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DESERT TORTOISE HABITAT CONSERVATION

HEARING

BEFORE THE

SUBCOMMITTEE ON
FORESTS AND PUBLIC LAND MANAGEMENT

OF THE

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

ON

H.R. 880

TO PROVIDE FOR THE ACQUISITION OF PROPERTY IN WASHINGTON COUNTY, UTAH, FOR IMPLEMENTATION OF A DESERT TORTOISE HABITAT CONSERVATION PLAN

MAY 10, 2001

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DESERT TORTOISE HABITAT CONSERVATION

THURSDAY, MAY 10, 2001

U.S. SENATE,
SUBCOMMITTEE ON
FORESTS AND PUBLIC LAND MANAGEMENT,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The subcommittee met, pursuant to notice, at 3:45 p.m., in room SD–366, Dirksen Senate Office Building, Hon. Craig Thomas presiding.

OPENING STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM WYOMING

Senator THOMAS. Senator Larry Craig, chairman of the Forest & Public Land Subcommittee, asked if at the close of this oversight hearing the Park Service would consent to a short hearing on this subcommittee to take testimony on H.R. 880. In the spirit of Senatorial efficiency, of course we agreed to do that.

Forest & Public Land Subcommittee held a hearing on a similar piece in the 106th Congress and consequently reported the bill favorably to the full Senate. H.R. 880 is an act to provide for the acquisition of property in Washington County, Utah, for the implementation of a desert tortoise habitat conservation plan.

The bill also provides for compensation to be paid to the owners of the property. We're delighted today to have witness from BLM, Mr. Anderson.

Mr. ANDERSON. Appreciate that.

Senator THOMAS. And if you would go ahead with your testimony, sir.

STATEMENT OF ROBERT ANDERSON, DEPUTY ASSISTANT DIRECTOR, BUREAU OF LAND MANAGEMENT

Mr. ANDERSON. Okay, thank you very much, Senator Thomas.

I appreciate the opportunity to appear before you today to testify on H.R. 880 which provides for all right, title, and interest to certain property in Washington County, Utah, to be vested in the United States.

The administration supports the land transfer as provided for in H.R. 880 but cannot support some of the factors and procedures outlined in the bill to be used in determining compensation. The administration would be pleased to work with the committee to revise these provisions so that the administration could support the bill.

H.R. 880 seeks to accomplish the Federal Government's long awaited and much desired acquisition of the last major block of private lands within the Washington County Habitat Conservation Plan area near St. George, Utah.

At issue is the area known as the Red Cliffs Desert Reserve which provides critical habitat for the threatened desert tortoise.

H.R. 880 provides for the acquisition by the BLM of 1,516 acres of private property within the Red Cliffs Desert Reserve, and 34 acres of private property adjacent to the reserve.

Since 1996, BLM has coordinated the acquisition of nearly 4,400 acres of desert tortoise habitat worth about $35 million within this reserve. These Federal, State, and private acquisitions have included land exchanges, direct purchases at market value, and one donation.

The administration has concerns regarding the language requiring the United States to take title 30 days after enactment. 30 days is not adequate time to ensure clear title, release of potential liens, and to satisfy property taxes that may be due on the property. We suggest the legislation be amended to state that the United States take title 60 days after the enactment.

In addition, the administration objects to those provisions of H.R. 880 that deviate from standard land acquisition practices that provide compensation beyond that received by other landowners in previous acquisitions in this area.

The administration supports the goal of acquiring this property for the Federal Government but not in the manner stated in the bill.

The administration stands ready to work with the committee to amend the bill to effect a legislative taking without these objectionable provisions.

In closing, Senator Thomas, the acquisition of these lands within the reserve is a high priority for the BLM and the Fish & Wildlife Service because there is no question this area is critical to the protection and recovery of the desert tortoise.

We thank Senator Bennett for his efforts to resolve this difficult issue.

This concludes my statement, and I would be pleased to answer questions that you may have.

[The prepared statement of Mr. Anderson follows:]

PREPARED STATEMENT OF ROBERT ANDERSON, DEPUTY ASSISTANT DIRECTOR, BUREAU OF LAND MANAGEMENT

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to appear before you today to testify on H.R. 880, to provide for all right, title, and interest in and to certain property in Washington County, Utah, to be vested in the United States.

The Administration supports the land transfer as provided for in H.R. 880, but cannot support some of the factors and procedures, outlined in the bill, to be used in determining compensation. The Administration would be pleased to work with the Committee to revise these provisions so that the Administration could support H.R. 880.

H.R. 880 seeks to accomplish the Federal government's long-awaited and much-desired acquisition of the last major block of private lands within the Washington County Habitat Conservation Plan (HCP) area near St. George, Utah. Specifically at issue is the area known as the Red Cliffs Desert Reserve which provides critical habitat for the threatened desert tortoise. The Bureau of Land Management (BLM)

supports the important goal and desire to consummate the final, critical acquisitions in this unique and special place.

H.R. 880 provides for the acquisition by the BLM of all right, title and interest to 1,516 acres of private property within the Red Cliffs Desert Reserve and 34 acres of private property adjacent to the Reserve. The Red Cliffs Desert Reserve was established in 1996 as part of the Desert Tortoise Habitat Conservation Plan (HCP) for Washington County, Utah. The County developed the HCP, with technical advice from the Fish and Wildlife Service, in order to receive a permit to allow for the incidental take (acceptable level of loss) of desert tortoises on about 12,000 acres of privately-held desert tortoise habitat and to mitigate that take by developing the Reserve to ensure the protection and recovery of the threatened Desert Tortoise and other listed species in the area. H.R. 880 provides compensation to the private landowner, Environmental Land Technology, Ltd. (ELT), as of the date of the approval of the HCP, with an initial payment of $15 million and any remaining judgment backed by the full faith and credit of the United States. Compensation by a judgment action would also include interest, reasonable costs, expenses of holding the property and attorney fees from February 1990 to the date of final payment.

Since 1996, BLM has coordinated the acquisition of nearly 4,400 acres of Desert Tortoise habitat, worth approximately $35 million, within the Red Cliffs Desert Reserve. These State and private acquisitions have included land exchanges, direct purchases at fair market value and one donation. BLM has expended $10.5 million in Land and Water Conservation Fund (LWCF) monies to date in completing land purchases and has an additional $1.5 million available to purchase high value habitat. BLM has completed five separate transactions with ELT, for a total of approximately 383 acres, including both exchanges and LWCF purchases.

In addition, since 1997, the Fish and Wildlife Service has provided approximately $4.7 million in grants to the State of Utah for land acquisitions associated with the Washington County HCP; and the Service has obligated $6 million for the same purpose on FY 2001. These grants were provided through the Service's HCP Land Acquisition Program under the Endangered Species Act Section 6 Cooperative Endangered Species Conservation Fund. These transactions demonstrate a long-term record of successful accomplishments in meeting the goals and objectives of the HCP despite widely varying expectations by many landowners.

The Administration has concerns regarding the language requiring the United States to take title 30 days after enactment. Thirty days is not adequate time to ensure clear title, release of potential liens, and to satisfy property taxes that may be due on the property. We suggest that the legislation be amended to state that the United States take title 60 days after enactment.

In addition, the Administration objects to those provisions of H.R. 880 that deviate from standard land acquisition practices and substitute procedures that provide compensation beyond that received by other landowners in previous acquisitions in this area. The Administration supports the goal of acquiring this property for the federal government, but not in this manner. The Administration stands ready to work with the Committee to amend the bill to effect a legislative taking without these objectionable provisions.

In closing, Mr. Chairman, the acquisition of these lands within the Reserve is a high priority for the BLM and the Fish and Wildlife Service because there is no question this area is critical to the protection and recovery of the Desert Tortoise. The HCP has provided a mechanism to protect listed species and allow for continued economic opportunities in Washington County, Utah. Completion of the land acquisition goals within the Reserve is supported by State and local officials, the Utah Congressional delegation and the Administration. We fully support the concept of transferring title to the land inside the reserve to the BLM in a manner that compensates the landowner in accordance with existing Federal law. We thank Mr. Bennett for his efforts to resolve this difficult issue. This concludes my statement. I would be pleased to answer any questions at this time.

Senator THOMAS. Thank you very much. Just as a question, this is—where is this generally in Utah?

Mr. ANDERSON. This is southwestern Utah just outside of the town of St. George.

Senator THOMAS. And this thing then finally what do you call it, a reserve?

Mr. ANDERSON. Yes.

Senator THOMAS. Will be 12,000 acres?

Mr. ANDERSON. Well, actually, the whole reserve is about 61,000 acres, the total reserve.

Senator THOMAS. What kind of reserve?

Mr. ANDERSON. It's a desert tortoise reserve, and the desert tortoise is an endangered species.

Senator THOMAS. There's 16,000 acres for desert tortoises to frolic in?

Mr. ANDERSON. It's a very important reserve because it's one of the most dense and healthiest areas in the whole world for the desert tortoise. As you might know, this desert tortoise encumbers Utah, Arizona, California, Nevada. So we have quite a habitat, but this is one of the best.

Senator THOMAS. Is it endanger listed?

Mr. ANDERSON. Yes, it's listed.

Senator THOMAS. Where else is there protection for it, do you know?

Mr. ANDERSON. Well, in California, Arizona, and Nevada.

Senator THOMAS. And there's spots there as well?

Mr. ANDERSON. Yes. In fact, much of the desert, the California desert conservation area has desert tortoise.

Senator THOMAS. What, just generally, what other activities do they allow on the 16,000 acres?

Mr. ANDERSON. Well, in the reserve they're not going to allow any development at all.

Senator THOMAS. Can you ride your horse out there?

Mr. ANDERSON. Yes, there will be recreation opportunities, and, as I understand it, in this reserve they'll be studying that. There is a State park within the reserve too.

Senator THOMAS. I see. Do they hunt whatever there is to hunt out there, or maybe there isn't anything?

Mr. ANDERSON. Generally they can hunt in these areas. It's mostly BLM land, and we, of course, allow hunting on BLM land.

Senator THOMAS. Thank you, sir. I understand that I said 16. It's 61,000, I'm sorry. I'm sure this will be discussed some before the committee mark up next week, and we appreciate very much your being here, sir. Mr. ANDERSON. You're welcome. Thank you.

Senator THOMAS. There are, I think, 6 days for open record, if someone wants to submit a statement for the record. We are adjourned.

[Whereupon, at 3:50 p.m., the hearing was adjourned.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

WESTERN LAND EXCHANGE PROJECT,
Seattle, WA, May 8, 2001.

HONORABLE MEMBERS,
Senate Energy and Natural Resources Committee, Dirksen Senate Office Building, Washington, DC.

Subject: Testimony in opposition to H.R. 880, federal buy-out of lands in Washington County, Utah

DEAR COMMITTEE MEMBERS: I write as director of the Western Land Exchange Project, a non-profit, public interest organization that monitors federal land exchanges and transactions. We strongly oppose H.R. 880, which would effect an inflated "down payment" on private lands within the desert tortoise reserve in Washington County, Utah. This bill is ultimately intended to hand over tens of millions of dollars to James Doyle, a land speculator operating as Environmental Land Technologies who owns land within the reserve.

The bill was referred to your committee on March 14, 2001 after having passed in the House. We opposed this bill last year (then H.R. 4721), and were grateful that it did not move in the Senate. We hope that you will again refrain from advancing this proposal.

The Western Land Exchange Project is a non-profit organization that monitors federal land exchanges and is working for long-term, substantive reform in the exchange process. We have had grave concern about land exchanges and other transactions within Washington County, Utah that appear to yield huge profits to private landowners while costing the American public millions of dollars. H.R. 880 continues in that tradition.

In the early 1990s, after the desert tortoise had been declared a threatened species, planning began for the preservation of critical habitat in the Washington County Habitat Conservation Area (HCA), and the BLM began a series of land exchanges to acquire private inholdings within the HCA. Private lands within the HCA were valued under the established appraisal conventions long accepted as the standards for these transactions.

However, some Washington County landowners were not satisfied with these standards, because—as would occur with any type of zoning or constraint on development—limits on development within the HCA lowered the market value of their lands. Utah Rep. Hansen accommodated this handful of citizens by placing a special provision in the Omnibus Parks Bill of 1996 (P.L. 104-333) mandating that lands within Washington County acquired through federal trade be appraised "without regard to the presence of a species listed as threatened or endangered." This provision has been applied to every land transaction in Washington County since passage of the 1996 Omnibus Parks bill.

This is entirely counter to the established standards of land valuation, and is flagrantly unfair. As outlined in a series of news articles published in the *Deseret News* last year, Washington County landowners have been handed a huge windfall, funded by the American taxpayer.

Jim Doyle, the beneficiary of H.R. 880, has already completed 5 land exchanges in Washington County, trading to the government 383 acres valued at $5.6 million. He now seeks as much as $50 million for his remaining 1,550 acres in the desert tortoise preserve. Mr. Doyle claims to have been victimized by the federal government because the presence of the desert tortoise has reduced the development potential (and thus the value) of his land.

Mr. Doyle began leasing this land from the State of Utah in 1983 and bought it from the State in 1990. Mr. Doyle was the beneficiary of a preferential sale by the State of Utah that was later declared illegal.

The desert tortoise was first listed as a threatened species in 1980; it received emergency endangered listing in August of 1989, and final listing as threatened in April 1990.

Mr. Doyle did not make a down payment to the State on his land purchase until June 1990, well after the tortoise was first listed. The listing of the Mojave population of the desert tortoise had been anticipated for years—it did not occur in a vacuum or without ample warning. Mr. Doyle did not go blindfolded into this land purchase, and for him to portray himself as an innocent victim of federal regulation is grossly misleading.

It seems clear that by the time he made his first payment to the State, he had long understood the potential impact the tortoise's listing would have on that land. Mr. Doyle originally bought the property from the State for about $330 an acre. Because the original preferential sale was later declared illegal, he reached a settlement with the State requiring that he pay the State a percentage of his proceeds from selling or exchanging the land. It was estimated that his final purchase price would end up at about $6 million, or $2,500 per acre.

H.R. 880 proposes to make an initial payment of $15 million to Doyle—about $9,600 per acre, or nearly four times his purchase price.

The ultimate payment to Mr. Doyle would consist of any balance beyond $15 million "owed" him based on the determination of the land value and costs. If Mr. Doyle's claims regarding the value of his land are upheld, he could eventually receive a total of up to $50 million. Not only would he make a huge windfall profit from the passage of H.R. 880, but the State of Utah also stands to benefit mightily by the inflated federal purchase price—again, at huge cost to American taxpayers.

Because of his trouble with the State of Utah, Mr. Doyle was not even able to present clear title to the land until 1997, so it was not until that year that the BLM began negotiating with him over the land value. Since then, disagreement over the value has delayed the purchase. Doyle claims the value should be based on the potential for maximum development and the presence of adequate infrastructure—neither of which exists. He has also threatened to sue Washington County for "inverse takings."

Under H.R. 880, Mr. Doyle would be paid "just compensation" for the land based on its value at the time it vests in the United States (upon the bill's passage). He would also receive compensation for the costs and expenses of having held the property since February 1996, plus other costs and attorney fees.

H.R. 880 is just the latest in a long series of dubious land deals and taxpayer ripoffs to have come out of St. George and Washington County, Utah. The Department of Interior Inspector General has recently finished an investigation of land exchanges in Washington County, prompted by evidence that the appraisal process for land trades in that area has been flagrantly manipulated by private landowners like Mr. Doyle. The General Accounting Office, too, has targeted St. George as a problem area in the Bureau of Land Management's exchange program.

This bill amounts to a scandalous bilking of American taxpayers for the benefit of one landowner and the State of Utah. Not only is the public being asked to pay a hugely inflated price for Mr. Doyle's land, but in doing so we would be rewarding him for his sharp land deals, cynical manipulation of the system, and posturing over "inverse takings."

There are far better ways to spend taxpayers' money than to subsidize and encourage land speculators like Mr. Doyle. We strongly urge the Committee to once again reject this bill.

Thank you for your consideration.

JANINE BLAELOCH,
Director.

ENVIRONMENTAL POLICY PROJECT,
Washington, DC, May 15, 2001.

Hon. LARRY E. CRAIG,
Chairman, Subcommittee on Forests and Public Lands, Senate Energy and Natural Resource Committee, Dirksen Building, U.S. Senate, Washington, DC.

Re: H.R. 880, An Act to Provide for the Acquisition of Property in Washington County, Utah

DEAR CHAIRMAN CRAIG: Please accept the following comments for inclusion in the hearing record for the above-referenced bill. The Environmental Policy Project takes no position either in support of or in opposition to this legislation. The following comments are provided to assist the Subcommittee in assessing (1) whether and to what extent the bill departs from the usual procedures and standards for acquisition

of interests in land for conservation purposes, and (2) whether and to what extent the amount to be paid by the public for the property may exceed fair market value as conventionally understood.

I. The proposed legislation departs from the usual procedures and standards for acquisition of land for conservation purposes in a number of respects.

First, a legislative taking for land conservation purposes is itself quite unusual. Congress has pursued this approach to the acquisition of conservation lands in fewer than half a dozen cases over the last several decades. The effect of this approach is to remove a particular acquisition from the agency priority-setting process and the congressional appropriations process, making it more difficult to ensure that limited financial resources are dedicated to the highest priority projects.

Second, the proposed legislative taking would require the public to pay for the property without regard to the effect on the property's value of restrictions on the use of the property imposed by the Endangered Species Act. See bill section 1(b), referencing section 309(f) of the Omnibus Parks and Public Lands Management Act of 1996. So far as we are aware, this valuation approach has not been adopted in any other legislative taking bill. This valuation approach also departs from the usual standards of the appraisal profession, which require an appraiser to consider existing legal constraints on the permitted use of the property in estimating fair market value. See Appraisal Standards Board, Uniform Standards of Professional Appraisal Practice, Standard Rule 1.3(b) (2000 Edition).

Third, the proposed legislation provides for payment of several items not ordinarily including in legislation authorizing a legislative taking. Section 1(b)(2) of the bill provides that the public, in addition to paying "just compensation" for the actual taking, would pay the owner's "reasonable costs and expenses of holding . . . [the] property from [the date of creation of the Red Cliffs Desert Reserve][1] to the date of final payment, including damages, if any, and reasonable costs and attorneys fees." Compare P.L. 104-333, section 817 (mandating a legislative taking, but without requiring payment of these items). Payment of these additional items, the cost of which could potentially run into many millions of dollars, is ostensibly justified by the long delay in government acquisition of the property. However, according to testimony on the bill, questions concerning Environmental Land Technology, Inc.'s title to the property precluded acquisition of the property for a number of years. In any event, if the "fair market value" of the property has increased over the last several years, as seems probable (see below), appreciation in the property's value may already have compensated the owner for its "holding costs."

Fourth, testimony on the proposed legislation suggests there may be some outstanding questions about the scope of the property interests held by Environmental Land Technology, Inc. and about whether the State of Utah or other third parties may hold separate interests in the property which could potentially conflict with the management of the property for species conservation purposes. A legislative taking of the interests of one owner will obviously fail in its intended conservation purpose if other owners continue to hold interests that are inconsistent with conservation objectives.

II. The proposed legislation would require taxpayers to confer a large windfall on Environmental Land Technology, Inc., perhaps 50-plus times what the company originally paid for the property. According to testimony on the bill and newspaper accounts, the company paid approximately $1 million for the property, apparently with full knowledge that the presence of the desert tortoise imposed constraints on the development of the property. The BLM has reportedly made an offer of $28 million for the property, which the owner has rejected. The proposed legislation provides for the immediate payment of $15 million to Environmental Land Technology, Inc, which the bill characterizes as an "initial payment" for the property. The bill envisions that the balance of the acquisition price would be determined through negotiation or in judicial proceedings.[2]

There are several factors contributing to this potential windfall at taxpayer expense. First, the provision in the legislation requiring that the effect of the ESA on land value be disregarded would require the public to pay in excess of fair market value as that term is normally defined. It is well recognized that legal constraints on the permissible uses of property are a major consideration influencing the valuation of property in the marketplace. In this instance, the company, apparently knowing of the constraints the ESA placed on development opportunities, purchased

[1] The bill as passed by the House uses a 1990 date; the date should probably be 1996.

[2] Apparently as a result of litigation between the company and the State of Utah, the company would be required to share some portion of any eventual payment with the State. While not reducing the burden on the federal taxpayer, this might reduce the size of the actual windfall received by Environmental Land Technology, Inc.

the property at a price that reflected the ESA constraints. Under the proposed legislation, however, the government would be required to disregard the effects of the ESA on value in purchasing the property. Successful investment proceeds according to the familiar maxim: buy low; sell high. The twist in this case is that the swing in price has been brought about largely if not entirely by a change in government policies applicable to the property.

Second, basic economic reasoning indicates that the owner is likely to reap a financial reward from the already large federal investments in land conservation in the St. George area. The St. George area is subject to heavy development pressures, which explains why ESA conflicts and the need for conservation action arose in the first place. The BLM has already acquired thousands of acres in the St. George area for conservation purposes. The effect of these acquisitions has been to limit the supply of developable land in the area and, in turn, to increase the market value of land in the St. George area that remains available for development. (See the attached EPP study, explaining how government policies creating a scarcity of development opportunities increase the value of development opportunities which remain.)[3] In this case, the federal acquisition of thousands of acres of conservation lands, together with a congressional mandate to value the property as if there were no ESA constraints, apparently have combined to create a severely inflated "fair market value" for the property.

Third, newspaper accounts of this proposed transaction (and other land purchases and exchanges in the St. George area) suggest that BLM appraisers, in addition to disregarding the effects of ESA constraints on land value (in accord with the 1996 parks bill), may have produced inflated appraisals of property values in order to expedite the completion of the Red Cliffs Desert Reserve. A former BLM appraiser with responsibility for the St. George area has charged that his superiors at the agency overrode his appraisals and disregarded established appraisal methods. These charges have in turn prompted ongoing investigations of land acquisitions in the St. George area by the Department of the Interior Inspector General. A draft of the IG's report in public circulation appears to reveal systematic violations of appraisal standards in the St. George area.

Thank you for the opportunity to submit these comments.

Sincerely,

JOHN D. ECHEVERRIA,
Director.

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[3] The study has been retained in subcommittee files.