



June 5, 2017

Senator Lisa Murkowski
 Chair
 Senate Committee on Energy and Natural Resources.
 522 Hart Senate Office Building
 Washington, DC 20510

Senator Maria Cantwell
 Ranking Member
 Senate Committee on Energy and Natural Resources
 511 Hart Senate Office Building
 Washington, DC 20510

Re: David Bernhardt's Actions as Interior Solicitor in 2008 Raise Serious Legal and Ethical Questions and Contemporary Conflicts-of-Interest

The Honorable Senator Murkowski and Senator Cantwell:

In testimony at his confirmation hearing, Mr. Bernhardt made derisive passing comments regarding a \$250 million dollar water project planning effort. Undoubtedly he was referring to the planning costs for the massive water export tunnels project, now called Cal WaterFix and which is promoted by Bernhardt's former employer, Westlands Water District (Westlands).

What Mr. Bernhardt neglected to reveal: Back in 2008, it was under Mr. Bernhardt's watch as Interior Solicitor, that the structure to fund this planning effort was originally devised. Documents are now just coming to light that raise serious legal questions which require investigation before he is confirmed as Deputy Secretary of the Interior.

Recently released Public Records show that, in September 2008, the Bureau of Reclamation and Westlands, along with three other federal water contractors, administratively colluded to redirect federal appropriations to pay their costs of the quarter of a billion dollar planning effort to export

more water from the San Francisco Bay-Delta, the largest estuary west of the Mississippi. Congress provided no such authority.

While Mr. Bernhardt was Interior Solicitor, documents were executed whereby Westlands and the three other federal contractors would front Operation and Maintenance funds and then Reclamation would "redirect" Congressional appropriations for those amounts and credit money back to Westlands and the other four federal water contractors for existing CVP charges and costs. It was a form of "double credit" for mandatory obligations--with one payment they got credit for both required operations and maintenance obligations, and their obligation to fund planning for the tunnels project.

The taxpayer gets the bill instead of the water contractors. According to Public Record Documents provided by Westlands, as of 2015, more than \$49 million dollars in Congressional appropriations have been 'redirected' by this shell-game approach. Of this amount Westlands reaped roughly \$36 million dollars. This is roughly equivalent to 3% of Reclamation's annual budget. This mechanism is described as follows by one of the participating federal water contractors:

This Agreement provides for continued advance payment of certain Central Valley Project (CVP) O&M costs as a mechanism to free up federal appropriations for the Delta Habitat Conservation and Conveyance Program (DHCCP). The District will receive a credit from the Bureau of Reclamation (Reclamation) for the advance payment applicable to its ongoing O&M costs for delivery of CVP water. The District and other CVP contractors benefit from using this mechanism because federal appropriations used to fund DHCCP are deemed to be non-reimbursable (no water contractor repayment needed), and reduce dollar for dollar the amounts that otherwise would need to be paid by the San Luis & Delta Mendota Water Authority.

Tom Birmingham, Westlands' Executive Director, described the scheme to his Board of Directors stating, *"the execution of an agreement with the Bureau of Reclamation which would provide the mechanism...[that] **would allow Reclamation to re-direct federal appropriations...to the DHCCP**[Delta Habitat Conservation and Conveyance Plan] planning process."* (emphasis added)

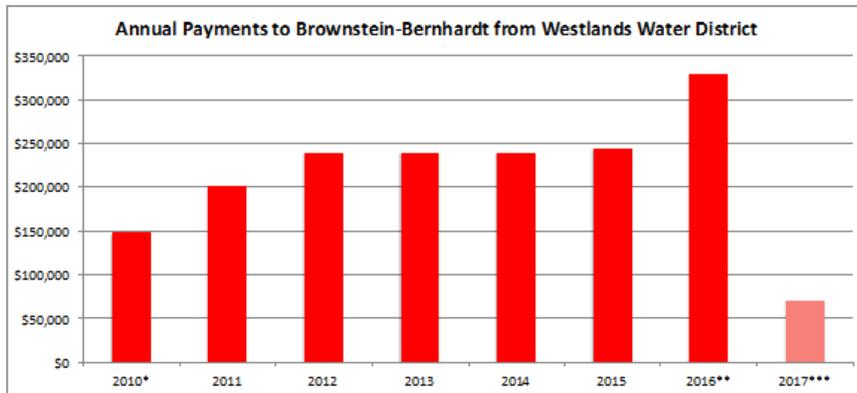
The agreements also established an executive committee whereby the contractors promoting the project are given authority over alternatives, the scope and funding of the tunnels planning efforts. All out of public view or comment.

According to the Public Records obtained from Reclamation, David Bernhardt's Solicitor's office approved the legal sufficiency of these agreements prior to his departure from the Department of Interior.

Creating this invisible funding mechanism that benefits a few federal water contractors at the expense of the American taxpayer, as well as other Federal and non-Federal water contractors, mandates full disclosure and further investigation. Given the pending nomination, Mr. Bernhardt's role in this deception of Congress, water users and the public requires a full examination.

Mr. Bernhardt testified he will conduct the business of Interior in a collaborative fashion, with open and transparent public involvement. And yet, while Solicitor he oversaw the creation of this closed, non-transparent, non-public funding apparatus that taps the US Treasury to benefit this select group of federal water contractors. Besides raising serious legal questions, this issue also raises factual and ethical questions.

Westlands Water District has yet to respond to public record requests regarding the payment details, including the work descriptions and payments made specifically to Mr. Bernhardt. His work is described only as "lobbying" and "Washington Representation." From public records and U.S. lobbying reports, Westlands has paid \$1,714,291 to the Brownstein firm, of which Mr. Bernhardt is a partner. This includes the \$189,291 paid to the firm prior to Mr. Bernhardt registering as the Westlands' lobbyist. Mr. Bernhardt in his ethics statement has disclosed he receives *"a pro rata partnership distribution based on the value of my partnership interest for services performed in 2017 through the date of my withdrawal."* The public is left in the dark regarding his conflicts.



* Reported in Westlands' Consultant Budget Expenditures from June 2010. These reports also show payment for the months of Jan-March 2011. These amounts have been added to the LDA disclosed funding. The total amount added to LDA disclosure is \$189,291

** Mr. Bernhardt withdraws from lobbying for Westlands in an attempt to meet Trump Administration ethics rules.

***Westlands' payments to Brownstein from January 2017 to April 2017.

Even without disclosure it is clear from released Public Record Documents, that Mr. Bernhardt participated extensively in efforts to impact **federal Interior water policy and budgets to the exclusive financial benefit of Westlands.** By water district/agency standards, the consulting/lobbying fees are among the largest in the Nation. Westlands is the largest federal water district in the nation. The District receives substantial public benefits in the form of subsidized water rates, power, and operation and maintenance charges. Unlike other western water and irrigation districts in the seventeen Western States, even Westlands' operation and maintenance costs are partially paid by the taxpayer.

Before confirming Mr. Bernhardt, as Deputy Secretary of Interior, with jurisdiction over this federal largess, it is critical to understand whether federal laws were broken, twisted or bent while Mr. Bernhardt was Solicitor and again while employed by Westlands. Limited disclosures to date reveal that millions of taxpayer dollars have gone to benefit Westlands that should have been deposited in the Federal Treasury. Before approving this nomination, to be in charge of the Nation's water, minerals, oil, gas and public lands, a comprehensive investigation is required.

If you have any questions or require additional information, please contact Jonas Minton, Senior Water Policy Advocate for the Planning and Conservation League at (916) 719-4049 or Noah Oppenheim, Executive Director for the Pacific Coast Federation of Fishermen's Associations at (415) 561-5080

Thank you in advance for your attention to this important ethics issue.



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