

October 6, 2020

David Bernhardt
United States Secretary
Department of the Interior
1849 C St NW
Washington DC, 20240

Re: Implications of the United States District Court for the District of Montana’s Order in *Bullock v. BLM*

Dear Secretary Bernhardt,

We are writing to address significant implications of the recent Order from the United States District Court for the District of Montana declaring that William Perry Pendley served unlawfully as the Acting Director for the Bureau of Land Management (BLM) and that any “function or duty” of the BLM Director that was performed by Mr. Pendley has no force or effect and must be set aside as arbitrary and capricious. *Bullock v BLM*, Case No. 4:20-cv-00062-BMM (D. Montana September 25, 2020), p. 33.

In the decision, the Court made clear that William Perry Pendley’s service as Acting BLM Director is contrary to the United States Constitution and the Federal Vacancies Reform Act (FVRA):

Pendley has served and continues to serve unlawfully as the Acting BLM Director. His ascent to Acting BLM Director did not follow any of the permissible paths set forth by the U.S. Constitution or the FVRA. Pendley has not been nominated by the President and has not been confirmed by the Senate to serve as BLM Director. Pendley is not a member of the permitted category of individuals who can serve in an acting capacity in a PAS office under the FVRA. Secretary Bernhardt lacked the authority to appoint Pendley as an Acting BLM Director under the FVRA. Pendley unlawfully took the temporary position beyond the 210-day maximum allowed by the FVRA. Pendley unlawfully served as Acting BLM Director after the President submitted his permanent appointment to the Senate for confirmation—another violation of the FVRA. And Pendley unlawfully serves as Acting BLM Director today. Id. at 28

Below we list a number of actions implicated by this decision. This list contains both “functions and duties” performed by Mr. Pendley while unlawfully exercising the authority of BLM Director, starting July 29, 2019, as well as “functions and duties” nominally performed by other parties but reviewed, approved and/or influenced by, Mr. Pendley during his tenure such that they too must be set aside. BLM must review and restart any action in which Mr. Pendley’s involvement renders the action invalid given his absence of authority. We note that this list is by no means exhaustive, and that, ultimately, BLM bears the burden of justifying any decision it makes to preserve final actions taken by the agency during Mr. Pendley’s illegal tenure. This justification will likely require a review of records of Mr. Pendley’s actions.

I. Resource Management Plans and Amendments

During the development of Resource Management Plans (RMPs) and RMP amendments, the Director of the BLM is responsible for responding to and rendering a decision on any protest to a proposed RMP. 43 C.F.R. § 1610.5-2(a)(3). The Director of the BLM is also responsible for ruling on, and responding in writing, to any appeal filed by a Governor during the State consistency review of RMPs. 43 CFR 1610.2-3. These actions constitute “functions and duties” performed by the Director of the BLM. Mr. Pendley was also engaged through the Director’s review and approval of RMP revisions and amendments. Consequently, any RMP or RMP amendment for which a protest or appeal period was open during Pendley’s unlawful tenure must be set aside. These include:

- Sonoran Desert National Monument (AZ) – 9.29.2020¹
- Converse County Oil and Gas Project and Casper RMP Amendment (WY) - 8.31.20 (close of protest period)
- Moneta Divide Natural Gas and Oil Development Project and Casper RMP Amendment (WY) – 8.7.20
- Borderlands Wind Project and Socorro RMP Amendment (NM) – 8.5.20
- Lewistown Field Office RMP (MT) – 7.30.20
- Missoula Field Office RMP (MT) – 7.30.20
- Browns Canyon National Monument RMP (CO) – 7.27.20
- Gemini Solar Project and Las Vegas RMP Amendment (NV) – 5.11.20
- Central Coast Field Office RMP Amendment for Oil and Gas Leasing Department (CA) – 05.09.2019 (FEIS and open of protest period)
- Four Rivers RMP (ID) – 5.1.20 (protest resolution report)
- Haiwee Geothermal Leasing Area Amendment to CDCA Plan (CA) – 4.24.20
- Dairy Syncline Phosphate Mine and Pocatello RMP amendment (ID) – 4.2.20
- Uncompahgre RMP (CO) – 4.10.20
- OK, KS, TX BLM RMP and BIA Integrated RMP – 2.27.20
- Northwest Colorado DSEIS for Greater Sage-Grouse Conservation – 2.21.20 (publication of DSEIS)
- Utah DSEIS for Greater Sage-Grouse Conservation – 2.21.20
- Idaho DSEIS for Greater Sage-Grouse Conservation – 2.21.20
- Oregon DSEIS for Greater Sage-Grouse Conservation – 2.21.20
- Wyoming DSEIS for Greater Sage-Grouse Conservation – 2.21.20²
- Nevada and Northeastern California DSEIS for Greater Sage-Grouse Conservation - 2/21/2020
- Ring of Fire RMP Amendment, Haines Block Planning Area (AK) – 2.7.20
- White River Travel and Transportation Management RMP Amendment (CO) – 2.7.20
- Bears Ears National Monument RMP (UT) – 2.6.20
- Grand Staircase Escalante National Monument RMP (UT) – 2.6.20
- Kanab-Escalante Planning Area RMP (UT) - 2.6.20

¹ All dates reference the date the Record of Decision was published unless otherwise clarified

² We understand that BLM is close to issuing a final decision related to the whether the sage-grouse SEIS process moves forward. Any final decision must be set aside as Mr. Pendley has already unduly influenced this process given its late stage.

- Tres Rios Areas of Critical Environmental Concern RMP Amendment (CO) – 1.29.20
- Bakersfield Field Office Hydraulic Fracturing SEIS (CA) 12.12.19
- Miles City (MT)/Buffalo (WY) RMP Amendments –11.26.19
- Ten West Link Transmission Project and Yuma RMP and CDCA Amendment (AZ) – 11.21.19
- West Mojave Route Network Project Amendment (CA) – 10.3.19

Although Mr. Pendley recused himself from the Utah Monument RMPs and RMP amendment final decisions, “resolution of protests [was] delegated to the BLM Assistant Director for Resources and Planning on behalf of the Director of the BLM, whose decision on the protest [was] the final decision of the U.S. Department of the Interior (43 CFR 1610.5-2(b))”³ As Mr. Pendley was unlawfully exercising the authority of BLM Director, the delegation on behalf of Mr. Pendley was unlawful and any decision that resulted from this delegation is thus unlawful and must be set aside.

II. Other Actions and Final Decisions

During his unlawful tenure, Mr. Pendley influenced and was directly and indirectly involved in a number of other agency decisions. Any final actions that resulted from these decisions must be set aside. Any actions not set aside must be subject to an additional showing from the BLM that they are not “functions and duties” performed by Mr. Pendley serving unlawfully as the Acting Director for the BLM.

a. Rulemakings, guidelines, programs and internal memorandum

During his tenure Mr. Pendley approved, implemented, and reviewed a number of departmental policies, guidelines, regulations and programs. Some of these policies were signed by Mr. Pendley and are therefore unlawful on their face and must be set aside. Others were not signed by Mr. Pendley but issued under his direction and approval, and so must be set aside absent any additional showing on the part of BLM that they are lawful. These actions include:

- Oil and Gas Site Security, Oil Measurement, and Gas Measurement Regulations - 9.10.2020 (final rule)
- Proposed Timber Salvage Categorical Exclusion 6.02.20 (proposed rule)⁴
- Increasing Recreational Opportunities Through the Use of Electric Bikes 4.10.2020 (publication of proposed rule)
 - o This rulemaking was a direct result of Information Bulletin (IB) 2020-003 signed by William Perry Pendley on October 22, 2019.
- Onshore Oil and Gas Operations-Annual Civil Penalties Inflation Adjustments 2.5.2020 (final rule)

³ See Bears Ear National Monument Record of Decision and Approved Management Plan Indian Creek and Sasha Jaa Units (Feb 6, 2020) at 23; Record of Decision and Approved Resource Management Plans for the Grand Staircase-Escalante National Monument (Feb 6, 2020) at ROD-36; Record of Decision and Approved Resource Management Plan for the Kanab-Escalante Planning Area (Feb 6, 2020) ROD-36.

⁴ We understand that BLM is close to issuing a final decision related to this categorical exclusion. Any final decision must be set aside as Mr. Pendley has already unduly influenced this process given its late stage.

- Instruction Memoranda (IM) for implementation of Greater Sage-Grouse Resource Management Plan Revisions or Amendments
- Implementation of Royalty Rate Relief Program
- Implementation of the Wild Horse and Burro Program

b. Oil and gas leasing

During his tenure at BLM, Mr. Pendley oversaw BLM's oil and gas leasing program, working to implement the administration's "energy dominance" agenda by overseeing the application of IM 2018-034 and the implementation of obligations to prioritize leasing and development outside sage-grouse habitat (under IM 2018-026 and, when that IM was invalidated, IM 2016-143). IM 2018-034 requires consultation with BLM's Washington, DC headquarters (i.e., Mr. Pendley) to defer parcels. As a result, any decision made to defer parcels or to refrain from deferring parcels must be reviewed as a "function or duty" performed by the BLM Director.

In addition, IM 2018-034 removed requirements for public engagement and environmental analysis, which affected the information BLM considered in proceeding with lease sales and has been found to be invalid, further jeopardizing the agency's ongoing reliance on its provisions.⁵ This IM further mandates that BLM complete lease parcel reviews within a 6-month timeline and a requirement to include parcels from all field offices in each quarterly sale. Acting as Director of the BLM, Mr. Pendley would have been responsible for ensuring field and state offices complied with these changes, which further impacted the ability of the agency to make informed decisions on leasing. Finally, as noted above, Mr. Pendley oversaw the BLM's ongoing failure to prioritize leasing outside sage-grouse habitat, implementing now invalid guidance and rejecting deferrals. Decisions made by Mr. Pendley to enforce leasing policy and to prevent deferrals from lease sales must be identified and overturned.

Alaska decisions

During Mr. Pendley's unlawful tenure, BLM issued Records of Decision related to oil and gas leasing and development in the Arctic National Wildlife Refuge and the location of the Ambler Road Project, as well as a Final Environmental Impact Statement for leasing and development in the National Petroleum Reserve-Alaska. BLM also made recommendations for revoking withdrawals put in place under the Alaska Native Claims Settlement Act. While Mr. Pendley did

⁵ Since September 2018, BLM has been enjoined from implementing certain provisions of IM 2018-034 for lease sales within the planning area of the greater sage-grouse conservation plans. *Western Watersheds Project v. Zinke*, No. 1:18-cv-00187-REB at 55-56 (D. Idaho Sept. 21, 2018); *Western Watersheds Project v. Zinke*, No. 1:18-cv-00187-REB at 32 (D. Idaho February 27, 2020). Noting that the directives in IM 2018-034 were explicitly tied to efforts to "streamline" the leasing process by removing the allegedly burdensome requirements for public involvement, the court found that "the public involvement requirements of FLPMA and NEPA cannot be set aside in the name of expediting oil and gas lease sales. Although the decision makes clear that limitations on public participation in IM 2018-034 are invalid as applied to all lease sales, BLM has continued to limit public participation and environmental analysis in leasing processes outside sage-grouse habitat.

not sign these decisions, it is inconceivable that he did not heavily influence the outcome of issues that were both important to the administration, and a primary focus of the agency. Before any of these decisions can be maintained, BLM must make an additional showing that these acts are not subject to the court's order for reversal.

- Final EIS For the Coastal Plain Oil and Gas Leasing Program. 8.21.20 (posting of FEIS)
- Final EIS for the Coastal Plain Oil and Gas Leasing Program, Alaska 9.25.19 (posting of FEIS)
- Ambler Mining District Industrial Access Road Project 7.28.20 (ROD)
- National Petroleum Reserve in Alaska Integrated Activity Plan Final EIS 2.26.2020 (posting of FEIS)

III. Oversight of BLM

During Mr. Pendley's tenure the BLM moved its headquarters from Washington D.C. to Grand Junction, Colorado. While BLM was not transparent about the role Mr. Pendley played in the reorganization decision making process, Mr. Pendley was the official face of this move. Mr. Pendley hosted employee townhalls, sent official communications to employees, oversaw the relocation, re-assignment, or termination of hundreds of employees, and testified in front of Congress regarding the agency's decision to move headquarters. Any decision made about this move must be closely reviewed, and if kept in place, BLM must show that these acts are not subject to the court's order.

During Mr. Pendley's tenure he was responsible for appointing four state directors, two acting directors, and a number of other leadership appointments. The implication of these appointments must be closely reviewed.

We are available to discuss this letter at your convenience and request a response as soon as possible given the time-sensitive and comprehensive nature of the actions at issue. Please contact Tracy Stone-Manning (StoneManningT@nwf.org) or Nada Culver (nada.culver@audubon.org).

Sincerely,

National Wildlife Federation
National Audubon Society

Alaska Wilderness League
Arctic Audubon Society
Arizona Trail Association
Arizona Wildlife Federation
Audubon Alaska
Audubon California
Audubon Louisiana
Audubon Minnesota

Audubon Mississippi
Audubon Southwest
Audubon Washington
Center for Biological Diversity
Clean Water Action
Climate Hawks Vote
Coalition to Protect America's National Parks
Colorado Wildlife Federation
Conservation Lands Foundation
Conservation Voters New Mexico
Defenders of Wildlife
Earthworks
Earth Action, Inc.
Endangered Species Coalition
Food & Water Action
Friends of Alaska National Wildlife Refuges
Friends of the Earth
Great Old Broads for Wilderness
GreenLatinos
Hispano Roundtable of New Mexico
Institute for Policy Studies Climate Policy Program
Laramie Maxwell Environmental LLC
Las Cruces Green Chamber of Commerce
Montana Audubon
Montana Wildlife Federation
The Mountain Pact
National Parks Conservation Association
Natural Resources Defense Council
Nevada Wildlife Federation
New Mexico Wild
New Mexico Wildlife Federation
The Nuestra Tierra Conservation Project
Ocean Conservancy
Oil Change International
198 methods
Partnership for Responsible Business
Physicians for Social Responsibility Pennsylvania
Progressive Democrats of America
SalmonState
Southeast Alaska Conservation Council (SEACC)
Southern Utah Wilderness Alliance
350PDX
Union of Concerned Scientists
Vet Voice Foundation
Western Slope Conservation Center
Western Values Project

The Wilderness Society
Wilderness Watch
Wilderness Workshop
Wyoming Wildlife Federation