



# Public Employees for Environmental Responsibility

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February 12, 2018

Ms. Mary L. Kendall  
Deputy Inspector General  
U.S. Department of Interior  
1849 C Street, NW  
Mail Stop 4428  
Washington, DC 20240

## **RE: Request for Review of Apparent Vacancies Reform Act Violations in Interior Bureaus**

Dear Deputy Inspector General Kendall:

I am writing on behalf of Public Employees for Environmental Responsibility (PEER) to request that your office review what the occurrences and implications of what appear to be blatant violations of the Federal Vacancies Reform Act of 1998<sup>1</sup> (“the Act”) by President Trump at three Department of Interior bureaus, namely –

- The National Park Service (“NPS”);
- The U.S. Bureau of Land Management (“BLM”); and
- The U.S. Fish & Wildlife Service (“FWS”).

These three positions are to be filled through presidential appointment subject to the advice and consent of the Senate as required by the Appointments Clause of the United States Constitution (Article II, Section 2). As such, they fall under the jurisdiction of the Act, which prevents the President from circumventing the constitutional advice and consent role of the U.S. Senate by simply appointing people to serve as “acting” directors for long periods and completely bypassing Senate confirmation.

Congress prohibited any circumvention or alternate avenues for filling vacancies of agency leadership positions such as those by providing with very limited exception that:

“Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency...”<sup>2</sup>

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<sup>1</sup> Pub. L. 105–277, Div. C, Title I, §151(b), Oct. 21, 1998, 112 Stat. 2681–611; as amended, Pub. L. 108–271, §8(b), 118 Stat. 814 July 7, 2004; codified at 5 U.S.C. §§ 3345-3349d).

<sup>2</sup> (5 U.S.C. § 3347(a))(Emphasis added).

“Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency (including the Executive Office of the President, and other

This law contains a self-enforcing provision that bluntly states:

“An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.”<sup>3</sup>

Further, such improper appointments cannot be subsequently “ratified”.<sup>4</sup> Thus, the effect of violation of the Act is that every action by such an illegitimate “acting” director – ranging from internal personnel moves to regulatory and management decisions – is incurably void and invalid.

This situation could cause significant disruption of the affected agency operations with major adverse effects to the efficiency of their services. It would also create widespread confusion both inside and outside these bureaus, and potentially lead to large wastes of funds by necessitating the agency revisiting potentially scores of null decisions.

Notably, President Trump has not nominated – or, to our knowledge, even announced an intention to nominate – any persons to fill these vacancies on a non-temporary basis.

A brief examination of the appointment paths of the three people functioning as an “acting” director in each bureau illustrates their noncompliance with the Federal Vacancies Reform Act:

### **NPS Acting Director Paul Daniel (Dan) Smith**

An NPS press release dated January 24, 2018, stated that:

“Today, U.S. Secretary of the Interior Ryan Zinke announced that he has selected Michael T. (Mike) Reynolds to be the superintendent of Yosemite National Park in California. He also named Paul Daniel (Dan) Smith the National Park Service’s acting

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than the Government Accountability Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless –

(1) a statutory provision expressly –

(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(2) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.” 5 U.S.C. § 3347(a).

<sup>3</sup> 5 U.S.C. § 3348(d)(1) (Emphasis added).

<sup>4</sup> 5 U.S.C. § 3348(d)(2).

director, replacing Reynolds, who has exercised the authority of NPS director since January 3, 2017.”<sup>5</sup>

That release goes on to note that Secretary Zinke had named Smith as a deputy NPS director on January 9, 2018.<sup>6</sup> Smith had retired as Superintendent of Colonial National Historical Park back in 2015.

Secretary Zinke’s action regarding Smith appears to be in direct violation of the Federal Vacancies Reform Act for the following reasons:

***1. Mr. Smith is ineligible to be acting director since he has not served for 90 days in NPS during the prior year.***

Section 3345 (a)(3) provides that the person must have “served in a position in such agency for not less than 90 days” during “the 365-day period preceding the date “ the vacancy was created” at a salary “equal to or greater than the minimum rate of pay payable for a position at GS–15 of the General Schedule.”

Mr. Smith had been back at NPS for approximately 15 days. He would not be eligible to serve as acting NPS director until at least April 9, 2018 – 90 days after he was brought out of retirement.

***2. The President – not the Interior Secretary – makes the appointment.***

Section 3345 (a) is quite explicit on this point:

“...the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346...the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346....”<sup>7</sup>

In this instance, Secretary Zinke declared that he made the appointment, but he is clearly not the president and cannot legally presume to exercise this exclusively presidential power and authority.

***3. Mr. Reynolds overstayed the statutory limits for an acting director.***

As noted in the above-cited NPS release, Mr. Reynolds served as “acting” director from January 3, 2017 until January 24, 2018 – a period of approximately 386 days.

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<sup>5</sup> “Secretary Zinke Announces Changes in National Park Service Leadership,” NPS Office of Communications (Jan. 24, 2018) <https://www.nps.gov/orgs/1207/01-24-2018-leadership.htm> (accessed Feb. 7, 2018).

<sup>6</sup> “Department of the Interior Names New National Park Service Deputy Director,” NPS Office of Communications (Jan. 9, 2018) <https://www.nps.gov/orgs/1207/01-09-2019-deputy-director.htm> (accessed Feb. 7, 2018).

<sup>7</sup> 5 U.S.C. §3345(a)(2)and(3). (Parentheses in original).

The time limitations of the Act stipulate that a person may serve as acting director “for no longer than 210 days beginning on the date the vacancy occurs.”<sup>8</sup> This period can be extended an additional 90 days after a “transitional inauguration day.”<sup>9</sup> The maximum tenure of an acting director, therefore, is 300 days.

Thus, by operation of law, for approximately the past three months any action Mr. Reynolds has taken as acting NPS director “shall have no force or effect.”<sup>10</sup>

### **BLM Acting Director Brian Steed**

Press reports indicate that Secretary Zinke named Brian Steed to serve as BLM assistant director for policy in late October 2017 and was elevated to acting director the following month.<sup>11</sup> Previously, Steed had been chief of staff to Congressman Chris Stewart (R-UT).

As with Mr. Smith of NPS, Mr. Steed had not served in a senior position at BLM for 90 days prior to assuming “acting” director status. Similarly, again Mr. Zinke – and not President Trump – made the appointment.<sup>12</sup>

The BLM website identifies Mr. Steed as the official “exercising authority of the director.”<sup>13</sup> As such, he is plainly acting as the director. That verbal construct does not shield Mr. Steed from application of the restrictions and prohibitions of the Act.

In addition, Mr. Steed’s predecessor as BLM “acting” director, Michael D. Nedd, may have violated the 210-day statutory time limit, as he served as acting director from March 15, 2017 until sometime in late November of that year. If that is the case, any of his actions after September 15, 2017 may also be null and void.

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<sup>8</sup> 5 U.S.C. § 3346(a)(1)

<sup>9</sup> 5 U.S.C. § 3349b(b)(1)

<sup>10</sup> 5 U.S.C. § 3348(d)(1)

<sup>11</sup> See, e.g., “Is appointment of ‘acting’ BLM chief legal?” [Jennifer Yachnin](#) and [Scott Streater](#), E&E News (Nov. 17, 2017) <https://www.eenews.net/eenewspm/stories/1060066917/> (accessed Feb. 7, 2018).

<sup>12</sup> See Secretarial Order No. 3345, Amendment No. 12, “Temporary Redefinition of Authority for Certain Vacant Non - Career Senate - Confirmed Positions” (Nov. 14, 2017) <https://elips.doi.gov/elips/DocView.aspx?id=4612&searchid=1d6f265b-3b6d-4445-8e2e-f3ec888ad746&dbid=0> (accessed Feb. 7, 2017).

That order expired on January 15, 2018 by its own expressed termination provision in section 5 of the order. On January 12, 2018, Mr. Zinke issued Amendment No. 14 to Secretarial Order No. 3345, “to temporarily redelegate authority” to Mr. Steed, among others, with a stated expiration date of March 15, 2018, “unless extended, modified, or revoked,” in the absence of “a Senate-confirmed appointee” to those various positions listed in the amendment. <https://elips.doi.gov/elips/DocView.aspx?id=4650&searchid=1d6f265b-3b6d-4445-8e2e-f3ec888ad746&dbid=0> (Accessed on Feb. 7, 2018).

<sup>13</sup> “Brian Steed is the BLM’s Deputy Director for Programs and Policy, exercising authority of the director.” <https://edit.blm.gov/bio/brian-steed> (accessed Feb. 7, 2018).

The net result of the above violations of the Act may be that all actions by the BLM during the past five months are vulnerable to legal challenge as having no effect.

### **FWS Acting Director Greg Sheehan**

In a June 5, 2017 release, The Department of Interior announced that Secretary Zinke had appointed Greg Sheehan to a “newly-created position of Deputy Director of the U.S. Fish and Wildlife Service.”<sup>14</sup> For the prior five years, Mr. Sheehan had served as the Director of the Utah Division of Wildlife Service. The Interior news release ended with this statement:

“Sheehan will begin in mid-June and will serve as the Acting Director of the U.S. Fish and Wildlife Service until a Director is nominated by the President and confirmed by the Senate.”

As with Mr. Smith of NPS and Mr. Steed of BLM, Mr. Sheehan had not served in a senior position at FWS for 90 days prior to assuming “acting” director status. Similarly, Mr. Zinke – not President Trump – made the appointment.

In addition, as of February 5, 2018, Mr. Sheehan will have served as “acting” FWS director for 210 days, the statutory limit to remain in that post without formal nomination by the president and the advice and consent of the Senate.

The full upshot of this situation, however, is that every action Mr. Sheehan has taken since he came to FWS in June 2017 is without any legal effect.

In conclusion, given the potentially very serious consequences PEER urges swift action by your office on this requested review and enforcement of the prohibitions and requirements of the Act. The widespread and chronic illegal lapse of senior leadership in core components of the Interior Department necessitates your office’s immediate involvement and action to prevent or limit major loss of efficiency and effectiveness within these three agencies.

In addition, PEER would urge your office to –

- Catalog all of the agency actions taken when out of compliance with the Act; and

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<sup>14</sup> “Secretary Ryan Zinke Appoints Utah’s Greg Sheehan as the Deputy Director of the U.S. Fish and Wildlife Service” <https://www.doi.gov/pressreleases/secretary-ryan-zinke-appoints-utahs-greg-sheehan-deputy-director-us-fish-and-wildlife> (accessed Feb. 7, 2018).

- Determine whether the agencies are implementing the mandatory statutory reporting duties of the Act.<sup>15</sup> Further, we would urge your office to make these reports contemporaneously available to the public in order to help ensure agency compliance.

If your office needs any additional information about this matter, please do not hesitate to contact me.

Sincerely,

Jeff Ruch  
Executive Director

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<sup>15</sup>The Act at 5 U.S.C. §3349 (“Reporting of vacancies”), charges that “the head of each Executive agency...shall submit to the Comptroller General of the United States and to each House of Congress—  
(1) notification of a vacancy in an office to which this section and sections 3345, 3346, 3347, 3348, 3349a, 3349b, 3349c, and 3349d apply and the date such vacancy occurred immediately upon the occurrence of the vacancy;  
(2) the name of any person serving in an acting capacity and the date such service began immediately upon the designation;  
(3) the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted immediately upon the submission of the nomination; and  
(4) the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.”

And, further:

“(b) If the Comptroller General of the United States makes a determination that an officer is serving longer than the 210-day period including the applicable exceptions to such period under section 3346 or section 3349a, the Comptroller General shall report such determination immediately to—

- (1) the Committee on Governmental Affairs of the Senate;
- (2) the Committee on Government Reform and Oversight of the House of Representatives;
- (3) the Committees on Appropriations of the Senate and House of Representatives;
- (4) the appropriate committees of jurisdiction of the Senate and House of Representatives;
- (5) the President; and
- (6) the Office of Personnel Management.” <https://www.gpo.gov/fdsys/pkg/USCODE-2009-title5/html/USCODE-2009-title5-partIII-subpartB-chap33-subchapIII-sec3349.htm> (accessed Feb. 7, 2018).