



VIA FED EX DELIVERY

October 7, 2019

Mark Lee Greenblatt
Inspector General
U.S. Department of the Interior
Office of Inspector General
1849 C Street NW - Mail Stop 4428
Washington, D.C. 20240

Re: Request for investigation of Secretary of the Interior David Bernhardt’s oversight of the Bears Ears National Monument Advisory Committee

Dear Mr. Greenblatt:

We write to request that you investigate whether Secretary of the Interior David Bernhardt has violated the Federal Advisory Committee Act (“FACA”) and the Act’s implementing regulations by operating the Bears Ears National Monument Advisory Committee (“Committee”) in a fashion that precludes the Committee from providing independent advice, both because the Committee is unfairly balanced to disproportionately favor opponents of the Monument and because some Committee members have interests in public resources that raise questions concerning their impartiality. (Indeed, some Committee members’ interests appear to be aligned with Secretary Bernhardt’s former clients in the mining and energy sectors.) Because the Secretary’s management of the Committee appears to violate FACA—which requires balanced advisory committee memberships free from conflicts of interest—we respectfully request that you investigate the Secretary’s maintenance of the Committee and, if warranted, recommend appropriate disciplinary action.

Background

In 2016, President Obama issued a Presidential Proclamation establishing the Bears Ears National Monument (the “Designating Proclamation”). The Designating Proclamation recognized that the Bears Ears “region is unsurpassed in wonders,” and that “[p]rotection of the Bears Ears area will preserve its cultural, prehistoric, and historic legacy and maintain its diverse array of natural and scientific resources, ensuring that the prehistoric, historic, and scientific values of this area remain for the benefit of all Americans.”¹ Subject to valid existing rights, therefore, the Designating Proclamation withdrew 1.35 million acres of federal land—managed

¹ *Presidential Proclamation—Establishment of the Bears Ears National Monument*, The White House (Dec. 28, 2016) [hereinafter Designating Proclamation].

by the Bureau of Land Management (“BLM”) and the United States Forest Service (“USFS”)—“from all forms of entry, location, selection, sale, or other disposition under the public land laws or laws applicable to [USFS], from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing, other than by exchange that furthers the protective purposes of the Monument.”²

The Designating Proclamation established two federal advisory committees to assist USFS and BLM in managing and conserving the Bears Ears Monument. The first—the Bears Ears Commission—recognizes the Monument’s unique connection to Native American Tribes, and consists of “one elected officer each from the Hopi Nation, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah Ouray, and [Pueblo of] Zuni.”³ The second committee—the Bears Ears National Monument Advisory Committee—“shall consist of a fair and *balanced* representation of interested stakeholders, including State and local governments, tribes, recreational users, local business owners, and private landowners.”⁴

The mining and energy industries opposed the Designating Proclamation.⁵ Thus, on April 26, 2017, President Trump signed an executive order that, in relevant part, directed the Secretary of the Interior to review all national monuments designated or expanded “since January 1, 1996, where the designation covers more than 100,000 acres . . . or where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders.”⁶ On August 24, 2017, then-Secretary of the Interior Ryan Zinke concluded his “review,” conceding in a summary that public comments were “overwhelmingly in favor of maintaining existing monuments.”⁷ Nonetheless, President Trump subsequently issued a Presidential Proclamation purporting to shrink the Bears Ears Monument by 85 percent (the “Withdrawal Proclamation”).⁸

The Withdrawal Proclamation left intact the Monument’s advisory committees, and, exactly one year after Secretary Zinke completed his review of Bears Ears, he signed the charter for the Bears Ears National Monument Advisory Committee.⁹ The Committee’s primary task is to “provide information and advice regarding . . . management of the Monument . . . as stated in the Presidential Proclamation establishing the Monument,” *i.e.*, the Designating Proclamation.¹⁰ The Department announced the creation of the Committee and solicited applications for its 15-person membership on August 30, 2018,¹¹ and, on April 11, 2019, Secretary David Bernhardt appointed the Committee’s membership.

² *Id.*

³ *Id.*

⁴ *Id.* (emphasis added).

⁵ Eric Lipton & Lisa Friedman, *Oil Was Central in Decision to Shrink Bears Ears, Emails Show*, N. Y. Times, Mar. 2, 2018.

⁶ *Presidential Executive Order on the Review of Designations Under the Antiquities Act*, The White House (Apr. 26, 2017).

⁷ *Report Summary by U.S. Secretary of the Interior Ryan Zinke*, U.S. Dep’t of the Interior (Aug. 24, 2017).

⁸ *Presidential Proclamation Modifying the Bears Ears National Monument*, The White House (Dec. 4, 2017).

⁹ *Bears Ears National Monument Advisory Committee Charter*, BLM & USFS (Aug. 24, 2018).

¹⁰ *Id.*

¹¹ 82 Fed. Reg. 44,302 (Aug. 30, 2018).

Although the Department has acknowledged that most who commented on the proposed Withdrawal Proclamation support the boundaries of Bears Ears set forth in the Designating Proclamation, a majority of the Committee vocally opposed that Proclamation.¹² Moreover, at least three of the Committee’s members—Bruce Adams, Zeb Dalton, and Gail Johnson—either hold grazing allotments on BLM land or have immediate family members with such holdings.¹³

Potential Legal Violations

The Secretary of the Interior must comply with FACA when appointing and operating the Committee. A “sunshine law,” FACA demands transparency and public participation when the executive branch establishes or uses non-federal bodies for the purpose of seeking advice and generating policy.¹⁴

Among the foremost problems FACA addresses is the possibility that the executive branch will stack advisory committee memberships to favor political allies or to exclude foes. As Congress explained, “[o]ne of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns,” citing in particular an Industrial Waste Committee where “only representatives of industry were present[,]” and “[n]o representatives of conservation, environment, clean water, consumer, or other public interest groups were present.”¹⁵ To ensure that special interests do not control the advice rendered by advisory committees, FACA requires “the membership of [an] advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.”¹⁶

Department regulations applicable to the MAC expand on these provisions, requiring that each committee “shall be formed with the objective of providing *representative* counsel and advice about public land and resource planning, retention, management and disposal.”¹⁷ “Individuals shall qualify to serve on an advisory committee because their education, training, or experience enables them to give informed and *objective* advice regarding an industry, discipline, or interest specified in the committee’s charter[.]”¹⁸

¹² See, e.g., Brady McCombs, *Bears Ears National Monument Advisory Panel New Flashpoint in Debate*, Durango Herald, Apr. 27, 2019 (Bruce Adams); Gary Herbert, *5 Myths About Bears Ears*, Deseret News, Dec. 4, 2017 (Utah Governor Gary Herbert, who is represented on the Committee by Gordon Larsen); Ex. A (Committee member Gail Johnson); Alfred Ben, *Sizing Them Up: Utah Rep, Not Trump or Obama, Meets Navajo Needs on Bears Ears*, The Hill, Dec. 26, 2017 (Committee member Alfred Ben); Art Hughes, *The Fate of Bears Ears*, Native Am. Calling, May 17, 2017 (interview with Committee member Ryan Benally); Kris Millgate, *The Poster Boys of Bears Ears*, Hatch, June 8, 2017 (Committee member Dustin Randall); *Trump’s Action on Monument Land Doesn’t Release It From Federal Control*, Fence Post Dec. 11, 2017 (Committee member Zeb Dalton); Kirk Siegler, *With National Monuments Under Review, Bears Ears Is Focus of Fierce Debate*, NPR, May 5, 2017 (Committee member Jami Bayles).

¹³ Testimony of Bruce Adams, Comm’r, San Juan Cty., Before the U.S. S. Comm. on Energy and Nat. Res. (July 27, 2016) (describing Adams allotment); Fence Post, *supra* note 12 (Dalton allotment); Exhibit A ¶ 4 (Johnson allotment).

¹⁴ See *Pub. Citizen v. DOJ*, 491 U.S. 440, 441 (1989).

¹⁵ H.R. Rep. No. 92-1017, at 6 (1972), as reprinted in 1972 U.S.C.C.A.N. 3491, 3496.

¹⁶ 5 U.S.C. app. II § 5(b)(2), (c).

¹⁷ 43 C.F.R. § 1784.2-1(a) (emphasis added).

¹⁸ *Id.* § 1784.2-1(b) (emphasis added).

To further protect against one-sided or biased recommendations, an advisory committee's charter must contain appropriate provisions to "assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment[.]"¹⁹ Likewise, Department of Interior regulations provide that "[p]ersons or employees of organizations who hold leases, licenses, permits, contracts or claims which involve lands or resources administered by the [BLM] normally shall not serve on advisory committees[.]"²⁰ To enforce this requirement, "[m]embers of advisory committees shall be required to disclose their direct or indirect interest in leases, licenses, permits, contracts, or claims and related litigation which involve lands or resources administered by the [BLM]," including holdings of spouses and children.²¹

Secretary Bernhardt's appointments to the Committee appear to have violated FACA in at least two respects.

First, Secretary Bernhardt appears to have violated FACA Section 10 and BLM's implementing regulations by conclusively staffing the Committee with *opponents* of the Designating Proclamation, even though the Committee's charter explicitly tasks the Committee with *furthering* that Proclamation's goals. The Committee appears to contain no advocates for the Monument's conservation or its original boundaries, and is therefore not "fairly balanced" within the meaning of applicable law.

The Committee's unbalanced membership renders the body incapable of providing independent advice and unable to fulfill its mandate. Indeed, the Committee proposed a spate of policy recommendations endorsing "Alternative D" from BLM's menu of proposed management plans for the Monument.²² That Alternative—which contains fewer protections for Bears Ears resources and was widely opposed by conservation and tribal advocates²³—was inconsistent with the Designating Proclamation and the Committee's charter. Explicitly relying on the Committee's advice, BLM then adopted a new "Alternative E" to govern the Monument's management.²⁴ According to BLM, Alternative E is similar to Alternative D in that it would "appl[y] fewer land and resource use restrictions,"²⁵ to the Monument, and was likewise criticized by the Monument's advocates.²⁶

Second, Secretary Bernhardt appears to have unlawfully appointed Committee members who hold (or whose family members hold) interests in BLM lands or resources, and has not

¹⁹ 5 U.S.C. app. II § 5(b)(3), (c).

²⁰ 43 C.F.R. § 1784.2-2(a).

²¹ *Id.* § 1784.2-2(c).

²² *Official Meeting Record: Bears Ears National Monument Advisory Committee 9-11*, BLM (Aug. 1, 2019).

²³ Zak Podmore, *Trump Team Releases Bears Ears Management Plan to Outcry From Environmental Groups*, Salt Lake Trib., July 26, 2019.

²⁴ *Bears Ears National Monument: Proposed Monument Management Plans and Final Environmental Impact Statement*, BLM at 1-6 (July 2019).

²⁵ *Id.* at 2-2.

²⁶ Darryl Fears & Juliet Eilperin, *Trump officials say a new plan will protect Bears Ears. Others call it 'salt in an open wound'*, Wash. Post, July 27, 2019.

released the ethics disclosures required of these and other members. These staffing decisions further risk the possibility that members of the Committee will act in their self-interest rather than according to the Committee's charter and FACA. And even if these members do not act in their self-interest, their undisclosed conflicts undermine the perceived independence of their advice, which is why BLM has required disclosures in the first place.

Beyond their unlawful nullification of FACA, Secretary Bernhardt's staffing decisions are troubling because he previously represented many private entities who may benefit from the Department's abrogation of the Designating Proclamation. For example, the Secretary previously represented Ur Energy,²⁷ a mining company that may profit from increased access to uranium deposits in the Bears Ears region.²⁸ Secretary Bernhardt also directed litigation for the Colorado Oil and Gas Association, a trade group whose members hold claims near Bears Ears.²⁹

Request for Relief and Further Investigation

Your office has the authority to review potential violations of applicable ethics rules and other laws governing the Secretary of the Interior.³⁰ We respectfully request that you use this authority to determine whether Secretary Bernhardt's maintenance of the Committee violates FACA and/or constitutes the improper use of his office. If such an investigation reveals that the Secretary has, in fact, improperly used his authority to benefit former clients or to contravene applicable law, we respectfully request that you recommend appropriate disciplinary action.

We look forward to learning more about the outcome of your inquiry. Should you have any questions or wish to discuss this matter further, please do not hesitate to contact Travis Annatoyn at tannatoyn@democracyforward.org or (202) 601-2483.

Sincerely,

Travis Annatoyn
Senior Counsel

Democracy Forward Foundation

CC:
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²⁷ *Statement for Completion by Presidential Nominee David Bernhardt 4*, U.S. S. Comm. on Energy and Nat. Res., available at https://www.eenews.net/assets/2017/05/11/document_gw_09.pdf.

²⁸ David Shepardson & Valerie Volcovici, *U.S. Agency Submits Uranium Import Probe to White House*, Reuters, Apr. 15, 2019.

²⁹ *NGI's North American Shale & Resource Plays Factbook* at 124, Nat. Gas Intelligence (2016) (listing shale holdings of Bill Barrett Corporation (now HighPoint Resources) in Paradox Basin, which underlies Bears Ears).

³⁰ 5 U.S.C. app. 3 § 4.