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CHAIRMAN

October 9, 2020

The Honorable David Bernhardt  
Secretary  
Department of the Interior  
1849 C Street N.W.  
Washington, DC 20240

Dear Secretary Bernhardt,

As members of the Congressional Western Caucus, we have closely followed the ongoing litigation in the U.S. District Court of Montana as it raises a foundational challenge to the manner in which the Bureau of Land Management (BLM) executes its many statutory and legal obligations. The challenge concerns a little-known law, the Federal Vacancies Reform Act (FVRA), which prohibits any officer from exercising the duty or function exclusively assigned through regulations or statute to a person in a position requiring Senate confirmation (PAS).

The FVRA has consistently been narrowly interpreted to encompass only those duties and functions that expressly indicate the intent of Congress or the Agency to prohibit delegation to another official. (*Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132 (2d Cir. 2009); *Guedes v. ATF*, 920 F.3d 1 (D.C. Cir. 2019); *Stand Up for California v. U.S. Dep't of [the] Interior*, 298 F. Supp. 3d 136 (D.D.C. 2018); see also “*The Vacancies Act: A Legal Overview*,” Congressional Research Service, at 7 (Updated May 28, 2020)). This makes sense given how the federal administrative state is currently designed to operate through delegation from the agency head down to the lowest level employee. For example, since all the BLM’s authority flows from the Secretary of the Interior through the BLM Director, nearly every employee at the Bureau is acting with authority necessarily delegated by the BLM Director.

Under Judge Brian Morris’ recent ruling on September 25, 2020, the Court stated that Deputy Director for Programs and Policy, William Perry Pendley, had exercised authority exclusively reserved for the BLM Director. Specifically, the Court cited a BLM regulation (43 CFR 1610.3-2(e)) that vested the BLM Director with the authority to resolve public protests of proposed Resource Management Plans (RMP) and issue Records of Decision upon finalizing the RMP. The Court provided no evidence that the Department has ever interpreted its own regulation to be exclusive or that the BLM’s practice of delegations showed anything but support for the notion that this authority was delegable. In fact, the Bureau’s Delegations Manual addressing these precise authorities dates back to at least 2009 in its near-current form.

While the ruling, taken to its logical conclusion, would spell doom for the Bureau to function in any efficient way – even with a Senate-confirmed BLM Director where employees exercise delegated authority to resolve RMP protests, for instance – several organizations that oppose the Trump Administration’s agenda, have sought to join the case. Essentially, these organizations believe since 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.

We disagree with the irrational outcome that the Court’s expansive interpretation of the FVRA requires. However, in the spirit of ensuring that the Court’s ruling is evenly applied to similarly situated actions, we request that the following RMP’s be treated consistently and set aside as having no legal effect. As federal records show, the BLM relied on its Delegations Manual to have an official other than the Acting Director or the Director resolve a protest, leading to a Final RMP, in at least 60 instances prior to this Administration.

Based on the court’s current interpretation of FVRA, the list of “unlawful” actions are detailed in the attachment below. Most notably, in light of the current challenges by Governor Bullock to overturn three RMP’s specific to his state, we draw particular attention to the Montana-specific Greater Sage Grouse RMPs, involving protests resolved by then-Deputy Director for Operations Steve Ellis. The Department’s Supplemental Brief filed on October 5, 2020 demonstrates Mr. Pendley had ZERO involvement in resolving the protests, addressing the Governor’s consistency review, or signing the Record of Decision for the Final RMPs at issue. In the event that delegation of this authority consistent with the BLM Manual is found to be unlawful, similar actions unlawfully delegated by Neil Kornze (e.g., in many instances to Steve Ellis) must be considered ultra vires and set aside.

In the event that additional acts of the BLM Director are deemed to be non-delegable by mere mention of their name in an agency regulation, we will consider filing an amicus brief in subsequent court filings that seeks to have the new interpretation of the FVRA applied consistently and fairly across similar actions that were delegated below the Director. Consistent application of the law is an inviolable principle that you have embraced during your tenure at the Department and we expect this matter will be treated no differently.

We appreciate all your work on behalf of the American people and your commitment to consistency and equal treatment under the law.

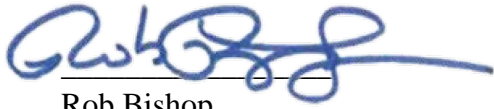
Sincerely,



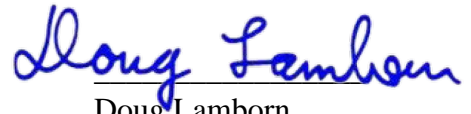
Paul A. Gosar, D.D.S.  
Member of Congress



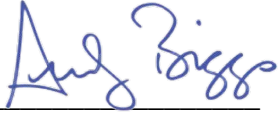
Liz Cheney  
Member of Congress



Rob Bishop  
Member of Congress



Doug Lamborn  
Member of Congress



Andy Biggs  
Member of Congress



Scott Perry  
Member of Congress

## Attachment – Ultra Vires Resource Management Plans to be Set Aside

State	RMP Name	Protest Decision Date	Protest Resolution Acting Official
AK	Eastern Interior RMPs- Draanjik, Fortymile, WhiteMountains, Steese RODs	12/30/2016	Kristin Bail, Assistant Director Resources and Planning
AK	Delta River Special Recreation Management Area and East Alaska RMPA	12/9/2011	Ed Roberson, Assistant Director Renewable Resources and Planning
AK	East Alaska RMP (Glennallen)	9/29/2006	Ed Shepard, Assistant Director Renewable Resources and Planning
AZ	Yuma RMP	November 14, 2008 or December 11, 2008	Ed Roberson, Assistant Director Renewable Resources and Planning
AZ	Agua Fria Natl Monument RMP	2/2/2009	Ed Roberson, Assistant Director Renewable Resources and Planning
AZ	Bradshaw-Harquahala RMP	2/2/2009	Ed Roberson, Assistant Director Renewable Resources and Planning
CA	Desert Renewable Energy Conservation Plan RMPA	9/14/2016	Nancy Haug, Acting Assistant Director Resources and Planning
CA	Soda Mountain Solar RMPA	3/28/2016	Michael H. Tupper, Acting Assistant Director Resources and Planning
CA	Bakersfield RMP	12/22/2014	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
CA	Dog Creek-Green Creek Allotments - Bishop RMPA	10/17/2014	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
CA	Carrizo Plain National Monument RMP	4/4/2010	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
CA	Sunrise-Eastern San Diego RMP	1/8/2009	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
CO	Dominguez-Escalante NCA RMP	1/9/2017	Kristin Bail, Assistant Director Resources and Planning

CO	White River Oil and Gas RMPA	8/17/2015	Amy Lueders, Acting Assistant Director Resources and Planning
CO	Grand Junction RMP	8/10/2015	Amy Lueders, Acting Assistant Director Resources and Planning
CO	Kremmling RMP	6/19/2015	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
CO	Colorado River Valley RMP	6/12/2015	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
CO	Tres Rio RMP	2/6/2015	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
CO	Little Snake RMP	10/14/2011	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
CO	Geothermal Lease -Gunnison RMPA	8/10/2011	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
CO	Canyons of the Ancients National Monument RMP	4/4/2010	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
CO	Dry Creek Travel Plan Management Plan; Uncompahgre RMP	11/9/2009	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
ES	Alabama-Mississippi RMP	12/5/2008	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
ID	Idaho-Southwestern Montana GRSG RMPA	9/15/2015	Steve Ellis, Deputy Director for Operations
ID	Jarbridge RMP	9/2/2015	Amy Lueders, Acting Assistant Director Resources and Planning
ID	Cottonwood RMP	8/18/2009	Nancy Haug, Acting Assistant Director Resources and Planning
MT_DK	Lewistown GRSG RMPA	9/15/2015	Steve Ellis, Deputy Director for Operations
MT_DK	Billings-Pompeys Pillar National Monument (Montana) GRSG RMPA	9/15/2015	Steve Ellis, Deputy Director for Operations
MT_DK	Hiline GRSG RMPA	9/15/2015	Steve Ellis, Deputy Director for Operations

MT_DK	Miles City GRSG RMPA	9/15/2015	Steve Ellis, Deputy Director for Operations
MT_DK	North Dakota GRSG RMPA	9/15/2015	Steve Ellis, Deputy Director for Operations
MT_DK	South Dakota GRSG RMPA	9/15/2015	Steve Ellis, Deputy Director for Operations
MT_DK	Butte RMP	2/11/2009	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
NV	Nevada and California Greater Sage-Grouse Bi-State Distinct Population Segment RMPA	5/27/2016	Kristin Bail, Assistant Director Resources and Planning
CA_NV	Nevada-Northeastern California GRSG	9/15/2015	Kristin Bail, Assistant Director Resources and Planning
NV	Winnemucca RMP	5/21/2015	Steve Ellis, Deputy Director for Operations
NM	Prehistoric Trackways National Monument RMP	12/21/2015	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
NM	Farmington RMPA for the Glade Run Recreation and Transportation Management Plan	5/22/2015	Amy Lueders, Acting Assistant Director Resources and Planning
NM	SunZia Transmission Line RMPA	1/23/2015	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
NM	Farmington Field Office Visual Resource Management RMPA	6/18/2014	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
NM	Taos RMP	7/11/2012	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
NM	Socorro RMP	5/20/2010	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
OR_WA	Western Oregon RMP (Northwestern and Coastal Oregon ROD; Southwestern Oregon ROD)	8/5/2016	Kristin Bail, Assistant Director Resources and Planning
OR_WA	Oregon GRSG RMPA	9/15/2015	Steve Ellis, Deputy Director for Operations

OR_WA	John Day Basin RMP	4/28/2015	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
OR_WA	Western Oregon RMP	12/29/2008	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
UT	Red Cliffs and Beaver Dam Wash NCAs RMPA	12/21/2016	Kristin Bail, Assistant Director Resources and Planning
UT	Moab MLP RPA	12/15/2016	Kristin Bail, Assistant Director Resources and Planning
UT	Utah GRSG RMPA	9/15/2015	Steve Ellis, Deputy Director for Operations
UT	Mona to Oquirrh Transmission Corridor--Pony Express RMPA	2/4/2011	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
WY	TransWest Express RMPA	12/16/2016	Kristin Bail, Assistant Director Resources and Planning
WY	Buffalo RMP	9/15/2015	Steve Ellis, Deputy Director for Operations
WY	Worland and Cody RMPs- Bighorn Basin EIS	9/15/2015	Steve Ellis, Deputy Director for Operations
WY	Wyoming 9-Plan GRSG RMPA	9/15/2015	Steve Ellis, Deputy Director for Operations
WY	Lander RMP	6/26/2014	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
WY	Buffalo RMPA-Fortification Creek	7/21/2011	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
WY	Kemmerer RMP	5/25/2010	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
WY	Rawlins RMP	12/24/2008	Edwin L. Roberson, Assistant Director Renewable Resources and Planning
WY	Pinedale RMP	11/25/2008	Edwin L. Roberson, Assistant Director Renewable Resources and Planning

