



A sign placed by a volunteer is taped to a restroom door at Joshua Tree National Park Jan. 4, 2019.

Photographer: Mario Tama/Getty Images

Bypassing Congress on Parks Adds to Scrutiny of Interior Pick

By Rebecca Kern

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- *Democrats say acting Interior chief called them, but didn't consult on shutdown spending*
- *Bernhardt defends actions; will likely face tough questions during March budget hearings*

Top Democratic appropriators say acting Interior Secretary David Bernhardt's decision to fund national parks during the government shutdown without consulting Congress may intensify questioning during hearings on his confirmation and the department's 2020 budget.

"I'm more than convinced, sadly, that the administration has ignored the law and policies that the agencies had in place for years to protect our citizens and public lands," said Rep. Betty McCollum (D-Minn.), chair of the House Appropriations Committee's Interior, Environment and Related Agencies Subcommittee.

"Congress holds the power of the purse, and our subcommittee has every intention of fulfilling our Constitutional authority and responsibility," she said.

Democrats will likely grill Bernhardt on his use of fees during the shutdown as he heads to March budget hearings in the House and Senate, and when he's up for Senate confirmation for his nomination to be Interior Secretary.

During the 35-day government shutdown, McCollum and Sen. Tom Udall (D-N.M.), ranking member on the Senate Appropriations committee that oversees Interior's budget, said they were not consulted before Bernhardt announced Jan. 5 that the National Park Service would dip into entrance fees from visitors to pay certain employees to keep facilities open.

Berhardt directed that the entrance fees should be used to pay employees at certain parks to pick up trash and clean bathrooms after reports of parks strewn with trash and human waste during the shutdown.

The entrance fees are meant to enhance park visitors' experiences, such as at interpretive centers and campgrounds, rather than to fund maintenance or cleaning.

Knows Law 'Like the Back of My Own Hand'

In a Jan. 9 letter to McCollum, Bernhardt said he was certain he acted properly, writing: "In some instances, I know the laws we administer like the back of my own hand."

Should Congress prefer that the Interior Department not use funds raised under Federal Land Recreation Enhancement Act (FLREA) during an appropriations lapse, "you have the power to write that requirement into law," he wrote, adding, "If such a law were enacted, we would fully execute it, whether we agree with it or not."

McCollum and Udall each separately asked for a legal opinion from the Government Accountability Office on whether Bernhardt violated the Antideficiency Act, an 1870 law that prohibits agencies from spending funds in advance or in excess of a congressional appropriation.

McCollum's staff said she may also ask for a separate investigation by Interior's Inspector General.

Jim Dyer, senior adviser at Baker Donelson who worked for the House Appropriations Committee for more than 30 years, told Bloomberg Environment he believes paying employees from non-appropriated funds without Congress's approval is a violation of the Antideficiency Act.

Charles Tiefer, a professor of law at the University of Baltimore, and a solicitor and general counsel at the House of Representatives for 11 years until 1995, said the GAO does not take lightly an abuse of the transfer of funds.

"If any administration could transfer money at will without consulting Congress, the power of the purse would have shifted from Congress to the executive branch," he said.

Shutdown Spending Rules

When there is a lapse in federal appropriations during a government shutdown, agencies must provide advance notice to appropriations committees before using any existing appropriated funds, or transferring or reprogramming funds, according to the GAO. It's murky whether advance notice means consultation.

Tiefer thinks it does not.

“Notification is not consultation,” Tiefer said. “The GAO will be the referee and will make the call.”

Bernhardt didn’t notify McCollum’s staff that he was going to use the entrance fees until right before his Jan. 5 decision. Bernhardt also didn’t tell Udall until Jan. 5, right before he issued his directive, a staffer familiar with the conversation told Bloomberg Environment.

The Interior Department says Bernhardt complied with the law. He called McCollum’s staff and briefed them on his intent to use the entrance fees, spokeswoman Faith Vander Voort told Bloomberg Environment.

“It’s important to note that the acting Secretary does not have a legal obligation to consult Congress before using FLREA funds,” she said.

Bernhardt’s reference to knowing the laws stems from his experience working in several roles at Interior, including solicitor—the agency’s top attorney—from 2006 to 2009, under President George W. Bush.

FLREA was signed into law by Bush in 2004, and allows five federal agencies under Interior’s umbrella to collect fees for visitor services and recreational enhancements on public lands.

In fiscal year 2017, the agencies collected \$390 million, with 73 percent of it coming from the National Park Service, according to an October 2018 Congressional Research Service report. The Interior Department said it couldn’t provide the total amount of money spent from FLREA during the shutdown.

Best of Bad Situation

Sen. Lisa Murkowski (R-Alaska), chair of the Senate Appropriations Committee’s Interior Subcommittee, said she talked with Bernhardt during the shutdown about Interior’s review to ensure it had the authority to use entrance fees to keep the parks open.

“So I think he will be able to articulate very clearly what the authority is,” she told Bloomberg Environment. She said she’s not concerned he acted on his own.

“Bernhardt was trying to allow access to our parks in a limited way in a manner that still respected his authority, and trying to make the best of a bad situation,” she said.

Entrance fees aren’t meant to be used for maintenance and cleaning, said Phil Francis, a retired 40-year park employee and chair of the Coalition to Protect America’s National Parks, a group of nearly 1,700 former National Park Service employees.

“I think that they took some liberties in defining what those meanings were,” he said.

‘Realistic Fears’

No matter if Bernhardt followed the law, the way he handled the matter could motivate Senate Democrats to tie up floor time on his confirmation to be permanent secretary, “to express realistic fears that he won’t obey the spending laws,” Tiefer said.

“Congress is a co-equal branch of government, and it is critical that we maintain our control over the power of the purse and continue to conduct essential oversight over the executive branch,” Udall told Bloomberg Environment in an email.

“These checks and balances are at the foundation of our government, and they cannot simply be ignored or bypassed.”

Even Murkowski, while satisfied that Bernhardt had the authority to transfer the funds, said she plans to ask him during March budget hearings about his decisions.

Those judgments include refunding the spent entrance fees by using the National Park Service’s operations dollars from the continuing resolution that reopened the government Jan. 25—something he told leaders on the House and Senate appropriations committees in a Feb. 6 letter.

Jeff Ruch, executive director of the Public Employees for Environmental Responsibility, a non-profit watchdog group, also said the March hearings will give Congress an opportunity to get more answers.

“When your budget is up before Congress, and they have to make an affirmative vote, Congress’s leverage is going to increase,” he said.

Rep. Raul Grijalva (D-Ariz.), chairman of the House Natural Resources Committee, who also signed onto McCollum’s GAO request, said he’s concerned Bernhardt is acting like the rest of the Trump administration in disregarding Congress, and his fellow lawmakers want to rein that in.

“It’s a pattern of arrogance that’s just there,” he told Bloomberg Environment.

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