

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

WESTERN VALUES PROJECT,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE
INTERIOR,

Defendant.

Case No. 18-1764 (EGS)

STATUS REPORT

Pursuant to the Court's order of February 4, 2019, Plaintiff submits the below status report.¹

This case concerns ten requests under the Freedom of Information Act ("FOIA") pertaining to Acting Secretary of the Interior David Bernhardt's potential conflicts of interest. As set forth below, Defendant Department of the Interior ("DOI" or the "Department") appears to have made no meaningful progress responding to these requests and has missed its own deadline for production by several weeks without explanation. On the afternoon of February 21, 2019, Defendant advised Plaintiff that it could provide no updates as to future production.

Particularly because President Trump has nominated the Acting Secretary to serve as a Senate-confirmed Secretary of the Interior, it is of the utmost importance that Defendant expeditiously comply with its obligations under FOIA. Accordingly, Plaintiff believes it is appropriate for the Court to Defendant to begin monthly productions and provide a

¹The Court's order directed "the parties . . . to file a joint status report by no later than February 22, 2019 with a recommendation for further proceedings." On the afternoon of February 21, 2019, Defendant provided Plaintiff with an update on Plaintiff's ten Freedom of Information Act requests. Plaintiff thereafter circulated a draft of this filing and invited Defendant to supply a response, as Defendant had done in prior joint status reports. ECF No. 13. Defendant declined and instead filed a status report unilaterally, necessitating this separate filing.

comprehensive update on Plaintiff's requests by March 1, 2019. In the alternative, Plaintiff respectfully requests the Court schedule a status conference.

Background of the FOIA request

The United States Department of the Interior is responsible for sustaining America's lands, water, wildlife, and energy resources, and for fulfilling the United States' responsibilities to 567 tribal nations. DOI manages one-fifth of the land in the United States, safeguards the water supply for more than 30 million people, and protects America's natural landscapes. On August 1, 2017, David Bernhardt was sworn in as Deputy Secretary of the Interior, the second-highest-ranking official at the agency. He served in that capacity until January 2, 2019, when his superior—former Secretary of the Interior Ryan Zinke—resigned in the wake of several ethics scandals.² Bernhardt has since served as Acting Secretary of the Interior, and was recently nominated by President Trump for Senate confirmation as Secretary.

It is open question whether Acting Secretary Bernhardt has exercised his duties impartially and consistent with his ethical obligations to the American public. Immediately before assuming the role of Deputy Secretary, Bernhardt served as chair of the natural resources group at the lobbying firm of Brownstein Hyatt Farber Schreck, LLP ("Brownstein Hyatt"). There, Acting Secretary Bernhardt worked on behalf of dozens of mining and fossil fuel companies with business before the Department. Many of these clients have sought to develop natural resources, especially energy resources, by stripping protections for the nation's public lands and waters, often over the objections of local communities, taxpayer advocates, and environmental and recreation groups. Although Acting Secretary Bernhardt pledged to recuse himself from involvement in matters involving some of his former clients, recent DOI activity

² Julie Turkewitz and Coral Davenport, *Ryan Zinke, Face of Trump Environmental Rollbacks, Is Leaving The Interior Department*, The New York Times (Dec. 15, 2019), <https://www.nytimes.com/2018/12/15/us/ryan-zinke-interior-secretary.html>.

suggests that the Acting Secretary may not have honored his commitment: many of the Acting Secretary's former clients began receiving sudden and dramatic windfalls only months after his swearing in.

To take only two examples, Brownstein Hyatt represent Cadiz Inc., which has long sought DOI permission to develop a sensitive aquifer under California's Mojave Desert. In connection with this work, Cadiz paid Brownstein Hyatt \$2.75 million in lobbying fees and granted the firm 200,000 shares of company stock, with a promise to issue more if Brownstein Hyatt successfully brought the aquifer project to fruition.³ In September and October of 2017 – shortly after Deputy Secretary Bernhardt was confirmed – DOI withdrew legal guidelines, adverse to Cadiz, that had previously protected the aquifers from development.⁴ Another entity on Deputy Secretary Bernhardt's list of recusals, Independent Petroleum Association of America ("IPAA"), benefited when Deputy Secretary Bernhardt oversaw proposed revisions of eleven state sage grouse cooperative habitat management agreements, pathbreaking compacts designed to forestall threats to the iconic and imperiled species while balancing the needs of states, localities, and energy interests.⁵

The FOIA requests and Defendant's processing thus far

To better understand and inform the public of the circumstances surrounding the Acting Secretary's role within DOI and his compliance with ethical obligations, Plaintiff—a not-for-profit-organization dedicated to educating Americans about DOI's management of public lands and resources—submitted ten FOIA requests to the agency between November 30, 2017 and

³ Bettina Boxall, *Trump Interior Department Nominee Tells Senate Panel He Can Avoid Potential Conflicts of Interest*, L.A. Times (May 18, 2017), <http://www.latimes.com/local/lanow/la-me-bernhardt-hearing-20170518-story.html>.

⁴ Michael Hiltzik, *Loan to Jared Kushner Raises Questions About California Water Project*, L.A. Times (Mar. 7, 2018) <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-cadiz-apollo-20180307-story.html>.

⁵ Coral Davenport, *Trump Drilling Plan Threatens 9 Million Acres of Sage Grouse Habitat*, The New York Times, (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/climate/trump-sage-grouse-oil.html>.

May 4, 2018. Each of these requests sought documents pertaining to the Acting Secretary. When Defendant failed to respond to these requests, Plaintiff filed this lawsuit on July 27, 2019.

In the last seven months, Defendant does not appear to have made substantial progress in responding to Plaintiff's requests other than to purport to complete production for one such request. In the parties' first two joint status reports, Defendant offered conflicting and incomplete updates on Plaintiff's requests, ECF No. 13 at 2, and committed to providing an initial release of responsive documents by December 31, 2019. *Id.*; ECF No. 12 at 2. Defendant then missed that deadline without explanation or notice to Plaintiff.

Insofar as Defendant seeks to justify its failure to produce on the grounds that congressional funding to most executive agencies lapsed on December 23, 2018, that explanation is unavailing: whereas Defendant might have lacked appropriations for eight days prior to the December 31, 2018 deadline, appropriations have now been restored for almost a month, and yet Defendant has not completed its production. Nor is the lapse in appropriations grounds for additional delay in this case, since the government shutdown did not prevent DOI from working diligently to advance preferred projects such as drilling for fossil fuels in the Arctic National Wildlife Refuge,⁶ off the eastern seaboard, *S.C. Coastal Conservation League v. Ross*, No. 2:18-CV-03326-RMG, 2019 WL 259116 (D.S.C. Jan. 18, 2019), and in western states.⁷ Defendant also found time and resources during the shutdown to publish a proposed rule that, if implemented, would grant it sweeping authority to arbitrarily deny FOIA requests or delay responses thereto. *See* 83 Fed. Reg. 67175 (Dec. 28, 2018).⁸ The Department has never

⁶ Yareth Rosen, *Trump administration working on Arctic oil leases despite shutdown*, Reuters (Jan. 9, 2019), <https://www.reuters.com/article/us-usa-alaska-oil/trump-administration-working-on-arctic-oil-leases-despite-shutdown-idUSKCN1P4086>.

⁷ Cooper McKim, *Despite Shutdown, BLM Lease Sale Continue On*, Wyoming Public Media (Jan. 31, 2019), <https://www.wyomingpublicmedia.org/post/despite-shutdown-blm-lease-sales-continue#stream/0>.

⁸ Charles S. Clark, *Interior Dept. Plan to Streamline FOIA Responses Alarms Transparency Groups*, Government Executive (Jan. 30, 2019), <https://www.govexec.com/management/2019/01/interior-dept-plan-streamline-foia-responses-alarms-transparency-groups/154525/>.

explained why it abandoned its mandatory duties under FOIA and other statutes during the shutdown even as the lapse in appropriations posed no obstacle to discretionary activities favored by the Acting Secretary.⁹

Proposal for further proceedings

Nearly ten months have passed since the *last* of Plaintiff's ten FOIA requests, but the Department appears no closer to acting on its obligations to process and release responsive documents. DOI's foot-dragging is particularly problematic given Acting Secretary Bernhardt's nomination to Secretary and, in advance of his confirmation hearings, his efforts to tout his commitment to agency transparency and ethical public service.¹⁰ As described above and in Plaintiff's Complaint, the Acting Secretary's commitment to these principles is not at all obvious, particularly in light of his recent efforts to shirk DOI's FOIA obligations through rulemaking and a deprivation of resources to the agency's FOIA offices. It is of the utmost importance that the public understand if the Acting Secretary's deeds match his words prior to his possible ascension to a Senate-confirmed Cabinet position.

In light of the Department's significant history of delay in this matter and the public interest in the documents sought by Plaintiff, Plaintiff believes it is appropriate for the Court to order Defendant to adhere to a production schedule. Specifically, Plaintiff believes it is appropriate for the Court to order Defendant to: (1) produce an itemized estimate of the number of responsive documents across DOI by March 1, 2019; (2) set forth how the agency plans to prioritize production among Plaintiff's FOIA requests by March 1, 2019, and; (3) on the first of

⁹ Adam Allington, *Shutdown Slowed Pesticide Reviews Under Endangered Species Act*, Bloomberg Environment (Jan. 29, 2019), <https://news.bloombergenvironment.com/environment-and-energy/shutdown-slowed-pesticide-reviews-under-endangered-species-act>.

¹⁰ Compare David Bernhardt, *A Message from Acting Secretary Barnhardt – Ethical Culture* (Feb. 1, 2019), <https://www.doi.gov/employees/message-acting-secretary-bernhardt-ethical-culture> with Coral Davenport, *A Top Leader at Interior Dept. Pushes a Policy Favoring His Former Client*, The New York Times (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/climate/david-bernhardt-endangered-species.html>.

each month, beginning March 1, 2019, process (and release responsive portions of) a number of pages the Court deems appropriate in light of the number of FOIA requests at issue and the public interest in those requests. *See Allen v. FBI*, 716 F. Supp. 667, 672 (D.D.C. 1988) (recognizing agency's processing of 5,000 pages per month). In the alternative, Plaintiff respectfully requests the Court schedule a status conference.

Dated: February 22, 2019.

Respectfully submitted,

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