

C A M P A I G N F O R

ACCOUNTABILITY

February 19, 2019

By Fax: 202-219-3856

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Emory A. Rounds, III
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Scott de la Vega
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Re: Request for Investigation of Acting Secretary David Bernhardt's Relationship with Westlands Water District

Dear Ms. Kendall, Mr. Rounds, and Mr. de la Vega:

Campaign for Accountability (“CfA”) respectfully requests that you open an investigation into the Acting Secretary of the Department of the Interior (“Interior”), David Bernhardt, and his relationship with Westlands Water District (“Westlands”), an agricultural conglomerate in California. Mr. Bernhardt worked as a lobbyist for Westlands for five years before joining the Trump administration as the deputy secretary of the Interior. Notably, while working for Westlands, Mr. Bernhardt lobbied the federal government to reduce protections for two endangered species of fish in California. As deputy secretary, Mr. Bernhardt directed an Interior official to initiate the process to eliminate environmental protections for the fish, which would have provided additional water for Westlands. Mr. Bernhardt’s actions for the benefit of Westlands, as a lobbyist and as a public official, appear to have violated ethics rules.

Background

Between March 30, 2011, and November 18, 2016, Mr. Bernhardt worked as a registered lobbyist for Westlands.¹ He was employed by the lobbying firm Brownstein Hyatt Farber Schreck, LLP. After deregistering as a lobbyist, Mr. Bernhardt began leading the Trump administration's interior department transition team.² He was formally nominated to be deputy secretary in April 2017, and confirmed on July 24, 2017.³ Then, on January 2, 2019, he assumed the role of Acting Secretary, and on February 4, 2019, President Trump announced Mr. Bernhardt's forthcoming nomination to be the permanent Secretary of the Interior.⁴

Lobbying Work

Before joining the Trump administration, Mr. Bernhardt lobbied to eliminate protections for the delta smelt and the winter-run Chinook salmon, two species of fish that live in the San Francisco Bay Delta region of California.⁵ The smelt is considered threatened, and the salmon is endangered.⁶ Due to these protections, California water districts must reduce the allocation of water to farmers so there is enough water to protect the habitats for these fish.

For decades, Westlands has lobbied federal authorities to roll back these protections, and *The New York Times* described it as Westlands' "chief goal."⁷ In 2011, Westlands hired Mr. Bernhardt to lobby Congress and federal officials to overhaul the Endangered Species Act to reduce protections for the smelt and the Chinook salmon. According to *The New York Times*:

¹ Brownstein Hyatt Farber Schreck, LLP, 2011 Lobbying Registration Report on behalf of Westlands Water District, Secretary of the Senate, Office of Public Records, *available at* <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=4846434C-D50A-4113-8F9D-A842930ABD13&filingTypeID=1>; Brownstein Hyatt Farber Schreck, LLP, Fourth Quarter 2016 Lobbying Disclosure Report, Amendment, on behalf of Westlands Water District, Secretary of the Senate, Office of Public Records, *available at* <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=74C70A3E-8A1A-4CFF-B90C-89DF3C2F66FE&filingTypeID=82>.

² Michael Doyle, Election Over, California Water District May Get Win With Controversial Drainage Plan, *McClatchy*, November 15, 2016, *available at* <http://www.mcclatchydc.com/news/politics-government/congress/article115010283.html>.

³ Michael Doyle, Deputy Nominee Still Advising California Water District, *E & E News*, July 18, 2017, *available at* <https://webcache.googleusercontent.com/search?q=cache:whX3YKL4gOsJ:https://www.eenews.net/greenwire/2017/07/18/stories/1060057527+&cd=1&hl=en&ct=clnk&gl=us>; Darryl Fears, Senate Confirms David Bernhardt as Interior Deputy, *Washington Post*, July 24, 2017, *available at* <https://www.washingtonpost.com/news/energy-environment/wp/2017/07/24/senate-confirms-interior-deputy-despite-conflict-of-interest-claims/>.

⁴ Ellen Knickmeyer, Matthew Brown, and Jonathan Lemire, Interior Secretary Ryan Zinke Resigning, Cites "Vicious" Attacks, *Associated Press*, December 15, 2018, *available at* <https://www.denverpost.com/2018/12/15/interior-secretary-ryan-zinke-resigning/>; Ben Lefebvre, Trump to Nominate Bernhardt as Interior Secretary, *Politico*, February 4, 2019, *available at* <https://www.politico.com/story/2019/02/04/david-bernhardt-interior-secretary-1145523>.

⁵ Coral Davenport, Top Leader at Interior Dept. Pushes a Policy Favoring His Former Client, *The New York Times*, February 12, 2019, *available at* <https://www.nytimes.com/2019/02/12/climate/david-bernhardt-endangered-species.html>.

⁶ *Id.*

⁷ *Id.*

For Westlands, Mr. Bernhardt said he lobbied Congress on a broad water infrastructure bill, but his lobbying was focused on one specific section of the bill: a provision to weaken smelt and salmon protections, and divert water to the Central Valley farmers. That bill passed, but it resulted in the release of only small amounts of river water for irrigation in Westlands, and will do so only through 2021.

Weakening the underlying Endangered Species Act protections would free up much more water.

In 2014, Mr. Bernhardt, on behalf of Westlands, [joined a legal petition asking the Supreme Court](#) to take up a case seeking to weaken or lift Endangered Species Act protections on the delta smelt. The same year, he made oral arguments in a case that pitted Westlands and a half-dozen other California water districts against the federal government and sought to weaken Endangered Species protections on the winter-run Chinook salmon.

In both cases, Mr. Bernhardt argued that the protections for the fish relied on flawed scientific and legal findings. In both cases, Mr. Bernhardt and his clients lost.⁸

According to his lobbying disclosure forms, Mr. Bernhardt lobbied the House of Representatives, the Senate, and Interior on behalf of Westlands.⁹ Mr. Bernhardt disclosed that he lobbied about “[p]otential legislation regarding the Bureau of Reclamation and the Endangered Species Act” and “[p]otential legislation related to energy and water appropriations”, among other issues. For his lobbying work, Westlands paid Mr. Bernhardt’s firm \$1.3 million.¹⁰

Unregistered Lobbying Work

After the 2016 election, Mr. Bernhardt continued to lobby for Westlands despite delisting as a lobbyist and working for the Trump transition team.¹¹ On January 23, 2017, Brownstein Hyatt Farber Schreck filed a lobbying report with the Clerk of the House and Secretary of the Senate stating that Mr. Bernhardt had terminated his lobbying for Westlands on November 18, 2016.¹²

⁸ *Id.*

⁹ Brownstein Hyatt Farber Schreck, LLP, [2011-2016 Lobbying Disclosure Reports on behalf of Westlands Water District](#), Secretary of the Senate, Office of Public Records, available at <https://soprweb.senate.gov/index.cfm?event=selectFields&reset=1>.

¹⁰ Davenport, *The New York Times*, Feb. 12, 2019.

¹¹ Letter from Daniel Stevens, Executive Director of Campaign for Accountability, to Channing D. Phillips, U.S. Attorney for the District of Columbia, July 20, 2017, available at <https://campaignforaccountability.org/work/letter-requesting-doj-investigation-of-interior-department-nominee-david-bernhardt-for-lobbying-disclosure-violations/>.

¹² “Lobbying termination effective as of filing on 11-18-16.” See Brownstein Hyatt Farber Schreck, LLP, [Fourth Quarter 2016 Lobbying Disclosure Report on behalf of Westlands Water District](#), Secretary of the Senate, Office of Public Records, available at <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=74C70A3E-8A1A-4CFF-B90C-89DF3C2F66FE&filingTypeID=82>.

Despite this deregistration, emails obtained by California environmental activists indicate Mr. Bernhardt continued to engage in the same type of activities for Westlands. On November 28, 2016, Mr. Bernhardt sent an email to Tom Birmingham, Westlands' General Manager, and others with his edits on a proposed "draft executive order" for then-President-elect Donald Trump.¹³ The Executive Order directed the Secretary of the Interior and the Secretary of Commerce to allow California farmers to pump more water into their fields.¹⁴

A few weeks later, on December 9, 2016, Matt Kellogg, Senior Policy Advisor and Counsel to House Majority Leader Kevin McCarthy, sent an email to Mr. Bernhardt thanking him for his help on a bill stating, "we will see what happens in the Senate."¹⁵ Mr. Bernhardt then forwarded that email to Johnny Amaral, the Deputy General Manager for External Affairs at Westlands.¹⁶ The next day, the Senate passed a substantial water bill, which *McClatchy* described as a major victory for Westland.¹⁷

Mr. Bernhardt's illicit work for Westlands continued into the next year. For instance, on January 2, 2017, Mr. Bernhardt drafted a letter to Rep. David Valadao (R-CA) for and on behalf of Westlands regarding HR 23.¹⁸ Mr. Bernhardt said in an email that he was sending "a short draft letter that is intended to be consistent with the discussion we had on the phone this afternoon."¹⁹ Westlands General Manager Tom Birmingham responded to the email about three hours later thanking Mr. Bernhardt for "taking the lead" on the letter.²⁰ The final version of Westlands' letter to Rep. Valadao contained several passages identical to those in Mr. Bernhardt's draft.²¹ In February 2017, Brownstein, Hyatt, Farber, Schreck sent Westlands an invoice for "Federal Lobbying" that included \$582.09 worth of services itemized for "Westlands Trip – David Bernhardt."²²

On July 20, 2017, CfA sent a letter to the U.S. Attorney for the District of Columbia requesting an investigation into whether Mr. Bernhardt violated the Lobbying Disclosure Act by continuing to lobby despite formally withdrawing his registration in 2016.²³ The status of any investigation is unknown.

¹³ See Letter from Daniel Stevens to Channing D. Phillips, July 20, 2017, Exhibit A.

¹⁴ *Id.*

¹⁵ *Id.*, Exhibit B.

¹⁶ *Id.*

¹⁷ Michael Doyle, [After years of drama, farmers score a big win in California water battle, McClatchy](http://www.mcclatchydc.com/news/politics-government/congress/article120131428.html), December 10, 2016, available at <http://www.mcclatchydc.com/news/politics-government/congress/article120131428.html>.

¹⁸ See Letter from Daniel Stevens to Channing D. Phillips, July 20, 2017, Exhibit E.

¹⁹ Doyle, *E & E News*, July 18, 2017.

²⁰ *Id.*

²¹ https://naturalresources.house.gov/uploadedfiles/hr_23_support_letter_-_westlands_water_district_01.03.17.pdf.

²² See Letter from Daniel Stevens to Channing D. Phillips, July 20, 2017, Exhibit G.

²³ *Id.*

Bernhardt's Actions at Interior

After Mr. Bernhardt was confirmed as deputy secretary, he reportedly directed agency officials to roll back environmental protections for the smelt and the Chinook salmon.²⁴ According to his public calendar, on November 8, 2017, Mr. Bernhardt had a phone call with David Murillo, the Acting Commissioner for the Bureau of Reclamation, who had the legal authority to initiate the process to roll back endangered species protections for the smelt and the Chinook salmon.²⁵ According to *The New York Times*, Mr. Bernhardt talked to Mr. Murillo on four occasions in November 2017.²⁶ Mr. Bernhardt then directed Mr. Murillo to end the protections for the Chinook salmon and the smelt as quickly as possible.²⁷

In December 2017, Mr. Murillo initiated the legal process to roll back the environmental protections for the smelt and the Chinook salmon.²⁸ On December 29, 2017, the Bureau of Reclamation issued a “Notice of Intent To Prepare a Draft Environmental Impact Statement, Revisions to the Coordinated Long-Term Operation of the Central Valley Project and State Water Project, and Related Facilities.”²⁹ The notice said, “This project will evaluate alternatives to restore, at least in part, water supply” to California farmers including those that belong to Westlands.³⁰

Ethics Rules

Mr. Bernhardt’s actions directing the Bureau of Reclamation to review environmental protections for the smelt and the Chinook salmon, for which he lobbied before joining Interior, may have violated ethics rules.

On October 12, 2017, Mr. Bernhardt signed his Certification of Ethics Agreement Compliance in which he stated that he had not received any waivers pursuant to President Trump’s Executive Order 13770 exempting him from various conflict of interest laws and regulations.³¹ The executive order requires executive branch officials to pledge, in part:

6. I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

²⁴ Davenport, *The New York Times*, Feb. 12, 2019.

²⁵ <https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=58176>; Davenport, *The New York Times*, Feb. 12, 2019.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ <https://www.federalregister.gov/documents/2017/12/29/2017-28215/notice-of-intent-to-prepare-a-draft-environmental-impact-statement-revisions-to-the-coordinated>.

³⁰ *Id.*

³¹ David L. Bernhardt, *Certification of Ethics Agreement Compliance*, *Office of Government Ethics*, October 12, 2017, available at [https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/3AAA2AC39738311C852581BC002C1FA4/\\$FILE/Bernhardt,%20EA%20Certification%201%20of%201.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/3AAA2AC39738311C852581BC002C1FA4/$FILE/Bernhardt,%20EA%20Certification%201%20of%201.pdf).

7. If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 6, I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.³²

The executive order clarifies that:

“Particular matter” shall have the same meaning as set forth in section 207 of title 18, United States Code, and section 2635.402(b)(3) of title 5, Code of Federal Regulations.³³

The relevant statute, 18 U.S.C. 207(i)(3), states:

The term “particular matter” includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding.

And the corresponding federal regulation, 5. C.F.R. 2635.402(b)(3), states:

The term particular matter encompasses only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. Such a matter is covered by this subpart even if it does not involve formal parties and may include governmental action such as legislation or policy-making that is narrowly focused on the interests of such a discrete and identifiable class of persons.

Finally, in 2006, the Office of Government Ethics (OGE) issued guidance to clarify the parameters of a “particular matter.” The director of OGE wrote:

Essentially, the term covers two categories of matters: (1) those that involve specific parties (described more fully above), and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession. OGE regulations sometimes refer to the second category as “particular matter of general applicability.” 5 C.F.R. § 2640.102(m). This category can include legislation and policymaking, as long as it is narrowly focused on a discrete and identifiable class.³⁴

³² Executive Order 13770, available at <https://www.whitehouse.gov/presidential-actions/executive-order-ethics-commitments-executive-branch-appointees/>.

³³ *Id.*

³⁴ Do-06-029, Memo from Robert I. Cusick, Director of the Office of Government Ethics, to Designated Agency Ethics Officials, October 4, 2006, available at https://www.oge.gov/Web/OGEnsf/All+Advisories/C10C6B23AC67F74685257E96005FBDD7/%24FILE/do-06-02_9.pdf.

Analysis

Mr. Bernhardt appears to have violated the ethics pledge by working on a particular matter in a specific issue area as a public official within two years of lobbying on the issue. He lobbied the federal government to roll back endangered species protections for the smelt and the Chinook salmon, advocating before Congress, according to *The New York Times*, and before Interior about “[p]otential legislation regarding the Bureau of Reclamation and the Endangered Species Act” according to his lobbying disclosure reports. Presumably, Mr. Bernhardt lobbied Interior about the Endangered Species Act protections for the Chinook salmon and the smelt, though his lobbying disclosures do not specify.

As the 2006 OGE memo explains, a particular matter “can include legislation and policymaking, as long as it is narrowly focused on a discrete and identifiable class. Here, it appears Mr. Bernhardt first lobbied for, and later presided over, a rulemaking benefitting an “identifiable class” – Westlands – and other similarly situated farmers in California. Notably, Westlands is poised to benefit more than any of its peers. *The New York Times* reported:

If the protections on the fish were lifted, Westlands would not be the only beneficiary — water would also flow to surrounding water districts. But because of a quirk in California law, Westlands would likely be the main beneficiary, according to Jeffrey Mount, a water management expert with the Public Policy Institute of California. That’s because river water in California is distributed according to a longstanding first-come-first-served system, and Westlands is low on the list.

“Westlands is the most penalized under the current system,” Mr. Mount said. “But if the protections on the fish are relaxed, they will be one of the biggest winners.”³⁵

Therefore, Interior’s rulemaking as it pertains to the smelt and the Chinook salmon is a particular matter in a specific issue area from which Mr. Bernhardt pledged to avoid participating. Notably, this particular matter meets the definition of a “particular matter of general applicability”,³⁶ which, as the OGE opinion makes clear, is still prohibited by the ethics pledge. Because section 7, and the corresponding definition included in the ethics pledge, specify “particular matter”, and not “particular matter involving a specific party”, despite Mr. Bernhardt’s claim that the rule offers widespread benefits, it nevertheless meets the definition of a particular matter and is clearly within a prohibited specific issue area.

The ethics pledge states that Mr. Bernhardt may not work on any particular matter or on any specific issue area in which the particular matter falls for two years after his appointment if he lobbied on that particular matter during the two years before his appointment. Mr. Bernhardt was confirmed on July 24, 2017, just eight months after deregistering as a lobbyist and six months after lobbying on behalf of Westlands on this exact particular matter. Finally, on his lobbying disclosure forms from July 2015 to November 2016, within the two-year window, Mr.

³⁵ Davenport, *The New York Times*, Feb. 12, 2019.

³⁶ 5 CFR § 2640.102(m).

Bernhardt disclosed that he lobbied on “[p]otential legislation regarding the Bureau of Reclamation and the Endangered Species Act”. Therefore, it is clear Mr. Bernhardt worked on this particular matter and the corresponding specific issue area in the two years before his appointment.

Further, as *The New York Times* reports, Mr. Bernhardt directed Interior to start the legal process to roll back protections for the smelt and Chinook salmon in November 2017, roughly four months after he was appointed, well within the two-year prohibition.

Additionally, the ethics pledge prohibits communications between a current government employee and his or her former clients about any particular matter for a period of two years after the date of their appointment.³⁷ If Mr. Bernhardt discussed removing the environmental protections for the Chinook salmon and the smelt with Westlands while employed at Interior, he violated the ethics pledge. The Western Values Project (“WVP”), a watchdog group, has filed a Freedom of Information Act (“FOIA”) to determine whether Mr. Barnhardt discussed government business with his former clients.³⁸ Interior has failed to respond to WVP’s FIOA, and WVP filed suit in July of 2018, to force Interior to turn over any such communications. Due to Interior’s intransigence, the public is unable to determine whether Mr. Bernhardt has violated this provision of the ethics pledge.³⁹

Conclusion

Mr. Bernhardt exemplifies the definition of a revolving door official. Public officials should serve in government to carry out the public’s interests, not the interests of their lobbying clients. Ethics officials should immediately investigate Mr. Bernhardt’s actions and determine if he violated the ethics pledge.

Sincerely,



Daniel E. Stevens
Executive Director

³⁷ Executive Order 13770 § 2(s).

³⁸ Press Release, Western Values Project, Democracy Forward Demand Records Exposing Whether DOI Deputy Secretary Bernhardt Continues to Work on Behalf of Special Interests, *Western Values Project*, July 30, 2018, available at <https://westernvaluesproject.org/western-values-project-democracy-forward-demand-records-exposing-whether-doi-deputy-secretary-bernhardt-continues-to-work-on-behalf-of-special-interests/>.

³⁹ In addition to the ethics pledge, Mr. Bernhardt may have violated the Standards of Ethics Conduct for Employees of the Executive Branch, which is “intended to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties.” See 5 C.F.R. § 2635 Subpart E, available at [https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/\\$FILE/SOC%20as%20of%2081%20FR%2081641%20FINAL.pdf](https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/$FILE/SOC%20as%20of%2081%20FR%2081641%20FINAL.pdf).