believe that we all benefit from the conservation of the grizzly bear. In addition, any effort to introduce bears must fully address the impacts to people and communities from such efforts, including public safety.

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Question 10: Goat Mountain Mining Project

On December 3, 2018, the Bureau of Land Management released the Finding of No Significant Impact (FONSI) and Decision Record (DR) on the Goat Mountain Hard Rock Prospecting Permit Applications. This decision awards a mining company, Ascot USA, two hard rock prospecting permits within the Gifford Pinchot National Forest, about 12 miles northeast of Mount St. Helens and adjacent to and extending from the boundary of the Mount St. Helens National Volcanic Monument.

The Green River valley is a very popular recreation destination for hunting, fishing, backcountry horse riding, hiking, and camping due to its scenic beauty, healthy fish and wildlife populations, and proximity to the Monument. In addition, the Green River has been found by the Forest Service to be eligible for designation as a Wild and Scenic River and has been designated by the state of Washington as a Wild Steelhead Gene Bank. The Green River is also an important human resource, as it flows into the Cowlitz River, which supplies municipal drinking water for hundreds of people that live in downstream communities.

The Forest Service purchased the land on which the Goat Mountain Project is proposed in 1986 with funding from the Land and Water Conservation Fund. As such, mineral development can only be authorized by the Secretary of the Interior, when advised by the Secretary of Agriculture, that "such development will not interfere with the primary purposes for which the land was acquired and only in accordance with such conditions as may be specified by the Secretary of Agriculture to protect such purposes." 5 U.S.C App. 1, 402. Before purchasing this land, the Forest Service sent a letter to Washington's Congressional delegation stating that the Forest Service's acquisition of the property would be to "aid in the preservation of the integrity of the Green River prior to its entering the National Volcanic Monument, and will also aid in the preservation of the scenic beauty of this area which is to become an important Monument portal."

I believe hard rock mining does not meet the intention of conserving the land for recreation purposes. The uses are inconsistent and commercial extraction of non-renewable natural resources seems completely at odds with the core principle of the Land and Water Conservation Fund.

Mr. Bernhardt, do you believe hard rock mining, including exploratory drilling, should occur on lands purchased through the Land and Water Conservation Fund?

Response: As you note, Congress specifically addressed the conditions where it is appropriate to consider such activities by adding the condition you referenced. If that is the case, it would seem the agency's decision would depend on whether or not "such development will not interfere with the primary purposes for which the land was acquired and only in accordance with such conditions as may be specified by the Secretary of Agriculture to protect such purposes."

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Question 11: Bureau of Indian Affairs Reorganization

At the 2019 Tribal Nation's Policy Summit winter session of the National Congress of American Indians, you stated the Bureau of Indian Affairs will remain intact and "will remain intact as we move forward with any plans to improve the Department of the Interior."

Mr. Bernhardt, can you confirm the Department of the Interior's reorganization plan does not include any changes to the Bureau of Indian Affairs programs?

Mr. Bernhardt, can you confirm the Department of the Interior's reorganization plan, or any other plan, does not include moving the location of the Bureau of Indian Affairs?

Response: As a result of tribal consultations carried out by the Department, the Bureau of Indian Affairs, the Bureau of Indian Education, and the Office of the Special Trustee for American Indians will not realign their regional structures to align with the other bureaus.

Question 12: Impact of Shutdown on National Parks

Local businesses and communities were harmed as a result of the 2018-2019 government shutdown. One example is the closure of Hurricane Ridge Winter Sports at the top of Hurricane Ridge in Olympic National Park because the road up to the ridge was closed because no National Park Service (NPS) personnel were available to plow snow. Likewise, at Olympic and Rainier National Parks, there were clear impacts to local communities and businesses from partial closure of the parks, with closed campgrounds and restrooms and other impacts leading to huge reductions in visits.

Mr. Bernhardt, what is the total amount of fee dollars obligated during the recent government shutdown and how many parks elected to use fee dollars? Please provide details on what specific activities were performed using fee revenues and in which parks? Can you please provide the list of parks and amount of fee dollars used and projects performed?

Mr. Bernhardt, can you detail the analysis regarding the likely impacts (contractors, partners, etc) of using fee dollars during the shutdown?

Mr. Bernhardt, how many NPS staff were paid using fee revenues during the lapse in appropriations?

Mr. Bernhardt, how much revenue was lost during the shutdown because no entrance or other forms of recreation fees were being collected?

Mr. Bernhardt, what was the total cost of repair to parks as a result of visitation to parks during the shutdown?

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Mr. Bernhardt, given your decision to replenish the lost fee dollars with the passage of the FY19 appropriations bills, what specific accounts had to be decreased in your operating budget in FY19?

Mr. Bernhardt, it's been reported that you have directed that all planned fee projects be halted until you approve the use of the fee dollars? What is your rationale for that?

Response: During the lapse in appropriations, the NPS, using retained fees collected under the Federal Lands Recreation Enhancement Act (FLREA) and in accordance with law, was able to address issues with restrooms and sanitation, trash collection, road maintenance, campground operations, law enforcement and emergency operations, and basic visitor services. Excepted staff that worked on specified allowable activities under FLREA were paid. Approximately 100 national parks were approved for the use of FLREA funds during this time.

While many of the smaller sites around the country remained closed, use of these funds allowed the American public to safely visit many of our national parks while providing these treasures additional protection and allowing NPS to meet its dual mandate. Importantly, the use of FLREA funds allowed continued visitor access to some park units, contributing to the economies of the respective gateway communities. It also meant that those employees who were providing these services were assured that they would receive a timely paycheck, an assurance that was comforting to some.

Congress, in the Fiscal Year 2019 Further Additional Continuing Appropriations Act (Public Law 116-5) that extended appropriations through February 15, 2019, explicitly made such funds cover the prior period during the lapse. Pursuant to this direction, the NPS was able to move obligations incurred during the appropriations lapse from the FLREA fee account to the account for which the charges were originally planned, including the NPS operating account, where most of these obligations would have been charged. The actions taken under these provisions, which were confirmed by the Office of Management and Budget, allowed NPS to fully restore FLREA balances to pre-lapse levels.

The Department is currently evaluating impacts to natural resources and infrastructure that occurred during the period of this lapse of appropriations from available funding. The Department is also collecting information related to the amount of revenue obligated during this period, and anticipates that additional information will be available early in the third quarter of operations. FLREA projects have been reviewed to ensure consistency with the law, and are continuing to be implemented across the country.

I hope that we will not be faced with another lapse of appropriations. However, I believe that this action provides critical direction for similar situations in the future. First, our national parks should not be made the public face of another lapse in funding, and we will be prepared to use these fees, as available, immediately for appropriate staffing, basic services, and other bureau needs in accordance with the authorities provided by law. In addition, we have modified our

contingency plans for the NPS and for the other relevant bureaus to ensure that in the event of a future lapse, we are prepared to use these fees for these allowable purposes.

Question 13: National Register of Historic Places

The Department of the Interior is proposing new regulations for the National Register of Historic Places that establishes weighted objections to listings by allowing the percent of land ownership to be a determining factor in objections.

Mr. Bernhardt, can you explain under what Congressional authority are you able to create a rule change that effectively changes the American voting structure?

Response: The proposed rule does not change the American voting structure. The proposed regulations you reference are intended to implement amendments to the National Historic Preservation Act included in the National Park Service Centennial Act of 2016 and to ensure that, if the owners of a majority of the land area in a proposed historic district object to listing, the proposed district will not be listed over their objection. Importantly, the 60-day comment period on these proposed regulations is open and will close on April 30, 2019, after which the NPS will carefully consider the comments received on this proposal.

Question 14: Disposable Plastic Water Bottle Recycling and Reduction

In August of 2017, the Department of the Interior overturned the prior Administration's "Disposable Plastic Water Bottle Recycling and Reduction" program, which was effectively a ban on the sale of plastic water bottles inside units of our National Park System. I absolutely support efforts to preserve customer choice, but plastic pollution remains one of the great environmental challenges of our time.

Mr. Bernhardt, as you prepare to more formally assume leadership of the Department of the Interior, I ask that you make time to focus on this issue of plastic pollution. Consistent with that request, I have a couple questions:

Following the decision in August of 2017 to overturn the prior Administration's ban on plastic water bottle sales inside units of the National Park System, has the Department undertaken any work on alternative approaches to mitigating or preventing plastic pollution on our federal lands and in our federal waters?

If not, can you please commit to providing me and the committee with a plan to do so within four months of being confirmed by the Senate?

Response: The NPS continues to promote recycling and reduce plastic waste while still providing as many safe, healthy hydration options as possible to visitors. Many parks have worked with partners to provide free potable water in bottle filling stations located at visitor

centers and near trailheads. At other parks, concessioners have implemented disposable water bottle reduction programs in consultation with park management and many parks conduct an annual clean-up, typically in partnership with the local community, and have information available in visitor centers on the importance of reducing waste. Several coastal parks also participate in research and monitoring projects related to marine debris and microplastics.

For FY 2018, the NPS reported that its solid waste management efforts are improving, as measured by the waste reduction rate, which measures parks' success in diverting waste from landfills. The rate for FY 2018 was 41.97%, compared to 31% for FY 2017. I will continue to support the effort to increase the diversion of waste from landfills.

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Questions from Senator Sanders

Climate Change

Question 1: The Department of the Interior's (DOI) mission, as stated on DOI's website, is to "conserve and manage [our] Nation's natural resources and cultural heritage." The vast majority of scientists tell us that climate change poses a number of serious risks to our nation's precious natural resources and cultural heritage, and that burning fossil fuels is the primary driver of climate change. Therefore, extracting and burning fossil fuels directly threatens our nation's natural resources and cultural heritage.

In the hearing to consider your nomination for DOI Deputy Secretary, you stated the following regarding your views on climate change:

"We are going to look at the science, whatever it is, but policy decisions are made. This president ran, he won on a particular policy perspective. The perspective is not going to change to the extent that we have the discretion under the law to follow it...we're absolutely going to follow the policy perspective of the president."

a. Do you agree that climate change is the greatest threat to our nation's natural resources and cultural heritage? If not, why not? If so, why did you not mention the threat of climate change at all in your testimony?

Response: As I indicated at that hearing, I recognize the climate is changing and that man is contributing to that change and the science, including in the fourth assessment, indicates that there is a lot of uncertainty in projecting future climate conditions.

b. Please outline your plan, including a timeline, for addressing climate change by ending any DOI activities, such as the extraction of fossil fuels from our nation's public lands that contribute to climate change.

Response: As I indicated at my hearing, I recognize that the climate is changing, man is contributing to that change, and the science indicates there is uncertainty in projecting future climate conditions. The Department of the Interior's role is to follow the law in carrying out our responsibilities using the best science. The laws governing Interior - such as the Federal Land Policy and Management Act - require us to manage our onshore federal resources on the basis of multiple use and sustained yield, which includes energy development. We are carrying out that statutory mission and will do so until Congress directs us differently. While I agree that the impacts of a changing climate need to be understood and addressed, the Department's role is to follow the law in carrying out our responsibilities. The laws that govern our resources management actions on public lands and offshore areas generally require us to manage these areas for maximum sustained yield of multiple uses, including energy development.

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Question 2: On March 28, 2017, the president issued an Executive Order, *Promoting Energy Independence and Economic Growth*, which included several provisions that would cause DOI to increase the extraction of fossil fuels, thereby violating its mission to conserve and manage our nation's natural resources and cultural heritage as well as contributing to climate change. Those provisions include:

a. Lifting any and all moratoria on federal land coal leasing activities related to Secretary's Order 2228.

b. Reviewing and suspending, revising, or rescinding the rules entitled "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands," "General Provisions and Non-Federal Oil and Gas Rights," and "Management of Non Federal Oil and Gas Rights," all of which limit fossil fuel extraction on public lands.

If confirmed, will you carry out the DOI's mission to protect our nation's natural resources and cultural heritage, or will you instead carry out the policy laid out in the aforementioned Executive Order? Are there any other policies of the President you intend to carry out that would violate DOI's mission protect our nation's natural resources and cultural heritage?

Response: I do not agree with the assertion that there is an inconsistency between the Executive Order and the Department's mission as set out in law. As I indicated in response to the previous question, while I agree that the impacts of a changing climate need to be understood and addressed, the Department's role is to follow the law in carrying out our responsibilities. The laws that govern our resources management actions on the public lands and offshore areas generally require us to manage these areas for maximum sustained yield of multiple uses, including energy development.

Question 3: In a March 20, 2019 CBS interview, EPA Administrator Andrew Wheeler stated that "most of the threats from climate change are 50 to 75 years out." However, the vast majority of the world's scientists tell us that climate change is already causing rising sea levels, increasing hunger and illness, extinction of species, and more frequent and intense extreme weather all around the world.

Do you agree with the vast majority of scientists, or do you agree with Administrator Wheeler's statement that "most of the threats from climate change are 50 to 75 years out"?

Response: I am unfamiliar with Administrator Wheeler's comments or the context in which he made them. My views are reflected above in the previous response

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Question 4: Do you accept the following findings from the Fourth National Climate Assessment on climate change-related impacts happening now?

a. Declines in surface water quality due to intensifying droughts, increasing heavy downpours, and reduced snowpack.

b. Increased air quality and health risks from wildfire and ground-level ozone pollution due to changes in temperature and precipitation.

c. Increased damage to America's trillion-dollar coastal property market and infrastructure due to increased frequency of high-tide flooding events driven by sea level rise.

d. Decreasing productivity of certain fisheries and damage to the marine ecosystems on which many of our coastal communities rely for livelihoods and recreation due to rising water temperatures, ocean acidification, retreating arctic sea ice, coastal erosion, and heavier precipitation.

Response: As I indicated at that hearing, I recognize the climate is changing and that man is contributing to that change and the science, including in the fourth assessment, indicates that there is a lot of uncertainty in projecting future climate conditions.

Public Lands

Question 5: In the hearing to consider Ryan Zinke's nomination for DOI Secretary, he told me that he was "absolutely against the sale or transfer of public land." In response to my questions for the record for the hearing to consider your nomination for DOI Deputy Secretary, you stated that you shared then-Secretary Zinke's "opposition to the sale or wide scale transfer of federal lands." And, in a March 6, 2019 speech to the North American Wildlife and Natural Resources Conference, you stated that the Trump administration opposes "large scale transfer [of public lands]."

After he was confirmed, then-Secretary Zinke conducted the largest rollback of federal land protection in our nation's history by proposing to slash the boundaries of the Bears Ears and Grand Staircase-Escalante National Monuments by more than two million acres. He also proposed to open the majority of U.S. coastal waters to oil and gas drilling in the largest offshore lease sale in American history and ordered the largest ever lease sale of the National Petroleum Reserve.

a. Do you believe it is appropriate for cabinet nominees, such as yourself, to lie to United States Senators during their constitutionally-mandated confirmation process?

Response: I do not agree with the premise of your question that Secretary Zinke lied. I believe it is unwise for any public official, whether elected or otherwise, to be untruthful.

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b. Given that the Trump administration opposes the large scale sale or transfer of public lands, please outline your plan, including a timeline, for reversing the decisions to shrink the boundaries of the Bears Ears and Grand Staircase-Escalante National Monuments, open up U.S. coastal waters and land to increased oil and gas drilling, and conduct the largest ever lease sale of the National Petroleum Reserve.

Response: To be clear, the President's proclamations issued under the Antiquities Act did not sell or transfer any lands out of federal ownership. Rather, as you may be aware, the Department, as it did before the issuance of the proclamations, continues to manage the public lands that were included within the original boundaries of Bears Ears and Grand Staircase-Escalante National Monument. Similarly, the authorizations of conventional or renewable energy development do not include the sale or transfer of any lands out of federal ownership.

Oil and Gas Leases

Question 6: In January 2018, DOI issued an internal Instruction Memorandum on oil and gas leasing rules that would make the National Environmental Policy Act review processes optional for potential oil and gas leases, eliminate the requirement for oil and gas lease site visits by DOI officials, and shrink the lease sale parcel protest period from 30 days to 10 days.

In response to my questions for the record for the hearing to consider your nomination for DOI Deputy Secretary, you stated that you would "advance Secretary Zinke's conservation agenda in a manner that is rooted in and supported by input from a wide array of stakeholders, particularly those state and local communities most directly affected by the decisions the Department makes." Furthermore, in your testimony, you stated that you would "actively seek input and listen to varied views and perspectives to help ensure the conclusions [you] draw are well informed."

Given that the January 2018 Instruction Memorandum on oil and gas leasing rules would severely limit input from state and local communities most impacted by DOI's decisions on oil and gas leases, please describe your plan, including a timeline, for withdrawing the Memorandum and replacing it with guidelines that are "rooted in and supported by input from a wide array of stakeholders, particularly those state and local communities most directly affected by the decisions the Department makes."

Response: The Department values meaningful public participation and an efficient environmental review process in the implementation of its onshore oil and gas program. The BLM observed a trend regarding protests over the past several years in which the percentage of parcels protested from the original sale notice had increased dramatically. This 10 day period is in addition to multiple opportunities for public participation and engagement through the BLM planning process under FLPMA and NEPA processes.

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Question 7: In my questions for the record for the hearing to consider your nomination for DOI Deputy Interior Secretary, I asked you if you could commit to the highest environmental protections for the Atlantic Region, Pacific Region, and Alaska Region, including the Beaufort, Chukchi, and North Aleutian Basin Planning Areas, identical with those provided by the Obama Administration, in your execution of President Trump's April 28, 2017 Executive Order to open our outer continental shelf to oil and gas drilling. You responded by stating that you were unaware of the details regarding the ongoing review of the Five Year Offshore Leasing Program.

Given that you have now had ample time to familiarize yourself with this plan, will you commit to the highest environmental protections for the Atlantic Region, Pacific Region, and Alaska Region, including the Beaufort, Chukchi, and North Aleutian Basin Planning Areas, identical with those provided by the Obama Administration? If so, please provide a plan, including a timeline, for withdrawing the 2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program and instead working to end all drilling in the Outer Continental Shelf. If not, why not?

Response: The Department's offshore energy development and safety activities are an important component of the Administration's policy of ensuring long term energy and economic security. The Administration's America First Offshore Energy Strategy calls for boosting domestic energy production to stimulate the Nation's economy and to ensure national security, while providing for responsible stewardship of the environment. The process of review and development of draft documents and proposals is currently ongoing. BOEM's management of the Nation's OCS oil and gas, marine minerals, and renewable energy resources will continue to be informed through environmental assessments, studies, and partnerships conducted under its Environmental Programs. These efforts are vital to ensuring that the impacts of OCS activities on the environment are understood and effective protective measures are put in place.

Question 8: In September 2018, DOI proposed eliminating safety rules for offshore oil and gas drilling that were adopted following the Deepwater Horizon accident, which killed 11 people and spilled 134 million gallons of oil into the Gulf of Mexico. This spilled oil decimated local economies and ecosystems. DOI now says that less rigid inspection and equipment requirements would have "negligible" safety and environmental risks.

a. Do you believe worker deaths are a negligible safety risk?

Response: No, I do not.

b. Do you consider 134 million gallons of spilled oil to be a "negligible" environmental risk? If not, please outline your plan, including a timeline, for withdrawing DOI's proposal to modify these safety rules.

Response: No, I do not. The Department's efforts, through the Bureau of Safety and Environmental Enforcement, to review the 2016 Well Control Rule for consistency with the

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policy set forth in Executive Order 13795, are aimed at improving the rule by codifying longstanding internal policies; revising provisions from which requests for alternate procedures or equipment were routinely granted; adding explanatory text to clarify existing regulations; and revising or removing provisions that provided no additional safety benefit, but increased regulatory complexity. These efforts are informed by career subject matter experts as well as independent organizations. In the wake of, and in response to, the Deepwater Horizon tragedy, 14 different organizations issued 26 separate reports. These reports contained a total of 424 recommendations to BSEE. BSEE considered the recommendations of these 14 organizations as inputs from outside, independent experts. The effect of this input is reflected in the draft revised Well Control Rule in that no proposed revision conflicts with or ignores any of the 424 recommendations made by those organizations.

BSEE also solicited input from a variety of stakeholders to identify potential revisions to the regulations promulgated through the draft revised Well Control Rule that would clarify unclear provisions of the original rule or reduce regulatory burdens without impacting safety and environmental protection.

Question 9: On January 22, 2019 I joined 13 of my Senate colleagues in sending you a letter requesting information on the Bureau of Ocean Energy Management's (BOEM) decision to continue work on the National Outer Continental Shelf Oil and Gas Leasing Program during the partial government shutdown. DOI's response, sent by BOEM Acting Director Walter Cruickshank, ignored several important aspects of our letter, so I will repeat those questions here.

In the Explanatory Statement accompanying the Consolidated Appropriations Act of 2018, Congress provided $171,000,000 for BOEM in Fiscal Year 2018, and included full funding for the five-year offshore leasing program through regular appropriations. At the time of our letter, what specific accounts, subaccounts, and programs were DOI and BOEM relying on to fund the continuation of the oil and gas activities referenced in our letter? Were these funds being used for other activities under the BOEM December 2018 contingency plan following the start of the government shutdown, and if so, what were those activities? Were these funds being used for other activities under the normal operations of the government prior to the shutdown on December 22, 2018, and if so, what were those activities?

a. Were BOEM's essential functions of emergency response and support for Bureau of Safety and Environmental Enforcement permitting operations short-staffed during the ongoing shutdown? If so, could the carryover funds used to support the 40 on-call employees working on the National OCS program have otherwise been used to support these shorthanded essential functions?

Response: To support activities and employees identified as "exempt" under the January 2019 contingency plan, BOEM utilized the direct appropriations and offsetting collections funds provided by the Consolidated Appropriations Act, 2018, to the Ocean Energy Management

account, specifically the Conventional Energy, Environmental Programs, and Executive Direction budget activities. BOEM had a limited amount of these funds left over from FY 2018 (such funding is termed "carryover") that was therefore available to fund FY 2019 mission functions in a manner consistent with appropriations language. Because this carryover was appropriated in FY 2018 and not expired (direct appropriations are available for two years and offsetting collections are available until expended), it was not subject to the FY 2019 lapse in appropriations.

Carryover funds were not used for activities identified in the Contingency Plan published December 27, 2018. That version of the plan stated that none of the employees performing excepted functions were funded ("Number of exempt employees whose compensation is financed by a resource other than annual appropriations (carryover): None"). BOEM refers to guidance from the Office of Personnel Management on the determination and definition of excepted (vice exempt) functions and how employees performing those functions are paid during a lapse in appropriations. Prior to the shutdown on December 22, 2018, carryover funds had been used to support ongoing mission work similar to the work undertaken during the shutdown.

b. Was the scope of activities related to the Environmental Compliance Monitoring program, which include monitoring for compliance with the Clean Air Act and Clean Water Act, at all curtailed during the shutdown, and if so, to what extent? Please include any reductions in personnel, inspections or other relevant activities.

Response: There was no potential of short-staffing. BOEM's contingency plan provides for over 60 BOEM employees to be on call to respond to BSEE requests for support in emergency situations.

Land and Water Conservation Fund

Question 10: On February 15, 2019, you tweeted the following:

"There's a lot to agree on in the #public lands package from the senate. The Trump administration fully supports reauthorizing #LWCF and we included it in our budget last year."

President Trump's FY2020 budget request would slash the Land and Water Conservation Fund's (LWCF) budget by 95 percent. A 95 percent budget reduction is not consistent with support for the LWCF. If confirmed, will you commit to submitting a FY2021 budget request for full funding for the LWCF of $900 million?

Response: I support the Land and Water Conservation Fund, and applaud Congress for permanently reauthorizing this fund as part of the John D. Dingell Jr. Conservation, Management and Recreation Act, which became law just three weeks ago. LWCF has only been fully funded by Congress twice since its enactment in 1965. Whatever funding level Congress chooses for this program, the Department under my leadership will faithfully execute the goals of LWCF.

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Questions from Senator Sanders

Question 11: If, like in FY19, Congress chooses to ignore the President's budget request and appropriate the LWCF budget at a higher level than the President's budget request in future fiscal years, will you commit to ensuring that all grant funds are awarded and delivered to their recipients in an expeditious manner?

Response: I commit to implementing the LWCF in accordance with laws passed by Congress.

Arctic National Wildlife Refuge

Question 12: Public Employees for Environmental Responsibility recently released a number of DOI documents which show that federal scientists believe there are significant gaps in scientific information related to fossil fuel extraction on the coastal plain of the Arctic National Wildlife Refuge (ANWR), and that numerous additional scientific studies related to vegetation, caribou, polar bears, birds, water, subsistence, cultural resources, fish, and public health are necessary before moving forward with fossil fuel extraction-related activities in ANWR. DOI attempted to hide these documents from the public, failed to clearly identify them in the draft Environmental Impact Statement (EIS) to implement an oil and gas leasing program within ANWR, and refused to release them in response to relevant Freedom of Information Act requests.

a. If confirmed, will you commit to publicly releasing any pertinent documents from federal scientists regarding this draft EIS? If so, please provide a timeline for releasing these documents.

b. Will you commit to ensuring that the draft EIS is revised and re-released to include all areas for which federal scientists believe more scientific research is necessary? If so, please provide a timeline for revising and re-releasing the draft EIS.

Response to a and b: DOI routinely releases scientific papers that have bearing on the Department's programs to the public, and this case is no different. The referenced documents were considered in the development of the leasing program and Draft EIS. The Department and the Bureau of Land Management are complying with the requirements of the authorizing legislation, the Tax Cuts and Jobs Act of 2017, the National Environmental Policy Act, and other relevant statutes, as we move toward conducting lease sales and providing for responsible development of these important resources. The agencies involved determined that data from the suggested studies were unnecessary to assure that the Draft EIS contained a robust environmental analysis of potential impacts of leasing for each of the referenced resources.

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Questions from Senator Stabenow

Question 1: It seems that I should remind you of the critical role the Interior Department plays in preserving the health of the Great Lakes, which hold 21% of the world's surface freshwater, provide drinking water to more than 30 million people, and support a $6 trillion economy.

The U.S. Fish and Wildlife Service, and the U.S. Geological Survey provide key research on water-quality and fish stocks, and conduct essential work to prevent the spread of invasive species like Asian carp that would decimate the Great Lakes.

But either this Administration has forgotten about this vital work, or considers it unimportant, because it has proposed a 14 percent budget cut to the USGS and a 16 percent cut to the US Fish and Wildlife Service for fiscal year 2020 – including a 28 percent cut to their efforts to combat Asian carp – which as I explained during your confirmation hearing for Deputy Secretary, are an eminent threat to the Great Lakes.

Given your and this administration's efforts to suppress science and exploit natural resources for mineral extraction and fossil fuel production, how can we trust you to protect the Great Lakes, especially when it's not even a priority for this President?

Response: I do not agree with the premise of your question. I support scientific integrity and have great respect for the work that Department scientists carry out. The Department is one of our country's principal stewards for the Great Lakes and we recognize the connection between the health of the Great Lakes Watershed and human health and the economy. The Department's budget request includes over $66 million for ecosystem work in the Great Lakes, and $107 million for invasive species work. This funding will support a number of federal and non-federal partnerships focused on critical restoration activities, including projects for aquatic invasive species management, including Asian Carp and habitat protection and restoration. Upon your request, if confirmed I would like to work with you on addressing the Asian Carp situation.

Question 2: During your confirmation hearing for Deputy Secretary, you promised me you would be "honest" to science – that you would look at it, evaluate it, and honor it. You said you were certain that scientists at the Interior Department were not under attack. However, under your leadership, the DOI has gone through great lengths to suppress science and limit public access to information – all, I might add, in the interest of fossil fuel projects that benefit companies you once represented as a private attorney. You signed Secretarial Order 3360 that abolished directions to use the best available science to increase understanding of climate change. On your watch, the DOI disbanded its Advisory Committee on Climate Change and Natural Resource Science; and proposed a rule restricting public access to information through the FOIA process – a proposal so alarming that even my Republican colleagues have called foul play. The DOI has deleted its top-level climate change web page, and has implemented a new screening process requiring scientific grants over $50,000 to be reviewed by political appointees.

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Scientists at the Interior Department and 12 other federal agencies recently reaffirmed the real threat of climate change in the Fourth National Climate Assessment. Isle Royale National Park in Northern Michigan is already experiencing significant impacts from climate change. However, as I understand, the Interior Department has removed all mention of climate from its latest draft resource management plan for the park. President Trump said he doesn't believe federal scientists, and this administration has clearly proven it has different priorities. The President's budget for fiscal year 2020 once again promotes fossil fuels at the expense of clean energy and conservation; and during the Trump Shutdown, you recalled workers to make sure oil and gas permitting continued – even while safety and environmental review personnel and national park employees remained furloughed.

I would like to know what has changed, then, since we last spoke. Either you have forgotten the commitments you made to me and this Committee, or thought we wouldn't notice your office's blatant attacks on science. Can you square with me how all of these activities demonstrate your commitment to be fair to science, and not this administration's desire to promote fossil fuels over all else?

Response: I do not agree with the premise of your questions. Science plays a critical role in our decision making process as does the law. Within the Department of the Interior over the last two years, the number of formal complaints of breach of scientific integrity have decreased. In addition, to further our application of well-grounded science, I have appointed a career scientist to serve as the Science Advisor to the Acting Secretary/Deputy Secretary, and if I am confirmed, he will continue to serve in the Immediate Office of the Secretary. There is no question that scientific integrity should underpin agency actions. As I have stated, my view is that an agency's decisions should be predicated on the best information, including an evaluation of science and application of the law. I believe when scientific data is evaluated on its merits and used as a basis to make legal and policy decisions that are honest to the science, conflicts will be reduced and those decisions will be reliable and legally sound. I believe when the Department picks and chooses between data, it is obligated to articulate a reason why it has done so, and it must be able to connect its conclusions to the facts it finds in a rational manner.

This is why I issued Secretary Order 3369 last September promoting open science. This Order is intended to ensure that the Department of the Interior bases its decisions on the best available science and provides the American people with enough information to thoughtfully and substantively evaluate the data, methodology, and analysis used by the Department to inform its decisions.

Question 3: When Mr. Zinke testified before this Committee during his confirmation hearing, he gave us his "full commitment" to support the Land and Water Conservation Fund. He recognized it as an "important program" and pledged to work with Congress to make it permanent. But to the disappointment of many of my colleagues, he fell short of his commitments and instead defended a FY2019 Interior budget that proposed a 95 percent cut to the program.

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This year, both parties in Congress came together to permanently authorize the Land and Water Conservation Fund as part of the John D. Dingell Jr. Conservation, Management, and Recreation Act. The Senate overwhelmingly passed this far-reaching lands bill by a vote of 92 to 8, and the House passed it by 363 to 62. So it seems both sides agree that America's most important conservation and recreation program merits permanent authority.

LWCF has leveraged over $329 million to protect special places across Michigan. In fact, one of the largest LWCF investments in the country is our very own Sleeping Bear Dunes National Lakeshore, where LWCF has invested over $96 million to protect the park's 65-mile shoreline and 400-foot dunes for generations more of hikers, kayakers, wildlife watchers, and fishermen.

Mr. Bernhardt, weeks after signing a bill that permanently authorizes the LWCF, President Trump sent Congress a budget proposal that guts its funding in fiscal year 2020. I don't understand how you can be a champion for the LWCF and lead a department that has effectively called for eliminating it. Please explain.

Response: I support the Land and Water Conservation Fund, and applaud Congress for permanently reauthorizing this fund as part of the John D. Dingell Jr. Conservation, Management and Recreation Act, which became law just three weeks ago. LWCF has only been fully funded by Congress twice since its enactment in 1965. Whatever funding level Congress chooses for this program, the Department under my leadership will faithfully execute the goals of LWCF.

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Questions from Senator Cassidy

Question 1: Knowing much of the current focus in the Gulf for energy development is in deep water exploration and production, folks in my state are concerned about how we "revive" energy development activity specifically in shallow water and on the Outer Continental Shelf. Royalty rates for new leases on the Outer Continental Shelf (OCS) were lowered from 18.75 to 12.5 percent but according to the Bureau of Safety and Environmental Enforcement, shallow water bids decreased by 25 percent compared to August 2018.

What are your thoughts on additional measures that can be taken to stimulate further oil and gas exploration and production activity on the OCS?

Response: The prudent development of our abundant offshore energy resources is an important component of our economic prosperity. There are a number of factors that contribute to positive market conditions for development of these resources including the economy, energy prices, and the regulatory environment. As market conditions fluctuate, the Department has the statutory authority to adjust royalty rates for future offshore lease sales in accordance with federal law. The law also requires the Secretary to conduct lease sales on the OCS that ensure fair market value to the taxpayer. Within this legal framework, I will ensure that the Department continues to examine ways to improve our programs.

Question 2: It is my understanding that the U.S. Coast Guard and the Bureau of Ocean Energy Management (BOEM) have not been able to reach a satisfactory agreement to avoid siting offshore energy project leases in recognized maritime navigation lanes, including port access routes. Improper siting can result in collisions between vessels and derricks.

As we continue to expand our offshore energy footprint and seek to ensure the safety of mariners and energy project workers, will you direct BOEM to conclude a siting agreement for offshore leases with the U.S. Coast Guard as soon as possible?

Response: Yes, I will work to ensure an appropriate agreement is in place.

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Questions from Senator Martin Heinrich

Question 1: My office has been in regular contact with staff from your office and the Bureau of Reclamation involved in implementing the Aamodt Indian Water Rights Settlement. Specifically, the parties have been negotiating a path forward to resolve the forecasted cost-overrun associated with the construction of the Pojoaque Basin Regional Water System.

Can you confirm that the Bureau of Reclamation will allow for and move forward with limited construction of the System once the parties agree to a project design, cost, and cost allocation that addresses the forecasted System cost overrun, pending congressional authorization of an agreed upon ceiling raise?

Response: The Department has been working diligently with the parties to reach agreement, we are making progress and hope to reach an agreement soon. We are committed to working with you on next steps once that agreement is reached.

Question 2: The Compensatory Mitigation Instruction Memorandum issued by the Bureau of Land Management seems to contradict itself. The IM states "FLPMA does not explicitly mandate or authorize the BLM to require public land users to implement compensatory mitigation as a condition of obtaining authorization for the use of the public lands." In the next paragraph, the IM states "Even if FLPMA authorizes the use of compensatory mitigation, it does not require project proponents to implement compensatory mitigation."

Which one is it? Does BLM have the authority or not to require compensatory mitigation?

Response: FLPMA does not provide the BLM with the authority to require compensatory mitigation as a condition of authorization for the use of public lands or to require that project proponents implement compensatory mitigation. Because of this, the IM referenced in your question clarifies that the BLM will consider compensatory mitigation only as a component of compliance with mitigation programs authorized under a state's policy or statute, federal law other than FLPMA, or when voluntarily offered by a project proponent.

Question 3: In 2018, the Mexican Wolf Recovery Program reported 21 wolf deaths, which is an alarmingly high number given last year's total population estimate for New Mexico and Arizona combined was only 114 Mexican wolves.

What is the Fish and Wildlife Service's plan to address and curb this high mortality rate of endangered Mexican wolves, especially with the data revealing more than half of these wolf mortalities were illegal kills?

Response: The Fish and Wildlife Service recorded 21 Mexican wolf mortalities in 2018, the highest documented number of mortalities to occur in a single year. In 2018 compared to prior

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years, more Mexican wolves were radio-collared providing improved mortality detection, which is the likeliest explanation for the increase in documented mortalities. The Mexican wolf population continues to expand in terms of both area occupied and number of wolves. In addition to promoting Mexican wolf conservation through education and outreach programs, the FWS continues to investigate and help prosecute illegal Mexican wolf killings.

Question 4: I am glad to learn that the Department of the Interior is talking with the pueblos about conducting a pueblo-led study of tribal cultural heritage in the Greater Chaco Area. Such a study could demonstrate how beneficial it is for all the stakeholders in the development process to have tribal leaders involved from the very beginning.

However, I am concerned that the initial proposed study area is entirely within the buffer area where the pueblos (and the New Mexico Congressional Delegation) believe no development at all should take place.

Would you be willing to work with pueblo leadership to identify a more appropriate area for this first tribal cultural resource study outside the immediate buffer area around the park?

Response: As I indicated to you at the hearing, I would be more than happy to visit the site and meet with you and your constituents about potential development matters there at your request.

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Questions from Senator Hirono

Question 1: Recently in response to questions regarding the new grant review process being implemented over at DOI Mr. Scott Cameron commented that DOI was in the midst of finalizing the streamlining process.

When will the entire process be finalized and what will the new grant review process entail, including the established timeline for each grant review?

Response: The Department just published a proposed rule in the Federal Register, the Financial Assistance Interior Regulation, which addresses longstanding ethics issues identified by the Inspector General in the Department's past administration of grants. In addition, the Department is currently in the process of implementing a new grants management platform called GrantSolutions, which is an HHS product. This platform will allow standardization of business processes across the Department along with providing all of the grants information in a single repository. This will provide increased transparency, and greater efficiency in processing, accountability, and management. The complete transition to such a program will likely take years.

Question 2: In July of last year the Department of the Interior, under your leadership, and NOAA Fisheries proposed a set of sweeping regulatory changes to the Endangered Species Act that would drastically undermine this law and make it harder for imperiled species to recover.

What is the status of these proposed regulatory changes?

Response: The proposed revisions to regulations that implement portions of the ESA are in interagency review.

Question 3: One focus of the Endangered Species Act regulatory proposals released last summer by DOI and NOAA was the scope of impacts that could be considered when listing a species or when evaluating actions that could affect listed species and their designated critical habitats.

In particular, there are at least two proposed changes to the regulations that seem to minimize or eliminate consideration of the effects of climate change on species survival. In the proposed changes to Section 4 regulations, the definition of foreseeable future – which is used to determine whether to list a species as threatened – would be limited to "only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future *are probable*."

In the proposed changes to Section 7 regulations, a planned activity by a federal agency would be exempt from consultation with the Services if that activity has "effects that are

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***manifested through global processes*" if those effects "(i) cannot be reliably predicted or measured at the scale of the species' current range, or (ii) would result in very small or insignificant impact on the species or critical habitat, or (iii) are such that the risk of harm to a listed species or critical habitat is remote."**

These two components of the proposed regulations seem to allow the Services to circumvent consideration of climate change when enforcing the ESA, despite the widespread scientific consensus on the significant impacts of climate change on species and habitats. The ESA relies on use of the best available science, and its mandate is to prevent extinction, so is it not incumbent upon DOI to understand and incorporate information on climate change into its enforcement of this law?

Response: As I indicated at that hearing, I recognize the climate is changing and that man is contributing to that change and the science, including in the fourth assessment, indicates that there is a lot of uncertainty in projecting future climate conditions. An objective of this proposed revision to portions of the ESA implementing regulations is to clarify the meaning of certain ambiguous terms that are in the ESA itself but not defined in the Act. For example, the law allows us to list species as threatened when they are likely to become endangered in the foreseeable future, but it does not explain what "foreseeable future" means. We aim to provide the public and our federal agencies with a shared terminology that will increase regulatory certainty.

Question 4: The Department of the Interior is currently rewriting the regulations that protect threatened and endangered species. As part of those changes, you are proposing removing the current, comprehensive protections species receive when they are listed as threatened and instead only granting protections under a species-specific rule. At the same time, your Department has recommended slashing the funding appropriated to the Fish and Wildlife Service for their listing program.

How do you reconcile requiring the agency to do more work to make sure species receive the necessary protections and providing them with less money to do that work?

Response: The U.S. Fish and Wildlife Service's (USFWS) focus on the recovery of species has resulted in twelve species being delisted and downlisted, and nine species proposed for delisting and downlisting in this Administration. Our FY 2020 budget request includes $95 million dedicated to the recovery of species listed under the ESA. By recovering species and returning them to state and tribal management, we further our commitment to being a good neighbor by working with states and private landowners on conservation activities, and we are able to focus our limited resources on those species of greatest conservation need. With proposed FY 2020 Recovery funding, the USFWS anticipates proposing or finalizing 36 delisting or downlisting rules.

The request also includes $26.4 million for conservation and restoration activities that can help keep at-risk species off the threatened and endangered species lists and under the management of

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our state and tribal partners. The USFWS is committed to strengthening delivery of conservation under the ESA by making it easier to work with the agency on proactive conservation efforts for species. By investing in reducing threats to species and their habitats before they become critically imperiled, future conservation efforts are likely to be less costly, more flexible, and more likely to result in successful conservation over time.

Question 5: On Tuesday the 26th the NYT reported that you personally intervened in the biological opinions for chlorpyrifos and two other pesticides and that four years of work by career scientists that was ready for review by the public was shelved subsequent to your intervention. The story included the newly released analysis by FWS career staff, which included the finding that almost 1400 endangered species are being put on the path to extinction by chlorpyrifos.

Is it true that under the Endangered Species Act a biological opinion must be based on the best available science at the time?

In the 18 months that you have been Deputy Secretary, how many biological opinions have you personally intervened in? How many times has the Department purposefully withheld or delayed the sharing of scientific information with the public? Is it also true that the Endangered Species Consultation Handbook does not contemplate Secretary level review of any biological opinion but instead that they are to be reviewed by the director of the USFWS?

Response: I serve as Deputy Secretary in an operating environment where there is no Senate confirmed Solicitor, Assistant Secretary for Fish and Wildlife and Parks, or a Director of the U.S. Fish and Wildlife Service. As a result, over the course of the last nineteen months I have found myself engaged in many activities that I would greatly prefer others were spending their time and focus on.

However, my lawful ability to be engaged in a vast array of activities within the Department of the Interior flows from the reality that I act with all of the Authority of the Secretary of the Interior. I serve as his or her alter ego. Theoretically, I can exercise all of the authority of the Secretary of the Interior.

I disagree with the factual premise of your question. Science related to the biological opinions for the pesticide related consultations have not been "shelved", but are undergoing further review and improvement.

Biological Opinions must be consistent with the law and science. They must comport with FWS' regulations. I am aware of no case in which the Department has purposely withheld or improperly delayed the sharing of scientific information with the public, where disclosure was appropriate during my tenure. I issued Secretary's Order 3369 last September promoting open science. This Order is intended to ensure that the Department of the Interior bases its decisions on the best available science and provides the American people with enough information to

thoughtfully and substantively evaluate the data, methodology, and analysis used by the Department to inform its decisions.

Under section 7(a)(2) of the ESA, each federal agency involved in the consultation is required to use the best scientific and commercial data available. The ESA assigns authority for implementing the Department's role in Section 7 to the Secretary, but that authority is also delegated to the Assistant Secretary of Fish Wildlife and Parks, and then to the Director of the Fish and Wildlife Service and further delegated by the Fish and Wildlife Service Manual to career senior executives or their subordinate managers. The Consultation Handbook reflects the Service's internal delegations, and decision authority for the pesticide biological opinions follow those delegations.

Question 6: I understand you have been realigning DOI regions to create 12 unified regions.

a. NPS has seven regions. Do you intend to hire 5 new regional directors or what is your plan?

Response: The unified boundaries went into effect in August 2018, pursuant to a Congressional reprogramming. As a result, the National Park Service consists of a headquarters office, twelve regions, and multiple parks and support units. In some cases a NPS Regional Director may oversee more than one region, or the NPS may choose to make other organizational changes over time.

b. How is this realignment impacting career staff and morale?

Response: The realignment enables all bureaus, except for the Bureau of Indian Affairs, the Bureau of Indian Education, and the Office of the Special Trustee for American Indians, who are not participating at this time, to operate on a common geographic framework. This structure should have a positive impact on employees as it improves communication and increases interaction among staff across bureaus, while also setting the stage for improving delivery of shared services. Inter-bureau teams were formed to provide input on all aspects of reorganization, and many participants found the interactions so useful that they have independently continued their regular meetings.

c. What is the opportunity cost and what impact does this realignment have on the bureau's budget?

Response: Establishing unified regions is designed to improve service delivery to the American public. The Department will leverage the unified regional structure to improve coordination and streamline business operations using shared services and best practices across the Department, focusing primarily on human resources, information technology, and acquisition services. Work is underway in 2019 to plan implementation, conduct analysis, and identify areas for

collaboration. The FY 2020 budget request for NPS includes $5.7 million to support the reorganization.

d. Will staff be asked to relocate?

Response: Currently there are no announced plans to relocate staff as part of implementing the Unified Regions.

Can you report on what precisely you are doing with the funds that were appropriated in FY19?

Response: The Department has been working with each of the relevant bureaus to finalize their 2019 implementation strategies since the funds became available in February 2019, and taking a careful and methodical approach in order to spend this money wisely. The 2019 funding will help implement changes needed within the bureaus to align their field operations to the new unified regional structure. Funds will be used to finalize proposals to relocate some staff out West. This 2019 funding will also be used to identify the best strategies for implementing smarter ways of doing business through shared services at the regional, bureau, and national levels.

The FY20 DOI Budget in Brief gives little detail as to how the proposed $28 million would be used. Please expand on how those funds would be used and justify how that number was arrived at.

Response: In FY 2020, the Department will continue implementing the reorganization effort, including standing up the unified regions, relocating a small number of headquarters staff and functions as appropriate, and improving operations through the use of technology, shared services and consistent best practices. We are working now to redesignate the bureau's prior regional assignments to the new boundaries. We expect to complete revisions to the Departmental Manual to reflect the unified regions this Spring.

We have received the first of three third party reviews of the Department's acquisition, information technology, and human capital services, which will help us identify the best business decisions and inform an implementation strategy that will improve the quality and efficiency of "back office" functions, allowing us to shift resources to public-facing work.

What agencies do you intend to move to the West?

Response: We propose to move some functions in the Bureau of Land Management closer to field operations. The USGS also proposes to move some leadership functions and staff to Colorado, phased over time.

Do you still intend to have Interior Regional Directors? What is your plan for having any centralized command?

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Response: The current budget proposal contemplated Interior Regional Directors.

Please report on the progress to date in the four focus areas. What exactly do you mean by "collaborative conservation"? What is your plan for recreation and permitting?

Response: The six focus areas are the 3 mission areas (Recreation, Collaborative Conservation, and Permitting), along with three administrative areas with potential shared services in information technology, acquisition, and human resources. Regional teams of experts in each mission area have been working together for many months to plan and accomplish priority activities.

- Collaborative conservation involves leveraging the bureaus' individual efforts to plan and implement programs and activities in the areas of species and habitat conservation, such as creating wildlife corridors and invasive species management.

- Enhanced recreation has been a Departmental priority since the beginning of the reorganization effort. We recently launched an online portal that helps people find recreation opportunities on Department-managed lands from one web page. The plan is to continue to increase opportunities for recreation and afford the American people greater access to their public lands.

- Permitting is a mission area where the bureaus have already made great strides in improving customer service to our many permittees. Improvements include expedited, but still legally compliant timelines and more clear and concise documents. We are planning additional improvements as the bureaus continue to work together through the unified region structure to improve cooperation and communication at the local and regional levels. The local bureau leaders are most familiar with the issues and the landscape or context for those issues and the unified region structure ensures better informed decisions by focusing decision-making on the same geography and stakeholders.

Question 7: During your last nomination hearing I also asked how you will balance fossil fuel interests with the health of our economy and environment. You responded by saying "...my view is that policy decisions should be predicated on the evaluation of science and application of the law. If confirmed, I will make decisions with an open mind, actively seeking input and listening to varied views and perspectives."

From whom are you seeking input? Is it from your own internal experts and career scientists or is it from outside sources?

Response: I have a deep appreciation for the dedicated career public servants and the work that they do at the Department. In my personal statement submitted for my confirmation hearing, I indicated that I seek out varied views, even when we disagree. During my tenure as Deputy Secretary, I have had more meetings with environmental, conservation, and sporting groups than

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any other type of external group. However, the vast majority of my information comes from internal experts, comments submitted by the public in regulatory proceedings, and other federal agency sources.

Question 8: In September 2018, the Bureau of Land Management made final its methane rule, which significantly altered the previous rule by eliminating its most significant requirements to reduce extensive waste of natural gas on federal lands. The 2016 rule was finalized after years of collecting data and stakeholder input as well as broad public support. This 2016 rule not only would have protected public health and reduced potent greenhouse gas emissions, it would have recouped millions of taxpayer dollars.

The Trump Administration's rule allows operators to waste a significant amount of taxpayer-owned methane every year during production. Adding to the waste, operators pay royalties on a fraction of wasted methane, costing taxpayers even more money. The BLM estimates that the new rule will cost taxpayers up to $80 million in lost royalty revenue and decrease natural gas production on federal lands by 250 billion cubic feet (bcf) over 10 years.

Why has the Department repealed this rule and put in place a rule that jeopardizes public health and costs taxpayers?

Response: I disagree with your premise that the 2010 rule "jeopardizes public health and costs taxpayers." The Department has provided a lengthy explanation to describe its action in the preamble to the rule which is available to you. Essentially, the explanation is that the rule was revised to reduce unnecessary compliance burdens; to be consistent with the Bureau of Land Management's existing statutory authorities; and to re-establish long-standing requirements that had been replaced. The final rule became effective on November 27, 2018. It is my personal view that the 2016 rule was an unlawful assertion of authority that Congress had not provided the Department, and if Congress wants to provide such authority it could do so at any time.

Question 9: In a recent speech at the North American Wildlife and Natural Resources Conference, you reportedly stated that the Trump administration "generally" opposes "large-scale transfer [of public lands]," but later added that "not everything is required to stay in federal hands."

If confirmed as Secretary, will you commit to not selling federal lands?

Response: My views on the disposal of public lands have not changed since I was confirmed to be Deputy Secretary of the Department of the Interior in 2017. As I noted at that time, I oppose the sale or wide scale transfer of federal lands. I will, however, faithfully execute the laws that Congress has put in place, including for example the provisions of the Federal Land Policy and Management Act. In addition the recent lands package contained a provision allowing certain Alaska Native Veterans of Vietnam to make land selections in Alaska.

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Question 10: In September 2017, you were the lead on a Secretarial order restricting environmental reviews under the National Environmental Policy Act (NEPA). The order reduces the time allowed for staff to conduct environmental assessments, while also limiting the scope of the studies by setting and enforcing arbitrary page limits of 150 pages, or 300 pages for an assessment considered "complex."

Do you agree that many decisions that DOI makes are complex, involve many stakeholders and require thorough scientific reviews? If so, why is the agency taking steps to limit studies and require arbitrary page and time limits?

Response: The primary goal of the order referenced in your question is to streamline the Department's environmental reviews while continuing to meet or exceed the National Environmental Policy Act requirements for informed decision making and public participation in environmental impact statements and environmental assessments. The Department's own NEPA regulations at 43 C.F.R. 46.240 direct the bureaus to set time limits. The framework is intended to encourage bureau and Departmental leadership to carefully scrutinize internal processes, when warranted. The order does not set arbitrary limits. Instead, it establishes a process to secure a waiver for any EIS that will exceed either the time completion goal or page goal. I have approved many timeline and page limit waivers upon request.

Question 11: In response to a request from your former client the Independent Petroleum Association of America, DOI reversed longstanding, bipartisan interpretations of the MBTA in order to end all enforcement of incidental takes, and removing any liability by oil and gas companies under the law. Since that time, you have received opposition from a large bipartisan group of former DOI officials and Flyaway Councils representing most state wildlife agencies in the country, and the Justice Department has questioned the changes. Despite all of this, the M-Opinion stands as the Department's current interpretation of the law.

Does the Department have scientific data to back-up this opinion that stands at odds with so many others who have longstanding experience on the issue?

Response: Solicitor opinions are based on the law. On December 22, 2017, after reviewing the text, history, and purpose of the MBTA, the Solicitor issued M-37050, which takes into account the positions of various Federal Courts of Appeals.

M-Opinions are issued by the Solicitor and they are some of the most important and serious work undertaken by the Office of the Solicitor. This important legal guidance is to be based on the law, not outside influence. The work to develop an opinion is a thoughtful and studious exercise.

I did not personally review the research or the prior case law before M-37050 was issued. However, I reviewed a draft and possibly drafts of this legal opinion, that would become the legal guidance for the entire Department.

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I certainly informed the drafters that I thought they had done a good job analyzing an important legal question.

It is my personal opinion that the direction and need for the Office of the Solicitor to issue an M-Opinion on the Migratory Bird Treaty Act and its application was the direct result of an M-opinion issued on January 10, 2017, which was suspended very early in the Trump Administration. It is my view that the opinion should not have been issued as the Solicitor was walking out the door, a Solicitor who would not be burdened by the responsibility of implementation and defense of that position, particularly in light of contrary case law in multiple Federal Courts of Appeals. Obviously, a broad and diverse set of interests care about the scope of lawful authority of the Migratory Bird Treaty Act and its overall application. Many have views on it, and Congress can impose any liability standard it would like to affirmatively impose.

I have neither a personal or professional relationship with the IPAA or its employees.

Question 12: Has the National Park Service conducted a damage assessment and report on the total costs to park system (e.g. damage to visitor centers, buildings, restrooms, equipment, roads, forests, trails, signs, petroglyphs, entry fee lost, etc.) due to the recent federal government shutdown? If so, can you provide the report to the committee and if not, can you provide to the Committee a complete accounting?

Response: The Department is currently evaluating impacts to natural resources and infrastructure that occurred during the period of this lapse of appropriations from available funding. The Department is also collecting information related to the amount of revenue obligated during this period, and anticipates that additional information will be available early in the third quarter of operations and will share this information with the Committee.

Question 13: Between 2011 and 2017, park visitation increased by 19%, but staffing has been reduced by 11%. How does the Department justify the decrease in staffing levels with record level visitation in our parks?

Response: There are many things that occurred during the prior administration that I find need careful review. This is certainly one of them. I do think we are too constrained on the front lines. The staffing levels proposed in the FY 2020 budget are an estimate of what could be funded and are not a specific target. Department-wide studies are underway looking at ways to manage back-office functions like human resources, information technology, and procurement more efficiently including developing and adopting consistent best practices across bureaus and offices to potentially reduce the overall personnel needs in these areas, thereby freeing up resources and staff who interact with the public. Additionally, numerous park employees have suggested to me that we reassess the policy of not hiring and paying for permanent employees with park fees perhaps that is something we need to consider.

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Question from Senator Hyde-Smith

Question: On July 17, 2014, the Department of the Interior U.S. Fish and Wildlife Service Leadership Team issued a memorandum to Regional Refuge Chiefs regarding agricultural practices for wildlife management on national wildlife refuges. Specifically, the memorandum stated that neonicotinoid pesticides could not be a part of a farmer's integrated pest management plan. In addition, it directed refuge chiefs to phase out the use of genetically modified (GMO) crops unless it was determined their use is essential to accomplishing refuge purposes. On August 2, 2018, your office issued a memorandum withdrawing the neonicotinoid and GMO prohibition. I applaud your agency for that decision. Please provide an update and timeline as to when farmers will be allowed to incorporate GMOs and neonicotinoid pesticides into their integrated pest management plans when engaged in agricultural production on wildlife refuges.

Response: The August 2, 2018, memorandum reversed the decision to ban the use of genetically modified crops and neonicotinoid pesticides on National Wildlife Refuges. Refuges are now determining the use of those crops and pesticides on a case-by-case basis, in compliance with all relevant laws, rules, and regulations. Interested farmers are now requesting the use of genetically modified crops and neonicotinoid pesticides with the appropriate refuge manager. The USFWS is currently developing programmatic NEPA compliance on the use of genetically modified crops in the Southeast and anticipates completion in early 2020. In addition to NEPA compliance approximately 30 National Wildlife Refuges in the Southeast are initiating determinations for the use of genetically modified crops. The USFWS believes that genetically modified crops and neonicotinoids, consistent with these determinations, could be used on National Wildlife Refuges in crop year 2020.

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Questions from Senator King

Question 1: As the leader of a Department that has been fraught with ethical violations in the past, it is imperative that the head of the Department to act with the upmost ethical standards beyond just what is required by law.

Beyond the letter of the law, how do you plan to enforce a culture of ethical standards at the Department of Interior?

Response: As I stated at my hearing, I believe that public trust is a public responsibility and that maintaining an ethical culture is critical. Enforcing a culture of ethical standards begins at the top. On a personal level, I have fully complied with my ethics agreement, the ethics laws, and my ethics pledge. I will continue to do so in the future.

In addition, because I believe the Department needs to move to a culture of ethical compliance throughout its offices and bureaus, I have begun to implement significant changes to the program. For years, the Department's Ethics program has been subject to a great deal of criticism, and oversight, and a lack of funding. To address this, we have hired highly qualified and experienced career leaders to lead this office. Since the beginning of this administration, we have hired a total of 42 career, professional ethics advisors, including: a new Designated Agency Ethics Official; an Alternate Designated Agency Ethics Official; a Financial Disclosure Supervisor; an Ethics Education and Training Supervisor with the Departmental Ethics Office; and new Deputy Ethics Counselors at the National Park Service, BLM, and other bureaus and offices. We have elevated the Designated Agency Ethics Official to directly reporting to the Solicitor--the third-ranking person in the Department. And, by the end of Fiscal Year 2019, we will have doubled the number of career ethics officials that the previous administration hired in its entire eight years.

With these efforts, we are starting to make tremendous strides in creating a better and more robust ethics program at the Department, but we have much ahead of us. I look forward to working with you, if confirmed, as we continue these efforts.

Question 2: As I mentioned during the hearing, the entire Maine state federal delegation, Maine's legislature and Maine's Governor are all opposed to any activities relating to the development or extraction of fossil fuel off the coast of New England.

Please explain in detail how the Bureau of Ocean Energy Management is legally obligated to take the comments, opinions and laws of a coastal state and the coastal state's elected representatives and officials into account when making decisions on all geological and geophysical surveying permits.

Response: Geological and geophysical surveying activities are conducted for a wide array of activities on the OCS aside from locating subsurface oil and gas resources. For instance, G&G activities are used to: map the seafloor for OCS wind turbine placement, identify OCS sand

resources for coastal restoration and beach replenishment, and identify subsea hazards. Aside from our permitting process, under the Coastal Zone Management Act, a state can review those OCS permits identified in its Coastal Zone Management Program for federal consistency. If a state wants to review a permit that is not identified, it follows NOAA's procedures to ask permission to review and add the permit to its Program. The state must concur with or object to the lessee's consistency certification within a designated time period. If the state does not meet the deadline, CZMA provisions render the permit consistent. If the state concurs, BOEM can approve the permit, and the lessee can begin activities.

If the state objects, the bureau is prohibited from approving the permit, and the applicant can appeal the state's decision to the Department of Commerce, or the applicant can amend the proposed activities and associated permit application and resubmit it to BOEM for approval and to the state for federal consistency review. There are also public commenting opportunities during the development of the associated National Environmental Policy Act analyses.

Question 3: If the Department of Interior was directed to permit oil and gas leasing on the Outer Continental Shelf, could these leases be permitted to go through and be acted on over the wishes of any state governor, state legislature, congressional delegation or state law relevant to the permitted activities?

Response: Under the OCS Lands Act, the states have several specific roles in the decision-making process for OCS leasing and development. First, in deciding whether to include an area in the leasing program, the laws goals and policies of affected states, as identified by the Governor, is one of eight factors the Secretary must consider. Governors are afforded specific review and comment opportunities under the Act. For individual lease sales, the Secretary shall accept recommendations of the Governor if he determines that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State.

As for development of existing leases, any activity must be consistent with the enforceable policies of an affected state's coastal management program, pursuant to the Coastal Zone Management Act. In addition to review of OCS permitting for geological and geophysical surveying as described in my previous response, under the Coastal Zone Management Act, states can review OCS exploration and development and production plans for Federal consistency. If a state objects to the plans, BOEM is prohibited from approving it. In this instance, the lessee can appeal the state's decision to the Department of Commerce or the lessee can amend the proposed activities associated permit and resubmit it to BOEM for approval and to the state for Federal consistency review.

Question 4: In a House Appropriations Subcommittee on the Interior hearing in April 2018, Former Secretary of Interior Ryan Zinke said that "in the state of Maine, most of the areas, A) you don't have the resources off of the coast, B) you don't have infrastructure in place and, C) most of the districts along the coast and communities are not in favor of oil and gas."

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a. Given these factors as reported from the Interior Department, can you report that the New England coastline will not be suitable for drilling or geological and geophysical surveying?

Response: Right now, the Department continues to analyze and assess information gathered during the comment period following the publication of the Draft Proposed Program. The three factors you mention are among those taken into account during the National OCS Program development. It is the Department's obligation to consider any and all laws, comments and views of affected states and communities. Of the eight factors outlined in the Outer Continental Shelf Lands Act, which include the views of each affected state, the Secretary may not ignore the other factors and base his decision on one factor. However, it is reasonable to assume that the three factors you reference would weigh heavily on any analyses.

I do recognize that there are certain areas where these activities are appropriate and there are areas where they are not. As I reaffirmed to you at my confirmation hearing, the views of states and Congressional delegations will be a major factor in the balancing analysis I will take, should I be confirmed, in making these decisions. I will further commit to you that any leasing or permitting decision I make will be grounded squarely within the law, consistent with the Department's mission, informed by public engagement and supported by science.

Geological and geophysical survey permitting is a separate process with stringent requirements and mitigation measures that ensure safe and appropriate geological and geophysical activities in specific areas of the Outer Continental Shelf.

b. Are these three factors determining factors in where fossil fuel development leasing and permitting will be done?

Response: Under Section 18 of the OCS Lands Act, the Secretary must consider eight factors when determining the size, timing, and location of potential oil and gas lease sales:

- Geographical, Geological, and Ecological Characteristics
- Equitable Sharing of Developmental Benefits and Environmental Risks
- Location with Respect to Regional and National Energy Markets and Needs
- Other Uses of the Sea and Seabed
- Laws, Goals, and Policies of Affected States Identified by Governors
- Interest of Potential Oil and Gas Producers
- Environmental Sensitivity and Marine Productivity
- Environmental and Predictive Information

The Secretary has the discretion to assign the weight he deems appropriate to these eight factors when considering the timing and location of the areas to be included in the National OCS Program.

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Questions from Senator Cortez Masto

Question 1: It was recently reported that during the 35-day government shutdown earlier this year, BLM under your supervision, approved 267 drilling permits and 16 leases applied for by oil and gas companies – two of your former lobbying clients were among the companies that received approval for their applications. This is during a time that you recalled some, but not all, furloughed workers who regularly review these applications. It is also my understanding that such supporting staff that contribute to these application reviews, such as those that review details concerning environmental and cultural resources, remained furloughed during this time period.

On February 15, you were quoted in the Carlsbad Current-Argus that work on oil and gas development continued "...because the fees were still coming in...There's also safety. We need to keep things safe. We need to keep things going. I'm very comfortable with what we did during the lapse. We could do more next time."

Why was this safety ethic not applied to your decision to keep the National Parks opened, which we now know led to acts of vandalism, destruction of precious resources like we've seen in Joshua Tree National Park, the safety of countless visitors travelling through the parks without park rangers available to act in case of emergencies, or the safety of visitors?

Response: I do not agree with the premise of your question. A safety ethic was applied to decisions involving the National Park Service. For the National Park Service, the length of the lapse in appropriations brought significant challenges. As a result, I instructed that the National Park Service's contingency plan be modified to ensure people were safe, park resources were protected, and at least some employees would be guaranteed to receive a paycheck on a set date. I also directed that fees collected by the NPS under the Federal Lands Recreation Enhancement Act (FLREA) be used to address resource protection and visitor safety concerns, including issues with restrooms and sanitation, trash collection, road maintenance, campground operations, law enforcement and emergency operations, and basic visitor services. Use of these funds allowed the American public to safely visit many of our national parks while providing these treasures additional protection and allowing NPS to meet its dual mandate of resource protection and visitor enjoyment.

With respect to comparisons between the BLM and the NPS, the two agencies operate on different funding regimes and have different options for dealing with a general lapse in appropriations. I would be happy to visit about this matter in detail with you in the future if you want to do so.

Question 2: Since you became Deputy Secretary of the Interior in August 2017, the Bureau of Land Management has offered more than 17 million acres of public land for oil and gas leasing. This is clearly in line with this Administration's priority of making oil and gas development the dominant use of our public lands, no matter the negative impact it might have on any other value public lands yield to the American people, like recreation or renewable energy development.

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Nation-wide, only 15 percent of the acreage offered for lease at competitive sale under your watch has been purchased. That number is even lower in Nevada where, since August 2017, industry has purchased just 9 percent of the acreage offered for lease and, of that, 83 percent was purchased for the minimum bid of $2 per acre.

Besides reflecting low demand, this apparent practice of indiscriminately opening lands for leasing allows speculators to purchase leases noncompetitively for incredibly small sums of money while preventing management for other, perhaps better uses.

What is the intention behind this Administration continuing to push to broadly open federal public lands when it appears to be decoupled from industry demand?

A. Should you be confirmed, can you please identify the concrete steps you will take to ensure that oil and gas leasing takes place only on lands that:

(1) Have real potential for mineral development; and

(2) are not better managed for other uses like wildlife, recreation, or wilderness?

B. Can you identify the concrete steps you will take to prevent land speculators from obtaining oil and gas leases on public lands?

Response: This year we saw some lease sales where the bids exceeded $81,000 per acre. The overall collections of revenue has markedly increased on our watch. As you know, the BLM is required by law to offer eligible lands that are available for lease by competitive auction on a quarterly basis. As part of the competitive leasing process, the BLM accepts informal expressions of interest and noncompetitive presale offers from the public that identify potential federal minerals for leasing.

Regarding which lands may be made available for development, the Federal Onshore Oil and Gas Leasing Reform Act of 1987 abolished criteria requiring that lands offered be within "Known Geologic Structures" and instead relies on the free market to establish value. The BLM is also required by law to hold quarterly lease sales wherever eligible lands are available for leasing and for which leasing is in the public interest. In this regard, the BLM relies on current land-use planning documents to ensure a balance between environmental protection and opportunities for responsible resource development.

As Secretary I will ensure that all of our onshore leasing activities are carried out diligently and in compliance with appropriate laws and BLM leasing development requirements.

Question 3: Last year, the Trump Administration issued new guidance pertaining to land parcel reviews for oil and gas leasing, as part of their "Energy Dominance" agenda to open more public lands for potential leasing. Prior to the Administration's new guidance, the

public was assured a 30-day comment period before parcels were included on a lease sale list and 30-days to file a protest.

Under the new guidance, comment periods are optional and the protest period is 10-days. Do you view the public input process as an impediment to leasing?

A. By reducing the public's ability to have a say in the process, what public benefit does this new guidance serve?

B. Would you commit to a meaningful public participation and environmental review process for all oil and gas leasing activities, including by restoring the previous process, as well as any other measures necessary to fully engage the public, tribes, local governments, state wildlife agencies, and affected landowners?

Response: The Department values meaningful public participation and an efficient environmental review process in the implementation of its onshore oil and gas program. The BLM observed a trend regarding protests over the past several years in which the percentage of parcels protested from the original sale notice had increased dramatically. This 10 day period is in addition to multiple opportunities for public participation and engagement through the BLM planning process under FLPMA and NEPA processes.

Question 4: I have been hearing concerns from sportsmen and women, the conservation community, tribal communities, local state legislators, and many others about the potential loss of bighorn sheep habitat and a loss of public recreational and conservation access that would result from the proposed military expansion within the Desert National Wildlife Range. The proposed expansion could cumulatively lead would lead to a loss of over 1 million acres of land directly managed or co-managed by the U.S. Fish and Wildlife Service, much of which is habitat currently managed for the benefit of emblematic Nevadan desert species, like bighorn sheep. While I certainly acknowledge the need for facilities that ensure military readiness, I am concerned about how the existing 4,531 square miles of federal land already under the military's control is supposedly no longer sufficient, and I am concerned about the potential effects such a land withdrawal would have on wildlife habitat.

To what extent have you been involved in these discussions, and, understanding this is ultimately a decision to be made by Congress, what is the position of the Department of the Interior on the military's request to take over administrative control of one of the largest expanses of protected wildlife habitat in the lower 48 states?

A. Are you concerned about such a large amount of land being re-purposed from under your purview?

Response: I am advised that the current legislative withdrawal for Nellis Air Force Range, which was overlaid upon the original Desert National Wildlife Refuge, is set to expire in 2021,

that efforts are underway to prepare for renewal of that withdrawal, and that some of the alternatives evaluated include expansion of the withdrawal. This effort is led by the Department of the Air Force, and includes coordination with the Bureau of Land Management and the Fish and Wildlife Service. I understand that this matter will ultimately be resolved by the Congress, and Congress would need to consider the potential benefits and detriments to the public in rendering a decision.

Question 5: Ethics laws require officials to avoid even the appearance of a conflict of interest or partiality. Given that 20 of your former clients have actively lobbied Interior since the beginning of 2017, how are you able to adequately meet this standard as Secretary?

Response: I have fully complied with my ethics agreement, the ethics laws, and my ethics pledge and I will do so in the future. I have actively sought and consulted with the Department's designated ethics officials for advice on particular matters involving clients and I have implemented a robust screening process to ensure that I do not meet with my former firm or former clients to participate in particular matters involving specific parties that I have committed to recuse myself from. My senior staff is well versed in matters at the Department and they either manage such matters without any consultation with me, or re-route issues to different offices within the Department of the Interior, as appropriate.

Question 6: I understand that you are barred from closed meetings with your former lobbying clients. But that doesn't stop former clients like the Petroleum Association from lobbying Interior—instead, they are presumably meeting with your subordinates. Have you ever had a conversation before or after they met with a Petroleum Association representative? How do you ensure you are not influencing your subordinates actions with your former clients?

Response: My subordinates are here to work on behalf of the American people. They have no interest in benefitting my former clients, nor do I.

Recusals are designed to ensure that the recused individual does not participate in a particular matter involving specific parties where one of the parties was either a represented client or an employer. They do not restrict the entity who had the relationship from petitioning other employees of the United States Government. In the Immediate Office of the Secretary, my entire team is very sensitive of the need for me to not participate in any particular matter involving specific parties in which my former firm or a former client is either a party or represents a party.

I have made clear we are here to work for the American people, no one else. Indeed, once a subordinate is involved with a particular matter in which a former client is a party or my former firm represents a party there is no communication between us on that particular matter involving specific parties. As a result, I do not provide any communication to them before or after meetings, and I would likely not ever be aware of the reality that such a meeting was occurring absent public disclosure.

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In addition, in the unlikely event a matter is raised directly to me, I would explain that I am recused and that they need to ensure they are going through the appropriate person on my staff on such particular matters involving specific parties and, if necessary, the Department's Ethics Office, to determine how best to handle a matter.

Question 7: A recent New York Times report suggests you effectively continued lobbying on behalf of one of your former clients, Westlands, after you became Deputy Interior Secretary. You participated in agency actions that advanced the same goals that you pursued as a lobbyist, potentially in violation of your ethics pledge. You lobbied for years to limit the application of a specific Endangered Species Act protections that limit water diversion to your former lobbying client, and then you joined government and effectively continued those efforts. Did it occur to you that advancing the same goals at Interior that you used to promote as a lobbyist would create the appearance that you are using your official authority to benefit your former client?

A. Will you commit to asking for written ethics advice on any matters related to your former lobbying clients and lobbying activities, and to instructing your subordinates to do the same before the purposed action takes place?

B. What other mechanisms do you intend to put in place to ensure subordinates track and avoid potential ethics violations, especially if they enter government with a long list of former lobbying clients who conduct business in front of the agency?

C. Will you commit to recusing from matters involving your former lobbying clients for the entirety of your tenure at Interior?

Response: I have not "effectively continued lobbying" on behalf of any former client at any time. I have fully complied with my ethics agreement, the ethics laws, and my ethics pledge and I will do so in the future. I have actively sought and consulted with the Department's designated ethics officials for advice on particular matters involving former clients and I have implemented a robust screening process to ensure that I do not meet with my former firm or former clients to participate in particular matters involving specific parties that I have committed to recuse myself from.

I have committed to securing written advice before taking any action involving former lobbying clients, and instructing my subordinates to do the same.

When the referenced New York Times article was published, I requested that the Departmental Ethics Office examine prior ethics advice and counsel I had received involving the issues raised in the article. The DEO carefully and extensively reviewed the matter and provided a memorandum explaining that "broad matters" are outside the scope of paragraph 7 of the Ethics Pledge. Furthermore, when responding to a letter from Senator Warren and Senator Blumenthal on this same issue and article, the Department's Designated Agency Ethics Official concluded that my actions have complied with all applicable ethics laws, rules and other obligations,

including the requirements of President Trump's Ethics Pledge. A copy of that correspondence is included for your convenience.

Attachment to Response
to Sen. Cortez Masto
Question 7

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

March 25, 2019

The Honorable Elizabeth Warren
United States Senate
317 Hart Senate Office Bldg.
Washington, DC 20510

The Honorable Richard Blumenthal
United States Senate
706 Hart Senate Office Bldg.
Washington, DC 20510

Dear Senator Warren and Senator Blumenthal:

Thank you for your letter of February 26, 2019 regarding your expressed concerns of the actions of the Acting Secretary of the Department of the Interior (Department or DOI). Your letter references an article published by the *New York Times* on February 12, 2019 discussing the Acting Secretary's legal practice prior to joining the Department as Deputy Secretary in August 2017. Specifically, you asked about the Acting Secretary's involvement with the Central Valley Project (CVP) in California and whether his actions, "violated his ethics pledge and federal conflict of interest regulations by participating in decisions that directly affect a former client." As discussed below, we have found the Acting Secretary's actions have complied with all applicable ethics laws, rules and other obligations, including the requirements of President Trump's Executive Order 13770 entitled, "Ethics Commitments by Executive Branch Appointees" (Jan. 28, 2017) (Ethics Pledge).

As an initial matter, I would like to take this opportunity to inform you and your colleagues of recent developments and improvements with the DOI ethics program that will enhance our ability to prevent conflicts of interest at all levels of the Department. Since our arrival at the Department in April 2018, Deputy Director Heather Gottry and I have overhauled an ethics office that was previously characterized by both DOI employees and numerous Inspector General reports as passive and ineffectual. With the strong support of the Acting Secretary, we have spearheaded a long-overdue build-out of the Departmental Ethics Office (DEO) as well as the ethics programs of the various Bureaus and Offices throughout the Department.

Our top priority as non-partisan, career ethics officials, is to prevent conflicts of interest at the DOI and ensure that DOI employees are aware of and comply with all applicable ethics laws and standards. We understand the importance of our program in helping the American people have trust and confidence in the lawful and proper administration of the Department.

Please know that my office takes all credible allegations of potential ethics violations by any DOI employee very seriously and allegations against senior officials are an extremely high priority. Consequently, when the *New York Times* published its article, I immediately sought to understand the facts and carefully analyzed the applicable legal authorities. We note that the Acting Secretary also immediately requested that my office look into this matter and to examine the prior ethics advice and counsel he had received.

Of critical importance, we note that the Acting Secretary does not have any financial conflicts of interest related to either his former client, Westlands Water District, or the CVP generally. As reflected in his Ethics Agreement, dated May 1, 2017, and his Ethics Recusal memorandum, dated August 15, 2017, the Acting Secretary was required under 5 C.F.R. § 2635.502 to recuse for one year (until August 3, 2018) from participating personally and substantially in any "particular matters involving specific parties" in which Westlands Water District was a party or represented a party. Because Westlands Water District is an agency or entity of a state or local government it is excluded from the requirements of paragraph 6 of the Ethics Pledge. Additionally, consistent with U.S. Office of Government Ethics (OGE) guidance, it was determined that the law the Acting Secretary had lobbied on for Westlands Water District, Public Law 114-322, should not be categorized as a "particular matter" because the law addressed a broad range of issues and topics. Therefore, because he did not lobby on a "particular matter" for Westlands Water District, he was not required to recuse himself under paragraph 7 of the Ethics Pledge either from "particular matters" or "specific issue areas" related to Public Law 114-322. Accordingly, the Acting Secretary's recusal related to Westlands Water District ended on August 3, 2018, and was limited in scope to "particular matters involving specific parties" under 5 C.F.R. § 2635.502.

I have enclosed the transmittal e-mail from me to the Acting Secretary with a detailed memorandum attached wherein the DEO consolidates and memorializes prior ethics advice and guidance on certain issues involving the CVP. Of particular importance for a legal analysis of the scope of the Acting Secretary's recusals related to Westlands Water District, the memorandum analyzed and categorized certain issues involving the CVP and related State Water Project as "matters," "particular matters of general applicability," and "particular matters involving specific parties." As I state in the transmittal e-mail, these legal categorizations are critical in determining whether an official complies with the various ethics rules. As reflected in the memorandum, we determined that both the Notice of Intent to Prepare a Draft EIS and the development of a 2019 Biological Assessment are appropriately categorized as "matters," not "particular matters." Our determinations are supported by Federal law and OGE opinions and though the matters involved may sound like "particular matters" or "specific issue areas," they are legally broad matters outside the scope of 5 C.F.R. § 2635.502. As noted above, the Acting Secretary's lobbying on behalf of Westlands Water District on Public Law 114-322 was not categorized as a "particular matter" and did not require an additional recusal under paragraph 7 of the Ethics Pledge. Therefore, the Acting Secretary was not required under either 5 C.F.R. § 2635.502 or the Ethics Pledge to recuse from participation in either the Notice of Intent to Prepare a Draft EIS or the development of a 2019 Biological Assessment. Attached, for your convenience, please find the legal reference materials addressed in the memorandum – I believe our interpretation and application of the relevant legal authorities is both reasonable and prudent.

I have advised the Acting Secretary, at his request, that he and his staff should continue to consult with the DEO prior to participating in any matter that is potentially within the scope of his Ethics Agreement, Ethics Recusal memorandum, the Ethics Pledge, or any other ethics law or regulation. Additionally, to eliminate any potential for miscommunication, I have instructed my staff that all ethics guidance to the Acting Secretary be in writing prior to his participation in a decision or action that reasonably appears to come within the purview of his legal ethics obligations.

In closing, and to be responsive to your final requests, the DEO has not issued any authorizations or ethics waivers to the Acting Secretary or other Interior officials on the topics you raised, nor have we referred any matters to the IG on these topics. It is worth noting that the Acting Secretary meets with me and my senior staff frequently and that I have a standing meeting with him once a week to discuss any significant ethics issues at the DOI. Pursuant to the Acting Secretary's direction, my senior staff also meets with his scheduling staff and other top officials twice a week, at a minimum, to ensure we are aware of who the Acting Secretary is meeting with and the issues he will be discussing. These efforts, supported by the Acting Secretary and his staff, are designed to ensure his compliance with applicable ethics rules and protect the integrity of the Department's programs and operations. My experience has been that the Acting Secretary is very diligent about his ethics obligations and he has made ethics compliance and the creation of an ethical culture a top priority at the Department.

If you have any other questions or concerns, please do not hesitate to contact me.

Sincerely,

Scott A. de la Vega
Director, Departmental Ethics Office and
Designated Agency Ethics Official

Enclosure

de la Vega, Scott <scott.delavega@sol.doi.gov>

Legal Categorization of CVP/SWP Issues

1 message

de la Vega, Scott <scott.delavega@sol.doi.gov> Tue, Feb 19, 2019 at 8:03 PM
To: David Bernhardt <dwbernhardt@ios.doi.gov>
Cc: Daniel Jorjani <daniel.jorjani@sol.doi.gov>, Heather Gottry <heather.gottry@sol.doi.gov>, "McDonnell, Edward" <edward.mcdonnell@sol.doi.gov>
Bcc: Scott de la Vega <scott.delavega@sol.doi.gov>

Acting Secretary Bernhardt:

Recently, you requested that my office examine prior ethics advice and counsel you had received from the Departmental Ethics Office (DEO) in regards to issues, decisions, and/or actions pending at the DOI involving the Central Valley Project (CVP) and the State Water Project (SWP) in California. You have also asked for my recommendations on any additional best practices to implement to fully ensure that you are in compliance with your Ethics Agreement, Executive Order 13770 (the "Ethics Pledge"), and all other ethics laws and regulations.

Attached, please find a detailed memorandum wherein the DEO reviews and explains the prior guidance you have received from this office and, of utmost importance, categorizes CVP and SWP issues as "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties." These legal categorizations are critical in determining whether an official complies with the various ethics rules. Reports that conflate these categories are sometimes confusing, however, the legal analysis and conclusion that Public Law 114-322 is not a "particular matter" and that both the Notice of Intent to Prepare a Draft EIS and the development of a 2019 Biological Assessment are "matters," not "particular matters" are supported by Federal law and Office of Government Ethics opinions. Consequently, these broad matters are outside the scope of paragraph 7 of the Ethics Pledge despite colloquially sounding like a "specific issue area."

Going forward, you and your staff should continue to consult with my office in advance of your participation in any matter that is potentially within the scope of your Ethics Agreement, the Ethics Pledge, or any other ethics laws or regulations. In addition, to eliminate any potential for miscommunication, misunderstanding or error, I have instructed my staff that all guidance to you be in writing before you decide to participate in a decision or action that reasonably appears to come within the purview of your legal ethics obligations. The implementation of these two recommendations will facilitate addressing any future question raised by your participation in a "matter," "particular matter of general applicability," or a "particular matter involving specific parties."

Finally, I am attaching reference materials that highlight many of the concepts discussed in the memorandum. Please let me know if you have any questions or would like to discuss any of these issues further and thank you for your conscientious approach to ethics compliance.

Scott A. de la Vega

Director, Departmental Ethics Office

& Designated Agency Ethics Official

Office of the Solicitor

U.S. Department of the Interior | MIB 5309

(O) (202) 208-3038

(C) (202) 740-0359

scott.delavega@sol.doi.gov

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6 attachments

- **Legal Categorization Memo CVP 2.19.19.pdf**
  1203K
- **LA-17-03.pdf**
  190K
- **Copy of LA-17-03 Webinar.pdf**
  1258K
- **DO-09-011.pdf**
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- **do-06-02_9.pdf**
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United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

MEMORANDUM

TO: Scott A. de la Vega, Director, Departmental Ethics Office & Designated Agency Ethics Official

FROM: Heather C. Gottry, Deputy Director for Program Management and Compliance, Departmental Ethics Office & Alternate Designated Agency Ethics Official

Edward McDonnell, Deputy Director for Ethics Law and Policy, Departmental Ethics Office

DATE: February 19, 2019

RE: Ethics Guidance on How to Categorize Issues, Decisions, and/or Actions Pending at DOI and Involving the Central Valley Project and State Water Project as "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties"

This memorandum consolidates and memorializes prior ethics advice and guidance provided by the Department Ethics Office (DEO) about whether issues, decisions, and/or actions pending at the U.S. Department of the Interior (DOI) involving the Central Valley Project (CVP), and coordination of operations with the State Water Project (SWP) should be categorized as "matters," "particular matters of general applicability," or "particular matters involving specific parties" pursuant to the definitions of those terms in ethics regulations and guidance from the Office of Government Ethics (OGE). 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.201; 5 C.F.R. § 2641.201(h)(1)-(2); OGE DO-06-029, *"Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"* (Oct. 4, 2006) (OGE DO-06-029). As a general matter, while it is clear that there are many broad policy determinations impacting the entire CVP and/or SWP that would not constitute either "particular matters of general applicability" or "particular matters involving specific parties," case-by-case factual analysis and ethics review will be required in most circumstances in order to determine whether an issue, decision, or action involving the CVP and/or SWP and pending before the DOI should be categorized as a "matter," "particular matter of general applicability," or "particular matter involving specific parties". This categorization will in turn govern whether certain DOI employees may participate in the issue, decision, or action involving the CVP and/or SWP and pending before the DOI, or whether they are required to disqualify themselves or recuse from participation pursuant to 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the requirements of paragraphs 6 and 7 of Executive Order 13770

entitled, "Ethics Commitments by Executive Branch Appointees" (Jan. 28, 2017) (Ethics Pledge).

This memorandum first provides background information on the CVP and the SWP. Second, the memorandum provides a summary of the applicable and governing legal definitions of "matters," "particular matters of general applicability", or "particular matters involving specific parties" found in the ethics regulations and other OGE guidance. Third, this memorandum applies these definitions to the deliberations and discussions that resulted in the publication of a *Notice of Intent to Prepare a Draft Environmental Impact Statement, Revisions to the Coordinated Long-Term Operation (LTO) of the CVP and the SWP, and Related Facilities* (*Draft EIS NOI*) in the Federal Register on December 29, 2017, or the DOI process that resulted in the *Reinitiation of Consultation on the Coordinated LTO of the CVP and SWP, Final Biological Assessment* (*2019 BA*), dated January 2019, in order to determine whether they should be categorized as "matters," "particular matters of general applicability," or "particular matters involving specific parties" as defined in the ethics regulations. Finally, this memorandum provides general guidance on how the DEO categorizes issues, decisions, and/or actions involving the CVP and/or SWP pending before the DOI as "matters," "particular matters of general applicability," or "particular matters involving specific parties."

I. Background of the CVP and SWP

As set forth in *2019 BA*, Congress authorized the U.S. Bureau of Reclamation (Reclamation)[1] to develop the CVP for the public good of delivering water and generating power, while providing flood protection to downstream communities and protecting water quality for water users within the system.[2] *2019 BA* at 1.1.1., 1-3. In its authorization to Reclamation, Congress envisioned that the CVP would be composed of a large, complex project integrated across multiple watersheds that Reclamation would operate to ensure the most beneficial use of water released into the system. *Id.*

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[1] Reclamation's mission is to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public. *2019 BA* at 1-1. Reclamation is the largest wholesale water supplier in the United States, and the nation's second largest producer of hydroelectric power. *Id.* Its facilities also provide substantial flood control, recreation, and fish and wildlife benefits. *Id.* In California, Reclamation operates the CVP in coordination with the State of California Department of Water Resources' (DWR) operation of the SWP. *Id.* The mission of the DWR is to manage the water resources of the State of California, in cooperation with other agencies, to benefit the state's people and to protect, restore, and enhance the natural and human environment. *Id.*

[2] The Rivers and Harbors Act of 1935 authorized Reclamation to take over the CVP from the State of California and its initial features were authorized for construction. In 1992, Public Law 102-575 included Title 34, the Central Valley Project Improvement Act (CVPIA) that refined water management for the CVP. *2019 BA* at 1.1.1, 1-4. The CVPIA added fish and wildlife mitigation, protection, and restoration as a project purpose with the same priority as water supply, and also added fish and wildlife enhancement as a project purpose with the same priority as power generation. *Id.* In addition, the CVPIA prescribed a number of actions to improve conditions for anadromous fish and provided for other fish and wildlife benefits. The Secretary of the Interior assigned the primary responsibility for carrying out the many provisions of CVPIA to Reclamation and the U.S. Fish and Wildlife Service (USFWS).

Currently, Reclamation operates the CVP consistent with the CVP's federally authorized purposes, which include: river regulation; improvement of navigation; flood control; water supply for irrigation and municipal and industrial uses; fish and wildlife mitigation, protection, and restoration; power generation; and fish and wildlife enhancement. *Id.* at 1.1.1, 1-4. The CVP consists of 20 dams and reservoirs that together can store nearly 12 million acre-feet (MAF) of water. *Id.* at 1-1. Reclamation holds over 270 contracts and agreements for water supplies that depend upon CVP operations. *Id.* Through operation of the CVP, Reclamation delivers water in 29 of California's 58 counties. *Id.* The CVP serves farms; homes, and industry in California's Central Valley as well as the major urban centers in the San Francisco Bay Area; it is also the primary source of water for much of California's wetlands. In addition to delivering water for farms, homes, factories, and the environment, the CVP produces electric power and provides flood protection, navigation, recreation, and water quality benefits. While the CVP's facilities are spread out over hundreds of miles, the CVP is financially and operationally integrated by the DOI as a single large water project.

The SWP is a water storage and delivery system of reservoirs, aqueducts, powerplants, and pumping plants operated by the State of California.[3] *2019 BA* at 1-1. Its main purpose is to store and distribute water to 29 urban and agricultural water suppliers in Northern California, the San Francisco Bay Area, the San Joaquin Valley, the Central Coast, and Southern California. Of the contracted water supply, 70 percent goes to urban users and 30 percent goes to agricultural users.

In 1986, Congress directed the Secretary of the Interior to execute the Coordinated Operations Agreement (COA) between the CVP and SWP. *2019 BA* at 1.1.1, 1-4. The COA between the U.S. Government and the State of California was signed by DWR and Reclamation in 1986. The COA defined CVP and SWP facilities and their water supplies, coordinated operational procedures between the DOI and the State of California, identified formulas for sharing joint responsibility between the DOI and the State of California for meeting Delta standards (such as those in D-1485), identified how unstored flow is shared between the CVP and SWP, and established a framework for exchange of water and services between the projects between the CVP and SWP. *Id.* In 1999, the California State Water Resources Control Board issued D-1641, obligating the CVP and SWP to the 1995 Bay-Delta Water Quality Control Plan. Revised in 2000, D-1641 provided standards for fish and wildlife protection, municipal and industrial water quality, agricultural water quality, and Suisun Marsh salinity. *Id.*

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[3] The Burns-Porter Act, approved by the California voters in November 1960 (Water Code [Wat. Code] §§ 12930–12944), authorized issuance of bonds for construction of the SWP. DWR's authority to construct state water facilities or projects is derived from the Central Valley Project Act (CVPA) (Wat. Code § 11100 et seq.), the Burns-Porter Act (California Water Resources Development Bond Act) (Wat. Code §§ 12930–12944), the State Contract Act (Pub. Contract Code § 10100 et seq.), the Davis-Dolwig Act (Wat. Code §§ 11900–11925), and special acts of the State Legislature. *2019 BA* at 1.1.1, 1-4. In 1978, the SWRCB issued Water Rights Decision 1485 (D-1485). D-1485 required spring outflow and set salinity standards in the Delta while setting standards for the diversion of flows into the Delta during winter and spring. *Id.*

The complex and varied activities of DOI with respect to the CVP and SWP are governed by a variety of laws, including the Water Infrastructure Improvements for the Nation Act (WIIN Act) (Pub. L. 114–322, 130 Stat. 1628). Section 4001 of the WIIN Act directs the Secretary of the Interior and the Secretary of Commerce to provide the maximum quantity of water supplies practicable to CVP contractors and SWP contractors by approving, in accordance with federal and applicable state laws, operations or temporary projects to provide additional water supplies as quickly as possible, based on available information. Consistent with authorizations and directions provided by Congress, the DOI routinely analyzes and takes action on a wide variety of both macro and micro operational and programmatic issues, decisions, and/or actions involving the operation of the CVP and coordination with the SWP.

II. Applicable Legal Definitions of "Matters," "Particular Matters of General Applicability," and "Particular Matters Involving Specific Parties"

For purposes of analyzing under ethics laws, regulations, and rules whether and to what extent a DOI employee is required to recuse from participating in a policy, operational and/or programmatic issue, decision, and/or action involving the operation of the CVP and coordination with the SWP depends on whether it is categorized as a matter, particular matter of general applicability, or particular matter involving specific parties. These are terms of art with established meanings defined in ethics laws and regulations as well as guidance from the OGE. 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.201; 5 C.F.R. § 2641.201(h)(1)-(2); OGE DO-06-029, *"Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"* (Oct. 4, 2006).

A. Definition of "Matter"

In the context of the ethics statutes and regulations, the unmodified term "matter" can refer to virtually all Government work from the broadest to the most narrow issue, decision, and/or action. OGE DO-06-029 at 10-11. The broad definition of "matter" also includes any "particular matter", including "particular matters of general applicability" or "particular matters involving specific parties." *Id* at 11. However, if an issue, decision, and/or action pending at the DOI can be categorized as a "particular matter of general applicability" or a "particular matter involving specific parties" then there are specific recusal and disqualification requirements that will apply to a DOI employee's participation in the issue, decision, and/or action in question. Such recusal and disqualification requirements may arise if a DOI employee has a financial interest that could be directly and predictably effected by the issue, decision, and/or action, if the DOI employee has a "covered relationship" (such as former employer, former client, spousal employer, *etc.*) with one of the parties involved in the issue, decision, and/or action, or if the DOI employee lobbied on the same particular matter prior to employment with the DOI. These recusal and disqualification requirements will generally not apply if the issue, decision, and/or action is not categorized as either a "particular matter of general applicability" or a "particular matter involving specific parties."

While the term "matter" is not affirmatively defined in the ethics regulations, for purposes of determining whether the specific recusal and disqualification requirements which apply to "particular matters of general applicability" or "particular matters involving specific

parties" are applicable to an issue, decision, and/or action pending at the DOI, a working definition can be derived from examples in the ethics regulations of the types of issues, decisions, and/or actions that OGE does not consider to be "particular matters of general applicability" or "particular matters involving specific parties." 5 C.F.R. § 2635.402(b)(3)(Ex. 1)(regulations changing the manner in which depreciation is calculated is not a particular matter, nor is the Social Security Administration's consideration of changes to its appeal procedures for disability claimants); 5 C.F.R. § 2641.201(h)(2)(Ex. 3)(formulation of policies for a nationwide grant program for science education programs targeting elementary school children is not a particular matter).

Therefore, we apply the generally accepted definition that the consideration of broad policy options that are directed to the interests of a large and diverse group of persons, such as health and safety regulations applicable to all employers or a legislative proposal for tax reform would not qualify as either "particular matters of general applicability" or "particular matters involving specific parties." 5 C.F.R. § 2635.402(b)(3). Hereinafter, for purposes of the analysis and discussion in this memorandum, the term "matter" is used to describe the consideration of broad policy options that are directed to the interests of a large and diverse group of persons.

Therefore, if an issue, decision, and/or action pending at the DOI is (1) broad and (2) directed to the interests of a large and diverse group of persons, then the recusal and disqualification requirements found in ethics laws, regulations, and rules for "particular matters of general applicability" and "particular matters involving specific parties" would not apply, and a DOI employee will generally be able to fully participate in the issue, decision, and/or action.[4]

B. Definition of "Particular Matter"

The term "particular matter" means any matter that involves "deliberation, decision, or action that is focused on the interests of specific persons or a discrete and identifiable class of persons." 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.103(a)(1).[5] The term "particular matter", however, "does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons." 5 C.F.R. § 2635.402(b)(3). Based on this definition it is clear that "particular matters" may include matters that do not involve specific parties and are not "limited to adversarial proceedings or formal legal relationships." Van Ee v. EPA, 202 F.3d 296, 302 (D.C. Cir. 2000) (Van Ee).[6]

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[4] The term "matter" is found in the one-year post-employment restrictions in 18 U.S.C. § 207(c) and (d) for "senior employees" and "very senior employees." Therefore, those restrictions will be applicable even to issues, decisions, and/or actions at the DOI that are (1) broad and (2) directed to the interests of a large and diverse group of persons. 5 C.F.R. § 2635.402(b)(3).

[5] Please note that for purposes of the Ethics Pledge, the term "particular matter" has the same meaning as set forth in 18 U.S.C. § 208, and 5 C.F.R. § 2635.402(b)(3). Ethics Pledge, Sec. 2(r).

[6] In Van Ee, the D.C. Circuit construed 18 U.S.C. § 205(a)(2), which bars executive branch employees and others from "act[ing] as agent or attorney" for others "before any department, agency, [or] court" in connection with certain "covered matters" in which "the United States is a party or has a direct and substantial interest." The D.C. Circuit concluded that 18 U.S.C. § 205(a)(2) does not prohibit the communications which the plaintiff in the case, a career employee, proposed to make:

The term "particular matter" generally covers two categories of matters: "(1) those that involve specific parties, and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession." OGE DO-06-029 at 8. These two types of particular matters are generally referred to as "particular matters involving specific parties" and "particular matters of general applicability," and the definitions of each type of "particular matter" is discussed further below starting with the broader category of "particular matter of general applicability."

1. Definition of "Particular Matter of General Applicability"

A "particular matter of general applicability" is broader than a "particular matter involving specific parties." 5 C.F.R. § 2641.20(h)(2). A "particular matter of general applicability" does not involve specific parties, but is a matter that focuses on the interests of a discrete and identifiable class, such as a particular industry or profession. *See* OGE DO-06-029 at 8. Examples of "particular matters of general applicability" includes rulemaking, legislation, or policy-making, as long as it is narrowly focused on a discrete and identifiable class such as a particular industry or profession. For instance, a "particular matter of general applicability" at the DOI might include a regulation prescribing safety standards for operators of oil rigs in the Gulf of Mexico or a regulation applicable to all those who have grazing permits on DOI public lands. On the other hand, a land use plan covering a large geographic area and affecting a number of industries (*e.g.*, agriculture, grazing, mining, timber, recreation, wind, solar, and/or geothermal power generation, *etc.*) would not generally constitute a "particular matter of general applicability" but, rather, would still fall within the broader definition of "matter," as it constitutes a broad policy directed to the interests of a large and diverse group of persons.

2. Definition of "Particular Matter Involving Specific Parties"

The narrowest type of matter under the ethics laws, regulations, and rules is a "particular matter involving specific parties." Depending on the grammar and structure of the particular statute or regulation, the wording may appear in slightly different forms, but OGE has advised that the meaning remains the same, focusing primarily on the presence of specific parties.[7] OGE

> We hold that § 205 is inapplicable to Van Ee's uncompensated communications on behalf of public interest groups in response to requests by an agency at which he is not employed for public comment on proposed environmental impact statements related to land-use plans; these proceedings lack the particularity required by the statute, will not result in a direct material benefit to the public interest groups, and do not create a real conflict of interest or entail an abuse of position by Van Ee.

Van Ee, 202 F.3d at 298-99. In reaching this conclusion, the D.C. Circuit analyzed the components required in order for an agency issue, action, and/or decision to be categorized as a "particular matter." This analysis is not limited to 18 U.S.C. § 205, but rather it provides guidance on how to categorize agency issues, actions, and/or decisions for other ethics statutes and regulations, including, but not limited to 18 U.S.C. § 203, 18 U.S.C. § 207, 18 U.S.C. § 208, and 5 C.F.R. § 2635.502.

[7] For example, in the post-employment statute, the phrase "particular matter . . . which involved a specific party or parties" is used. 18 U.S.C. § 207(a)(1), (a)(2). Similar language is used in 18 U.S.C. §§ 205(c) and 203(c), which describe the limited restrictions on representational activities applicable to

DO-06-029 at 10-11. As set forth in 5 C.F.R. § 2641.201(h)(1), a particular matter involving specific parties "typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case." Legislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability are not particular matters involving specific parties. 5 C.F.R. § 2641.201(h)(2). The regulations further advise that "[i]nternational agreements, such as treaties and trade agreements, must be evaluated in light of all relevant circumstances to determine whether they should be considered particular matters involving specific parties; relevant considerations include such factors as whether the agreement focuses on a specific property or territory, a specific claim, or addresses a large number of diverse issues or economic interests." *Id.; see also* OGE DO-06-029 at 2-5.

Additionally, in its preamble to the final rule implementing 5 C.F.R. part 2641, the OGE stated that "OGE does not necessarily equate 'Government program' with 'particular matter involving specific parties.' For one thing, some Government programs are not even, in and of themselves, particular matters involving specific parties. For example, a Government program to understand the causes of a particular disease is not, in and of itself, a particular matter involving specific parties, even though the program may involve several grants, contracts or cooperative agreements all designed to support or implement different aspects of the overall program. *See, e.g., OGE Informal Advisory Letter* 80 x 9; 5 C.F.R. § 2637.201(c)(1) (Ex. 4)." *Post-Employment Conflict of Interest Restrictions Action: Final Rule*, 73 Fed. Reg. 36168, 36177 (June 25, 2008).

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special Government employees. In contrast, 18 U.S.C. § 208 generally uses the broader phrase "particular matter" to describe the matters from which employees must recuse themselves because of a financial interest. However, even this statute has one provision, dealing with certain Indian birthright interests, that refers to particular matters involving certain Indian entities as "a specific party or parties." 18 U.S.C. § 208(b)(4); *see OGE Informal Advisory Letter 00 x 12*. OGE has also issued certain regulatory exemptions, under 18 U.S.C. § 208(b)(2), that refer to particular matters involving specific parties. 5 C.F.R. § 2640.202(a), (b). Additionally, the distinction between "particular matters involving specific parties" and broader types of particular matters (*i.e.*, those that have general applicability to an entire class of persons) is crucial to several other regulatory exemptions issued by OGE under 18 U.S.C. § 208(b)(2). 5 C.F.R. §§ 2640.201(c)(2), (d); 2640.202(c); 2640.203(b), (g). OGE has used similar language in various other rules. Most notably, the provisions dealing with impartiality and extraordinary payments in subpart E of the Standards of Ethical Conduct for Employees of the Executive Branch refer to particular matters in which certain persons are specific parties. 5 C.F.R. §§ 2635.502; 2635.503. OGE also uses the phrase to describe a restriction on the compensated speaking, teaching and writing activities of certain special Government employees. 5 C.F.R. § 2635.807(a)(2)(i)(4). The Ethics Pledge states that for purposes of paragraphs 6 and 7 the term "particular matter involving specific parties" will be defined as set forth in 5 C.F.R. § 2641.201(h) "except that it shall also include any meeting or other communication relating to the performance of one's official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties." Ethics Pledge, Sec. 2(s).

III. Analysis of Whether the *Draft EIS NOI* or *2019 BA* Should Be Categorized as "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties"

A. The *Draft EIS NOI* is a "Matter"

On December 29, 2017, Reclamation published the *Draft EIS NOI*[8] which set forth Reclamation's intent to prepare a programmatic environmental impact statement for analyzing potential modifications to the continued LTO of the CVP, for its authorized purposes, in a coordinated manner with the SWP, for its authorized purposes. *Draft EIS NOI*, 82 Fed. Reg. 61789 (Dec. 29, 2017). Reclamation proposed to evaluate alternatives that maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements; and to augment operational flexibility by addressing the status of listed species. *Id.* Reclamation sought suggestions and information on the alternatives and topics to be addressed and any other important issues related to the proposed action. *Id.*

After review, the DEO has determined that the discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI* do not constitute a "particular matter" (either a "particular matter involving specific parties" or a "particular matter of general applicability") and, therefore, DOI employees would not be required to recuse from participation in the *Draft EIS NOI* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge. This decision is consistent with prior DEO analysis and

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[8] Under the National Environmental Policy Act (NEPA), codified at 42 C.F.R. §4321 *et seq.*, a Federal agency must prepare an environmental impact statement (EIS) if it is proposing a major federal action significantly affecting the quality of the human environment. In this case, Reclamation and DWR propose to continue the long-term operation of the CVP and SWP to maximize water supply delivery and optimize power generation consistent with applicable laws, contractual obligations, and agreement; and to increase operational flexibility by focusing on non-operational measures to avoid significant adverse effects. Reclamation and DWR propose to store, divert, and convey water in accordance with existing water contracts and agreements, including water service and repayment contracts, settlement contracts, exchange contracts, and refuge deliveries, consistent with water rights and applicable laws and regulations. The proposed action includes habitat restoration that would not otherwise occur and provides specific commitments for habitat restoration.

The EIS process begins with publication of a Notice of Intent (NOI), stating the agency's intent to prepare an EIS for a particular proposal. The NOI is published in the Federal Register, and provides some basic information on the proposed action in preparation for the scoping process. The NOI provides a brief description of the proposed action and possible alternatives. It also describes the agency's proposed scoping process, including any meetings and how the public can get involved. The NOI will also contain an agency point of contact who can answer questions about the proposed action and the NEPA process. The scoping process is the best time to identify issues, determine points of contact, establish project schedules, and provide recommendations to the agency. The overall goal is to define the scope of issues to be addressed in depth in the analyses that will be included in the EIS.

interpretations of Environmental Impact Statements and is supported by the decision of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in Van Ee.

As discussed in Van Ee, whether an administrative proceeding is a "particular matter" is determined by the nature and focus of the governmental decision to be made or action to be taken as a result of the proceeding. Van Ee, 202 F.3d at 309. Only where the decision is focused on a probable particularized impact on discrete and identifiable parties is the proceeding considered a particular matter. *Id.* In Van Ee, the D.C. Circuit examined whether the public comment phase on a proposed EIS related to land use plans was a "particular matter," and determined that because the focus of the decision to be made by the agency following the public comment phase on the proposed EIS was not on the interests of particular groups or individuals, the public comment phase of a proposed EIS on a land use plan did not constitute a "particular matter." *Id.*

In this instance, Section VIII of the *Draft EIS NOI* identifies the following purposes: (1) to advise other agencies, CVP and SWP water users and power customers, affected tribes, and the public of Reclamation's intention to gather information to support the preparation of an EIS; (2) to obtain suggestions and information from other agencies, interested parties, and the public on the scope of alternatives and issues to be addressed in the EIS; and (3) to identify important issues raised by the public related to the development and implementation of the proposed action. *Draft EIS NOI*, 82 Fed. Reg. at 61791. Similar to the facts underlying the D.C. Circuit's decision in Van Ee, the deliberations and discussions leading up to the publication of the *Draft EIS NOI* and the potential impact of the EIS itself was not focused on the interests of a discrete and identifiable class of persons and, accordingly, it should not be categorized as a "particular matter" but rather as a "matter" as defined above.

In Van Ee, the D.C. Circuit noted the types of proposed actions generally set forth in EISs are focused on diverse sets of interests, such as how to reconcile or balance recreational, conservation, and commercial interests in a land use plan covering considerable territory. Van Ee, 202 F.3d at 309. Similarly, Section II of the *Draft EIS NOI*, notes that Reclamation intends to analyze potential modifications to the LTO of the CVP, in a coordinated manner with the SWP, to achieve the following goals:

- Maximize water supply delivery, consistent with applicable law, contracts and agreements, considering new and/or modified storage and export facilities.
- Review and consider modifications to regulatory requirements, including existing Reasonable and Prudent Alternative actions identified in the Biological Opinions issued by the USFWS and NMFS in 2008 and 2009, respectively.
- Evaluate stressors on fish other than CVP and SWP operations, beneficial non-flow measures to decrease stressors, and habitat restoration and other beneficial measures for improving targeted fish populations.
- Evaluate potential changes in laws, regulations and infrastructure that may benefit power marketability.

Draft EIS NOI, 82 Fed. Reg. at 61790. Additionally, Section III of the *Draft EIS NOI* states: "[t]he purpose of the action considered in this EIS is to continue the operation of

the CVP in a coordinated manner with the SWP, for its authorized purposes, in a manner that enables Reclamation and California Department of Water Resources to maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements; and to augment operational flexibility by addressing the status of listed species." *Id.*

Sections II and III of the *Draft EIS NOI* establish that the discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI*, focused on the broad policy option of remedying reduced availability of water for delivery south of the Delta by continuing operation of the CVP in a coordinated manner with the SWP in a manner that enables Reclamation and DWR to maximize water deliveries and optimize marketable power generation, consistent with applicable laws, contractual obligations, and agreements, while augmenting operational flexibility by addressing the status of listed species.

These discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI* did not focus on the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case; or on the interests of a discrete and identifiable class of persons. Therefore, they are not appropriately categorized as "particular matters" as defined in 5 C.F.R. § 2635.402(b)(3), 5 C.F.R. § 2640.103(a)(1), 5 C.F.R. § 2641.201(h)(1) ("particular matters involving specific parties"), or 5 C.F.R. § 2641.201(h)(2) ("particular matters of general applicability"). Rather, they were focused on the broad policy of restoring, at least in part, water supply, in consideration of all of the authorized purposes of the CVP as discussed in greater detail above. Accordingly, the discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI*, are appropriately categorized as "matters" and do not trigger the specific recusal and disqualification requirements that are applicable when an issue, decision, and/or action pending at the DOI is a "particular matter of general applicability" or a "particular matter involving specific parties." Consistent with this, DOI employees would not be required to recuse from participation in the *Draft EIS NOI* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

B. The *2019 BA* is a "Matter"

On August 2, 2016, Reclamation and DWR[9] requested reinitiation of Section 7 consultation under the Endangered Species Act of 1973 (ESA), codified at 16 U.S.C. § 1531 *et*

[9] While 5 C.F.R. § 2641.201(h)(1) includes "application" as an example of a "particular matter involving specific parties," in this case, DWR should not be considered an applicant as the word is traditionally defined. While DWR was listed as an applicant for the reinitiation of Section 7 consultation in 2016, they are not included as an author of the *2019 BA*. Indeed, based on available information, DWR is not applying for a specific permit or license to carry out an activity through the consultation process. Instead, DWR, along with BOR, requested reinitiation of formal consultation under Section 7 of the ESA on the continued operation of the CVP and the SWP, both of which are massive water projects serving multiple purposes throughout a large portion of the State of California. Further, under the consultation process set forth in Section 7 of the ESA, only federal agencies can request consultation from the USFWS and the NMFS to review the impacts proposed significant federal action. 16 U.S.C. § 1536. Accordingly,

seq., with the United States Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) on the Coordinated LTO of the CVP and SWP.[10] *2019 BA* at 1-1. The USFWS accepted the reinitiation request on August 3, 2016, and the NMFS accepted the reinitiation request on August 17, 2016. *Id.* The *2019 BA* supports Reclamation's consultation under Section 7 of the ESA, and documents the potential effects of the proposed actions[11] to provide

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identification of DWR as part of the "application" for the reinitiation request does not act to convert the *2019 BA* into a "particular matter involving specific parties."

[10] As codified in 16 U.S.C. § 1531, the purpose of the ESA is to protect and recover imperiled species and the ecosystems upon which they depend. It is administered by the USFWS and the NMFS. The USFWS has primary responsibility for terrestrial and freshwater organisms, while the responsibilities of NMFS are mainly marine wildlife such as whales and anadromous fish, such as salmon. Under the ESA, species may be listed as either endangered or threatened. "Endangered" means a species is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. § 1532(6). "Threatened" means a species is likely to become endangered within the foreseeable future. 16 U.S.C. § 1532(20). All species of plants and animals, except pest insects, are eligible for listing as endangered or threatened. For the purposes of the ESA, Congress defined species to include subspecies, varieties, and, for vertebrates, distinct population segments.

The ESA directs all Federal agencies to work to conserve endangered and threatened species and to use their authorities to further the purposes of the ESA. Section 7 of the ESA, called "Interagency Cooperation," is the mechanism by which Federal agencies ensure the actions they take, including those they fund or authorize, do not jeopardize the existence of any listed species or adversely modify or destroy critical habitats. 16 U.S.C. § 1536. Under Section 7, Federal agencies must consult with the USFWS (and/or NMFS as appropriate) when any action the agency carries out, funds, or authorizes (such as through a permit) *may affect* a listed endangered or threatened species. This process often begins as informal consultation. *Id.* A Federal agency, in the early stages of project planning, approaches the USFWS (and/or NMFS as appropriate) and requests informal consultation. Discussions between the agencies may include what types of listed species may occur in the proposed action area, and what effect the proposed action may have on those species. If it appears that the agency's action may affect a listed species, that agency may then prepare a biological assessment to assist in its determination of the project's effect on a species. 16 U.S.C. § 1536(c).

When a Federal agency determines, through a biological assessment or other review, that its action is *likely to adversely affect* a listed species, the agency submits to the USFWS (and/or NMFS as appropriate) a request for formal consultation. During formal consultation, the USFWS (and/or NMFS as appropriate) and the agency share information about the proposed project and the species likely to be affected. Formal consultation may last up to 90 days, after which the USFWS (and/or NMFS as appropriate) will prepare a biological opinion on whether the proposed activity will *jeopardize* the continued existence of a listed species. The USFWS (and/or NMFS as appropriate) has 45 days after completion of formal consultation to write the opinion. Please note that these timeframes may be extended upon agreement between the action agency and the services the USFWS (and/or NMFS as appropriate).

[11] The proposed action analyzed in the *2019 BA* centers on a Core Water Operation that provides for Reclamation and DWR to operate the CVP and SWP for water supply and to meet the requirements of State Water Resources Control Board (SWRCB) Water Right Decision 1641 (D-1641), along with other project purposes. *2019 BA* at 1-2. The Core Water Operation consists of operational actions that do not require subsequent concurrence or extensive coordination to define annual operation. *Id.* The proposed action also includes conservation measures designed to minimize or reduce the effects of the action on listed species. *Id.* In addition, the *2019 BA* and resulting consultation evaluates actions that will require

operational flexibility for the CVP and SWP, large-scale government programs that divert, store, and convey water throughout California for various purposes, on federally listed endangered and threatened species that have the potential to occur in the action area and critical habitat for these species. *Id.* It also fulfills consultation requirements for the Magnuson-Stevens Fishery Conservation and Management Act of 1976 for Essential Fish Habitat. *Id.*

As set forth in the *2019 BA*, several factors resulted in Reclamation requesting reinitiation of consultation under the ESA, including the apparent decline in the status of several listed species, new information related to recent multiple years of drought, and the evaluation of best available science. https://www.usbr.gov/mp/bdo/lto.html. The coordinated long-term operations of the CVP and SWP are currently subject to 2008 and 2009 biological opinions issued pursuant to Section 7 of the ESA. *2019 BA* at 1.1.2, 1-4-5. Each of these biological opinions included Reasonable and Prudent Alternatives to avoid the likelihood of jeopardizing the continued existence of listed species, or the destruction or adverse modification of critical habitat that were the subject of consultation. *Id.* In the *2019 BA*, Reclamation proposes to maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements, and to augment operational flexibility by addressing the status of listed species. https://www.usbr.gov/mp/bdo/lto.html.

After review, the DEO has determined that the *2019 BA* should not be categorized as either a "particular matter involving specific parties" or a "particular matter of general applicability," but rather as a "matter" as defined for purposes of this memorandum. Therefore, DOI employees would not be required to recuse from participation in the *2019 BA* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge. This decision is consistent with prior DEO analysis and interpretations of Biological Assessments (BAs) and Biological Opinions issued pursuant to the requirements of the ESA, and is supported by the decision of the D.C. Circuit in Van Ee.

Generally, a BA is a compilation of the information prepared by or under the direction of a Federal agency as part of its Section 7 consultation concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation of potential effects of the action on such species and habitat. 16 U.S.C. § 1536(c). A BA evaluates the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determines whether any such species or habitat are likely to be adversely affected by the proposed actions and is used in determining whether formal consultation or a conference is necessary. *Id.*

The *2019 BA* analyzes and includes as an environmental baseline, the past and present impacts of all federal, state, and private actions and other human activities in the action area, the anticipated impacts of all proposed federal projects in the action area that have already undergone formal or early Section 7 consultation, and the impact of certain state or private actions that are contemporaneous with the consultation in process, including the past and present

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further development and may change during repeated implementation as more information becomes available (*i.e.*, "adaptive management"). Adaptively managed actions will require additional coordination prior to implementation through program-specific teams established by Reclamation and DWR with input and participation from partner agencies and stakeholders. *Id.*

impacts of CVP and SWP operations under 2008 and 2009 biological opinions. *2019 BA* at 3-1-21. The BA also analyzes the effects of multiple physical, hydrological, and biological alterations that have negatively affected the species and habitat considered in the consultation with the USFWS and NMFS, including past, present, and ongoing effects of the existence of the CVP structures, as well as disconnected floodplains and drained tidal wetlands, levees, gold and gravel mining, gravel, timber production, marijuana cultivation, large woody debris, alterations to address effects, fish passage, spawning and rearing habitat augmentation, tidal marsh restoration, *etc. Id.* The *2019 BA* also sets forth a series of proposed actions that – if implemented – will work to maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements, and to augment operational flexibility while minimizing impact to listed species. *2019 BA* at 4-1-62; 5-1-498; 6-1-4.

Additionally, applying the D.C. Circuit's decision in Van Ee, BAs generally may not even constitute "particular matters," let alone "particular matters involving specific parties." As noted by the D.C. Circuit in Van Ee: "...whether an administrative proceeding is a 'particular matter' . . . is determined by the nature and focus of the governmental decision to be made or action to be taken as a result of the proceeding. Only where the decision is focused on a probable particularized impact on discrete and identifiable parties [is it a particular matter]." Van Ee, 202 F.3d at 309. As discussed above, the *2019 BA* is not focused on a probable particularized impact on discrete and identifiable parties. Instead, the *2019 BA* evaluates the potential effects of the action on a number of listed and proposed species and designated and proposed critical habitats, and determines whether any such species or habitat are likely to be adversely affected by the proposed actions and is used in determining whether formal consultation or a conference is necessary. *Id.* Moreover, the numerous proposed actions that the *2019 BA* discusses will work together to provide additional operational flexibility for the continued operation of the CVP and SWP, both of which, as described above in greater detail, are federal and state government projects that are enormous in geographical extent and impact on the people, wildlife, and environment of California. As a result, the proposed actions under review in the *2019 BA* take into account and have the potential to impact a wide and diverse sets of interests, and the *2019 BA* analyzes how to reconcile or balance recreational, conservation, and commercial interests in the operation of the CVP and SWP.

Accordingly, even though some of the issues, decisions, and actions undertaken by the DOI with respect to the preparation, development, drafting, discussion, and submission of the *2019 BA* may have a discernible impact on the interests of certain identifiable parties, the overall impact and focus of the proposed actions and decisions to be made are of a much broader nature, including the avoidance of jeopardizing the continued existence of a listed species and the destruction or adverse modification of designated critical habitat in connection with the continued operation of the CVP and the SWP. Consistent with this, the DOI's work on the *2019 BA* did not focus on the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case; or on the interests of a discrete and identifiable class of persons. Therefore, it is not appropriately categorized as a "particular matter" as defined in 5 C.F.R. § 2635.402(b)(3), 5 C.F.R. § 2640.103(a)(1), 5 C.F.R. § 2641.201(h)(1) ("particular matters involving specific parties"), or 5

C.F.R. § 2641.201(h)(2) ("particular matters of general applicability"). The *2019 BA* considered a wide range of diverse issues related to and the interests of the environmental, agricultural, industrial, municipal, business, academic, and recreational sectors. As result, the DOI's work on the *2019 BA* involved multifaceted discussions among representatives of those numerous sections and industries in a process that more closely resembles legislative policymaking than contracting, litigation, or negotiations. The issues, decisions, and actions undertaken by the DOI with respect to the preparation, development, drafting, discussion, and submission of the *2019 BA* are therefore appropriately characterized as a "matter" as defined for purposes of this memorandum, and DOI employees would not be required to recuse from participation in the *2019 BA* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

IV. Guidance On Assessing Whether Issues, Decisions, and/or Actions Involving the CVP and/or SWP Are "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties"

As set forth in greater detail above, the DEO has determined that both the *Draft EIS NOI* and the *2019 BA* are appropriately categorized as "matters" as defined in this memorandum. It is important to note that as work on the *Draft EIS NOI* and the *2019 BA* continues, it is possible that certain aspects of each, such as the implementation of certain underlying actions, interpretation of specific requirements, or the application of decisions on one sector, could develop into "particular matters of general applicability" or "particular matters involving specific parties." This, in turn, can implicate the recusal or disqualification requirements of 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

Accordingly, DOI employees should not assume that the conclusions of this memorandum are applicable to every EIS or BA, or to the entire lifecycle of either the *Draft EIS NOI* or the *2019 BA* at the DOI. Further, while the CVP and SWP projects taken as a whole at DOI are "matters" as defined in this memorandum, DOI employees should not conclude that each issue, decision, and/or action that impacts the CVP or SWP are also "matters." Instead, the DEO recommends that DOI employees assess whether the issues, decisions, and/or actions that they undertake with respect to the CVP and the SWP are best categorized as;

- broad policy options that are directed to the interests of a large and diverse group of persons;
- an issue, decision, and/or action focused on the interests of a discrete and identifiable class, such as a particular industry or profession; or
- a specific proceeding affecting the legal rights of certain parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.

In order to assist DOI employees in categorizing their work on CVP and SWP issues, decisions, and/or actions pending before the DOI, the DEO has prepared the chart below as a general reference guide. It sets forth the three general categories under the ethics laws and regulations and includes examples of certain issues, decisions, and/or actions involving the CVP

and SWP that could potentially be categorized as "matters," "particular matters of general applicability," or "particular matters involving specific parties."

CATEGORIES	EXAMPLES
"Matters" as defined in this memorandum • Broad policy options that are directed to the interests of a large and diverse group of persons	• *Draft EIS NOI* [as described above] • *2019 BA* [as described above] • Issue, decision, and/or action that impacts all industries and sectors involved with the CVP and/or SWP • CVP-wide operational and programmatic policy decisions
"Particular Matters of General Applicability" • Issue, decision, and/or action focused on the interests of a discrete and identifiable class, such as a particular industry or profession	• Issue impacting only the agricultural industry involved with the CVP and/or SWP • Decision limited only to hydroelectric power generators • Action focused only on municipal water issues • Anything that impacts an entire sector and/or industry or a subset of sectors and/or industries involved with and impacted by the CVP and/or SWP
"Particular Matters Involving Specific Parties" • Specific proceeding affecting the legal rights of certain parties or an isolatable transaction or related set of transactions between identified parties	• CVP Water Contracts • Litigation • Settlement Agreements • Permit for a specific party or parties • Specific request from individual(s) or entity(ies)

In every case, the categorization of issues, decisions, and/or actions will depend on the specific facts involved, and the DEO is available to provide specific guidance and assistance in making such determinations.

V. Conclusion

This memorandum reflects the current analysis and guidance of the DEO on how the types of issues, decisions, and/or actions involving the CVP and the DOI's coordination of operations with the SWP, should be categorized as "matters," "particular matters of general applicability," or "particular matters involving specific parties" pursuant to the definitions of those terms in ethics regulations and guidance from the OGE. As discussed in greater detail above, the DEO has determined that both the *Draft EIS NOI* and the *2019 BA* are "matters" as defined in this memorandum and, as such, DOI employees would not be required to recuse from participation in either the *Draft EIS NOI* or the *2019 BA* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

While there are other similar broad policy determinations impacting the entire CVP and/or SWP that would not constitute either "particular matters of general applicability" or "particular matters involving specific parties," the DEO notes that case-by-case factual analysis and ethics review will be required in many, if not most, circumstances in order to determine the appropriate categorization of issues, decisions, and/or actions undertaken at the DOI with respect to the CVP and the SWP. The DEO is available to provide further ethics guidance on this and other issues upon request.

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

March 20, 2017
LA-17-03

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
General Counsel

SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires "appointees" to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President's office OGE's prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on these discussions, this Legal Advisory identifies the parts of OGE's issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance.

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE's prior guidance on Executive Order 13490 is applicable to Executive Order 13770 to the extent that it addresses language common to both executive orders. Therefore, all substantive legal interpretations in the following Legal Advisories are applicable to Executive Order 13770: DO-09-005, DO-09-007, DO-09-010, DO-09-014, DO-09-020, DO-10-003, and LA-12-10. The following Legal Advisories remain valid in part, as specified in annotations that now appear in the versions posted on OGE's website: DO-09-003, DO-09-011, DO-10-004, and LA-16-08. For the convenience of ethics officials and employees, an enclosed table highlights certain language common to both executive orders and references prior guidance that is applicable to Executive Order 13770.

II. Paragraph 7: "Specific Issue Area"

Executive Order 13770 prohibits an appointee from participating in any particular matter on which the appointee lobbied during the two-year period before being appointed or in the "specific issue area" in which that particular matter falls. *See* E.O. 13770, sec. 1, par. 7; E.O. 13490, sec. 1, par. 3. The Counsel to the President's office has advised OGE that, as used in Executive Order 13770, the term "specific issue area" means a "particular matter of general applicability," and OGE has accepted the Administration's interpretation of this term. Although "specific issue" and "general issue area" are used in the context of the Lobbying Disclosure Act (LDA), the term "specific issue area" is not used in that context. *See* E.O. 13770, sec. 2; *see also*

2 U.S.C. §§ 1602, 1603(b)(5), 1604(b)(2). Although the term "specific issue area" appeared in Executive Order 13490, it was not defined in any guidance issued during the eight years in which that executive order remained in effect.

OGE has issued guidance distinguishing two types of particular matters: "particular matters involving specific parties" and "particular matters of general applicability." *See* 5 C.F.R. § 2640.102(l)-(m); *see also* OGE Inf. Adv. Op. 06 x 9 (2006). The latter is broader than the former. *Id.* This difference in breadth is relevant in determining the scope of the recusal, as illustrated in the following example:

> An appointee was a registered lobbyist during the two-year period before she entered government. In that capacity, she lobbied her agency against a proposed regulation focused on a specific industry. Her lobbying was limited to a specific section of the regulation affecting her client. Her recusal obligation as an appointee is not limited to the section of the regulation on which she lobbied, nor is it limited to the application of the regulation to her former client. Instead, she must recuse for two years from development and implementation of the entire regulation, subsequent interpretation of the regulation, and application of the regulation in individual cases.

III. Paragraphs 1 and 3: Post-Government Employment Lobbying Restrictions

The ethics pledge under Executive Order 13770 establishes two post-Government employment lobbying restrictions. The restriction in paragraph 1 of the ethics pledge prohibits a former appointee, for five years after terminating employment with an executive agency, from engaging in lobbying activities "with respect to" that agency. *See* E.O. 13770, sec. 1, par. 1. The restriction in paragraph 3 of the ethics pledge establishes the same restriction "with respect to" any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration. *See id.*; E.O. 13770 sec. 1, par. 3; sec. 2(c).

Executive Order 13770 relies partly on the definition of "lobbying activities" in the Lobbying Disclosure Act (LDA). *See* E.O. 13770, sec. 2(n). The LDA defines that term to include both "lobbying contacts" and behind-the-scenes efforts in support of such contacts. 2 U.S.C. § 1602(7). The LDA's definition of "lobbying contacts" is limited to certain types of communications and excludes 19 types of communications. 2 U.S.C. § 1602(8). Executive Order 13770 specifically excludes additional types of communications. *See* E.O. 13770, sec. 2(n).

For purposes of paragraph 1, lobbying activities are deemed to be carried out "with respect to" an agency only to the extent that they involve the following:

> (a) Any oral or written communication to a covered executive branch official of that agency; or

(b) Efforts that are intended, at the time of performance, to support a covered lobbying contact to a covered executive branch official of that agency.

For purposes of paragraph 3, the prohibition on lobbying activities "with respect to" a covered executive branch official or non-career Senior Executive Service appointee extends to non-career Senior Executive Service appointees. Therefore, lobbying activities in paragraph 3 involve the following:

(a) Any oral or written communication to a covered executive branch official or non-career Senior Executive Service appointee; or

(b) Efforts that are intended, at the time of performance, to support a covered lobbying contact to a covered executive branch official or non-career Senior Executive Service appointee of that agency.

For the convenience of ethics officials and employees, an enclosed table compares the post-Government employment lobbying restrictions in paragraphs 1 and 3.

Attachments

Applicability of Prior Guidance to Executive Order 13770
Attachment to LA-17-03

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Section 1. *Ethics Pledge.* Every appointee in every executive agency appointed on or after January 20, 2017, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee: As a condition, and in consideration, of my employment in the United States Government in an appointee position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:	Signing requirement ("appointee"): E.O. 13770, sec. 1 E.O. 13490, sec. 1 Definition of appointee: E.O. 13770, sec. 2(b) E.O. 13490, sec. 2(b)	Whether the following categories of employees are considered "appointees" for the purpose of signing the ethics pledge: • Acting officials and detailees: DO-09-010 • Appointees, generally: DO-09-003, DO-09-010 • Career officials appointed to confidential positions: DO-09-010 • Career Senior Executive Service (SES) members given Presidential appointments: DO-09-010 • Excepted service, generally: DO-09-010 • Foreign Service, similar positions: DO-09-010 • Holdover appointees: DO-09-010 • Individuals appointed to career positions: DO-09-003 • IPA detailees: DO-09-020 • Schedule C employees with no policymaking role: DO-09-010 • Special Government Employees (SGEs): DO-09-005, DO-09-010 • Temporary advisors/counselors pending confirmation to Presidentially appointed, Senate-confirmed (PAS) positions: DO-09-005 • Term appointees: DO-09-010
	Signing requirement ("shall sign"): E.O. 13770, sec. 1 E.O. 13490, sec. 1	When the ethics pledge must be signed: • Holdover appointees: DO-09-010, DO-09-014 • Nominees to PAS positions: DO-09-005 • Non-PAS who have already been appointed: DO-09-005 • Non-PAS who may be appointed in the future: DO-09-005 • Temporary advisors/counselors pending Senate confirmation to PAS positions: DO-09-005
Sec. 1, par. 2: If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions.	Restriction on communicating with employees of former agency: E.O. 13770, sec. 1, par. 2 E.O. 13490, sec. 1, par. 4	Guidance on the restriction: DO-10-004, LA-16-08 *Note: Ethics officials and employees may continue to rely on DO-10-004 regarding the substance of the restriction. Note, however, that the duration of this restriction in E.O. 13770 is one year and commences when the individual ceases to be a senior employee, whereas the duration of the corresponding restriction in E.O.13490 was two years, commencing when the appointee moves to a position that is not subject to the Pledge.*
Sec. 1, par. 5: I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee.	Prohibition on accepting gifts from registered lobbyists, lobbying orgs: E.O. 13770, sec. 1, par. 5 E.O. 13490, sec. 1, par. 1	Guidance on the lobbyist gift ban: DO-09-007, DO-10-003, LA-12-10 Relationship to 5 C.F.R. 2635, subpart B (Gifts from Outside Sources): DO-09-007, DO-10-003
	Definition of "gift": E.O. 13770, sec. 2(k) E.O. 13490, sec. 2(c)	Guidance on the following terms: • "Gift": DO-09-007 • "Solicited or accepted indirectly:" DO-09-007 Treatment of official speeches, accompanying staff: DO-10-003
	Definition of "registered lobbyist or lobbying organization": E.O. 13770, sec. 2(w) E.O. 13490, sec. 2(e)	Guidance on the term, "registered lobbyist or lobbying organization": DO-09-007 Treatment of the following: • 501(c)(3) organizations: DO-09-007, LA-12-10 • Clients of lobbyists/lobbying firms: DO-09-007 • Institutions of higher education: LA-12-10 • Media organizations: DO-09-007, LA-12-10

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Sec. 1, par. 6: I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.	Revolving door ban (incoming appointees): E.O. 13770, sec. 1, par. 6 E.O. 13490, sec. 1, par. 2	Guidance on the revolving door ban (incoming appointees): DO-09-011, DO-09-020 Relationship to impartiality regulations: DO-09-011
	Definition of "directly and substantially related to my former employer or former clients": E.O. 13770, sec. 2(d) E.O. 13490, sec. 2(k)	Guidance on the term, "directly and substantially related to": DO-09-011
	Definition of "former client": E.O. 13770, sec. 2(i) E.O. 13490, sec. 2(j)	Guidance on the term, "former client": DO-09-011 Treatment of the following: • Discrete, short-term engagements/*de minimis*: DO-09-011 • Federally funded research and development centers: DO-09-011 • Government entities: DO-09-011 • Nonprofit organizations: DO-09-011 • Service as a consultant: DO-09-011 • State or local colleges and universities: DO-09-011
	Definition of "former employer": E.O. 13770, sec. 2(j) E.O. 13490, sec. 2(i)	Guidance on the term, "former employer": DO-09-011 Treatment of the following: • Federally funded research and development centers: DO-09-011 • Government entities: DO-09-011 • State or local colleges and universities: DO-09-011 • Nonprofit organizations: DO-09-011
	Definition of "particular matter involving specific parties": E.O. 13770, sec. 2(s) E.O. 13490, sec. 2(h)	Guidance on the term, "particular matter involving specific parties": DO-09-011, DO-09-020 Treatment of the following: • Consultation with experts: DO-09-011 • Meetings, other communications: DO-09-011 • Official speeches: DO-09-020 • Open to all interested parties/multiplicity of parties: DO-09-011 • Rulemakings/regulations: DO-09-011

Paragraphs 1 and 3 in Executive Order 13770
Attachment to LA-17-03

	Paragraph 1	Paragraph 3
Basic Prohibition	I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency. E.O. 13770, sec. 1, par. 1.	In addition to abiding by the limitations of paragraphs 1 and 2, I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration. E.O. 13770, sec. 1, par. 3.
Length of Restriction	5 years. E.O. 13770, sec. 1, par. 1.	Remainder of the Administration. E.O. 13770, sec. 1, par. 3
Commencement of Restriction	Termination of employment as an appointee. E.O. 13770, sec. 1, par. 1.	Termination of government service. E.O. 13770, sec. 1, par. 3

Restricted Activity	Lobbying activities, as defined in the Lobbying Disclosure Act, but excluding certain types of communications. E.O. 13770, sec. 2(n). The term "lobbying activities" includes "lobbying contacts" and behind-the-scenes efforts in support of such contacts. 2 U.S.C. § 1602(7).
	• "Lobbying contacts" are limited to written or oral communications with covered officials that are made on behalf of a client. 2 U.S.C. § 1602(8)(A).
	  o The term "lobbying activities" as defined in E.O. 13770 does not include communications and appearances with regard to: a judicial proceeding; a criminal or civil law enforcement inquiry, investigation, or proceeding; or any agency process for rulemaking, adjudication, or licensing, as defined in and governed by the Administrative Procedure Act, as amended, 5 U.S.C. 551 et seq.
	  o The definition of "lobbying contact" includes 19 exceptions listed at 2 U.S.C. § 1602(8)(B). 2 U.S.C. § 1602(8)(B)(i)-(xix)
	  ▪ For example, the definition excludes "a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered executive branch official." 2 U.S.C. § 1602(8)(B)(v).
	• The term "client" means any person or entity that employs or retains another person for financial or other compensation to conduct lobbying activities on behalf of that person or entity. 2 U.S.C. § 1602(2).
	• An activity is considered a "lobbying activity" whether or not a former appointee is required to register as a lobbyist. Therefore, there is no minimum requirement to engage in lobbying activities before the restrictions apply (*i.e.*, no 20% service threshold). *See* E.O. 13770, sec. 2(n).	

With Whom Appointees are Restricted From Engaging in Lobbying Activities	Covered executive branch officials <u>at the former appointee's former agency</u>. E.O. 13770, sec. 1, par. 1 ("with respect to that agency"). • A communication to or appearance solely before a covered legislative branch official is not a lobbying activity "with respect to" the former appointee's former agency. *Id.* • With respect to those appointees to whom component designations are applicable, "agency" means the separate and distinct component agencies designated in accordance with 18 U.S.C. § 207(h). E.O. 13770, sec. 2(e).	Covered executive branch officials <u>throughout the executive branch</u>. E.O. 13770, sec. 1, par. 3. Non-career senior executive service appointees <u>throughout the executive branch</u>. E.O. 13770, sec. 1, par. 3.
	Covered executive branch officials are: • The President; • The Vice President; • Any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President; • Any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order; • Any member of the uniformed services whose pay grade is at or above O–7 under section 201 of title 37; and • Any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2)(B) of title 5. See E.O. 13770, sec. 2(c); 2 U.S.C. § 1602(3).	

LA-17-03: Guidance on Executive Order 13770

U.S. Office of Government Ethics
Advanced Practitioner Webinar
Thursday, April 27, 2017

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LA-17-03: Guidance on E.O. 13770

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

March 20, 2017
LA-17-03

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
General Counsel

SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires "appointees" to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President's office OGE's prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on these discussions, this Legal Advisory identifies the parts of OGE's issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance.

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE's prior guidance on Executive Order 13490 is applicable to

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What is Covered in LA-17-03?
(Past Guidance)

- Elaboration on Guidance in LA-17-02
  - Extent to which past guidance is applicable to EO 13770
  - Extent to which past guidance is NOT applicable or NOT relevant to EO 13770

3

What is Covered in LA-17-03?
(New Guidance)

- LA-17-03 also addresses recusal obligations for recent lobbyists (pledge paragraph 7)
- Post-government employment restrictions
  - 5-year restriction under pledge paragraph 1
  - Administration-length restriction under pledge paragraph 3
  - Citations to – but not interpretations of – the Lobbying Disclosure Act (LDA)

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What is Not Covered in LA-17-03?

- Section 3 of the new Executive Order concerning pledge waivers
- Paragraph 4 concerning post-government restrictions and the Foreign Agents Registration Act of 1938
- Paragraph 8 concerning employment decisions
- The continued applicability of EO 13490

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Language Common to E.O. 13770 and E.O. 13490

6

LA-17-02: Executive Order 13770

"With respect to Executive Order 13770, ethics officials and employees may continue to rely on OGE's prior guidance regarding Executive Order 13490 to the extent that such guidance addresses language common to both orders."

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LA-17-03: Guidance on E.O. 13770

SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires "appointees" to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President's office OGE's prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on those discussions, this Legal Advisory identifies the parts of OGE's issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance.

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE's prior guidance on Executive Order 13490 is applicable to Executive Order 13770 to the extent that it addresses language common to both executive orders. Therefore, all substantive legal interpretations in the following Legal Advisories are applicable to Executive Order 13770: DO-09-005, DO-09-007, DO-09-010, DO-09-014, DO-09-020, DO-10-003, and LA-12-10. The following Legal Advisories remain valid in part, as specified in annotations that now appear in the versions posted on OGE's website: DO-09-003, DO-09-011, DO-10-004, and LA-16-08. For the convenience of ethics officials and employees, an enclosed table highlights certain language common to both executive orders and references prior guidance that is applicable to Executive Order 13770.

II. Paragraph 7: "Specific Issue Area"

Executive Order 13770 prohibits an appointee from participating in any particular matter on which the appointee lobbied during the two-year period before being appointed or in the "specific issue area" in which that particular matter falls. *See* E.O. 13770, sec. 1, par. 7; E.O. 13490, sec. 1, par. 3. The Counsel to the President's office has advised OGE that, as used in Executive Order 13770, the term "specific issue area" means a "particular matter of general applicability," and OGE has accepted the Administration's interpretation of this term. Although "specific issue" and "general issue area" are used in the context of the Lobbying Disclosure Act

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Example:

DO-09-010: Who Must Sign the Ethics Pledge?

Note: All substantive legal interpretations in this advisory are applicable to Executive Order 13770, sec. 1. *See* LA-17-02 and LA-17-03.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 16, 2009
DO-09-010

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Who Must Sign the Ethics Pledge?

The Office of Government Ethics (OGE) has received numerous questions concerning

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Example:

DO-09-011: Revolving Door Ban—All Appointees Entering Gov't

NOTE: All substantive legal interpretations in this advisory concerning Pledge paragraph 2 (E.O. 13490) and the terms used in Pledge paragraph 2 are applicable to Executive Order 13770, sec. 1, par. 6. All substantive legal interpretations pertaining to waivers of the Ethics Pledge are not applicable to Executive Order 13770, sec. 3. *See* LA-17-02 and LA-17-03.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 26, 2009
DO-09-011

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Ethics Pledge: Revolving Door Ban--All Appointees Entering Government

Executive Order 13490 requires any covered "appointee" to sign an Ethics Pledge that

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4/26/2017

Example:

DO-10-004: FAQs on Post-Employment under the Ethics Pledge

Note: Please see the attached addendum for the applicability of substantive legal interpretations in this advisory to Executive Order 13770. *See also* LA-17-02 and LA-17-03.

Addendum (March 20, 2017)
DO-10-004: Post-Employment Under the Ethics Pledge: FAQs

The following substantive legal interpretations in this advisory are **applicable** to Executive Order 13770:

- Part A. Post-employment cooling-off period. See E.O. 13770, sec. 1, par. 2
  - Q2. Which appointees are subject to the restriction
  - Q3. How the restriction affects very senior employees
  - Q4. Which officials may not be contacted under this restriction
  - Q5. Applicability of exceptions under 18 U.S.C. § 207(c) to the restriction
- Part B. Post-employment lobbying ban. See E.O. 13770, sec. 1, par. 3
  - Q1. Relationship of the lobbying ban to other restrictions
  - Q2. Whether the lobbying ban applies to appointees who are not senior employees
  - Q5. Duration of the lobbying ban
  - Q11. Whether exceptions to the restriction exist

The following substantive legal interpretations in this advisory are **applicable in part** to Executive Order 13770, to the extent that they address the core questions listed below. However, because the post-employment ban in Executive Order 13490 restricts "lobbying," while the corresponding ban in Executive Order 13770 restricts "lobbying activities," the substantive legal interpretations of

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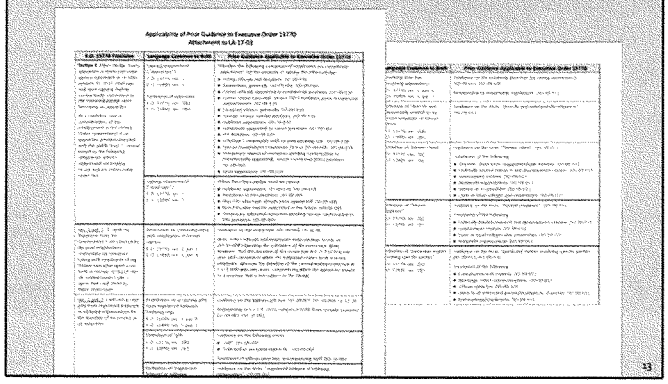
02/26/2009

DO-09-010: Who Must Sign the Ethics Pledge?

OGE identifies the categories of officials who must sign the Ethics Pledge required by Executive Order 13490 and those who are not required to sign. [The guidance in this advisory was modified in 2017 by legal advisories LA-17-02 and LA-17-03.]

4/26/2017

Attachment to LA-17-03



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Language Common to Both

E.O. 13370, sec. 1, par. 6

I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

E.O. 13490, sec. 1, par. 2

I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

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4/26/2017

Language Common to Both

E.O. 13370, sec. 2(b)

"Appointee" means every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

E.O. 13490, sec. 2(b)

"Appointee" shall include every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

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Attachment to LA-17-03

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Section 1. *Ethics Pledge.* Every appointee in every executive agency appointed on or after January 20, 2017, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee: As a condition, and in consideration, of my employment in the United States Government in an appointee position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law.	Signing requirement ("appointee") E.O. 13770, sec. 1 E.O. 13490, sec. 1 Definition of appointee E.O. 13770, sec. 2(b) E.O. 13490, sec. 2(b)	Whether the following categories of employees are considered "appointees" for the purpose of signing the ethics pledge: • Acting officials and detailees: DO-09-010 • Appointees, generally: DO-09-003, DO-09-010 • Career officials appointed to confidential positions: DO-09-010 • Career Senior Executive Service (SES) members given Presidential appointments: DO-09-010 • Excepted service, generally: DO-09-010 • Foreign Service, similar positions: DO-09-010 • Holdover appointees: DO-09-010 • Individuals appointed to career positions: DO-09-003 • IPA detailees: DO-09-020 • Schedule C employees with no policymaking role: DO-09-010 • Special Government Employees (SGEs): DO-09-005, DO-09-010 • Temporary advisors/counselors pending confirmation to Presidentially appointed, Senate confirmed (PAS) positions: DO-09-005 • Term appointees: DO-09-010
	Signing requirement ("shall sign") E.O. 13770, sec. 1 E.O. 13490, sec. 1	When the ethics pledge must be signed: • Holdover appointees: DO-09-010, DO-09-014 • Nominees to PAS positions: DO-09-005 • Non-PAS who have already been appointed: DO-09-005 • Non-PAS who may be appointed in the future: DO-09-005 • Temporary advisors/counselors pending Senate confirmation to PAS positions: DO-09-005

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Paragraph 7:
Particular Matter & Specific Issue Area

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment . . .
I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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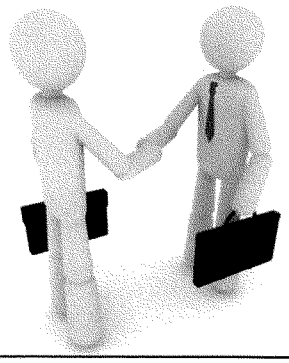
Paragraph 7



If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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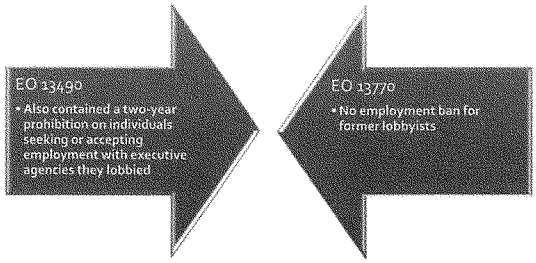
Paragraph 7: Specific Issue Area

"Specific issue area" is not defined in LDA or Executive Orders 13490 or 13770



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Paragraph 7: PMGA

As used in Executive Order 13770, the term "specific issue area" means a "**particular matter of general applicability**"

If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 6, I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

Lobbied on:	→	Recusal:
Particular Matter	→	Same Particular Matter

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

Lobbied on:	→	Recusal:
Particular Matter	→	Same Particular Matter
Matter	→	No Recusal to that Matter

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 6, I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Ethics Pledge: Restrictions for Incoming Appointees

Paragraph 6 *Not limited to registered lobbyists*	I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.
Paragraph 7 *Limited to registered lobbyists*	If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraphs 1 and 3:

Post-Employment Lobbying Activity Restrictions

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Ethics Pledge: Post-Employment Restrictions

Paragraph 1	I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.
Paragraph 2	If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with appointees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions.
Paragraph 3	I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.
Paragraph 4	I will not, at any time after the termination of my employment in the United States Government, engage in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2017, would require me to register under the Foreign Agents Registration Act of 1938, as amended.

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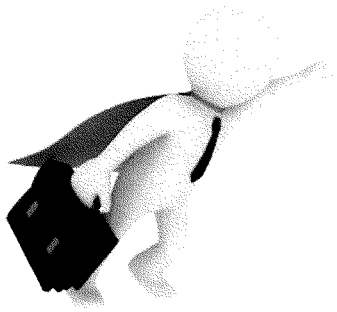
Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions



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Paragraph 1

I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.

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Paragraph 3

I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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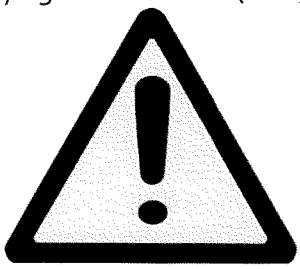
Restricted Activity

- Engage in a "lobbying activity" as defined by the Lobbying Disclosure Act (LDA)



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Engage in a Lobbying Activity

You engage in a "**lobbying activity**" if you:

- Make a lobbying contact
  - Written or oral communications
  - With covered executive or legislative branch officials
  - On behalf of a client
  - For financial or other compensation
  - 19 exceptions

OR

- Engage in behind-the-scenes efforts in support of such lobbying contact

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Paragraph 1: "With respect to" that agency

A lobbying activity occurs "with respect to" that agency if the activity involves :

- A communication to a covered executive branch official at that agency *(component designations may be available)*

OR

- Efforts intended, at the time of performance, to support such a communication to a covered executive branch official at that agency

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Paragraph 3: "With respect to" certain officials

A lobbying activity occurs "with respect to" certain officials if the activity involves :

- A communication to a covered executive branch official or non-career SES

OR

- Efforts intended, at the time of performance, to support such a communication to a covered executive branch official or non-career SES

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency = Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Paragraph 3: Examples

- Write to various exec branch officials seek support for his client's research
- Assist his client in preparing for a meeting with one of the officials
- Assist his client in understanding grant application process and guidelines that agency established for research projects
- Request the status of an action affecting his client.

I agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

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Paragraph 1: Examples

Write to a covered executive branch official at NIH to seek support for his client's research

Assist his client in preparing for a meeting with the FDA official

Contact covered legislative branch official to discuss pending legislation that could affect NIH research projects

I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.

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LA-17-03: Guidance on Executive Order 13770

U.S. Office of Government Ethics
Advanced Practitioner Webinar
Thursday, April 27, 2017

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NOTE: All substantive legal interpretations in this advisory concerning Pledge paragraph 2 (E.O. 13490) and the terms used in Pledge paragraph 2 are applicable to Executive Order 13770, sec. 1, par. 6. All substantive legal interpretations pertaining to waivers of the Ethics Pledge are not applicable to Executive Order 13770, sec. 3. *See* LA-17-02 and LA-17-03.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 26, 2009
DO-09-011

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Ethics Pledge: Revolving Door Ban--All Appointees Entering Government

Executive Order 13490 requires any covered "appointee" to sign an Ethics Pledge that includes several commitments. 74 Fed. Reg. 4673 (January 26, 2009). OGE Memorandum DO-09-003 explains the definition of appointee, describes the commitments included in the Pledge, and provides a Pledge Form to be used for appointees.[1] The purpose of the present memorandum is to advise ethics officials on how to implement paragraph 2 of the Pledge, "Revolving Door Ban--All Appointees Entering Government."

Paragraph 2 of the Pledge requires an appointee to commit that he or she will not, for a period of two years following appointment, participate in any particular matter involving specific parties that is directly and substantially related to his or her former employer or former clients, including regulations and contracts. Exec. Order No. 13490 sec. 1(2). To help agencies implement this requirement, OGE is providing the following explanation of the phrases that comprise paragraph 2 of the Pledge and of how paragraph 2 interacts with existing impartiality regulations.

Understanding the Meaning of the Terms that Comprise Paragraph 2 of the Pledge

"Particular matter involving specific parties"

In order to determine whether an appointee's activities concern any particular matters involving specific parties, ethics officials must follow the definition of that phrase found in section 2(h) of the Executive Order. That definition incorporates the longstanding interpretation of particular matter involving specific parties reflected in 5 C.F.R. § 2641.201(h). However, it also expands the scope of the term to include any meeting or other communication with a former employer or former client relating to the performance of the appointee's official duties, unless

[1] https://www.oge.gov/Web/oge.nsf/Resources/DO-09-003:+Executive+Order+13490,+Ethics+Pledge.

the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties. The purpose of this expansion of the traditional definition is to address concerns that former employers and clients may appear to have privileged access, which they may exploit to influence an appointee out of the public view.[2]

The expanded party matter definition has a two-part exception for communications with an appointee's former employer or client, if the communication is: (1) about a particular matter of general applicability and (2) is made at a meeting or other event at which participation is open to all interested parties. Although the exception refers to particular matters of general applicability, it also is intended to cover communications and meetings regarding policies that do not constitute particular matters. An appointee may participate in communications and meetings with a former employer or client about these particular or non-particular matters if the meeting or event is "open to all interested parties." Exec. Order No. 13490 sec. 2(h). Because meeting spaces are typically limited, and time and other practical considerations also may constrain the size of meetings, common sense demands that reasonable limits be placed on what it means to be "open to all interested parties." Such meetings do not have to be open to every comer, but should include a multiplicity of parties. For example, if an agency is holding a meeting with five or more stakeholders regarding a given policy or piece of legislation, an appointee could attend such a meeting even if one of the stakeholders is a former employer or former client; such circumstances do not raise the concerns about special access at which the Executive Order is directed. Additionally, the Pledge is not intended to preclude an appointee from participating in rulemaking under section 553 of the Administrative Procedure Act simply because a former employer or client may have submitted written comments in response to a public notice of proposed rulemaking.[3] In any event, agency ethics officials will have to exercise judgment in determining whether a specific forum qualifies as a meeting or other event that is "open to all interested parties," and OGE is prepared to assist with this analysis.

"Particular matter involving specific parties...including regulations"

Because regulations often are cited as examples of particular matters that do not involve specific parties, OGE wants to emphasize that the phrase is not intended to suggest that all rulemakings are covered. Rather, the phrase is intended to serve as a reminder that regulations sometimes may be particular matters involving specific parties, although in rare circumstances. As OGE has observed in connection with 18 U.S.C. § 207, certain rulemakings may be so focused on the rights of specifically identified parties as to be considered a particular matter

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2 Note, however, that the expanded definition of party matter is not intended to interfere with the ability of appointees to consult with experts at educational institutions and "think tanks" on general policy matters, at least where those entities do not have a financial interest, as opposed to an academic or ideological interest. See Office of Legal Counsel Memorandum, "Financial Interests of Nonprofit Organizations," January 11, 2006 (distinguishing between financial interests and advocacy interests of nonprofits); http://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/05/29/op-olc-v030-p0064.pdf; cf. 5 C.F.R. § 2635.502(b)(1)(v)(Note)(OGE impartiality rule does not require recusal because of employee's political, religious or moral views).

3 For other reasons discussed below, however, rulemaking sometimes may constitute a particular matter involving specific parties, albeit rarely

involving specific parties.[4] Such rulemakings likewise are covered by paragraph 2.

"Directly and substantially related to"

The phrase "directly and substantially related to," as defined in section 2(k) of the Executive Order, means only that the former employer or client is a party or represents a party to the matter. Ethics officials should be familiar with this concept from 5 C.F.R. § 2635.502(a).

"Former employer or former client"

In order to determine who qualifies as an appointee's former employer or former client, ethics officials must follow the definitions of each phrase found in section 2(i) and 2(j), respectively, of the Executive Order. In effect, the Executive Order splits the treatment of former employer found in the impartiality regulations into two discrete categories, "former employer" and "former client," and removes contractor from the definition of either term. *See* 5 C.F.R. §§ 2635.502(b)(1)(iv), 2635.503(b)(2).

Former Employer

For purposes of the Pledge, a former employer is any person for whom the appointee has, within the two years prior to the date of his or her appointment, served as an employee, officer, director, trustee, or general partner, unless that person is an agency or entity of the Federal Government, a state or local government, the District of Columbia, a Native American tribe, or any United States territory or possession. Exec. Order No. 13490, sec. 2(i). While the terms employee, officer, director, trustee, or general partner generally follow existing ethics laws and guidance, OGE has received questions about the scope of the exclusion for government entities from the definition of former employer, specifically with regard to public colleges and universities. The exclusion for state or local government entities does extend to a state or local college or university.[5]

OGE also has received several questions about whether the definition of former employer includes nonprofit organizations. Consistent with the interpretation of similar terms in other ethics rules and statutes, the definition of former employer in the Executive Order covers

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[4] *See, e.g.*. 73 Fed. Reg. 36168, 36176 (June 25, 2008); *see also* OGE Informal Advisory Letter 96 x 7, n.1.

[5] *See* OGE Informal Advisory Opinion 93 x 29 n.1 where OGE held that for purposes of applying the supplementation of salary restrictions in 18 U.S.C. § 209, the exception for payments from the treasury of any state, county, or municipality included a state university. OGE cautions, however, that the exclusion for state and local entities may not extend to all entities affiliated with a state or local college or university. OGE notes that some colleges and universities may create mixed public/private entities in partnership with commercial enterprises. Such entities should not automatically be considered as falling within the exclusion, but rather should be examined on a case-by-case basis to determine whether they should be viewed as instrumentalities of state or local government for the purposes of the Executive Order.

nonprofit organizations.[6] Moreover, it includes nonprofit organizations in which an appointee served without compensation, provided of course that the appointee actually served as an employee, officer, director, trustee, or general partner of the organization. Thus, for example, the recusal obligations of Pledge paragraph 2 would apply to an appointee who had served without pay on the board of directors or trustees of a charity, provided that the position involved the fiduciary duties normally associated with directors and trustees under state nonprofit organization law. This does not include, however, purely honorific positions, such as "honorary trustee" of a nonprofit organization. It also does not include unpaid positions as a member of an advisory board or committee of a nonprofit organization, unless the position involved fiduciary duties of the kind exercised by officers, directors or trustees, or involved sufficient supervision by the organization to create a common law employee-employer relationship (which is not typical, in OGE's experience).

Former Client

For purposes of the Pledge, a former client means any person for whom the appointee served personally as an agent, attorney, or consultant within two years prior to date of appointment. Exec. Order No. 13490 sec. 2(j). A former client does not include a client of the appointee's former employer to whom the appointee did not personally provide services. Therefore, although an appointee's former law firm provided legal services to a corporation, the corporation is not a former client of the appointee for purposes of the Pledge if the appointee did not personally render legal services to the corporation. Moreover, based on discussions with the White House Counsel's office, OGE has determined that the definition of former client is intended to exclude the same governmental entities as those excluded from the definition of former employer. Thus, for example, an appointee who had provided legal services to the Department of Energy would not be prohibited from participating personally in particular matters in which the Department is a party.

In addition, the term former client includes nonprofit organizations. However, a former client relationship is not created by service to a nonprofit organization in which an appointee participated solely as an unpaid advisory committee or advisory board member with no fiduciary duties. Although a former client includes any person whom the appointee served as a "consultant," OGE has not construed the term consultant, as used in analogous provisions of the Ethics in Government Act and the Standards of Ethical Conduct, to include unpaid, non-fiduciary advisory committee members of a nonprofit organization. *See* 5 U.S.C. app. § 102(a)(6)(A)(disclosure of consultant positions); 5 C.F.R. § 2635.502(b)(1)(iv)(covered relationship as former consultant). Likewise, former client does not include a nonprofit organization in which an appointee served solely in an honorific capacity.

[6] For similar reasons, Federally-funded research and development centers (FFRDCs), whether nonprofit or for profit, are intended to be included in the definitions of former employer and former client for purposes of paragraph 2 of the Pledge.

The definition of former client specifically excludes "instances where the service provided was limited to a speech or similar appearance." Exec. Order No. 13490, sec. 2(j). In addition to excluding all activities that consist merely of speaking engagements, this provision is intended to exclude other kinds of discrete, short-term engagements, including certain de minimis consulting activities. Essentially, the Pledge is not intended to require a two-year recusal based on activities so insubstantial that they are not likely to engender the kind of lingering affinity and mixed loyalties at which the Executive Order is directed. The exclusion for speaking and similar engagements was added to emphasize that the provision focuses on services that involved a significant working relationship with a former client. Therefore, the exclusion is not limited to speeches and speech-like activities (such as serving on a seminar panel or discussion forum), but includes other activities that similarly involve a brief, one-time service with little or no ongoing attachment or obligation. In order to determine whether any services were de minimis, ethics officials will need to consider the totality of the circumstances, including the following factors:

- the amount of time devoted;
- the presence or absence of an ongoing contractual relationship or agreement;
- the nature of the services (e.g., whether they involved any representational services or other fiduciary duties); and
- the nature of compensation (e.g., one-time fee versus a retainer fee).

For example, the recusal obligation of Pledge paragraph 2 would not apply to an appointee who had provided consulting services on a technical or scientific issue, for three hours on a single day, pursuant to an informal oral agreement, with no representational or fiduciary relationship.[7] On the other hand, an appointee who had an ongoing contractual relationship to provide similar services as needed over the course of several months would be covered. In closer cases, OGE believes ethics officials should err on the side of coverage, with the understanding that waivers, under section 3 of the Order, remain an option in appropriate cases.

The Relationship of Paragraph 2 of the Pledge to the Existing Impartiality Regulations

Paragraph 2 of the Pledge is not merely an extension of the existing impartiality requirements of subpart E of the Standards of Ethical Conduct, although in some circumstances the restrictions of the Pledge and the existing impartiality restrictions could align. The effect of any overlap is that all of the relevant restrictions apply to the appointee and should be acknowledged in the appointee's ethics agreement and considered when granting a waiver or authorization under either set of restrictions.

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[7] Note that appointees still will have a covered relationship for one year after they provided any consulting services, under the OGE impartiality rule, 5 C.F.R. § 2635.502(b)(1)(iv). Therefore, the OGE rule may require an appointee to recuse from certain matters (or obtain an authorization, as appropriate), even if the Pledge does not extend the recusal for an additional year. Indeed, the presence of the OGE rule as a "fall-back" was a factor in the decision to exclude certain de minimis consulting services from the Pledge in the first place.

Paragraph 2 of the Pledge and Impartiality Regulations Differ and Overlap

An appointee's commitments under paragraph 2 of the Pledge both overlap and diverge from the existing impartiality regulations in important ways depending upon the facts of each appointee's circumstances. The following highlights some of the key areas in which paragraph 2 of the Pledge and the existing impartiality restrictions differ. In addition, OGE has developed a chart as a quick reference tool to identify the key differences among the existing impartiality regulations and paragraph 2 of the Pledge. *See* **Attachment 1.**

Paragraph 2 of the Pledge is at once more expansive and more limited than the existing impartiality restrictions found at 5 C.F.R. §§ 2635.502, 2635.503. For example, an appointee is subject to impartiality restrictions based on his covered relationships with a much broader array of persons[8] than to the restrictions of paragraph 2, which are limited to the appointee's former employer and former clients. Thus, for instance, if the appointee has served as a contractor, but not in any of the roles described in the definitions of former employer or former client in the Executive Order, then the appointee may have recusal obligations under 5 C.F.R. §§ 2635.502 and 2635.503, but not under Pledge paragraph 2. Conversely, Pledge paragraph 2 is more expansive than the definition of covered relationship in section 2635.502 because the Pledge provision looks back two years to define a former employer or former client and it imposes a two-year recusal obligation after appointment, both of which are considerably broader than the one-year focus of section 2635.502(b)(1)(iv). Pledge paragraph 2 also is more expansive in that the recusal obligation may apply to certain communications and meetings that do not constitute particular matters involving specific parties as that phrase is used in sections 2635.502 and 2635.503.[9]

On the subject of recusal periods alone, ethics officials will need to be especially attentive to the possible variations, as it may be possible for as many as three periods to overlap. For example, an appointee could have: a one-year recusal, under 5 C.F.R. § 2635.502, from the date she last served a former employer; a two-year recusal, under section 2635.503, from the date she received an extraordinary payment from that same former employer; and a two-year recusal with respect to that former employer, under Pledge paragraph 2, from the date of her appointment.

Specific Recusals under Paragraph 2 of the Pledge are Not Required to be Memorialized in an Appointee's Ethics Agreement.

Executive Order 13490 does not require recusals under paragraph 2 of the Pledge to be addressed specifically in an appointee's ethics agreement, unlike recusals under paragraph 3 of

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[8] See definition of "covered relationship" at 5 C.F.R. § 2635.502(b)(1).

[9] *Compare* Exec. Order No. 13490, sec. 2(h)(definition broader than post-employment regulation); *with* 5 C.F.R. § 2635.502(b)(3)(defining particular matter involving specific parties solely by reference to post-employment regulations).

the Pledge. *See* Exec. Order No. 13490 sec. 4(a).[10] However, if an appointee will have a written ethics agreement addressing other commitments, OGE requires that the following language be inserted in that written ethics agreement in order to ensure that the appointee is aware of her commitments and restrictions under both her ethics agreement and the Pledge.

> Finally, I understand that as an appointee I am required to sign the Ethics Pledge (Exec. Order No. 13490) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this and any other ethics agreement.

Written ethics agreements will continue to address section 2635.502 and 2635.503 issues separately using the model provisions from OGE's "Guide to Drafting Ethics Agreements for PAS Nominees." Thus, regardless of paragraph 2 of the Pledge, the one-year "covered relationship" under the OGE impartiality rule remains in effect and may require an appointee to recuse from certain matters, even if the Pledge does not extend the recusal for an additional year. *See* 5 C.F.R. § 2635.502(b)(1)(iv).

The Pledge and Impartiality Regulations Waiver Provisions

Designated Agency Ethics Officials have been designated to exercise the waiver authority for the Ethics Pledge, under section 3 of Executive Order 13490, in addition to their existing role in the issuance of impartiality waivers and authorizations. DAEOgram DO-09-008; 5 C.F.R. §§ 2635.502(d), 2635.503(c). Generally, it is expected that waivers of the various requirements of the Pledge will be granted sparingly. *See* OGE DAEOgram DO-09-008. Although paragraph 2 clearly adds new limits on the revolving door, those limits are not intended to bar the use of qualified appointees who have relevant private sector experience in their fields of expertise. Therefore, at least where the lobbyist restrictions of paragraph 3 of the Pledge are not implicated, OGE expects that DAEOs will exercise the waiver authority for paragraph 2 in a manner that reasonably meets the needs of their agencies. In this regard, DAEOs already have significant experience in determining whether authorizations under 5 C.F.R. § 2635.502(d) are justified, and DAEOs should use similar good judgment in decisions about whether to waive paragraph 2 of the Pledge. Of course, any such waiver decisions still must be made in consultation with the Counsel to the President. Exec. Order No. 13490, sec. 3. Additional details on the standards for issuing a waiver of provisions of Pledge paragraph 2, as well as on issues related to the interaction of the waiver provisions of the impartiality regulations and relevant paragraphs of the Pledge, are reserved for future guidance.

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[10] An ethics agreement is defined as "any oral or written promise by a reporting individual to undertake specific actions in order to alleviate an actual or apparent conflict of interest," such as recusal from participation in a particular matter, divestiture of a financial interest, resignation from a position, or procurement of a waiver. 5 C.F.R. § 2634.802.

ATTACHMENT 1

OGE developed the following table as a quick reference tool to highlight the main differences between paragraph 2 of the Pledge and existing impartiality regulations. It is not intended to be a substitute for thorough analysis, but we hope you find it useful.

		5 C.F.R. § 2635.502	5 C.F.R. § 2635.503	Paragraph 2 of the Pledge
Relationship:	Former Employer	Any person which the employee served, within the last year, as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; no exclusion for governmental entities (other than Federal)	Any person which the employee served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; no exclusion for governmental entities (other than Federal)	Two years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner; contractor and consultant omitted from list (although consultant added below under former client); is not a former employer if governmental entity
	Former Client	Clients of attorney, agent, consultant, or contractor covered same way as former employer, under 5 C.F.R. § 2635.502(b)(1)(iv)	Clients of attorney, agent, consultant, or contractor covered same way as former employer, under 5 C.F.R. § 2635.503(b)(2)	Two years prior to date of appointment served as an agent, attorney, or consultant. Is not former client if: • Only provided speech/similar appearance (including de minimis consulting) • Only provided contracting services other than as agent, attorney, or consultant • Served governmental entity
	Business and Personal/ Covered Relation-ship	In addition to former employers/ clients discussed above, includes various current business and personal relationships, as listed in 5 C.F.R. § 2635.502(b)(1)	No equivalent concept	No equivalent concept
Prohibition:	May not participate in particular matter involving specific parties if:	Reasonable person with knowledge of facts would question impartiality	Extraordinary payment from former employer	Includes communication by former employer or former client unless matter of general applicability or non-particular matter and open to all interested parties
Length of recusal:		1 year from the end of service	2 years from date of receipt of payment	2 years from date of appointment

05 x 1

Letter to a Designated Agency Ethics Official
dated February 10, 2005

This is in response to your letter of February 9, 2005, in which you inquire whether the deliberations of the President's Advisory Panel on Federal Tax Reform would constitute particular matters for purposes of 18 U.S.C. § 208. The first meeting of the Panel is scheduled for February 16, and the need for a prompt resolution of the question is apparent. Your letter follows up on earlier telephone conversations in which my Office advised that the proposed work of the Panel, as described to us, did not constitute a particular matter or particular matters within the meaning of the conflict of interest statute. We continue to be of the same view.

Pursuant to Executive Order 13369 (January 7, 2005), the Panel is charged with producing a single report that will address a range of "revenue neutral policy options" for legislative reform of the Federal tax system. The contemplated scope of the report is quite broad, as indicated by the three guiding principles in the Executive order: the options should "(a) simplify Federal tax laws to reduce the costs and administrative burdens of compliance with such laws; (b) share burdens and benefits of the Federal tax structure in an appropriately progressive manner while recognizing the importance of homeownership and charity in American society; and (c) promote long-run economic growth and job creation, and better encourage work effort, saving, and investment, so as to strengthen the competitiveness of the United States in the global marketplace." Executive Order, § 3. The Executive order only prescribes that "at least one option submitted by the Advisory Panel should use the Federal income tax as the base for its recommended reforms." *Id.* Consistent with this broad mandate, your letter indicates that Panel deliberations are expected "to focus on a wide range of tax matters--including both matters that have the potential to affect all taxpayers (*e.g.*, the alternative minimum tax and the compliance burdens for large, small and individual taxpayers) as well as matters that specifically and uniquely affect taxpayers comprised of

industry sectors (*e.g.*, depletion allowance for the oil and gas industries)."

As you know, section 208(a) prohibits employees from participating personally and substantially in any "particular matter" in which they have a personal or imputed financial interest. Under the interpretive regulations issued by the Office of Government Ethics, "[t]he term 'particular matter' includes only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." 5 C.F.R. § 2640.103(a)(1). The phrase generally is understood to include matters of general applicability that are narrowly focused on the interests of a discrete industry, such as the meat packing industry or the trucking industry. *E.g.*, 5 C.F.R. § 2640.103(a)(1) (example 3); 5 C.F.R. § 2635.402(b)(3) (example 2). However, the term does not extend to the "consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons." § 2640.103(a)(1).

The work of the Panel, as described above, fits comfortably within the latter exclusion for consideration of broad policy options directed to the interests of a large and diverse group of persons. Indeed, the Panel's report is expected to address issues affecting every taxpayer in the United States. In this regard, the matter is analogous to example 8 following section 2640.103(a)(1), in which the consideration of a legislative proposal for broad health care reform is held not to be a particular matter because it is intended to affect every person in the United States. However, your letter refers to the preamble discussion of this example in the final rule and indicates that it suggests that the larger legislative proposal may be broken down into different constituent parts that might be viewed as separate particular matters in their own right. 61 *Fed. Reg.* 66830, 66832 (December 18, 1996). You note that some of the many tax policy options to be considered by the Panel will focus more narrowly on discrete industries and question whether the language in the preamble means that the consideration of these options should be treated as separate particular matters, apart from the overall report.

It was not OGE's intention that example 8 and the preamble should be read as requiring that broad legislative proposals of this type be fractionated into separate provisions or issues for purposes of identifying particular matters. Such an approach would prove little, since the consideration of most matters of

broad public policy can be carved up into successively finer and more focused parts: after all, much of policymaking inevitably involves the consideration of how different aspects of an overall proposal will affect different constituencies in a pluralistic democracy. Nor do we think it would be workable to employ a variation of what one court has criticized as an "elastic approach" to identifying particular matters, which is contingent on the part of the overall matter in which the particular individual happened to be involved. *Van Ee v. EPA*, 202 F.3d 296, 309 (D.C. Cir. 2000).[1] It would not be logical to conclude that an employee could participate in considering the overall legislative proposal but not its constituent parts.

In any event, the text of example 8 does not state that work on the broad health care proposal must be divided up into separate particular matters. It simply indicates that "consideration *and implementation, through regulations,* of a section of the health care bill" that limits prices for prescription drugs would be a particular matter that is focused on the pharmaceutical industry. § 2640.103(a)(1) (example 8) (emphasis added); *see also* 60 *Fed. Reg.* 47208, 47210 (September 11, 1995) (preamble to proposed rule) (broad policy matters may *later* become particular matters when implemented in a way that distinctly affects specific persons or groups of persons). At most, the preamble language indicates only that there may be *other* conceivable situations where a narrowly focused provision in a larger legislative proposal should not be viewed as merely an integral part of the broader policy deliberations. Although OGE has not had occasion to render any opinions on such situations, an example might be (depending on the facts) a private relief bill that becomes attached to a larger legislative vehicle focused on an unrelated subject.

Apart from example 8, the OGE regulations contain another example that appears to be almost indistinguishable from the work of the Panel. Example 5 following section 2640.103(a)(1) states that "deliberations on the general merits of an omnibus bill such as the Tax Reform Act of 1986 are not sufficiently

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[1] *Van Ee* involved the use of the same phrase, "particular matter," in a related conflict of interest statute, 18 U.S.C. § 205. In interpreting the same regulatory definition of particular matter discussed above, the Court in that case criticized the Government for focusing on "aspects of the [Government matter] that might ultimately affect specific groups or individuals, rather than upon the overall focus of the proceeding itself." 202 F.3d at 309.

focused on the interests of specific persons, or a discrete and identifiable group of persons to constitute participation in a particular matter." As my Office explained in our earlier telephone conversations, the Tax Reform Act of 1986 itself contained numerous provisions, which, if considered alone, might have constituted separate particular matters, such as specific tax provisions for the oil, gas and pharmaceutical industries. *See* Pub. L. 99-514, October 22, 1986. However, the inclusion of such topics simply as components of a much more global tax reform proposal meant that the Tax Reform Act, like the comprehensive tax reform deliberations of the new Panel, must be viewed as too broadly focused to be considered a particular matter.

If you have any further questions about this matter, feel free to contact my Office.

Sincerely,

Marilyn L. Glynn
Acting Director

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

October 4, 2006

DO-06-029

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: "Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"

Perhaps no subject has generated as many questions from ethics officials over the years as the difference between the phrases "particular matter involving specific parties" and "particular matter." These phrases are used in the various criminal conflict of interest statutes to describe the kinds of Government actions to which certain restrictions apply. Moreover, because these phrases are terms of art with established meanings, the Office of Government Ethics (OGE) has found it useful to include these same terms in various ethics rules. A third term, "matter," also has taken on importance in recent years because certain criminal post-employment restrictions now use that term without the modifiers "particular" or "involving specific parties."

It is crucial that ethics officials understand the differences among these three phrases. OGE's experience has been that confusion and disputes can arise when these terms are used in imprecise ways in ethics agreements, conflict of interest waivers, and oral or written ethics advice. Therefore, we are issuing this memorandum to provide guidance in a single document about the meaning of these terms and the distinctions among them.

Because the three phrases are distinguished mainly in terms of their relative breadth, the discussion below will proceed from the narrowest phrase to the broadest.

Particular Matter Involving Specific Parties

The narrowest of these terms is "particular matter involving specific parties." Depending on the grammar and structure of the particular statute or regulation, the wording may appear in slightly different forms, but the meaning remains the same, focusing primarily on the presence of specific parties.

1. Where the Phrase Appears

This language is used in many places in the conflict of interest laws and OGE regulations. In the post-employment statute, the phrase "particular matter . . . which involved a specific party or parties" is used to describe the kinds of Government matters to which the life-time and two-year representational bans apply. 18 U.S.C. § 207(a)(1), (a)(2). Occasionally, ethics officials have raised questions because section 207 includes a definition of the term "particular matter," section 207(i)(3), but not "particular matter involving specific parties"; however, it is important to remember that each time "particular matter" is used in section 207(a), it is modified by the additional "specific party" language.[1]

In addition to section 207(a), similar language is used in 18 U.S.C. §§ 205(c) and 203(c). These provisions describe the limited restrictions on representational activities applicable to special Government employees (SGEs) during their periods of Government service.[2]

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[1] For a full discussion of the post-employment restrictions, see OGE DAEOgram DO-04-023, at https://www.oge.gov/Web/oge.nsf/Resources/DO-04-023:+Summary+of+18+U.S.C.+§+207.

[2] These restrictions on SGEs are discussed in more detail in OGE DAEOgram DO-00-003, at https://www.oge.gov/Web/oge.nsf/Resources/DO-00-003:+Summary+of+Ethical+Requirements+Applicable+to+Special+Government+Employees.

As explained below, 18 U.S.C. § 208 generally uses the broader phrase "particular matter" to describe the matters from which employees must recuse themselves because of a financial interest. However, even this statute has one provision, dealing with certain Indian birthright interests, that refers to particular matters involving certain Indian entities as "a specific party or parties." 18 U.S.C. § 208(b)(4); see OGE Informal Advisory Letter 00 x 12. Moreover, OGE has issued certain regulatory exemptions, under section 208(b)(2), that refer to particular matters involving specific parties. 5 C.F.R. § 2640.202(a), (b). Likewise, the distinction between particular matters involving specific parties and broader types of particular matters (i.e., those that have general applicability to an entire class of persons) is crucial to several other regulatory exemptions issued by OGE under section 208(b)(2). 5 C.F.R. §§ 2640.201(c)(2), (d); 2640.202(c); 2640.203(b), (g).

Finally, OGE has used similar language in various other rules. Most notably, the provisions dealing with impartiality and extraordinary payments in subpart E of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) refer to particular matters in which certain persons are specific parties. 5 C.F.R. §§ 2635.502; 2635.503. OGE also uses the phrase to describe a restriction on the compensated speaking, teaching and writing activities of certain SGEs. 5 C.F.R. § 2635.807(a)(2)(i)(4).

2. What the Phrase Means

When this language is used, it reflects "a deliberate effort to impose a more limited ban and to narrow the circumstances in which the ban is to operate." Bayless Manning, Federal Conflict of Interest Law 204 (1964). Therefore, OGE has emphasized that the term "typically involves a specific

proceeding affecting the legal rights of the parties, or an isolatable transaction or related se t of transactions between identified parties." 5 C.F.R. § 2640.102(1).[3] Examples of particular matters involving specific parties include contracts, grants, licenses, product approval applications, investigations, and litigation. It is important to remember that the phrase does not cover particular matters of general applicability, such as rulemaking, legislation, or policy-making of general applicability.[4]

Ethics officials sometimes must deci de when a particular matter first involves a specific party. Many Government matters evolve, sometimes starting with a broad concept, developing into a discrete program, and eventually involving specific parties. A case-by-case analysis is required to determine at which stage a particular matter has sufficiently progressed to involve

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[3] This definition, found in OGE's regulations implementing 18 U.S.C. § 208, differs slightly from the definition found in the regulations implementing a now-superseded version of 18 U.S.C. § 207, although this is more a point of clarification than substance. Specifically, the old section 207 regulations referred to "identifiable" parties, 5 C.F.R. § 2637.201(c)(1), whereas the more recent section 208 rule refers to "identified" parties. As explained in the preamble to OGE's proposed new section 207 rule: "The use of 'identified,' rather than 'identifiable,' is intended to distinguish more clearly between particular matters involving specific parties and mere 'particular matters,' which are described elsewhere as including matters of general applicability that focus 'on the interests of a discrete and identifiable class of persons' but do not involve specific parties. [citations omitted] The use of the term 'identified,' however, does not mean that a matter will lack specific parties just because the name of a party is not disclosed to the Government, as where an agent represents an unnamed principal." 68 Feder al Register 7844, 7853-54 (February 18, 2003).

[4] Usually, rulemaking and legislation are not covered, unless they focus narrowly on identified parties. See OGE Informal Advisory Opinions 96 x 7 ("rare" example of rulemaking that involved specific parties); 83 x 7 (private relief legislation may involve specific parties).

specific parties. The Government sometimes identifies a specific party even at a preliminary or informal stage in the development of a matter. E.g., OGE Informal Advisory Letters 99 x 23; 99 x 21; 90 x 3.

In matters involving contracts, grants and other agreements between the Government and outside parties, the general rule is that specific parties are first identified when the Government first receives an expression of interest from a prospective contractor, grantee or other party. As OGE explained recently in Informal Advisory Letter 05 x 6, the Government sometimes may receive expressions of interest from prospective bidders or applicants in advance of a published solicitation or request for proposals. In some cases, such matters may involve specific parties even before the Government receives an expression of interest, if there are sufficient indications that the Government actually has identified a party. See OGE Informal Advisory Letter 96 x 21.

Particular Matter

Despite the similarity of the phrases "particular matter" and "particular matter involving specific parties," it is necessary to distinguish them. That is because "particular matter" covers a broader range of Government activities than "particular matter involving specific parties." Failure to appreciate this distinction can lead to inadvertent violations of law. For example, the financial conflict of interest statute, 18 U.S.C. § 208, generally refers to particular matters, without the specific party limitation. If an employee is advised incorrectly that section 208 applies only to particular matters that focus on a specific person or company, such as an enforcement action or a contract, then the employee may conclude it is permissible to participate in other particular matters, even t hough the la w prohibits such participation.

1. Where the Phrase Appears

In addition to 18 U.S.C. § 208, several other statutes and regulations use the term "particular matter." [5] The representational restrictions applicable to current employees (other than SGEs), under 18 U.S.C. §§ 203 and 205, apply to particular matters.[6] As mentioned above, section 207 also contains a definition of "particular matter." [7] However, where the phrase is used in the post-employment prohibitions in

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[5] The relevant language in 18 U.S.C. § 208(a) is "a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter" (emphasis added).

[6] The prohibition in 18 U.S.C. § 205(a)(2) actually uses the phrase "covered matter," but that term is in turn defined as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter," 18 U.S.C. § 205(h)(emphasis added).

[7] The definition in 18 U.S.C. § 207(i)(3) provides: "the term 'particular matter' includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." This language differs slightly from other references to "particular matter" in sections 203, 205 and 208, in part because the list of matters is not followed by the residual phrase "or other particular matter." However, OGE does not believe that the absence of such a general catch-all phrase means that the list of enumerated matters exhausts the meaning of "particular matter" under section 207(i)(3). The list is preceded by the word "includes," which is generally a term of enlargement rather than limitation and indicates that matters other than those enumerated are covered. See Norman J. Singer, 2A Sutherland on Statutory Construction 231-232 (2000).

section 207(a)(1) and (a)(2), it is modified by the "specific parties" limitation.[8]

The phrase "particular matter" is used pervasively in OGE's regulations. Of course, the term appears throughout 5 C.F.R. part 2640, the primary OGE rule interpreting and implementing 18 U.S.C. § 208. Similarly, it is used in 5 C.F.R. § 2635.402, which is the provision in the Standards of Conduct that generally deals with section 208. The phrase also is used throughout subpart F of the Standards of Conduct, which contains the rules governing recusal from pa rticular matters affecting the financial interest of a person with whom an employee is seeking non-Federal employment. 5 C.F.R. §§ 2635.601-2635.606. Moreover, the phrase appears in the "catch-all" provision of OGE's impartiality rule, 5 C.F.R. § 2635.502(a)(2). See also 5 C.F.R. 2635.501(a).[9] Various other regulations refer to "particular matter" for miscellaneous purposes. E.g., 5 C.F.R. § 2635.805(a)(restriction on expert witness activities of SGEs); 5 C.F.R. § 2634.802(a)(1)(written rec usals pursuant to ethics agreements).

2. What the Phrase Means

Although different conflict of interest statutes use slightly different wording, such as different lists of examples of particular matters, the same standards apply for determining what is a particular matter under each of the relevant statutes

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[8] At one time, the post-employment "cooling-off" restriction for senior employees in 18 U.S.C. § 207(c) applied to particular matters, but the language was amended (and broadened) in 1989 when Congress removed the adjective "particular" that had modified "matter." See 17 Op. O.L.C. 37, 41-42 (1993).

[9] Generally, section 2635.502 focuses on particular matters involving specific parties, as noted above. However, section 2635.502(a)(2) provides a mechanism for employees to determine whether they should recuse from other "particular matters" that are not described elsewhere in the rule. In appropriate cases, therefore, an agency may require an employee to recuse from particular matters that do not involve specific parties, based on the concern that the employee's impartiality reasonably may be questioned under the circumstances.

and regulations. See 18 Op. O.L.C. 212, 217-20 (1994). Particular matter means any matter that involves "deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." 5 C.F.R. § 2640.103(a)(1)(emphasis added). It is clear, then, that particular matter may include matters that do not involve parties and is not "limited to adversarial proceedings or formal legal relationships." Van Ee v. EPA, 202 F.3d 296, 302 (D.C. Cir. 2000).

Essentially, the term covers two categories of matters: (1) those that involve specific part ies (described more fully above), and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession. OGE regulations sometimes refer to the second category as "particular matter of general applicability." 5 C.F.R. § 2640.102(m). This category can include legislation and policymaking, as long as it is narrowly focused on a discrete and identifiable class. Examples provided in OGE rules include a regulation applicable only to meat packing companies or a regulation prescribing safety standards for trucks on interstate highways. 5 C.F.R. §§ 2640.103(a)(1)(example 3); 2635.402(b)(3)(example 2). Other examples may be found in various opinions of OGE and the Office of Legal Counsel, Department of Justice. E.g., OGE Informal Advisory Letter 00 x 4 (recommendations concerning specific limits on commercial use of a particular facility); 18 Op. O.L.C. at 220 (determinations or legislation focused on the compensation and work conditions of the class of Assistant United States Attorneys).

Certain OGE rules recognize that particular matters of general applicability sometimes may raise fewer conflict of interest concerns than particular matters involving specific

parties.[10] Therefore, while both categories are included in the term "particular matter," it is often necessary to distinguish between these two kinds of particular matters. Of course, in many instances, the relevant prohibitions apply equally to both kinds of particular matters. This is the case, for example, in any application of 18 U.S.C. § 208 where there is no applicable exemption or waiver that distinguishes the two.

It is important to emphasize that the term "particular matter" is not so broad as to include every matter involving Government action. Particular matter does not cover the "consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons." 5 C.F.R. § 2640.103(a)(1). For example, health and safety regulations applicable to all employers would not be a particular matter, nor would a comprehensive legislative proposal for health care reform. 5 C.F.R. § 2640.103(a)(1)(example 4), (example 8). See also OGE Informal Advisory Letter 05 x 1 (report of panel on tax reform addressing broad range of tax policy issues). Although such actions are too broadly focused to be particular matters, they still are deemed "matters" for purposes of the restrictions described below that use that term.

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[10] As noted above, OGE's imparti ality rule generally focuses on particular matters involving specific parties. See OGE Informal Advisory Letter 93 x 25 (rulemaking "would not, except in unusual circumstances covered under section 502(a)(2), raise an issue under section 502(a)"). Furthermore, as also discussed above, several of the regulatory exemptions issued by OGE under 18 U.S.C. § 208(b)(2) treat particular matters of general applicability differently than those involving specific parties. The preamble to the original proposed regulatory exemptions in 5 C.F.R. part 2640 explains: "The regulation generally contains more expansive exemptions for participation in 'matters of general applicability not involving specific parties' because it is less likely that an employee's integrity would be compromised by concern for his own financial interests when participating in these broader matters." 60 Federal Register 47207, 47210 (September 11, 1995). Of course, Congress itself has limited certain conflict of interest restrictions to the core area of particular matters that involve specific parties. E.g., 18 U.S.C. § 207(a)(1), (a)(2).

A question that sometimes arises is when a matter first becomes a "particular matter." Some matters begin as broad policy deliberations and actions pertaining to diverse interests, but, later, more focused actions may follow. Usually, a particular matter arises when the deliberations turn to specific actions that focus on a certain person or a discrete and identifiable class of persons. For example, although a legislative plan for broad health care reform would not be a particular matter, a particular matter would arise if an agency later issued implementing regulations focused narrowly on the prices that pharmaceutical companies could charge for prescription drugs. 5 C.F.R. § 2640.102(a)(1)(example 8). Similarly, the formulation and implementation of the United States response to the military invasion of an ally would not be a particular matter, but a particular matter would arise once discussions turned to whether to close a particular oil pumping station or pipeline operated by a company in the area where hostilities are taking place. 5 C.F.R. § 2640.102(a)(1)(example 7).

Matter

The broadest of the three terms is "matter." However, this term is used less frequently than the other two in the various ethics statutes and regulations to describe the kinds of Government actions to which restrictions apply.

1. Where the Phrase Appears

The most important use of this term is in the one-year post-employment restrictions applicable to "senior employees" and "very senior employees." 18 U.S.C. § 207(c), (d). In this context, "matter" is used to describe the kind of Government actions that former senior and very senior employees are prohibited from influencing through contacts with employees of their former agencies (as well as contacts with Executive Schedule officials at other agencies, in the case of very senior employees). The unmodified term "matter" did not appear in these provisions until 1989, when section 207(c) was amended to replace "particular matter" with "matter" and section 207(d) was first enacted. Pub. L. No. 101-194, § 101(a), November 30, 1989. OGE also occasionally uses the term "matter" in ethics regulations, for example, in the description of teaching,

speaking and writing that relates to an employee's official duties. 5 C.F.R. § 2635.807(a)(2)(E)(1).

2. What the Phrase Means

It is clear that "matter" is broader than "particular matter." See 17 Op. O.L.C. at 41-42. Indeed, the term is virtually all-encompassing with respect to the work of the Government.[11] Unlike "particular matter," the term "matter" covers even the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons. Of course, the term also includes any particular matter or particular matter involving specific parties.

Nevertheless, it is still necessary to understand the context in which the term "matter" is used, as the context itself will provide some limits. In 18 U.S.C. § 207(c) and (d), the post-employment restrictions apply only to matters "on which [the former employee] seeks official action." Therefore, the only matters covered will be those in which the former employee is seeking to induce a current employee to make a decision or otherwise act in an official capacity.

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[11] A now-repealed statute, 18 U.S.C. § 281 (the predecessor of 18 U.S.C. § 203), used the phrase "any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter" (emphasis added). One commentator noted that the term "matter" in section 281 was "so open-ended" that it raised questions as to what limits there might be on the scope. Manning, at 50-51. Manning postulated that some limits might be inferred from the character of the matters listed before the phrase "or other matter." Id. at 51. Whatever the force of this reasoning with respect to former section 281, the same could not be said with respect to 18 U.S.C. § 207(c) or (d), as neither of these current provisions contains an exemplary list of covered matters.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Question 8: On January 29, 2019, you signed an Order (Order No. 3345, Amdt. 24), of "Temporary Redelegation of Authority" to "ensure uninterrupted management and execution of duties of vacant non-career positions during a Presidential transition pending Senate-confirmation of new non-career officials." This is to ensure the duties of 8 vacant leadership-level political employees are carried out by other officials on an acting basis.

These positions include the directors for the National Park Service, the BLM, Fish and Wildlife Service, and others. We are in the third year of this administration, and the President has yet to announce nominees for some of these positions. Your Order implies Senate confirmation is "pending"; but for 6 of the 8 positions there is no nominee pending. Do you believe the "transition" is still underway?

A. Considering we are into the President's third-year, do you think this redelegation practice sidesteps the Constitution's "checks and balances" framework?

B. Would you commit to ending this practice of having so many officials in an acting capacity and request the President formally submit nominees to fill these positions?

Response to questions A and B: The Vacancies Reform Act (VRA) places conditions on how a position requiring confirmation can be filled in an "acting" capacity. Additionally, the law allows the head of an agency to delegate to departmental employees certain "non-exclusive" functions of roles contemplated to be filled by Senate confirmed individuals. Interior Order 3345 and the Department Reorganization Plan No. 3 of 1950 are fully compliant with the VRA. Nevertheless, we hope for speedy confirmation of all nominees.

Question 9: Regarding the ongoing reorganization effort within the Department, information pertaining to the creation of these 12 "unified regions", which problematically splits my home state of Nevada into two different regions, as well as any information about potentially moving the headquarters for the BLM to a western state, has been very vague and hard to come by – yet the President's budget requests $27.6 million to continue these efforts. Can you provide an update today on the status of this effort and will you commit to provide a briefing to this committee before any structural changes or announcements are made?

A. I previously asked this to Secretary Zinke, but did not receive an adequate response, so I will ask you the same - What studies or analyses have been done in order to determine if there are needs for this reorganization? Have any analyses been prepared on how the proposed changes will correct identified needs? If so, would you share those with us? The response I received from the Secretary was vague and seemed to indicate there were no such studies or other documentation to otherwise guide any of these decisions.

Response: On August 22, 2017 the Department's regions were realigned after Congress agreed to Secretary Zinke's reprogramming request. As a result, we are now in the phase of implementing the reality of that action. Simply put, the Department's bureaus evolved

independently over many decades, each with its own geographic regions. This structure, with 49 geographic regions, was complex and not optimal for efficient citizen service. In order to improve citizen service, delivery of shared services internally, facilitate improved inter-bureau coordination and communication, enhance cooperation in shared mission interests and activities, reduce the confusion that differing bureau boundaries cause the Department's partners and the American public, a new regional structure that established 12 Unified Regions went into effect in August, 2018. We are working now to align the bureau's structures to the new boundaries. We expect to complete revisions to the Departmental Manual to reflect the unified regions this spring.

As part of the analyses conducted, we commissioned external third party evaluations of information technology, acquisition processes, and human capital services. Some complex supporting processes and systems will take time to fully implement. For example, implementing changes to align the budget and financial structures and systems to the new regions will be phased in over an extended period. Feedback from the external reviews will help us make sound business decisions and will inform implementation strategies to help us improve administrative function and thereby free up resources for citizen-facing work.

We do propose to move certain functions west. We are developing business case analyses of proposed moves so that spending and relocation decisions are made wisely in order to best enable the bureau to most effectively accomplish its mission and responsibilities.

By streamlining and improving business practices, shared services, and operations, the Department and its individual bureaus will more effectively accomplish their missions. We are committed to thoroughly evaluating the impact of these changes - to measure success and identify any improvements that should be made. We are evaluating performance metrics that can help assess and improve the 3 mission areas (Recreation, Collaborative Conservation, and Permitting) and shared services (human resources, information technology, and acquisition services). By examining performance metric data early in the process, we will ensure that the implementation is nimble and flexible enough to allow us to make any necessary course corrections during the implementation phase.

Question 10: The review conducted by Interior on monuments created by the Antiquities Act over the past twenty years, and the subsequent Presidential decision to remove protections from large swaths of Bears Ears and Grand Staircase-Escalante National Monuments was largely determined behind closed doors. Following the controversial changes to the aforementioned monuments, it is unclear what further considerations to other monuments awaits. Is there active work being done in the Department to pursue changes to other monuments that were on the monument review list? Can you clarify what the next steps are for the remaining national monuments that have not been "pardoned" or altered?

A. Would you commit to rescinding the recommendations that former Secretary Zinke made to President Trump as part of his national monuments review?

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Response: The review of national monuments conducted by former Secretary Zinke in accordance with the President's direction in Executive Order 13792 was informed by the Secretary's travel to eight monument sites in six states, more than 60 meetings held by the Secretary and his staff with hundreds of advocates for and opponents of monument designations, a review of more than 2.4 million public comments, and multiple tribal consultations. Public input in this review was robust. Secretary Zinke provided a report to the President. Ultimately, under the Antiquities Act, the President is solely authorized, in his discretion, to declare, by public proclamation, national monuments.

Follow-up: Would you commit to not writing or rewriting any monument management plans in any manner that is inconsistent with the intent of the original proclamations?

Response: I commit to implementing the President's proclamation in accordance with all appropriate laws and regulations.

Question 11: Please provide data on both how much and what percentage of the land that has been offered for onshore oil and gas lease sale while you have been Deputy Secretary is designated as low or no potential? What percentage of land currently available for oil and gas leasing on a noncompetitive basis has been designated as no or low potential? Please provide data on how many of BLM's Reasonably Foreseeable Development Scenarios (RFD's), which are used by BLM to inform land use planning and leasing decisions, are more than five years old? How many RFD's has BLM completed overall?

Response: The BLM advises me that since August of 2017, 2,626 parcels have received bids at competitive lease sales covering 2.74 million acres. During calendar year 2018, a total of 1,412 parcels received bids, covering nearly1.5 million acres at competitive lease sales.

The BLM generated $1.1 billion from 28 oil and gas lease sales in calendar year 2018, an amount nearly equal to the BLM's entire budget for FY 2018. It was the highest-grossing year on record, nearly tripling what had been the agency's highest year ever in 2008.

BLM does not have an official resource designation to track resource potential on a national level. Individual Resource Management Plans (RMPs) and field development Reasonable Foreseeable Development (RFD) scenarios identify areas, in that time frame, that are expected to have resource potential. However, given recent technological innovations, areas once thought to have low potential have been shown to have more promising energy resources. The U.S. Geological Survey maintains the National Oil and Gas Assessments, but many of these are outdated due to technical advancements allowing for development in new formations that were previously thought to be low potential. The BLM does not track whether nominated lands or lease parcels were designated to have low or no potential in a RFD scenario.

Noncompetitive leases are considered low potential, since they did not receive bids during competitive lease sales. Because these are estimates made at a particular time and are subject to change, whether a lease is designated high and low potential is not maintained in the leasing

databases. It is disclosed to the public during the individual lease sale in NEPA compliance documentation. These documents are posted on BLM's ePlanning website and in the public room 45 days prior to the start of the lease sale.

There are a total of 74 completed RFDs, primarily tied to RMPs. Of those, 36 are more than five years old, many in areas where drilling is not occurring.

Question 12: When were the federal bonding rates for individual leases, statewide bond minimums, and nationwide bond minimums last updated? If these rates were adjusted for inflation, what would they be today? Considering that bonds insure against serious degradation of public land, can you explain why the Interior Department has declined to keep bonding rates on pace with inflation, and at levels that are far lower than what many states require for drilling on state lands?

Response: The BLM advises that its regulations establish the following minimum bond amounts: $10,000 for an individual lease; $25,000 to cover all leases of a single operator in a state; and $150,000 to cover all leases of a single operator nationwide.

The bond amount for individual leases was set in 1960, while the statewide and nationwide bond amounts were set in 1951. The BLM conducts bond adequacy reviews of each oil and gas bond every five years and makes adjustments as needed. These reviews assess the level of potential risk and liability posed by an operator.

Question 13: How does the federal onshore oil and gas royalty rate compare to royalty rates in Colorado, Montana, New Mexico, North Dakota, Texas, Utah and Wyoming? When was the federal rate last updated? How much additional revenue would taxpayers receive if federal rates matched, or exceeded, these states' rates?

Response: The Mineral Leasing Act stipulates that the Federal royalty rate be no less than 12.5 percent. The state royalty rate in Colorado is 20.0 percent, Montana is 16.67 percent, New Mexico is 12.5 to 20.0 percent, North Dakota is 16.67 or 18.75 percent, Utah is 12.5 to 16.67 percent, Wyoming is 12.5 or 16.67 percent, and Texas is typically 20 to 25 percent. It is important to note that Federal oil and gas leases are subject to different regulations than state oil and gas leases. Also, in most of these states, obtaining a permit to drill takes significantly less time and costs less compared to the Federal permitting system.

The Government Accountability Office (GAO) concluded in the *Report to Congressional Committees 17-540, Oil, Gas, and Coal Raising Federal Royalty Rates Could Decrease Production on Federal Lands but Increase Federal Revenue, June 2017* that "Raising federal royalty rates—a percentage of the value of production paid to the federal government—for onshore oil, gas, and coal resources could decrease oil, gas, and coal production on federal lands but increase overall federal revenue, according to studies GAO reviewed and stakeholders

interviewed. However, the extent of these effects is uncertain and depends, according to stakeholders, on several other factors, such as market conditions and prices."

10 N Post St. Ste. 305 | Spokane WA 99201-0705
P. 509.624.1158 | F. 509.623.1241
info@miningamerica.org | www.miningamerica.org

March 13, 2019

The Honorable Lisa Murkowski
United States Senate
Washington DC 20510

The Honorable Joe Manchin
United States Senate
Washington DC 20510

Dear Chairwoman and Ranking Member:

On behalf of the 1700 members of the American Exploration & Mining Association (AEMA), we urge your support for the appointment of David Bernhardt as Secretary of the Department of the Interior (DOI). Mr. Bernhardt is highly qualified for this position. His past service as the Deputy Secretary and DOI Solicitor has uniquely prepared him for this critical position.

Mr. Bernhardt has demonstrated his effectiveness as a leader of DOI. He has earned the respect of the many dedicated employees and those in the private sectors with whom he seeks to collaborate. As a westerner, he understands the unique balance and the value of responsible multiple uses on public lands. His dedication to ensuring a clean environment and respect for cultural resources while allowing responsible economic activity has been clearly demonstrated throughout his tenure. We urge you and your colleagues to support his nomination.

AEMA is a 123-year old, 1700-member national association representing the minerals industry with members residing in 42 U.S. states. AEMA is the recognized national voice for exploration, the junior mining sector, and maintaining access to public lands, and represents the entire mining life cycle, from exploration to reclamation and closure. Our members work closely with DOI to responsibly develop the mineral resources our society requires.

Thank you for your time and consideration.

Yours truly,

Mark D Compton

Mark Compton
Executive Director

MDC/mge

AMERICAN FARM BUREAU FEDERATION®
600 Maryland Ave. SW | Suite 1000W | Washington, DC 20024

ph. 202.406.3600
f. 202.406.3602
www.fb.org

March 27, 2019

The Honorable Lisa Murkowski
Chairwoman
Senate Committee on Energy &
Natural Resources
304 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Joe Manchin
Ranking Member
Senate Committee on Energy &
Natural Resources
304 Dirksen Senate Office Building
Washington, DC 20510

Chairwoman Murkowski & Ranking Member Manchin:

The President's nomination of David Bernhardt as Secretary of the Interior is great news for American agriculture. He understands the needs of America's farmers and ranchers and is an excellent choice for Interior Secretary. The American Farm Bureau Federation supports the swift confirmation of Mr. Bernhardt.

Mr. Bernhardt's proven leadership while serving in the roles of deputy and acting secretary for the Interior Department has reinvigorated the multiple use of America's public lands, through regulatory efforts to reform the outdated and ineffective Endangered Species Act, streamline the National Environmental Policy Act, and promote outcome-based grazing across our nation's rangelands. Additionally, Mr. Bernhardt has been successful in leading a comprehensive reorganization of the Interior Department to improve the effectiveness and transparency of DOI bureaus.

We look forward to working with Mr. Bernhardt as secretary to promote actions that reduce the risk of catastrophic wildfires, which have ravaged rural America and threatened infrastructure critical to farmers and ranchers. We urge members of the Senate Committee on Energy and Natural Resources to support his confirmation.

Sincerely,

Zippy Duvall
President

March 27, 2019

The Honorable Lisa Murkowski
Chairman
Committee on Energy and Natural Resources
522 Hart Senate Office Building

The Honorable Joe Manchin
Ranking Member
Committee on Energy and Natural Resources
306 Hart Senate Office Building

Dear Chairman Murkowski and Ranking Member Manchin:

On behalf of the millions of hunters, anglers, recreational shooters and other outdoor enthusiasts that our organizations represent, we are writing to express our strong support for the confirmation of David Bernhardt as the next Secretary of the Interior.

Through his public service experience on Capitol Hill and within the Department of the Interior (DOI), Bernhardt has demonstrated his commitment to conserving and protecting our nation's natural resources for the benefit of current and future generations.

Bernhardt has a passion for conservation that is guided by his personal commitment to balance the Department's mission. He also has a strong track record of collaborating with diverse cross-sections of stakeholders to ensure that their best interests, not partisan politics, inform policy decisions that may affect them.

An avid sportsman, David has volunteered his time to serve on the Commonwealth of Virginia's Board of Game and Inland Fisheries, Bernhardt understands the value of state and federal partnerships on issues such as ensuring that states retain primary jurisdiction over fish and wildlife within their borders, and interagency collaboration to enhance and expand the public's access to the lands that the public owns.

In 2017, Bernhardt was confirmed by the Senate to serve as a Deputy Secretary of the Interior on a bipartisan vote, and has been serving as Acting Secretary since January 2019. In 2006, Bernhardt was unanimously confirmed by the Senate to serve as the Solicitor of the DOI, where he was the chief legal officer and third ranking official for the Department.

During his time at DOI, during both the current administration and his prior service, Bernhardt was instrumental in several complex wildlife habitat policies:

- Recently issued Secretarial Order 3373 to direct the Bureau of Land Management to consider outdoor recreation value before disposing or exchanging public lands.
- Oversaw the implementation of Secretarial Orders that expand public access and promote fish and wildlife conservation including S.O. 3362 that encourages collaboration between DOI and western state fish and wildlife agencies for the conservation of big-game winter range and migration corridors.
- Through Secretarial Order 3356, Bernhardt worked to expand hunting and fishing opportunities on more than 250,000 acres within the National Wildlife Refuge System, while

working to significantly increase migratory waterfowl populations.

- Worked with Congress and administratively during the Bush Administration to create 15 new National Wildlife Refuges and emphasized recovery goals under the Endangered Species Act.
- Took efforts to conserve the populations of both the bald eagle and the Yellowstone grizzly bear that led to the recovery and removal of the bald eagle from the Endangered Species List; and the proposed delisting of the Greater Yellowstone grizzly bear population.
- Drafted 10-year plan to implement the Executive Order (E.O. 13443) to facilitate the expansion and enhancement of hunting opportunities and the management of game species and their habitat.

We urge you to approve the confirmation of David Bernhardt, so that the Senate may act to quickly confirm the next Secretary of the Interior.

Sincerely,

American Woodcock Society
Archery Trade Association
Association of Fish and Wildlife Agencies
Bass Anglers Sportsman Society (B.A.S.S.)
Boone and Crockett Club
Camp Fire Club of America
Catch-A-Dream Foundation
Center for Sportfishing Policy
Congressional Sportsmen's Foundation
Conservation Force
Council to Advance Hunting and the Shooting Sports
Dallas Safari Club
Delta Waterfowl Foundation
Ducks Unlimited
Houston Safari Club
Masters of Foxhounds Association
Mule Deer Foundation
National Association of Charterboat Operators
National Association of Forest Service Retirees
National Marine Manufacturers Association
National Rifle Association
National Shooting Sports Foundation
National Wild Turkey Federation
North American Falconers Association
Pheasants Forever/Quail Forever
Pope and Young Club
Professional Outfitters and Guides of America
Quality Deer Management Association
Recreational Fishing Alliance

Rocky Mountain Elk Foundation
Ruffed Grouse Society
Safari Club International
Sportsmen's Alliance
Theodore Roosevelt Conservation Partnership
Wild Sheep Foundation
Wildlife Forever
Wildlife Mississippi

March 8, 2019

The Honorable Lisa Murkowski
United States Senate
Washington, D.C. 20510

Dear Senator Murkowski:

As representatives of national organizations promoting responsible motorized recreation, we are writing in support of the nomination of David Bernhardt to be the next Secretary of the Department of the Interior. At a time when many of the senior posts at the agency lack Senate confirmed executives, a person of Mr. Bernhardt's experience is sorely needed.

Mr. Bernhardt knows the Interior Department well, given that he previously served in a variety of senior executive positions at the Department including: Deputy Chief of Staff and Counsellor to former Secretary of Interior Gayle Norton; DOI's Director of Congressional and Legislative Affairs; Solicitor of the Department from 2006-2009; Deputy Secretary of the Department and currently serves Acting Secretary. He brings to the agency unparalleled experience at a critical time.

In the last two years, we have seen the Department's renewed interest on the value of recreation on public lands. Outdoor recreation is not only important for the health of the American people, but it also serves to strengthen the economic health of our nation. Increasing access to our public lands, including access for off-highway vehicle (OHV) recreation, is an important part of this equation. We have every confidence that as Secretary, Mr. Bernhardt will continue to focus on all the benefits that outdoor recreation affords the American people.

We are hopeful that your committee will be able to consider Mr. Bernhardt's nomination in the very near future and that the full Senate will vote in the affirmative for his nomination. Having Mr. Bernhardt at the helm of the Interior Department will strengthen the agency's resolve to make the lands it manages accessible to the recreating public.

Sincerely,

Larry Smith
Executive Director
Americans for Responsible Recreational Access

Christine Jourdain
Executive Director
American Council of Snowmobile Associations

Spencer Gilbert
Executive Director
BlueRibbon Coalition, Inc.

Tim Buche
President
Motorcycle Industry Council

• 1025 Connecticut Ave, NW • Suite 1000 • Washington, DC 20036 • PH: (202) 336-5116 •

Duane Taylor
Executive Director
National Off-Highway Vehicle Conservation Council

Fred Wiley
Executive Director
Off-Road Business Association

Erik Pritchard
Executive Vice President and General Counsel
Recreational Off-Highway Vehicle Association

Stuart D. Gosswein
Senior Director, Federal Government Affairs
Specialty Equipment Market Association

Scott Schloegel
Senior Vice President, Government Relations
Specialty Vehicle Institute of America

Steve Egbert
President
United Four Wheel Drive Associations, Inc

ARCHERY
TRADE ASSOCIATION

March 22, 2019

The Honorable Lisa Murkowski
Chairman
Committee on Energy and Natural Resources
522 Hart Senate Office Building
Washington, DC 20510

The Honorable Joe Manchin
Ranking Member
Committee on Energy and Natural Resources
511 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Murkowski and Ranking Member Manchin:

On behalf of the Archery Trade Association, we are writing to express our strong support for the confirmation of David Bernhardt as the next Secretary of the Department of the Interior.

The Archery Trade Association (ATA) is an organization comprised of manufacturers, retailers, distributors, sales representatives and others working in the archery industry. The ATA has served its members since 1953 and is dedicated to increasing participation in archery, bowhunting and bowfishing.

Throughout Mr. Bernhardt's long history of public service, he has demonstrated tremendous commitment to conserving and protecting our nation's natural, historic and cultural resources for the benefit of current and future generations. As an avid hunter, angler and shooter, Mr. Bernhardt understands the value of state and federal partnerships on issues such as ensuring that states retain primary jurisdiction over fish and wildlife within their borders, to enhance and expand the public's access to public lands.

David's experience with the Department of Interior coupled, exemplary history of collaboration, non-partisan views, highly respected demeanor and deeply held passion for conservation and historic preservation make him uniquely qualified for this position.

We urge you to approve the confirmation of Mr. Bernhardt for this most critical position at the Department of the Interior.

Regards,

Dan Forster

Dan Forster, Vice President & Chief Conservation Officer
Archery Trade Association

Dan Forster
4652 Hawkins Academy Road | Social Circle, GA | 30025
Toll Free (866) 266-2776 Ext. 128| Mobile (770) 601-5038
archerytrade.org

The voice of fish and wildlife agencies
1100 First Street, NE, Suite 825
Washington, DC 20002
Phone: 202-838-3474
Fax: 202-350-9869
Email: info@fishwildlife.org

March 27, 2019

The Honorable Lisa Murkowski
Chairwoman
Committee on Energy and Natural Resources
522 Hart Senate Office Building
Washington, DC 20510

The Honorable Joe Manchin
Ranking Member
Committee on Energy and Natural Resources
306 Hart Senate Office Building
Washington, DC 20510

Dear Chairwoman Murkowski and Ranking Member Manchin:

I am writing on behalf of the Association of Fish and Wildlife Agencies (Association) in strong support of Mr. David Bernhardt's nomination to serve as the Secretary of the Department of the Interior. The Association represents the state fish and wildlife agencies on national conservation policy and legislation.

The Association has had a positive working relationship with Mr. Bernhardt dating back to his tenure as Solicitor of the Department of the Interior (2006-2009). More recently, we have collaborated with Mr. Bernhardt and his senior team, both as Deputy Secretary and Acting Secretary, on several issues ranging from regulatory reform of the federal Endangered Species Act to protection and management of big game migration corridors in the West, from due recognition of state authority for fish and wildlife management to recreational access to federal public lands under the stewardship of the Department of the Interior. We welcome Mr. Bernhardt's explicit interest in Chronic Wasting Disease.

State fish and wildlife agencies are highly supportive of collaborative and transparent decisions, based on science, to advance our collective state-federal missions. Mr. Bernhardt has demonstrated an earnest respect for the work and mandates of state fish and wildlife agencies. Indeed, his time as a member of the Board of Game and Inland Fisheries for the Commonwealth of Virginia gives him unique, first-hand insights into the role of state agencies.

Mr. Bernhardt has a sharp legal mind, he is committed to good governance and stewardship of the Department of the Interior, a great understanding of its heritage and mission, coupled with a long record of accomplishment, and he is a thoughtful communicator of vision. In addition to this impeccable professional standing, he grew up in the west with a strong outdoor recreation ethic shaped in part by being a hunter and an angler.

Thank you for your consideration of this letter. In sum, the Association commends Mr. Bernhardt for timely consideration and action by the United States Senate.

Sincerely,

Ed Carter

Ed Carter
President

March 15, 2019

Senator Lisa Murkowski, Chairperson
Senator Joe Manchin, Ranking Member
Senate Energy and Natural Resources Committee
304 Dirksen Senate Building
Washington, DC 20510

By Mail and Hand Delivery

Re: Confirmation of David Bernhardt as Secretary of the Department of the Interior

Dear Senators Murkowski and Manchin:

The Association of O&C Counties (AOCC) supports confirmation of Mr. David Bernhardt to serve as Secretary of the Department of the Interior (DOI). AOCC represents counties in Western Oregon in connection with their statutory interests in 2.1 million acres of timberland managed by the Bureau of Land Management within the DOI. Mr. Bernhardt's extensive public service both as DOI's chief legal counsel and as a policymaker make him very well qualified to lead the agency.

Mr. Bernhardt's background and experience in dealing with the nation's natural resources are a matter of record. He has led efforts related to species conservation, conventional and alternative energy development, natural resources planning, environmental compliance, climate change and Indian affairs. Among a variety of other positions he has filled at the DOI, in 2006 he was unanimously confirmed by the Senate to serve as the Solicitor of the DOI and in that capacity was immersed in a very broad range of complex issues confronting the agency. He has also worked in the private sector and understands the very important role DOI plays in communities and in the lives of citizens throughout the nation. Mr. Bernhardt has been a consistent advocate for closer and more frequent communication with those who use, and are dependent on the wise management and stewardship of the lands under the jurisdiction of the DOI.

Mr. Bernhardt has a broad and unique understanding of the many legal, social and scientific complexities the DOI must deal with. AOCC strongly supports his confirmation.

Very truly yours,

Rocky McVay

Rocky McVay
Executive Director

cc: Oregon's Congressional Delegation (by email)

16289 Hwy 101 South, Suite A · Brookings, Oregon 97415 · 541.412.1624 · 541.412.8325 Fax

Sustained Yield Forestry = Sustainable Environments + Sustainable Communities

Bill Harvey
Commission Chair
bharvey@bakercounty.org

March 14, 2019

The Honorable Jeff Merkley
313 Hart Senate Office Bldg.
Washington, DC 20510

The Honorable Ron Wyden
221 Dirksen Senate Office Bldg.
Washington, DC 20510

Dear Senators,

Baker County, Oregon fully supports Dave Bernhardt to become the Secretary of the U.S. Department of the Interior (DOI). Since January 2019, Mr. Bernhardt has served admirably as the Acting Director of the Department of the Interior which oversees the National Park Service, U.S. Fish and Wildlife Service, Bureau of Indian Affairs, and the Bureau of Land Management. Mr. Bernhardt's nomination was formally sent to the Senate on March 8, 2019.

Baker County spans 3,089 square miles, making the County larger than Rhode Island or Delaware. Federal agencies manage approximately 51.5% of the land in the County, comprising a total of 1,016,511 acres. Approximately 18.5% is managed by the Bureau of Land Management. The remaining 48% of the land in the County, 950,382 acres, is privately owned. The citizens of Baker County rely on both private and public land for natural resources, recreation, and the ability to continue our customs, culture, and economic viability.

During his previous eight years serving in the DOI, Mr. Bernhardt has proven he understand the needs of local communities and to recognize that public lands are an integral part of our society. He recognizes that public lands must provide for multiple use and sustained yield—a balance of providing for our communities and protecting these valuable lands.

Since being confirmed to the number two spot in DOI two years ago, Mr. Bernhardt has demonstrated leadership by engaging with other agencies and organizations. These partnerships have resulted in successful implementations of recommendations and provided platforms to discuss policy priorities with the citizens they will affect. Mr. Bernhardt has proven himself in the past by demonstrating understanding between the balance that is needed from an environmental standpoint, as well as from the social and economic aspects of public land use.

Please join Baker County in supporting Dave Bernhardt for Secretary of the Interior.

Sincerely,

Bill Harvey, Chair
Baker County Commission

1995 Third Street • Baker City, Oregon 97814 • PH: (541)523-8200 • FAX: (541)523-8201

BEAVER COUNTY COMMISSION
Michael F. Dalton - Tammy T. Pearson - Mark S. Whitney
P.O. Box 789 - 105 East Center - Beaver, UT 84713
P: (435)438-6490 F: (435)213-1752

March 20, 2019

Honorable Senator Michael Lee
361A Russell Senate Office Building
Washington, DC 20510

Honorable Senator Mitt Romney
B33 Russell Senate Office Building
Washington, DC 20510

Honorable Senators:

Beaver County, Utah expresses our strong support for Mr. David Bernhardt, nominee for Secretary of the Interior and asks that you vote in favor of his nomination.

With more than 77% of Beaver County under federal ownership, the decision you make in regards to who manages the Department of Interior, has a significant impact on our County. Our communities and economy rely heavily on the use of federal land – with active mining operations, grazing, agriculture, wild horse management, renewable energy production, tourism, recreation, and other multi-use activities. This appointment will have a significant impact on our county, its lands and opportunities for our residents and visitors.

In our interactions with Mr. Bernhardt we have found him to act with integrity, be open minded to all points of view, and have a contagious passion for the health of our Nation's lands and people. These qualities, combined with many others, make Mr. Bernhardt an ideal candidate to serve the country by leading the Department of Interior.

We request you vote in favor of his nomination in the upcoming confirmation hearings.

Please contact us if you have any questions, and thank you in advance for your thoughtful consideration.

Sincerely,

Michael F. Dalton
Commission Chair

Tammy T. Pearson
Commissioner

Mark S. Whitney
Commissioner

COLORADO
BOARD OF COUNTY COMMISSIONERS
District 1 - John Justman 970-244-1605
District 2 - Scott McInnis 970-244-1604
District 3 - Rose Pugliese 970-244-1606

P.O. Box 20,000 544 Rood Avenue Grand Junction, Colorado 81502-5010 mcbocc@mesacounty.us Fax (970) 244-1639

March 18, 2019

President Donald J. Trump
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Re: Letter of Support for Nomination of David Bernhardt to the position of United States Secretary of the Interior

Dear Mr. President:

The Board of Mesa County Commissioners submits this letter in strong support of the nomination of David Bernhardt for Secretary of the Interior.

The Board admires the dedication and professionalism Mr. Bernhardt has shown in his previous efforts in dealing with public land management issues that affect state and local governments with substantial amounts of public lands. Mr. Bernhardt is a Colorado native who understands the role the federal government has with respect to public lands and its impact on state and local governments and their economies.

Mr. Bernhardt recently helped western Colorado counties obtain reimbursement of the oil and gas lease revenue held by the Department of Interior that was owed to rural communities from the Anvil Points Naval Oil Shale Reserve. The federal government had withheld all mineral lease funds, royalties and bonus payments from 1997 to 2008, from Garfield, Mesa, Moffat and Rio Blanco counties. Additionally, the withholding created a surplus in the trust fund, and when the site cleanup was completed in 2011, the funds were not released. This year, thanks to Mr. Bernhardt, the affected counties finally received reimbursement of their funds.

With his extensive background in both the private and public sectors dealing with public lands issues, Mr. Bernhardt is undoubtedly experienced and qualified for the position. We are grateful for Mr. Bernhardt's leadership and ability to find effective advocacy within complex issues for the benefit of our counties. We consider his level-headedness and focus on what is best for our Colorado communities and the nation as a whole a great asset.

Mr. Bernhardt's extensive knowledge of public lands and energy issues make him an avid leader with skills to see issues from multiple perspectives to maintain and improve partnerships among federal, state, and local governments.

Without reservation, the Board of County Commissioners highly recommends David Bernhardt for the position of United States Secretary of the Interior. Thank you for the opportunity to comment.

Respectfully,

Rose Pugliese, Chair
Board of County Commissioners

John Justman
Commissioner

Scott McInnis
Commissioner

RIO BLANCO COUNTY
BOARD OF COUNTY COMMISSIONERS
HISTORIC COURTHOUSE, 555 MAIN STREET
P.O. BOX 599
MEEKER, COLORADO 81641
970-878-9430

March 25, 2019

President Donald J. Trump
The White House
1600 Pennsylvania Avenue, N.W.
Washington D.C. 20500

Dear Mr. President:

The Board of County Commissioners of Rio Blanco County, Colorado would like to thank you for your nomination of David Bernhardt as Secretary of the Interior. Rio Blanco County is made up of 6,666 people, and covers approximately 3,200 square miles in northwest Colorado.

Rio Blanco County is home to significant amounts of public land. It has vast natural resources including coal, natural gas and timber. Agriculture plays a vital role in our community. Our region is home to one of the largest elk and deer herds in the country. We also offer many great fishing, rafting, and outdoor opportunities. We are the home of Colorado's oldest Rodeo, celebrating its 134th anniversary this year. Throughout its existence our county has balanced resource development with recreation for more than 100 years and boast some of the cleanest air and water in the country.

Mr. Bernhardt grew up in this region of the state and is familiar with balancing of its natural resources. As you are aware, he has held multiple positions at the Department of the Interior (DOI), and has worked with the laws and regulations related to DOI in the private sector. He understands the complexities of the laws and regulations from both sides which gives him a perspective superior to most when it comes to the management of public lands. We believe there is nobody better suited to be the top manager of public lands in the U.S., than David Bernhardt.

As a local government, we appreciated Mr. Bernhardt's efforts to carry out the review and revision of management plans related to the greater sage grouse. He has listened to the local experts and has worked to develop a way forward regarding a habitat management plan for this species that is balanced and much more representative of a collaborative effort than the 2015 Record of Decision. Deputy Secretary Bernhardt has

been straightforward with local governments. He has also been diligent in avoiding discussions that may potentially be construed as conflicting with his duties.

We cordially invite you to visit and experience firsthand the balance of natural resources we have achieved in Rio Blanco County. We applaud the nomination of David Bernhardt for the position of Secretary of the Interior. It is vitally important to our community to have a man with his knowledge and experience as Secretary. We strongly encourage the Senate to confirm quickly his nomination so he can move on with the important work of properly managing the nation's public lands.

If you have any questions, or would like to speak with us individually, please email us at bocc@rbc.us, or feel free to contact us at our individual telephone numbers listed below.

Sincerely,

Board of County Commissioners
of Rio Blanco County, Colorado

Jeff Rector
Chairman
(970) 878-9437

Si Woodruff
Commissioner
(970) 878-9433

Gary Moyer
Commissioner
(970) 878-9678

Cc: Senator Michael Bennett
Senator Cory Gardner
Congressman Scott Tipton

COUNTY MANAGER
Stanton L. Riggs
PO Box 1817
Roswell, NM 88202-1817
PHONE: 575-624-6602
FAX: 575-624-6659
Email: sriggs@co.chaves.nm.us

COMMISSIONERS
Dara Dana · District 1
T. Calder Ezzell, Jr. · District 2
Jeff Bilberry · District 3
Robert Corn · District 4
William E. Cavin · District 5

March 6, 2019

Honorable Senator Martin Heinrich
303 Hart Senate Office Building
Washington, DC 20510

RE: Support of Mr. David Barnhardt's Nomination as Secretary of the Department of Interior

Dear Senator Heinrich:

My name is William Cavin and I am the Chairman of the Chaves County Board of Commissioners. Chaves County is proud to support the nomination of Mr. David Barnhardt for the Secretary of the Department of Interior.

The Department of Interior oversees the BLM and U.S. Fish and Wildlife Services. Chaves County has 1.2 million acres in our County under the control of the BLM. In addition, Chaves County contains the Bitter Lake National Wildlife Refuge and the Southwest Native Resources and Recovery Center Fish Hatchery, which are under the control of the service.

The decisions made by the Interior Department can have a tremendous impact on our county's economy and our way of life. That is why we are so pleased that Mr. Barnhardt has been nominated for this very important position. We have had the pleasure of meeting with Mr. Barnhardt. We believe he is a person of great integrity and will truly listen to our positions with an open mind. All we ask is for a Secretary who will honestly and fairly consider all sides. We believe Mr. Barnhardt is such a person. As such, Chaves County wholeheartedly supports his nomination as Secretary of the Department of Interior.

Sincerely,

William E Cavin, Chairman
Chaves County Commission

Conservation Lands Foundation
Protecting America's Heritage

Conservation Lands Foundation Statement on Nomination of David Bernhardt as Interior Secretary

Durango, Colo. (February 4, 2019) – Today, the Conservation Lands Foundation (CLF) issued the following statement on behalf of Executive Director Brian Sybert in response to the nomination of Acting Secretary David Bernhardt as the next Secretary of the U.S. Department of the Interior.

"The nomination of David Bernhardt continues the Administration's trademark move of putting anti-public lands ideologues in charge of lands that belong to all of us. Bernhardt has been pulling the strings of the department's most destructive public lands policies since he was Deputy Interior Secretary. These decisions threaten the National Conservation Lands for generations to come, and his nomination as Interior Secretary continues the culture of corruption that defines this administration.

For the past two years, Zinke and Bernhardt have together prioritized the will of extractive industries over the will of the people. Bernhardt helped mastermind Secretary Zinke's misguided "monuments review," which ignored the will of Tribal governments and more than 2.9 million public comments in favor of keeping the monuments as they are. Their actions paved the way for President Trump's illegal proclamations, which shrunk Bears Ears National Monument by 85 percent and Grand Staircase-Escalante National Monuments by 50 percent.

We have no doubt this will continue should he be confirmed as Secretary, and we call on the United States Senate to reject his nomination. Bernhardt's relentless push to sell off America's national treasures to the detriment of the natural resources all of us rely on ought to alarm everyone. It makes it all the more important to bolster our grassroots advocates on the ground who are working tirelessly to protect our public lands for the benefit of all Americans. Their voices will be critical for holding the Department accountable and reminding Bernhardt exactly who he works for."

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About the Conservation Lands Foundation
The Conservation Lands Foundation is the only organization dedicated solely to protecting, restoring and expanding the National Conservation Lands so they will endure from generation to generation. The National Conservation Lands are 36+ million acres of protected public lands, rivers and trails managed by the Bureau of Land Management, that have joined the ranks of our national parks and wildlife refuges as guardians of our nation's natural, cultural and outdoor heritage, and drivers of its $887 billion outdoor recreation economy. Learn more at www.ConservationLands.org.

--

David Feinman / Government Affairs Director
davidf@conservationlands.org

Conservation Lands Foundation
202-429-8446 (o) / 202-306-8162 (c)
1615 M St NW, Suite 200, Washington, DC 20036
www.conservationlands.org

www.corpsnetwork.org

March 28, 2019

The Honorable Lisa Murkowski
Chairwoman
Energy and Natural Resources Committee
304 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Joe Manchin
Ranking Member
Energy and Natural Resources Committee
306 Hart Senate Office Building
Washington, DC 20510

Dear Chairwoman Murkowski and Ranking Member Manchin,

On behalf of The Corps Network, I write to express support for the prompt confirmation of David Bernhardt as the Secretary of the US Department of the Interior.

The Corps Network represents the nation's 130 Service and Conservation Corps (Corps) which provide young adults and recent veterans with opportunities to serve their country, advance their education, and obtain in-demand job skills and credentials, while they perform important conservation, resource management, outdoor recreation, wildfire, and disaster response service projects on public lands and waters and in communities across the country.

Last year alone, Corps engaged over 25,000 youth and veterans, improved access to 11,000 miles of multi-use trails and 16,000 recreation facilities; restored and protected 567,000 acres of fish and wildlife habitat; removed 365,000 acres of invasive species; reduced 32,000 acres of fire fuel; and responded to more than 500 wildfires and other disasters.

Mr. Bernhardt has been a strong supporter of outdoor recreation during his tenure at DOI and has specifically recognized and promoted the value of Corps service on public lands both as the Deputy Secretary and now as Acting Secretary of DOI. Mr. Bernhardt has been accessible and responsive to our inquiries, visited several Corps in the field, and joined The Corps Network's Day of Service last summer where he drew parallels between his own experience as a young man and that of our Corpsmembers, while recognizing the important role that Corps play in improving and maintaining our public lands and resources.

Our network has spent considerable time engaging Mr. Bernhardt and his team on various proposals to expand Corps' scope of work department-wide and are pleased to have received positive feedback throughout the two years we've worked with the Administration. We've also begun conversations on the timely implementation of key elements within the 21st Century Conservation Service Corps Act – signed into law a few short weeks ago.

If confirmed, we are committed to working with Mr. Bernhardt and his department to promote continuity of Corps involvement in existing areas and growing the number of young adults and veterans who serve on public lands and waters.

Thank you for your favorable consideration of this matter.

Sincerely,

Mary Ellen Sprenkel

Mary Ellen Sprenkel
President and CEO

#CorpsWork #21CSC | 1275 K St. NW, Suite 1050 | Washington, DC 20005 | p: 202.737.6272 | f: 202.737.6277

March 27, 2019

John E. Frampton
President/CEO

1100 First Street, NE
Suite 825
Washington, D.C. 20002

The Honorable Lisa Murkowski
Chairman
Committee on Energy and Natural Resources
522 Hart Senate Office Building

The Honorable Joe Manchin
Ranking Member
Committee on Energy and Natural Resources
306 Hart Senate Office Building

Dear Chairman Murkowski and Ranking Member Manchin:

On behalf of the Council to Advance Hunting and the Shooting Sports, we are writing to express our strong support for the confirmation of Mr. David Bernhardt as the next Secretary of the Department of the Interior. The Council to Advance Hunting and the Shooting Sports is a non-governmental, charitable, 501(c)(3) educational organization incorporated in the District of Columbia. The Council was formed by the leaders in the conservation community to take a fresh look at the business of recruiting, retaining and reactivating hunters and target shooters and to develop new and sustainable strategies and tactics to solicit, engage and support these groups that are so vital to Conservation and America's heritage.

Mr. Bernhardt has proven his commitment to the conservation of natural resources throughout his career as a public servant. From his service on the local Board for the Virginia Department of Game and Inland Fisheries to his work with the International Boundary Commission, Mr. Bernhardt maintained his responsibilities to ensuring the proper and wise management of America's valued natural resources at all levels of government. His proven record of accomplishment, in combination with his reverence for the land as an avid hunter and angler, position Mr. Bernhardt well to serve as the Secretary of the Interior. In the last two years, Mr. Bernhardt demonstrated his potential to lead the Department forward while serving as Deputy Secretary, and his confirmation as Secretary of the Interior will provide even greater opportunity for Mr. Bernhardt to apply his unique skill set to have a lasting impact on America's natural resources.

The Council and its Board of Directors are encouraged with the Committee's consideration of Mr. Bernhardt for the position, and we urge you to confirm Mr. Bernhardt as the next Secretary of the Department of the Interior.

Regards,

John E. Frampton

CEO/President

Office: 202-838-3471 | Mobile: 202-308-0873 | Fax: 202-350-9869 | Email: jframpton@fishwildlife.org

Protecting Water for Western Irrigated Agriculture

P.O. Box 216 Klamath Falls, OR 97601
(541)-892-6244 www.familyfarmalliance.org

March 21, 2019

The Honorable Lisa Murkowski, Chairwoman
The Honorable Joe Manchin, Ranking Member
U.S. Senate Committee on Energy and Natural Resources
304 Dirksen Senate Building
Washington, DC 20510

Dear Chairwoman Murkowski, Ranking Member Manchin and Members of the Committee:

On behalf of the Family Farm Alliance (Alliance), we appreciate the opportunity to strongly endorse The Honorable David Bernhardt as the next Secretary of the U.S. Department of the Interior (Interior).

The Alliance is a grassroots organization of family farmers, ranchers, irrigation districts and allied industries in 16 Western states. The Alliance is focused on one mission: To ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers. We are also committed to the fundamental proposition that Western irrigated agriculture must be preserved and protected for a host of economic, sociological, environmental and national security reasons – many of which are often overlooked in the context of other national policy decisions.

Our organization works constructively with many federal departments and agencies, but the relationship we have with the Department of the Interior – and in particular, with the Bureau of Reclamation – is our closest.

We believe Mr. Bernhardt is a strong leader; a person with vision, common sense and high ethical standards. We have worked with Mr. Bernhardt over the past several years on Western water issues and, as a Westerner himself, we believe he understands the unique challenges faced by rural agricultural producers living in Western states where the federal government plays a significant role in the management of public land and water.

Mr. Bernhardt already has a proven track record at Interior, where he has served as Deputy Secretary at the Department since 2017. In that time, Interior has taken significant steps to make Western water issues a high priority, as well as implementing administrative measures that we believe will improve implementation of federal environmental laws like the National Environmental Policy Act and the Endangered Species Act.

Prior to his most recent work at Interior, in 2006 Mr. Bernhardt was unanimously confirmed by the United States Senate to serve as Interior's Solicitor. Prior to serving as Solicitor, he held several other high-level positions in the George W. Bush Administration including: Deputy Solicitor, Deputy Chief of Staff, Counselor to the Secretary of the Interior, and Director of the Office of Congressional and Legislative Affairs.

As Solicitor, Mr. Bernhardt served with distinction as the Chief Legal Officer and third ranking official at Interior. He provided advice and counsel on a wide range of legal and policy matters to each of the

agencies that make up the Department of the Interior, while leading a team of nearly 500 attorneys and staff.

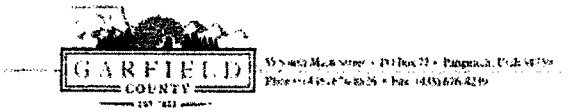
Based on these considerations, and especially on our more recent work with Mr. Bernhardt over the past two years as Deputy Secretary, we fully expect he will continue to bring a level of practical experience, empathy for rural producers, and intelligent, common sense resource management decision-making into this new role as the next Secretary of the Interior.

The Family Farm Alliance respectfully requests your support of The Honorable David Bernhardt's nomination as the next Secretary of the Interior. We know he will serve our Nation well in this important position.

Sincerely,

Patrick O'Toole
President

Dan Keppen
Executive Director



February 28, 2019

Honorable Senator Michael Lee
361A Russell Senate Office Building
Washington, DC 20510

Honorable Senator Mitt Romney
B33 Russell Senate Office Building
Washington, DC 20510

Honorable Senators:

This correspondence expresses Garfield County, Utah's strong support for Mr. David Bernhardt, nominee for Secretary of the Interior and asks that you vote in favor of his nomination at upcoming confirmation hearings.

More than 90% of Garfield County is under federal ownership, and the vast majority is managed by Department of Interior Agencies (BLM and the National Park Service). We have nearly 2 million acres under Interior Department management; and we are the only county in the country – that we know of- that hosts 3 National Parks. This appointment will have a significant impact on our county, its lands and opportunities for our residents and visitors.

We have observed Mr. Bernhardt and have associated with him off and on over the years in his various roles with the federal government. We have found him to be honest, fair and sincerely concerned about the health of the Nation's lands and its people. We assert he is an ideal candidate to serve the country by leading the Department.

We specifically recommend him and request your affirmative vote in the confirmation hearings. We also request the Senate to act quickly, so activities in the Department may continue unimpeded.

Please contact us if you have any questions, and thank you in advance for your thoughtful consideration.

Sincerely,

Leland F. Pollock
Commission Chair

David B. Tebbs
Commissioner

Jerry Taylor
Commissioner

GILA RIVER INDIAN COMMUNITY

Executive Office of the Governor & Lieutenant Governor

"Putting Our People First"

Stephen Roe Lewis
Governor

Robert Stone
Lieutenant Governor

March 27, 2019

The Honorable Lisa Murkowski
Chairwoman
Committee on Energy & Natural Resources
United States Senate
Washington, DC 20510-6150

The Honorable Joe Manchin III
Ranking Member
Committee on Energy & Natural Resources
United States Senate
Washington, DC 20510-6150

RE: Support for Nomination of Mr. David Bernhardt as Secretary of the Department of the Interior

Dear Chairwoman Murkowski and Ranking Member Manchin,

On behalf of the Gila River Indian Community, I write in support of the nomination of Mr. David Bernhardt to serve as Secretary of the Department of the Interior. Our support stems from our experience working with Mr. Bernhardt during his previous tenure as a senior official at the Department of the Interior and most recently in his role as Deputy Secretary of the Department of the Interior.

During Mr. Bernhardt's previous stint at the Department, we negotiated extensively with him on our water settlement—the Gila River Indian Community Water Rights Settlement – that was enacted into law in 2004 as part of the Arizona Water Settlements Act. Mr. Bernhardt was a tough negotiator for the Department but allowed us to present our case to him. Once he understood that the Community had legitimate rights to water, he was able to balance his role as an advocate for the Department with the understanding that the Department had a trust responsibility to the Community. Additionally, after a final settlement was reached, the Community found Mr. Bernhardt helpful in navigating the legislative process to ensure that Congress understood that the settlement benefited both the Community and the Federal government. As a result, the Community's water settlement was enacted into law and brought critical water resources to the Community and our members.

Most recently, the Community worked with Mr. Bernhardt on gaining this Administration's support for a trust mismanagement settlement that had been negotiated during the prior Administration. The settlement required Congressional action for implementation of certain components. Again, Mr. Bernhardt took the time to determine whether our issues were legitimate, and once he made that determination he recommended that the Department support the legislative effort to implement our settlement. This resulted in the introduction and passage of H.R. 4032, the Gila River Indian Community Federal Rights-of-Way, Easements and Boundary Clarification Act,

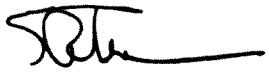
525 West Gu u Ki · P.O. Box 97 · Sacaton, Arizona 85147
Telephone: 520-562-9841 · Fax: 520-562-9849 · Email: executivemail@gric.nsn.us

which passed Congress and was signed into law on December 21, 2018. This legislation resolved federal litigation that originated in 2006 and provided a process to document and legitimize existing Federal rights-of-way on the Community's lands that, once complete, will remove longstanding barriers to housing development and implementation of the Community's water settlement. Further, H.R. 4032 settles a Reservation boundary dispute while simultaneously placing Federal disposal lands that are culturally significant to the Community into trust after the Community purchases these lands from the United States. Under Mr. Bernhardt's leadership, the Department of the Interior supported and testified in favor of this critical legislation for the Community.

Mr. Bernhardt has also shown his support for innovative solutions to address the significant need for replacement school construction at Bureau of Indian Education funded schools that plagues much of Indian Country. The Community is currently working with the Department to establish an alternative funding mechanism within the Department's statutory authority to create additional avenues for tribes to construct schools in their communities in which tribes are able to construct a new school and upon completion, lease the school facility back to the Bureau of Indian Education through a negotiated lease. This type of innovative thinking and partnership with tribes is just what Indian Country needs to address the significant construction backlog of Bureau of Indian Education schools.

Based on our experience in negotiating and working on complex issues with Mr. Bernhardt we support his position as Secretary of the Department of the Interior. We believe he has an understanding of tribal sovereignty and the United States' trust responsibility to tribal nations, including the Gila River Indian Community.

Sincerely,



Stephen Roe Lewis
Governor

February 5, 2019

Acting Secretary Bernhardt
Department of Interior
1849 C Street N.W.
Washington, DC 20240

Dear Acting Secretary Bernhardt,

Jennie and I offer congratulations on your nomination to lead the Department of Interior. I came away from our meeting impressed and feel you have the right approach and skill set required to guide Interior. I look forward to many more discussions about federal lands; endangered and sensitive species; oil, gas and coal development; and our national parks.

Your recognition of expertise in the states is refreshing and I believe we in the states now need to step to the plate and provide responsible leadership. I believe that we are doing that now working in concert with Interior to conserve sage grouse, while maintaining other valuable economic activities and land uses. Your responsiveness to Wyoming's concerns with sage grouse management is appreciated.

I wish you a speedy and easy confirmation process and I hope we are offered the opportunity to continue the discussion about grizzly bear management again soon and that we can find a path forward.

Please be in touch any time if there are matters to discuss or if there is anything I can to offer you assistance or insight.

Best regards,

Mark Gordon
Governor of Wyoming

2323 CAREY AVE. CHEYENNE, WY. 82001 307.777.7434 MARK GORDON WYOMING STATE GOVERNOR GOVERNOR@WYO.GOV HTTP://GOVERNOR.WYO.GOV

HARNEY COUNTY COURT
450 North Buena Vista #5, Burns, Oregon 97720
Phone: 541-573-6356 Fax: 541-573-8387
E-mail: Pete.runnels@co.harney.or.us
Websites: www.co.harney.or.us ♦ www.harneycounty.org

March 12, 2019

Senators Wyden and Merkley,

Harney County Court writes today to express our support for David Bernhardt to lead the U.S. Department of Interior. Bernhardt has served as acting director of the interior, which oversees the National Park Service (NPS), United States Fish and Wildlife Service (USFWS), Bureau of Indian Affairs (BIA), and the Bureau of Land Management (BLM) since January. His nomination was formally sent to the Senate on March 8th 2019.

Harney County has over 4.8 million acres of public lands. Public lands are one of our Country's greatest assets. Maintaining these public lands is a must for our County and our Country. In conjunction with our customs and culture, Harney County depends on these vast public lands to promote and cultivate our agriculture, recreational and tourism communities. During his previous eight years serving in the department, in various high-level positions for former administrations, Mr. Bernhardt has proven to understand and observe the needs of local communities and also, to recognize that these lands are an integral part of our society. His knowledge and expertise that public lands need to provide for multiple use and sustained yield is a must in this position. In order for Harney County and other public land counties to survive and be able to support public land as one of our greatest assets, we need a leader that can understand the balance of providing for our communities and protecting these valuable lands.

Since rejoining the Interior, by being confirmed to the number two spot two years ago, he has shown leadership in working with various entities. One of these entities that he has prioritized has been the sportsmen community obtaining a platform to discuss policy priorities. Additionally, he has assisted with implementing recommendations from the newly-formed Hunting and Shooting Conservation Council. Hunting and Shooting Conservation Council is an advisory group tasked with providing feedback to the Department to benefit wildlife and hunting collectively. Mr. Bernhardt has proven himself in the past by exhibiting understanding between the balance that is needed from an ecological standpoint, but also, what is needed from the economic and social aspect of public land use. He will work towards a balanced approach by trying to assess and distinguish between the multiple issues that we are facing with the NPS, USFWS, BIA and the BLM.

Please join Harney County Court in supporting Dave Bernhardt for Secretary of the Interior.

Respectfully submitted,

Pete Runnels
County Judge

Mark Owens
Commissioner

Patty Dorroh
Commissioner

NATIONAL ENDANGERED SPECIES ACT
REFORM COALITION
1050 Thomas Jefferson Street, NW, 6th Floor
Washington, DC 20007
tel. 202.333.7481 fax 202.338.2416
www.nesarc.org

April 2, 2019

The Honorable Lisa Murkowski
Chairman
Committee on Energy and Natural Resources
United States Senate
Washington, DC 20510

The Honorable Joe Manchin
Ranking Member
Committee on Energy and Natural Resources
United States Senate
Washington, DC 20510

Re: Nomination of David Bernhardt as Secretary of the Department of the Interior

Dear Chairman Murkowski and Ranking Member Manchin:

On behalf of the National Endangered Species Act Reform Coalition (NESARC), I am writing to express our support of David Bernhardt for the position of Secretary of the Department of the Interior (DOI). With great respect for Mr. Bernhardt's exceptional qualifications, we are pleased to see his nomination to this federal leadership role.

NESARC is the country's oldest broad-based, national coalition dedicated solely to achieving improvements to the ESA and its implementation. Our members are committed to promoting effective and balanced legislative and administrative improvements to the ESA that support the protection of fish, wildlife, and plant populations as well as responsible land, water, and resource management.

Mr. Bernhardt's substantial experience in the public and private sectors makes him an excellent choice for leadership at the DOI. His deep knowledge of environmental and natural resource matters, such as those related to the Endangered Species Act, has been an asset to the Department under both the George W. Bush and the Trump Administrations. As Secretary, Mr. Bernhardt will continue to provide the Department with the leadership needed to guide continued management and conservation of our nation's federal lands and natural resources.

NESARC urges the committee to approve this nomination during its meeting later this week. Please do not hesitate to contact me at ryany@fb.org, or NESARC's Executive Director, Jordan Smith at jas@vnf.com, with questions or if we may be of additional assistance.

Sincerely,

Ryan R. Yates
Chairman

February 5, 2019

The Honorable Lisa Murkowski, Chairman
Committee on Energy and Natural Resources
United States Senate
304 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Murkowski:

The National Park Hospitality Association (NPHA) supports the President's nomination of David Longly Bernhardt to serve as Secretary of the U.S. Department of the Interior, an appointment of great importance to our members. NPHA is the national trade association of the businesses that provide lodging, food services, gifts and souvenirs, equipment rentals, transportation and other visitor services in the National Park System. Concessioners have played an important role in creating lasting national park memories for more than 125 years. Concessioners operate in more than 100 national park units with combined sales exceeding $1.5 billion annually and $150+ million in franchise and related fees paid to the National Park Service each year. The in-park concessioner workforce of some 25,000 persons assists visitors an estimated 100 million times annually.

Many of us have known David Bernhardt for years through his prior public service at the Department. We have found him responsive, intelligent, remarkable in energy and committed to cooperation among government agencies at all levels and the recreation/tourism community. He understands that our industry has designed, built and now operates lodging, campgrounds, restaurants and more in our parks, working as partners with the National Park Service.
David grew up with an appreciation of the outdoors in and around Rifle, Colorado, and those experiences have shaped his priorities and outlook. He remains passionate about time outdoors, including family time out fishing. We worked with him in his role as Interior's Director of Congressional Affairs on numerous issues, including the crafting of the Federal Lands Recreation Enhancement Act, and later during his service as the department's Deputy Chief of Staff and Solicitor. And we have worked with him closely since his confirmation as Deputy Secretary. In his role as Deputy Secretary, he has aided efforts to boost access to public lands and waters, acted to overcome years of fiscal neglect resulting in a backlog of more than $18 billion in deferred maintenance which create both safety risks and hamper enjoyment, and has embraced changes including expansion of conservation corps to connect youth to the outdoors while achieving fiscal improvements.

The Department benefits from leadership aware of the complexities of balancing recreation, conservation and commodity purposes – and a person who understands that there are usually solutions to even very difficult matters if time is invested in understanding the full range of alternatives and then gaining broad buy-in by the range of interests involved in Interior topics. We believe that Mr. Bernhardt has that capability.

1200 G Street, NW • Suite 650 • Washington, DC 20005 • 202-682-9530

The nation and our industry will benefit from Mr. Bernhardt's unique and comprehensive knowledge of the U.S. Department of the Interior. We supported his confirmation as Deputy Secretary in 2017, and he has earned our continued support. We look forward to working with Mr. Bernhardt and the team at the Department of Interior to protect our national park resources, serve visitors and grow jobs in the U.S.

Sincerely,

Scott Socha
Chair
National Park Hospitality Association

cc: Members, Energy and Natural Resources Committee, United States Senate
Hon. David Bernhardt, U.S. Department of the Interior
Members, National Park Hospitality Association

NATIONAL SHOOTING SPORTS FOUNDATION, INC.
Headquarters: 11 Mile Hill Road, Newtown, CT 06470-2359
400 N. Capitol Street NW, Suite 490, Washington, D.C. 20001
202-220-1340 ext. 249 lkeane@nssf.org

Lawrence G. Keane
SVP Gov't & Public Affairs
Assistant Secretary & General Counsel

March 25, 2019

The Honorable Lisa Murkowski
Chairman
Committee on Energy and Natural Resources
522 Hart Senate Office Building
Washington, DC 20510

The Honorable Joe Manchin III
Ranking Member
Committee on Energy and Natural Resources
306 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Murkowski and Ranking Member Manchin:

On behalf of the National Shooting Sports Foundation's more than 10,000 members, I am writing to express our strong support for the confirmation of David Bernhardt as the next Secretary of the Interior.

An avid hunter, angler and recreational shooter, Mr. Bernhardt is passionate about issues important to the sportsmen-conservation community. Through his public service on Capitol Hill and at the Department of the Interior, David has demonstrated an unwavering commitment to conserving and protecting our nation's public lands, wildlife habitat, and appropriate access to them, on behalf of current and future generations.

Additionally, having served as Acting Secretary, Deputy Secretary, Solicitor, Deputy Chief of Staff, Counselor to the Secretary and Director of Congressional and Legislative Affairs, Mr. Bernhardt's experience and expertise in navigating the complexities of the Department is unparalleled.

During his time at the Department, Mr. Bernhardt has taken an outcome-based approach to delivering policy outcomes on behalf of America's sportsmen and women. For example, David played an integral role in the development and execution of multiple Secretarial Orders that facilitate habitat conservation and recreational access to Interior lands and waters. He has also overseen a successful effort by the U.S. Fish and Wildlife Service to open hundreds of thousands of acres of National Wildlife Refuge lands to hunting. These are just a few examples of the many achievements that have resulted from David's leadership.

For these reasons, the National Shooting Sports Foundation urges the Senate Committee on Energy and Natural Resources to approve David Bernhardt's nomination as the next Secretary of the Department of the Interior so that the full Senate can act to confirm him as soon as possible.

Thank you very much for your consideration of this request.

Sincerely,

Lawrence G. Keane

PIUTE COUNTY COMMISSION

550 N Main, Junction, Utah 84740 - 435-577-2840

March 11, 2019

Honorable Senator Michael Lee
361A Russell Senate Office Building
Washington, DC 20510

Honorable Senator Mitt Romney
B33 Russell Senate Office Building
Washington, DC 20510

Honorable Senators:

Please accept this letter of strong support by Piute County, for Mr. David Bernhardt, nominee for Secretary of the Interior. We understand that Mr. Bernhardt's confirmation hearings will soon be before you, we highly encourage your favorable vote.

Piute County is more than 72% federally controlled, and much of it is under the control of the BLM a division of the Department of Interior. This appointment will have a significant impact on our county, our lands and opportunities for our residents and visitors.

We have observed Mr. Bernhardt and have been associated with him off and on over several years in his various roles with the federal government. We find Mr. Bernhardt to be honest, fair and sincerely concerned about the health of the Nation's lands and its people. We believe that Mr. Bernhardt is the perfect candidate to serve the country as Secretary of the Interior.

We specifically recommend him and request your affirmative vote in the confirmation hearings. We also request the Senate to act quickly, so activities in the Department may continue unimpeded.

Please contact us if you have any questions, and thank you in advance for your thoughtful consideration.

Sincerely,

Will Talbot
Commission Chair

Darin Bushman
Commissioner

Scott Dalton
Commissioner

Cc.

Gov. Gary Herbert

Public Employees for
Environmental Responsibility
962 Wayne Avenue, Suite 610 • Silver Spring, MD 20910
Phone: (202) 265-PEER • **Fax:** (202) 265-4192
Email: info@peer.org • **Web:** http://www.peer.org

March 20, 2019

Senator Lisa Murkowski, Chair
Senate Energy and Natural Resources Committee
522 Hart Senate Office Building
Washington, DC 20510

Senator Joe Manchin, Ranking Member
Senate Energy and Natural Resources Committee
306 Hart Senate Office Building
Washington, DC 20510

Sent via email to: Fortherecord@energy.senate.gov

Re: David Bernhardt Nomination – New Report on Federal Vacancies Act Violations

Dear Chair Murkowski and Ranking Member Manchin,

I am writing on behalf of Public Employees for Environmental Responsibility (PEER), a non-profit group that works nationwide with government scientists, land managers, law enforcement agents, field specialists and other leading environmental professionals. We have represented a large number of Department of the Interior staff over the years and we have been very involved with, and concerned about, the proper functioning of the Department. We strongly oppose the nomination of Acting Secretary David Bernhardt to be Secretary of the Interior and urge you to vote against his confirmation.

There are many reasons to reject Mr. Bernhardt. The primary reason this letter focuses on is that he has violated the Federal Vacancies Reform Act by illegally delegating authority to multiple officials, as is shown in a report PEER issued on March 18, titled *Bernhardt's Bad Actors.* (See PEER Press Release of March 18, "Bernhardt Surrounded by Illegitimate Acting Officials," at: https://www.peer.org/news/press-releases/bernhardt-surrounded-by-illegitimate-acting-officials.html and subsequent media.[1]) It charges him with undermining the constitutional "advice and consent" power of the U.S. Senate because he has improperly-designated eight quasi-acting officials to be in charge of most of Interior's major bureaus. These unconfirmed political appointees manage more than 450 million

[1] See, e.g., https://yubanet.com/usa/bernhardt-surrounded-by-illegitimate-acting-officials/.

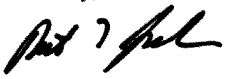
acres of the public's frequently-visited national parks, wildlife refuges, monuments, and rangelands. Mr. Bernhardt has allowed these eight political appointees to fill these positions in violation of the Federal Vacancies Reform Act including, but not limited to, the functioning Directors of the National Park Service, Fish and Wildlife Service and Bureau of Land Management. The *Bad Actors* report shows Mr. Bernhardt is complicit in these ongoing subversions of the Senate's prerogative to approve or disapprove the individuals who head those key Interior bureaus. This represents nothing less than an unprecedented "power grab" that has benefitted him.

Interior is tied for the lowest rate among all Federal agencies of actual Senate confirmation for those positions that require it -- a paltry 41%. If it goes unchallenged by the Senate, this Trump/Bernhardt practice will pave the way for future Presidents to also successfully use the tactic of employing unconfirmed political appointees to basically do the day-to-day running of whole agencies, not just Interior, but other agencies too. It would be a step towards an unchecked and highly politicized autocracy; in short, a dangerous precedent for the nation. Please obtain his responses on the record to these concerns.

A second reason to oppose David Bernhardt involves the staffing and spending decisions he made for the Department during the most recent 35-day government shutdown, which eroded Congress's "power of the purse". (See PEER Press Release of January 22, "Interior Department Gaming the Shutdown," at https://www.peer.org/news/press-releases/interior-department-gaming-the-shutdown.html and subsequent media.[2]) Despite the shutdown he directed Interior staff to: a) return to work in National Parks that were improperly kept open; b) return to work in National Wildlife Refuges to facilitate private hunting; c) prepare environmental analyses for expanded hunting in the Wildlife Refuges; and d) process oil and gas drilling permits, both on land and offshore. These were among a number of staffing decisions that fell outside the Antideficiency Act's exceptions for shutdown spending in "cases of emergency involving the safety of human life or the protection of property". We urge you to obtain Mr. Bernhardt's answers on the record about his apparent "gaming" of the shutdown.

In sum, we believe that careful questioning will lead to a demonstration that David Bernhardt is not fit to be confirmed as Secretary of the Interior. Please contact me if you have any questions.

Sincerely,



Peter T. Jenkins, Senior Counsel
Tel: 202.265.4189 (direct) pjenkins@peer.org

Attachment

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[2] See, e.g., Washington Post, Jan. 24, 2019, "Gaming the System," at: https://www.peer.org/news/news-clips/gaming-the-system.html; TruthOut, Jan. 25, 2019, "Is Trump Using the Shutdown to Serve Energy and Hunting Special Interests?," at: https://truthout.org/articles/is-trump-using-the-shutdown-to-serve-energy-and-hunting-special-interests/ .

Public Employees for
Environmental Responsibility
962 Wayne Avenue, Suite 610 • Silver Spring, MD 20910
Phone: (202) 265-PEER • **Fax:** (202) 265-4192
Email: info@peer.org • **Web:** http://www.peer.org

BERNHARDT'S BAD ACTORS

or

Interior's Detour Around Senate Confirmation

Synopsis:

- *Eight political appointees are leading most of the Department of the Interior bureaus without the required "advice and consent" of the Senate.*
- *President Trump's tactic violates fundamental "checks and balances".*
- *Acting Secretary of the Interior David Bernhardt is complicit in these violations; therefore the Senate should deny his nomination to be Secretary.*

Act 1. Lead Interior officials are illegally "acting" in roles that require Senate confirmation.

The U.S. Department of the Interior (DOI) now has eight improperly-designated quasi-"acting" officials in charge of most of its major bureaus. These political appointees who manage DOI lack the "advice and consent" of the Senate that is required to fully serve in their positions under the Appointments Clause of the Constitution and under Federal statutes. They control vast expanses - over 450 million acres - of the public's frequently-visited National Parks, National Wildlife Refuges and Bureau of Land Management lands,

amounting to almost one-fifth of the nation's land area.[1] Tens of thousands of DOI staff must answer to their orders and decision. Further, they hold the keys to unlocking billions of dollars' worth of Federal oil, gas, geothermal, wind, coal, timber, grazing lands and other Federal resources tied to those lands. One official, the Solicitor, decides DOI's legal positions in major natural resource disputes and another serves in the sensitive job of Special Trustee to Native Americans. The Administration is allowing them to work (and be paid by the taxpayers) without being confirmed by the Senate.

This is not some quirk of circumstances. After more than two years of Donald Trump's presidency it now is revealed as a deliberate tactic of the White House.[2] It violates the Constitution's fundamental "checks and balances" framework. If it goes unchallenged by the Senate, this Trump practice will pave the way for future Presidents to also successfully use the tactic of employing lesser, unconfirmed, political appointees to basically do the day-to-day running of whole agencies, not just DOI but other agencies too. It would be a step towards an unchecked and highly politicized autocracy. Such a frightening erosion of the Constitution cannot continue.

The DOI is tied for the lowest rate among all Federal agencies of actual Senate confirmation for those positions that require it -- a paltry 41% (as of February 2019). For most of the open DOI bureau leadership positions the President has not bothered to nominate anyone to fill them.[3]

When questioned about his record low number of Senate-confirmed officials compared to any other modern President Mr. Trump openly stated: ***I like acting because I can move so quickly. It gives me more flexibility***.[4] However, he is ignoring Federal law on designating "acting" officials (explained below). The President's goal is transparent: he aims to hollow out the normal, time-tested administrative framework of the Federal government and instead employ low-level, often unqualified, political appointees who are more "responsive" (Trump's word) and more pliable to his ends.

As with much else he does Mr. Trump's approach insults the Separation of Powers enshrined in the Constitution. The President is detouring around the Appointments Clause in Article II, Section 2, which mandates (emphasis added):

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[1] DOI. 2010. *Introduction To Interior Acquisitions: A Guide for Small Businesses,* Office of Small and Disadvantaged Business Utilization Report, p. 4, at: https://www.doi.gov/sites/doi.gov/files/migrated/pmb/osdbu/upload/dbwdoi.pdf .

[2] Doyle, M. 2019, "With vacancies galore, 'acting' leaders gain more time," *E&E News,* Jan. 31, at: https://www.eenews.net/greenwire/stories/1060119173 .

[3] See, U.S. Government Accountability Office (GAO), Federal Vacancies Reform Act webpage and database "Search Federal Vacancies for Current Administration," at: https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act, search under Department of the Interior vacancies.

[4] Eilperin, J., et al. 2019. "Agency vacancies worrying the GOP," *Washington Post*, Feb. 4, p. A1, at: https://www.washingtonpost.com/national/health-science/its-way-too-many-as-vacancies-pile-up-in-trump-administration-senators-grow-concerned/2019/02/03/c570eb94-24b2-11e9-ad53-824486280311_story.html. Pres. Trump quotes in the article are per his interview with CBS News, Feb. 3, 2019.

> [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 represents an essential check and balance. The President is allowed to appoint acting officers to those positions, 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 an acting title (they are called "**bad actors**" herein):

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

All of those DOI roles require Senate confirmation; none have it, going back to the Trump Inauguration on January 20, 2017. The individuals in those roles are violating the Federal Vacancies Reform Act (FVRA), which allows for acting officials, but <u>only</u> under detailed and time-limited conditions, generally for a maximum of 210 days with very limited exceptions, with which none of those individuals now comply.[5] These eight **bad actors** either never qualified as acting under FVRA or, even if they once were qualified, they were not properly appointed by the President or now have long exceeded the time period that they could have stayed if they had been properly appointed. They are now, in effect, "deputies to nobody". But, nothing in Federal law or practice allows deputies to be elevated

[5] 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.

to the chief position in a bureau and stay for a year or more in that role merely because the President and the DOI's Acting Secretary want to avoid the confirmation process.

Throughout his presidency his own party has controlled the Senate, which makes Mr. Trump's laggard approach even less justifiable. It is a negative drag on the morale of career staff to never have their bureau's official leadership position filled.

Senate confirmation offers numerous benefits – that is why the Founders wrote it into our nation's charter. It provides accountability and a record upon which to judge the nominee's qualifications. It allows Senators and affected stakeholders to engage in a public process to ensure nominees are "vetted" to confirm that they intend to serve the nation's interests. Such confirmed officials have more authority and greater willingness to make hard decisions. **Senators in the 116th Congress have no obligation to accept President Trump's tactic and every reason to demand that the Administration respect their competence to provide advice and consent under Article II, Section 2, for the unconfirmed individuals in those positions.**

Act II. David Bernhardt's starring role: beneficiary and villain.

Secretary of the Interior nominee David Bernhardt has aided and abetted these violations through his written "delegations" to the eight listed officials using word games that merely give the appearance of FVRA compliance. Mr. Bernhardt and his predecessor, the discredited former Secretary Ryan Zinke, who exited the stage under a dark ethics cloud, signed what they called "Temporary Redelegations of Authority" for all of the bad actors.[6] These unprecedented Secretarial Orders, now issued at least six times going back at least to November of 2017, allow those lesser political appointees to occupy the higher jobs, but also claim they are not exercising the actual legal authority that goes with the higher position.[7] That is rank fiction, like saying Tom Brady can play the position and throw passes, but he is not really the quarterback if the team roster does not put "quarterback" next to his name.

Other deceptions in the Redelegations are that they are "temporary," since they have gone on continually for more than one year and three months now, plus this gross deceit (Sec. 1; emphasis added):

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[6] Secretary (Acting) of the Interior, Order No. 3345, Amendment No. 24, "Temporary Redelegation 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 "Redelegation" for four months, through May 30, 2019, which is the longest such extension of the Orders to date. Bernhardt is a highly knowledgeable lawyer who was Mr. Zinke's top deputy during 2017 and 2018. It is likely that he was the author of the Temporary Delegation Orders or, at the least, he was heavily involved.

[7] The oldest known such order is Secretarial Order No. 3345, Amendment No. 12, "Temporary Redelegation of Authority for Certain Vacant Non - Career Senate - Confirmed Positions" (Nov. 14, 2017).

> *This Order is Intended to ensure uninterrupted management and execution of the duties of these vacant non-career positions during the Presidential* ***transition*** *pending Senate-confirmation of new non-career officials.*

Mr. Trump has been in office for two years; his "transition" ended long ago. Further, the President has submitted, and now has "pending," only two nominees for the eight positions at issue.[8] Americans should not tolerate such capricious deceit in an official Secretarial Order. It is not a game. And the delay obviously is not the fault of the Senate for the large majority of the positions for which the President has nominated no one.

Another fiction in the latest Bernhardt Redelegation Order is in Section 2 and its reliance on "Section 2 of the Reorganization Plan No. 3 of 1950". That was the post-World War II DOI basic organization act signed by President Harry Truman. It contains no delegation authority that somehow could now override the specific rules about acting officials in FVRA, which Congress adopted in 1998.[9]

The recent Bernhardt Redelegations had an alarming effect – they benefitted him! Section 4 states the **bad actors** are not supposed to actually exercise any decision-making power that statutes or DOI regulations may have allowed for their positions. This means that, in many contexts, the only higher official left in DOI's hierarchy with the power necessary to make such decisions is the Interior Secretary himself. Thus, the tactic of avoiding the Senate and using the Redelegation process amounts to a Secretarial "power grab" -- and one dripping with irony and confusion because there is no Senate-approved Interior Secretary now either, only the Acting Mr. Bernhardt.

Because of his involvement in this dodge around the Constitution in which Bernhardt not only has arrogated all of his DOI subordinates' decision-making power up to himself, but also is assisting President Trump in sidestepping the Senate's authority to confirm or deny those same subordinate officials, the Senate should reject his nomination. If the Senate were to confirm him, then it would itself become a player in this tragedy, which after two years is verging on a farce.

Act. III. Behind the scenes of two actors.

Below are details on two of the DOI officials initially named in acting roles and still in the same positions, in violation of FVRA's time limits, well more than one year later:

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[8] See pending nominations before the Senate Energy and Natural Resources Committee, at: https://www.energy.senate.gov/public/index.cfm/nominations, indicating only Susan Combs' nomination for Assistant Secretary for Fish and Wildlife and Parks, and David Vela's held-over nomination from the 115th Congress as Director of the NPS; and GAO, FVRA database, at: https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act; and White House, Presidential Actions, at: https://www.whitehouse.gov/presidential-actions/. The President made a few unsuccessful nominations to the positions at issue in the 115th Congress over the last two years, that is, who either were denied confirmation or withdrew.

[9] FVRA explicitly prohibits agency heads from relying on basic agency delegation powers to avoid the statute's restrictions on "acting" officials. 5 U.S.C. § 3347(b).

Paul Daniel (Dan) Smith: Upon his appointment an NPS press release (PR), issued on January 24, 2018, overtly stated (emphasis added):[10]

> *Today, U.S. Secretary of the Interior Ryan Zinke ..... named Paul Daniel (Dan) Smith the National Park Service's* ***acting*** *director....*

Mr. Smith's listing on the NPS webpage makes clear that he is: "exercising the authority of the Director of the National Park Service".[11] Yet, somehow we are now to believe, despite the explicit PR, that he is not the acting director, just some lesser official sitting in that chair.

Brian Steed: Then-Secretary Zinke named him to run the Bureau of Land Management (BLM) in November of 2017. In a remarkable piece of Orwellian "double-speak," the DOI spokeswoman upon Steed's appointment stated (emphasis added):[12]

> *Technically,* ***he is acting*** *with the full delegated functions, duties, responsibilities and authority of the BLM director* ***but does not have the title of 'acting*** *BLM director,'" Interior spokeswoman Heather Swift said of Steed.*

That is, Ms. Swift admitted that everything Mr. Steed is doing is fully the same as being the acting BLM director, but since he does not have the magical title he is somehow something else. Amazing fantasy.

The other six **bad actors** suffer from the same defects. However, DOI has tried harder to craft its messaging about their roles with less *1984*-like deception. The Senate and the Courts can look behind the scenes of DOI's word manipulations and judge the illegal reality. As stated in 1998 by former Senator Fred Thompson when FVRA was adopted, as an indication of Congress's intent:[13]

> *As participants in the appointments process, we Senators have an obligation, I believe, to ensure that the appointments clause functions as it was designed, and that manipulation of executive appointments not be permitted.*

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[10] For documentation of these facts, see PEER's complaint dated Feb. 12, 2018, to the DOI's Inspector General, at: https://www.peer.org/assets/docs/doi/2_12_18_IG_Complaint.pdf .
[11] At: https://www.nps.gov/aboutus/contactinformation.htm .
[12] Yachnin, J., and S. Streater. 2017. "Is appointment of 'acting' BLM chief legal?" *E&E News*, Nov. 17, at: https://www.eenews.net/eenewspm/stories/1060066917/ .
[13] 144 CONG. REC. S11021 (daily ed. Sept. 28, 1998).

RECOMMENDATIONS

i. The Senate should complete its Constitutional advice on David Bernhardt's nomination as Secretary by withholding its consent. There are numerous other substantive and conflict-of-interest reasons to deny Mr. Bernhardt the promotion Mr. Trump is proposing for him, beyond his aiding and abetting the Appointments Clause and FVRA violations described herein. But those violations are enough. The Senate must protect its prerogatives.

ii. Go to Court. Any Senator should have the legal standing to go to Federal Court and challenge the Trump Administration's practice of negating the advice and consent mandate of some or all of the eight **bad actors**.[14] One or more Senators should take the initiative and sue on both Constitutional and FVRA violation grounds.[15]

iii. Challenge the infirm actions. Individual actions taken by the **bad actors** also can be challenged and declared void, thus "without force or effect".[16] These could include a variety of actions, including, but not limited to, personnel actions such as terminating or suspending any DOI employee under their direction. However, this is a more incremental, official-by-official, action-by-action remedy than a Senatorial challenge to the Administration's overall tactic. Further, a specific DOI action voided by a Court might then be quickly "fixed" by having the action then signed off instead by the Secretary, rendering a legal challenge potentially moot and ineffective. Nevertheless, the **bad actors** need "the hook" and the curtain needs to come down on them before they do more damage to our basic governmental framework.

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[14] For an example of Senators successfully suing over an Appointments Clause violation by former President Richard M. Nixon, see Williams v. Phillips, 360 F.Supp. 1363 (D.D.C. 1973), *motion for stay denied* 482 F.2d 669 (D.C. Cir. 1973).

[15] There would be no point in seeking a legal opinion from the GAO because the agency has made clear that it does not offer such opinions regarding the potential illegality of actions of officials who are violating FVRA. Rather, the GAO merely records basic information about agency compliance with FVRA such as the titles and numbers of vacant positions, and the GAO may report to Congress when a properly-appointed acting official "is serving longer than permitted by the act". See, https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act . None of the eight officials involved in this report has ever been properly appointed or served as acting under FVRA, thus GAO would not report on them.

[16] Brannon, V. 2018. *The Vacancies Act: A Legal Overview*, Congressional Research Service Report No. 7-5700. At: https://fas.org/sgp/crs/misc/R44997.pdf .

Rocky Mountain Elk Foundation
Like This Page · February 5 ·

"RMEF congratulates David Bernhardt on his nomination by President Trump to serve as the nation's 53rd secretary of the Interior. As deputy and acting secretary, Bernhardt demonstrated significant knowledge of and commitment to the interests of sportsmen and women. We expect under his leadership, the Interior Department's commitment to improving access to public lands for hunting, fishing, trapping and recreational shooting will continue. RMEF also looks forward to continuing its work with the department on active and multiple-use land management, wildlife corridors and measures to shift management of gray wolves and grizzly bears to state wildlife agencies."

R. Kyle Weaver
President & CEO
Rocky Mountain Elk Foundation

ROCKY MOUNTAIN ELK FOUNDATION

March 26, 2019

The Honorable Lisa Murkowski
Chair
Senate Energy & Natural Resources Committee
304 Senate Dirksen Office Building
Washington, D.C. 20510

The Honorable Joe Manchin
Ranking Member
Senate Energy & Natural Resources Committee
304 Senate Dirksen Office Building
Washington, D.C. 20510

Dear Chair Murkowski, Ranking Member Manchin and members of the Committee,

The Rocky Mountain Elk Foundation (RMEF)—a hunter-based wildlife organization with a mission to ensure the future of elk, other wildlife, their habitat and our hunting heritage—proudly endorses the nomination of David Bernhardt to serve as the nation's 53rd Secretary of the Department of the Interior. RMEF's 234,000 members and 12,000 volunteers have conserved or enhanced more than 7.4 million acres of vital habitat, opened or secured more than 1.2 million acres for public access, helped restore elk to seven states and reached thousands of youth and adults with conservation and hunting heritage outreach projects.

RMEF works closely with the Interior Department and other federal agencies to accomplish land conservation, public access, habitat enhancement and hunting heritage priorities. RMEF has helped the Bureau of Land Management and the U.S. Forest Service implement more than 4,300 wildlife habitat enhancement, land protection, and public access improvement projects. Such projects include aspen restoration, forest restoration thinning, prescribed fire, burned area restoration, planting, seeding, fence removal, and weed control to enhance more than five million acres of wildlife habitat on federal public lands. RMEF also facilitated BLM and Forest Service land and easement acquisitions through the nation's Land and Water Conservation Fund to conserve wildlife habitat and improve public recreational access on federal lands. RMEF has directly contributed more than $36.6 million to both agencies to help fund wildlife and conservation projects. The combined total conservation value of the two agencies' partnership with RMEF is estimated at more than $411 million.

The Interior Department advanced several directives in the past two years that directly benefit wildlife management and public land recreational access. These include secretarial orders expanding recreational access on federal lands, conserving migration corridors for elk, mule deer and pronghorn antelope and convening the hunting and shooting sports conservation advisory council. David Bernhardt was significantly involved in these actions as Deputy Secretary and has continued to advocate for the interests of sportsmen and women as Acting Secretary through implementation of these directives and through development of new proposals to address predator management and retain federal parcels that have significant value for public recreational access.

RMEF and other sportsmen led-conservation organizations have enjoyed unprecedented opportunities to advance their priorities to Interior Department leadership during this Administration. Acting Secretary Bernhardt has consistently consulted these organizations on departmental policies and directives that impact

ROCKY MOUNTAIN ELK FOUNDATION

wildlife and federal land management. We expect this trusted relationship to grow and further benefit Americans who hunt, fish, hike and camp on federal lands if Acting Secretary Bernhardt is confirmed as Secretary.

We encourage members of the Senate Energy and Natural Resources Committee to ensure continued balanced leadership of the Interior Department by approving this nomination.

Sincerely,

R. Kyle Weaver
President & CEO

5705 Grant Creek Rd. | Missoula, MT 59808-8249 | (800) CALL ELK | WWW.RMEF.ORG

March 25, 2019

The Honorable Lisa Murkowski, Chairman
Committee on Energy and Natural Resources
United States Senate
304 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Joe Manchin, Ranking Member
Committee on Energy and Natural Resources
United States Senate
304 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Murkowski & Ranking Member Manchin:

The RV Industry Association supports the President's nomination of David Longly Bernhardt to serve as Secretary of the U.S. Department of the Interior, an appointment of great importance to the RV industry and the outdoor recreation community. As the steward of more than 20 percent of the nation's land-base – including prime recreation sites on public lands drawing nearly half a billion visits annually – the Department is essential to our American-made industry and its customers.

The Department needs leadership from those aware of the complexities of balancing vital recreation, conservation and commodity purposes – and a person who understands that there are often solutions to even difficult matters if time is invested in collaborating with stakeholders and understanding the diverse needs of the American people.

During his time as Deputy Secretary, Mr. Bernhardt has aided efforts to boost recreational access to public lands and acted to address the deferred maintenance backlog plaguing our federal lands and waters. The National Park System faces a backlog of deferred maintenance nearing $12 billion, with campgrounds, roads and bridges poorly equipped to meet the expectations of today's RV campers. Mr. Bernhardt understands that our industry allows Americans to experience and appreciate the shared legacy of our national parks, national recreation areas, wildlife refuges and more. We are convinced that Mr. Bernhardt will continue to actively respond to these challenges.

Department leadership plays a central role in supporting the $734 billion outdoor recreation economy, which represents 2.2 percent of the U.S. GDP and supports 4.5 million jobs. We encourage Mr. Bernhardt to continue to support critical investments in recreation infrastructure, including much-needed modernization and expansion of federal campgrounds to accommodate our uniquely American industry.

The RV Industry Association is the premier national trade association representing RV manufacturers and suppliers who together build more than 98 percent of all RVs produced in the U.S. The RV industry contributes $49.7 billion to the U.S. economy and provides 289,852 full-time jobs to American workers. We respectfully request that this letter be included in the record of the March 28, 2019 confirmation hearing by your committee for this nomination.

We look forward to collaborating with Mr. Bernhardt and the team at the Department to advance the outdoor recreation sector, grow jobs in the U.S. and to ensure robust public access and treasured experiences are protected in our great outdoors.

Sincerely,

Frank Hugelmeyer
President

1896 Preston White Drive, Reston, VA 20191 T 703 620 6003 F 703 620 5071 rvia.org

SRM
Society for Range Management

March 28, 2018

Chairman Lisa Murkowski
Committee on Energy and Natural Resources
U.S. Senate
304 Dirksen Senate Building
Washington, DC 20510

Ranking Member Joe Manchin
Committee on Energy and Natural Resources
U.S. Senate
304 Dirksen Senate Building
Washington, D.C. 20510

Dear Chairman Murkowski, Ranking Member Manchin, and Members of the Committee;

The Society for Range Management (SRM), a professional scientific society whose members are concerned with studying, conserving, managing and sustaining the varied resources of rangelands, supports the appointment of Mr. David Bernhardt to the position of Secretary of Interior.

SRM's members are land managers, scientists, educators, students, producers and conservationists–a diverse membership guided by a professional code of ethics and unified by a strong land ethic. Our members are among the multiple users of public rangelands for scientific, professional, and recreational purposes. To continue building successful private-public partnerships for the betterment of the resource, rangeland managers depend on steady leadership from within the Department of the Interior (DOI).

The resignation of Secretary Ryan Zinke last December left a gap in the operational effectiveness of the Department. Without a confirmed Secretary, it is difficult for the Department to fulfill its mission of conserving and managing the Nation's natural resources and cultural heritage for the benefit and enjoyment of the American people. The Society stands ready to work with Mr. Bernhardt and the Department to advance our shared goals and mission, and to improve the health and well-being of our nation's rangeland resources.

On behalf of the Society for Range Management, I encourage the U.S. Senate Committee on Energy and Natural Resources to proceed with the confirmation process and appoint Mr. David Bernhardt to the position of Secretary of Interior.

Sincerely,

Clayton Marlow
President, Society for Range Management

March 28, 2019

Chairwoman Lisa Murkowski
U.S. Senate Committee on Environment
and Natural Resources
304 Dirksen Senate Building
Washington, DC 20510

Ranking Member Joe Manchin
U.S. Senate Committee on Environment
and Natural Resources
304 Dirksen Senate Building
Washington, DC 20510

Dear Chairwoman Murkowski, Ranking Member Joe Manchin, and Members of the Committee;

The Department of the Interior's (DOI) mission is straightforward: conserve and manage the Nation's natural resources and cultural heritage for the benefit and enjoyment of the American people.

Responsible for approximately 500 million acres of surface land, or one-fifth of the land within our borders, the DOI's responsibly is not one to be taken lightly. From the Bureau of Land Management to the U.S. Fish and Wildlife Service and the Bureau of Indian Affairs, housed within this department are some of the most crucial natural and cultural heritage mission areas.

As the organization dedicated to the U.S. cattle producer, our membership relies on the ability of the Department of the Interior to carry out its mission in an efficient, timely manner.

The Bureau of Land Management issues nearly 18,000 permits and leases each year to cattlemen and women who pay a fee in return for the ability to graze their animals on federally-managed lands. The U.S. Fish and Wildlife Service makes decisions almost daily that affect livestock producers – from enforcing federal wildlife laws and the Endangered Species Act to managing migratory birds and conserving and restoring wetlands. The Bureau of Indian Affairs provides services, such as grants and training agreements, to our members raising cattle on tribal lands.

In order to fulfill these responsibilities, the Department needs a leader who has a deep understanding of the multiple layers of the federal government. Mr. David Bernhardt, nominated by President Donald J. Trump to serve as the Secretary of the Interior, fits this description.

With nearly ten years of experience working within the Department, Mr. Bernhardt's extensive resume took him through the many divisions of DOI - from the Solicitor's office, to Chief of Staff for the Secretary, and as director of Congressional and legislative affairs. Not to mention, he has been serving as former-Secretary Ryan Zinke's Deputy Secretary since 2017.

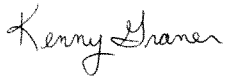
U.S. cattle producers need commonsense and clear regulations to continue maintaining their operations on both public and private lands. We also need the ability work with the federal

government through the continuation of successful private-public partnerships, where all stakeholders can take part in the regulatory process.

We look forward to working with Mr. Bernhardt in addressing the needs of producers across our public lands. USCA appreciates the ongoing willingness and opportunity for open conversation with the Acting Secretary and will look to maintain this communication as he moves through the confirmation process. U.S. cattle producers who operate on public lands must have certainty and stable leadership as they plan for the year ahead and USCA will continue to support a timely confirmation process.

Please direct questions to our Washington, DC office at (202) 870-1552.

Sincerely,



Kenny Graner
President
United States Cattlemen's Association

March 8, 2019

The Honorable Donald J. Trump
President of the United States of America
The White House
Washington, DC 20016

Dear Mr. President:

The Western Caucus Foundation applauds your recent appointments of David Bernhardt to serve as Secretary of the Department of the Interior and Daniel Jorjani to serve as Solicitor of the Department of the Interior. Furthermore, we are looking forward to action by the Senate to confirm Susan Combs as the Assistant Secretary for Policy, Management, and Budget.

The Department of the Interior under the leadership of your appointees are improving the management of our parks, monuments, preserves, and public lands; modernizing species conservation; empowering American Indian tribes and Alaska Natives; managing western water and natural resources; and expanding our nation's energy dominance.

We believe it is critical to Western and rural America that qualified and visionary individuals are appointed to lead the DOI's departments and bureaus. The actions and activities of these entities intersect with the daily lives of those in Western and rural America. Filling the acting leadership positions with permanent leaders will further improve DOI's bureaus and department's ability to better manage Western land and our nation's natural resources.

Last year, you appointed some tremendous individuals to lead some of the DOI's departments and bureaus. Unfortunately, some of those appointments lapsed because the Senate did not act before the end of the last Congress. We encourage you to re-nominate these qualified individuals. In particular, we encourage you to re-nominate Aurelia Skipwith to serve as the next Director of the U.S. Fish and Wildlife Service. When first nominated in 2018, I stated that "Ms. Skipwith is an accomplished and capable public policy professional with the management and organization skills to effectively execute their mission. The Fish and Wildlife Service needs a leader who understands that it will take a balanced approach to meet the needs of the West – a vast expanse of bountiful wildlife and natural resources where people live, work, and recreate. I'm confident that Ms. Skipwith will be a thoughtful and effective leader for the Service."

Once again, the Western Caucus Foundation is proud to support David Bernhardt, Daniel Jorjani, and Susan Combs – they are all outstanding and capable individuals. We appreciate your consideration of our support for the re-appointment of Aurelia. Skipwith as the Director of Fish and Wildlife. We believe she will be an asset to our country and a catalyst to further your agenda and reforms for the Department of the Interior.

Sincerely,

Darrell A. Henry
Executive Director

WESTERN CAUCUS FOUNDATION ★ 400 N. CAPITOL STREET #562 E ★ WASHINGTON, DC 20001

www.westerncaucusfoundation.org info@westerncaucusfoundation.org westerncaucusfoundation @WestCaucusFound

WYOMING STOCK GROWERS ASSOCIATION
Guardian of Wyoming's Cow Country since 1872

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Region IV Vice President- Brad Mead, *Jackson*
Region V Vice President- Reg Philips, *Dubois*
Executive Vice President- Jim Magagna, *Cheyenne*
Young Producers Assembly- Will Hudson, *Sinclair*

March 27, 2019

The Honorable Lisa Murkowski
Chairman
Committee on Energy and Natural Resources
United States Senate
304 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Joe Manchin
Ranking Member
Committee on Energy and Natural Resources
United States Senate
304 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Murkowski and Ranking Member Manchin:

The Wyoming Stock Growers Association (WSGA) is pleased to have this opportunity to express our support for the confirmation of Mr. David Bernhardt to be Secretary for the Department of the Interior. WSGA has, for over 147 years, represented the interests of the ranching industry in Wyoming. Many of our members are ranchers who hold federal grazing permits and operate on federal lands. In our role, we maintain an active working relationship with most of the agencies under the jurisdiction of the Department of Interior in managing western lands, water and wildlife species.

Mr. Bernhardt is well qualified for this position, having previously worked in various capacities at the Department under President George W. Bush. As a native of Colorado, he has firsthand knowledge of America's multiple-use landscapes and the role that livestock grazing plays in the management of federal lands. As Deputy Secretary and Acting Secretary he has proven to be a fair and honest broker in his dealings with the livestock industry. Ranchers were pleased with President Trump's nomination of Mr. Bernhardt and are proud to enthusiastically support his nomination to be Secretary of the Interior. I have had the opportunity to interact directly with Mr. Bernhardt. His willingness to listen and his understanding of our issues was impressive.

. Ranchers who hold grazing permits on public land do vital work that benefits public land including the improvement of water sources, improvement of wildlife habitat, and maintaining the open space that Americans enjoy. Having leadership at the Department of Interior who understand the agriculture industry and role it plays in the stewardship of America's public lands is vital to ensure the continuity of this national heritage.

WSGA urges prompt confirmation of David Bernhardt to the position of Secretary of the Interior.

Sincerely,

Jim Magagna

Jim Magagna
Executive Vice President

"Shaping and Living The Code of The West"
P.O. BOX 206, CHEYENNE, WY 82003• PH: 307.638.3942 • FX: 307.634.1210
EMAIL: INFO@WYSGA.ORG •WEBSITE: WWW.WYSGA.ORG • BLOG: WWW.REALRANCHERS.COM

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