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WASHINGTON COUNTY, UTAH LEGISLATIVE TAKING

OCTOBER 2 (legislative day, SEPTEMBER 22), 2000. Ordered to be printed

Mr. MURKOWSKI, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany S. 2873]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 2873) to provide for all right, title, and interest in and to certain property in Washington County, Utah, to be vested in the United States, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE MEASURE

The purpose of S. 2873 is to provide for a legislative taking of approximately 1,550 acres of private lands within the federally designated Red Cliff Reserve in Washington County, Utah.

BACKGROUND AND NEED

In 1983, Environmental Land Technology (ELT) acquired 2,440 acres from the State of Utah for development purposes and completed appraisals, engineering studies, site plans, and other work in preparation for development of its property. In April, 1990, the desert tortoise (Gopherus agassizii) was listed as a threatened species pursuant to the Endangered Species Act of 1973. The landowner testified before the Committee that he has been unable to develop the property as originally intended because of the occurrence of critical desert tortoise habitat in and around the ELT property. In February 1996, the United States Fish and Wildlife Service (USFWS) adopted a Habitat Conservation Plan (HCP) creating the Red Cliffs Reserve for the protection of the desert tortoise habitat. Under the plan, the Bureau of Land Management (BLM) proposed to acquire all private lands in the designated habitat area.

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To date, the BLM has acquired nearly all the private property located in the Reserve except for approximately 1,516 of ELT land. Numerous attempts to reach an agreement with the BLM for exchanges of this property have failed, at considerable cost to the landowner. In the interim, Congress has enacted legislation to exchange large blocks of Federal lands with the State of Utah, making other land exchanges in the State much more difficult to complete.

No funds were appropriated to the BLM in FY 2000 to purchase the property. The Department of the Interior did not request funds for this acquisition in FY 2001, though the acquisition of the ELT property remains a high priority for the BLM.

The continued inability to develop or otherwise dispose of the property has resulted in economic hardship for the landowner. Conventional financing to hold the property was not available to the landowner because the banks were unwilling to lend money against the land without a clear payoff date. Accordingly, ELT has had to borrow substantial sums, sometimes at high interest rates, to hold the property. S. 2873 is needed to complete the land transfer and to compensate ELT for its land in a more timely manner than is available without the legislation.

LEGISLATIVE HISTORY

S. 2873 was introduced on July 14, 2000 by Senator Bennett and referred to the Committee on Energy on Natural Resources. The Subcommittee on Forests and Public Land Management held a hearing on S. 2873 on September 13, 2000. At the business meeting on September 20, 2000, the Committee on Energy and Natural Resources ordered S. 2873 favorably reported.

COMMITTEE RECOMMENDATION

The Senate Committee on Energy and Natural Resources, in open business session on September 20, 2000, by a voice vote of a quorum present, recommends that the Senate pass S. 2873.

SECTION-BY-SECTION ANALYSIS

Section 1 lists several findings of Congress.

Section 2(a) transfers title to the United States for 1,516 acres of property owned by Environmental Land Technology (ELT) within the Red Cliffs Reserve and 34 acres owned by ELT adjacent to the land within the reserve.

Subsection 2(b) provides for compensation to ELT through an initial cash payment of $15,000,000 and the balance to be paid in cash or, at the option of ELT, as provided in Subsection 2(e). Payment shall be in the amount of appraised value plus interest and reasonable costs and expenses of holding the property from February, 1990.

Subsection 2(c) directs that, in the absence of a negotiated settlement, the Secretary shall initiate a proceeding in the U.S. District Court to determine just compensation.

Subsection 2(d) provides for the orderly termination of all current activities of the landowner.

Subsection 2(e) provides that the Secretary, at the option of ELT, credit a surplus property account in the amount of the unpaid compensation due which ELT could use to bid for surplus property.

COST AND BUDGETARY CONSIDERATIONS

The Congressional Budget Office (CBO) estimate of the cost of this measure has been requested but was not available at the time the report was filed. When the report is available, the Chairman will request it be printed in the Congressional Record for the advice of the Senate.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 2873.

The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 2873, as ordered reported.

EXECUTIVE COMMUNICATIONS

On September 20, 2000, the Committee on Energy and Natural Resources requested legislative reports from the Department of the Interior and the Office of Management and Budget setting forth executive views on the bill. These reports had not been received at the time the report on S. 2873 was filed. When the reports become available, the Chairman will request that they be printed in the Congressional Record for the advice of the Senate.

The testimony provided by the Department of the Interior at the Subcommittee hearing follows:

STATEMENT OF TOM FRY, DIRECTOR, BUREAU OF LAND MANAGEMENT

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to appear before you today to testify on S. 2873, 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 opposes this legislation. The bill 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. There is no disagreement as to the important goal and desire to consummate the final, critical acquisitions in this unique and special place, yet we believe the objectives of S. 2873 can be accomplished through the normal land acquisition process for which the Bureau of Land Management (BLM)

has well-established procedures. I would like to point out that the Administration also opposed Mr. Hansen's companion bill on this issues, H.R. 4721, at the House Resources Committee hearing held on July 13, 2000. I will now briefly outline the legislation and our reasons for opposing it.

S. 2873 would provide 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 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 of 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. S. 2873 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 would also include interest, reasonable costs, expenses of holding the property and attorney fees from February 1996 to the date of final payment.

Since 1996, BLM has coordinated the acquisition of nearly 4,400 acres of Desert Tortoise Habitat within the Red Cliff's Desert Reserve worth approximately $35 million. 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 in FY 2000. BLM has completed five separate transactions with ELT, the private landowner at issue in S. 2873, 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. These grants were provided through the Service's HCP Land Acquisition Program under the Endangered Species Act section 6 Cooperative Endangered Species Conservation Fund. The Washington County HCP is one of only two HCPs which have received funding through this program in each year since its inception in 1997. This program is based on a competitive proposal process. To date, the Fish and Wildlife Service has not received a proposal for grant assistance for acquisition of the 1,500 acre ELT property. If a proposal were submitted and included the required 25% non-Federal cost sharing, it would be eligible to compete for funding under the HCP Land Acquisition Program. However, the acquisi-

tion would have to satisfy all applicable Federal appraisal and other land acquisition requirements.

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 believes that S. 2873 is not in the public interest for several reasons:

(1) S. 2873 provides preferential treatment to one land owner and provides for compensation above and beyond the benefits received by other landowners in previous acquisitions in this area. The amounts that S. 2873 directs the landowner be paid are not supported by the preliminary appraisal for this property and, in fact, are considerably in excess of the appraised values on other adjacent properties. We see no justification to add interest, reasonable costs, expenses of holding the property and attorney fees to any settlement with the private landowner. Given the early absence of clear title and other delays in final settlement, no such considerations are in the public interest.

(2) The bill also legislates the acquisition of 34 acres adjacent to but not within the Reserve. This parcel abuts the Reserve on only one side and is surrounded on three sides by private land which has been developed. Access is available to the parcel through adjacent lands. The parcel has not been included in any agreement, it is not addressed in the HCP and because of its size and configuration, it has marginal potential for habitat management. We have no reason to believe that the public interest would be well served by this 34-acre acquisition.

(3) The BLM has attempted to work with ELT over the last four years to reach agreement on a fair and reasonable process in conducting appraisals in reaching agreement on the value of the remaining 1,500 acres. After completing a number of previous transactions using approved and acceptable appraisal standards, the company has departed from the process and sought independent private appraisers who have used appraisal assumptions not consistent with BLM policies and procedures used on previous HCP acquisitions. All previous appraisal reports have complied with Public Law 104–333, the Omnibus Parks and Public Lands Management Act of 1996, which requires the BLM to disregard the listing of the Desert Tortoise in the appraisals and determination of value for other properties. Appraisals involving Federal acquisitions must carefully conform to established and accepted procedures to ensure a fair and an unbiased estimate of value. Laws and regulations pertaining to land exchanges provide reasonable administrative discretion for resolving disputes concerning property value.

(4) S. 2873 would provide for the acquisition of all right, title and interest of the 1,516 acres of property within the Reserve and the additional 34 acres outside the Reserve. Title to the subject property was clouded by litigation for

many years with the State of Utah and was not resolved until a settlement was signed between the parties in 1997. We are uncertain as to what rights, title and interest the land owner may possess at this time. The State of Utah may have also retained the mineral rights to these properties. There is also some concern that title may still be encumbered by other liens or financial obligations.

(5) The legislation is premature because it circumvents the normal court considerations of a property owner's claims. The property owner has the right to bring a civil action in a court of law to seek indemnification for an alleged government taking of private property. The court would determine whether the property has been taken and the amount of just compensation. If S. 2873 is a legislative taking, Congress should determine the full amount of just compensation and leave it to the property owner to contest the payment.

(6) The legislation requires the United States to take title immediately upon enactment but does not provide an adequate time frame to ensure clear title or remove encumbrances, potential liens, and satisfy property taxes that may be due on the property. Also, the bill does not address how or when to complete pre-acquisition site assessments, hazardous material investigations and follow through on findings to protect the interests of the United States.

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 both 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 Bureau of Land Management 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. While we cannot support S. 2873 for the reasons set forth in this testimony, we are nevertheless committed to working with the land owner to finalize the acquisition of its lands within the Red Cliffs Desert Reserve. This concludes my statement. I would be pleased to answer any questions at this time.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by S. 2873, as ordered reported.

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