



January 11, 2019

VIA CERTIFIED MAIL AND FACSIMILE

The Honorable Mary Kendall
Deputy Inspector General
Department of Interior
1849 C Street NW
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Dear Ms. Kendall,

On behalf of Democracy Forward Foundation and the National Parks Conservation Association,¹ we write to respectfully request that your office investigate the Department of the Interior's ("DOI's" or "the Department's") violations of federal law attendant to its decision to leave the United States National Park System open during the ongoing lapse of appropriations with levels of staffing and services that are grossly inadequate to protect the parks and their visitors. This decision has exposed the public and our natural and cultural resources to a substantial risk of irreparable harm during the ongoing federal government shutdown, and runs directly counter to the Secretary of the Interior's obligation to ensure our national parks fulfill their "fundamental purpose," to "conserve . . . [and] provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 54 U.S.C. § 100101(a); *see also* 16 U.S.C. § 1a-1 ("The authorization of activities shall be construed and the protection, management, and

¹ Democracy Forward Foundation and the National Parks Conservation Association are nonpartisan, nonprofit organizations.

administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.”).

I. DOI’s Decision to Keep the Parks Open Without Funding for Staff and Services

Appropriations to the Department, including the National Park Service (“NPS” or “Park Service”), lapsed on December 22, 2018. Since that date, NPS has furloughed most of its employees and suspended most of its services. Nonetheless, the Department decided to leave most national parks open but largely unstaffed and without even basic services. *National Park Service Contingency Plan* (Jan. 2018) (Exhibit A).

As documented in numerous reports, this decision adversely threatens public health and safety. In the absence of federal staff to monitor trails and visitor activity, visitors face greater risk of personal injury. The Park Service has acknowledged that vital search and rescue services may be delayed, and at least one visitor death is partially attributable to the Department’s decision.²

The decision also poses significant risks to the conservation of nationally important natural and cultural resources. Without enough personnel and services, parks have seen – among other impacts – illegal fires, Joshua trees cut and cleared to facilitate illegal roads, and camping and parking in undesignated areas, which can cause harm to the natural environment. Numerous parks have also been polluted with human waste and significant quantities of garbage and refuse, threatening not only visitor health but the health and safety of wildlife. The Department’s decision also makes it more likely that visitors or poachers will hunt or injure federally protected species or deface cultural sites.³ DOI has acknowledged that the damage to national parks

² See Wash. Post, *Three Dead in National Park System Accidents as Shutdown Wears On*, https://www.washingtonpost.com/energy-environment/2019/01/04/three-dead-national-parks-shutdown-wears/?noredirect=on&utm_term=.4258d30c9423 (Jan. 4, 2019) (describing, among others, incident involving man at Yosemite National Park who died after suffering injuries along with his dog in a part of the park where bringing dogs is “against the rules and dangerous” and ordinarily would be prevented by rangers); CNN, *When He Broke His Leg at a National Park, Strangers Had to Carry Him to Safety Because of the Government Shutdown*, <https://www.cnn.com/2019/01/02/us/big-bend-injury-shutdown/index.html> (Jan. 3, 2019).

³ See) Wash. Post, *With the Government Shut Down, We’re Trying to Keep Chaos at Bay in Joshua Tree*, <https://www.washingtonpost.com/outlook/2019/01/02/with-government-shut-down-were-trying-keep-chaos-bay-joshua-tree> (Jan. 2, 2019); The Guardian, *Keeping US National Parks Open During the Shutdown is a Terrible Mistake*, <https://www.theguardian.com/environment/2019/jan/03/national-parks-government-shutdown-trump> (Jan. 3, 2019). Prior coverage has also made clear that adequate staffing is required to prevent poaching and looting. See L.A. Times, *Looting Prompts Closures at Mining Sites in Joshua Tree*, <https://www.latimes.com/local/lanow/la-me-joshua-tree-looting-20160215-story.html> (Feb. 15, 2016).

resulting from its decision has required the agency to take remedial steps, thereby incurring obligations despite the absence of appropriations.⁴

II. Violations of Federal Law

A. *The Antideficiency Act*

Under the Antideficiency Act, 31 U.S.C. § 1341 *et seq.*, federal agencies – and the officers and employees thereof – are barred from obligating funds in the absence of an appropriation by Congress except in rare circumstances in which such obligation is necessary to prevent an imminent threat to human life or property. Moreover, under decisions of the Office of Legal Counsel, agencies are also required to take reasonable steps to prevent the need to incur unappropriated obligations. *See* U.S. Dep’t of Justice, Office of Legal Counsel, *United States Marshals Service Obligation to Take Steps to Avoid Anticipated Appropriations Deficiency*, 23 Op. O.L.C. 105 (1999). In other words, if the agency can foresee that its actions (or inaction) will cause it to incur unappropriated obligations, it has a duty under the Antideficiency Act to avoid that outcome.

DOI has ignored this requirement by choosing to leave the national parks open, knowing full well that doing so without staffing and services invites the creation of health and safety issues that will require the agency to incur obligations to remediate. In other words, DOI, through its decision, has effectively invited the creation of conditions that will cause it to violate the Antideficiency Act. This the law does not allow. That is why, absent a separate funding source, past Administrations have consistently closed the national parks during a lapse in appropriations.

Thus, we believe these actions clearly violate the Antideficiency Act, as interpreted and applied consistently by Administrations dating back to the 1970s.

B. *Environmental Statutes*

As relevant here, at least two statutes require the Department to consider and analyze the environmental impacts of its decision to open the national parks without appropriate staffing and services. The National Environmental Policy Act requires an environmental impact statement for

⁴ NPS announced that Joshua Tree National Park would close for emergency cleanup and repairs, before subsequently reversing that decision upon diverting funds from user fees—itsself legally problematic, as discussed below. L.A. Times, *Park Officials First Say Joshua Tree is Closing, But Then Say It Will Reopen By End of Week*, <https://www.latimes.com/travel/la-tr-joshua-tree-national-park-to-close-shutdown-20190108-story.html> (Jan. 8, 2019); NBC News, *Joshua Tree to Stay Open as Park Service Uses Fee Revenue Amid Shutdown*, <https://www.nbcnews.com/news/us-news/joshua-tree-stay-open-parks-service-uses-fee-revenue-amid-n957006> (Jan. 9, 2019). Decisions to close the Parks for the duration of the government shutdown have been made for Sequoia and Kings Canyon National Parks. *Health and Safety Concerns Force Closure of Sequoia and Kings Canyon National Parks*, <https://www.yourcentralvalley.com/news/national-news/health-and-safety-concerns-force-closure-of-sequoia-and-kings-canyon-national-parks/1684210871> (Jan. 2, 2019).

“major Federal actions significantly affecting the quality of the human environment,” 42 U.S.C. § 4332(C), and the Endangered Species Act (“ESA”) requires the Department to insure that its actions are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species,” 16 U.S.C. § 1536(a)(2). Even though the Department’s decision significantly affects the quality of the human environment and threatens park wildlife, the Department does not appear to have undertaken this analysis or to have rendered regulatory determinations that such analysis is unnecessary, and it is therefore in violation of both statutes. *See* 50 C.F.R. §§ 402.13, 14; 40 C.F.R. § 1501.4. Moreover, DOI could be liable under ESA Section 9 if its decision to leave parks open causes the take of an individual member of a federally-protected species. *See, e.g., Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997).

C. Federal Lands Recreation Enhancement Act

Additional legal questions arise as a result of the revised NPS contingency plan signed by Acting Secretary Bernhardt on January 5, 2019.⁵ Under the revised plan, NPS may pay for certain routine national park operating expenses using visitor fee funds raised pursuant to the Federal Lands Recreation Enhancement Act, 16 U.S.C. § 6801 *et seq.* That Act, however, only permits the use of visitor fee funds for six enumerated purposes related to improving visitor experiences – not as a general purpose operating fund account. *See id.* § 6807(a)(3). And yet that is exactly what NPS has decided to do. We believe that this action – which also contradicts the approach of prior Administrations during appropriations lapses – violates the law and warrants review by your Office.

III. Request for Investigation

Because the Department’s decision to leave the national parks open without adequate staffing violates at least four separate provisions of federal law, we believe it is appropriate for your Office to open an investigation into the matter. The Department’s decision – which apparently resulted from political pressure to keep parks open and thus soften public opposition to the shutdown – puts our national parks and their visitors in jeopardy, and raises troubling questions surrounding the Department’s decision-making and its adherence to legal requirements. Accordingly, Democracy Forward and the National Parks Conservation Association respectfully request that your office review the following:

- The process of deciding to keep the national parks open and accessible throughout the shutdown without adequate staffing and services, including but not limited to whether the Department consulted with the White House, Office of Legal Counsel, and outside stakeholders, and whether career officials at the Department (including those at NPS, the Fish and Wildlife Service, or the Office of the Solicitor) were consulted, and whether any

⁵ *See* Wash. Post, *Park Service Takes ‘Extraordinary Step’ of Dipping into Entrance Fees To Bolster Operations at Popular Sites*, <https://www.washingtonpost.com/energy-environment/2019/01/06/park-service-takes-extraordinary-step-dipping-into-entrance-fees-bolster-operations-popular-sites/> (Jan. 6, 2019); *see also* National Park Service’s Revised Contingency Plan, <https://www.doi.gov/sites/doi.gov/files/2018-01-nps-contingency-plan.pdf> (Jan. 2019).

dissenting views by career officials or others were overruled or ignored.

- The projected costs to DOI to assess conditions and return parks to their pre-shutdown status and resource condition.
- The extent to which DOI officials analyzed the environmental impact of park operations before or during the federal shutdown, including whether the Department considered basic questions such as the projected length of the shutdown, the estimated number of visitors, the loss of fee revenue, the cost of cleanup and condition assessments after the shutdown, and the number of staff required to properly maintain the national parks.
- The process surrounding Acting Secretary David Bernhardt's decision to utilize entry fees to pay for routine operating expenses, notwithstanding statutory limitations on the use of those funds.
- An accounting of projects to which diverted entry fee funds were committed prior to the Acting Secretary's decision to divert these funds.

* * *

We hope you share our concerns about the Department's actions in this matter. Please do not hesitate to contact us if we may provide anything further. Thank you for your time and consideration.

Sincerely,

/s/ Anne Harkavy

Anne Harkavy
Executive Director
Democracy Forward Foundation

/s/ Theresa Pierno

Theresa Pierno
President and CEO
National Parks Conservation Association