

COMMITTEE ON NATURAL RESOURCES

8/1/13 Oversight Hearing on “Transparency and Sound Science Gone Extinct? : The Impacts of Obama Administration’s Closed-Door Settlements on Endangered Species and People”

Written comments by: Kent D. McMullen
Chairman, Franklin County
Natural Resources Advisory Committee

Thank you for taking the time for my comments today. My comments are in regard to requiring the US Fish and Wildlife Service to use sound science and be required to do testing prior to listing under the ESA. The U.S. Fish and Wildlife Service (USFWS) provided no notification to our local government jurisdiction (Franklin County Board of Commissioners) or to the thirteen landowners whose land fell within the proposed critical areas of habitat and moved forward with listing under the ESA. Operating in Washington state, the USFWS is using the advantage of our Ninth Circuit Court of Appeals decision that circumvents ESA requirements to provide ninety days notice to a local government jurisdiction preliminary to any proposed ESA listing. The Tenth Circuit Court of Appeals does respect and uphold this consideration. Clearly one of the issues that needs to be dealt with is that rules need to be uniform and not allow for the USFWS to find loopholes which allow them circumvent the process.

Our Franklin County Natural Resources Advisory Committee (NRAC), which I am Chair, received notice on May 1, 2013 of a Federal Register notice for a final rule adoption of the ESA listing and establishment of critical areas of habitat for the White Bluffs Bladderpod. The listing was to become law on May 23, 2013. If not for Congressman Hastings office, this final rule listing would have passed undetected, just as had occurred with the May2012 Federal Register notice of the proposed listing, proposed demarcation of critical areas of habitat, and the 60 day period of public comment. The USFWS had provided “notice” to our Franklin County residents only through the Federal Register and the Spokesman Review newspaper in Spokane, WA; a newspaper not circulated in Franklin County. The view of angered landowners was that the USFWS had purposely tried to keep the first proposal and subsequent final rule “under the radar” so that it could be quietly adopted as law. This was collaborated by a USFWS employee that apologized in private to a farm family and told

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them that they had been told to keep the issue quiet and to not inform landowners or locals.

Franklin County NRAC serves at the pleasure of our Franklin County Commissioners and provides advice for relevant issues. In the case of this potential ESA listing of the White Bluffs Bladderpod, we advised the Board of Commissioners to retain outside counsel, Karen Budd-Falen of Cheyenne, WY for consultation. This resulted in a conference call to USFWS Washington (state) Director Ken Berg and an agency attorney. That conference call led to an agreement that USFWS would suspend the listing of the White Bluffs Bladderpod and the determination for critical areas of habitat for 6 months and reopen public comment immediately for 60 days or face an immediate filing of Franklin County's Board of Commissioners' "intent to sue". USFWS realized they were in an indefensible position in having circumvented direct public notice.

The close of the reopened comment period ended July 22, 2013. On July 11, 2013 while the comment period was open, USFWS held an oral public comment hearing at the TRAC facility in Pasco, WA to record public comments to the ESA final rule listing for the White Bluffs Bladderpod. The meeting was attended by 225 landowners, farmers, the manager for our South Columbia Basin Irrigation District, and representatives of some key ag commodity organizations.

Prior to this hearing, our Franklin County NRAC took the lead in notifying landowners and held a meeting with them on May 6, 2013 to update them of our research into the science reports cited as supporting the ESA listing of the White Bluffs Bladderpod under a threatened status. We had reviewed the references cited for support of the ESA listing and had found a major conflict of interest with The Center for Biological Diversity providing science, in part, for the listing when at the same time they were the plaintiff in the mega settlement with USFWS. Furthermore, we found a reference scientist's Phd thesis on White Bluffs Bladderpod whose report indicated her dissenting view for declaring the bladderpod (*Physaria douglasii* subspecies *tuplashensis*) a subspecies of the more common *Physaria douglasii*. Also, several referenced reports stated more time was needed for searching additional areas of critical habitat and additional research. However, although listed as references cited for support of the ESA listing, it appeared a cadre of scientists used for numerous other bladderpod species listings across the United States prevailed in declaring this White

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Bluffs Bladderpod as a subspecies worthy of ESA protection.

Due to those conflicting reports being referenced as supporting the ESA listing, we determined the best course of action was to hire a certified agronomist for the purpose of collecting plant samples and locating a qualified laboratory for contracting DNA testing for bladderpods from a widespread geographical area. Thus, we would allow definitive science to determine if *tuplashensis* was truly a subspecies requiring ESA protection or if it was merely part of a larger population reportedly found in four states: Washington, Oregon, Idaho, and Montana. The key interest was the full integrity of science without bias.

Mr. Stuart Turner of Turner & Company, Inc. provided us his skills as a certified agronomist for collecting bladderpod plant samples after he obtained a USFWS permit for sampling. Obtaining a permit was delayed when an agency employee refused to respond to Mr. Turner's repeated stops at her headquarters and his pleas indicating her immediate response was necessary for a time-sensitive issue. To this date, she has completely ignored those requests. In two telephone conversations with this agent, she denied knowing anything about bladderpods and contended she was an animal biologist. Yet, she was referenced in two separate science studies supporting the W.B. Bladderpod listing and even wrote a blog about bladderpods posted on her Facebook site. We circumvented this employee and finally received a permit for sampling by applying pressure to the manager of the refuge area to where we had been directed. This effort was delayed and cost contributors additional expense for the molecular laboratory's use of additional labor to complete DNA testing and summation prior to the close of the reopened comment period.

The laboratory chosen for testing was the University of Idaho's Laboratory for Evolutionary, Ecological, and Conservation Genetics, operated under the auspices of Dr. Cort Anderson, Director. In discussions of our project, it was established early on that we wanted the DNA report to speak for itself and that there would be no biases or outside influence brought to bear upon the results. That was fully desirable and acceptable to Dr. Anderson, Mr. Stuart Turner, and our Franklin County NRAC. Dr. Anderson was fully involved in every facet of the testing and summation of results. He personally reviewed all of the nearly 45,000 base pair genetic comparisons made by the molecular testing equipment to ensure accuracy. The

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laboratory is nationally recognized for molecular work and, in fact, USFWS is currently using the same lab in testing other species.

In conducting research of the ESA bladderpod listing science references, we see a predisposed relationship involving four main participants. The USFWS requires ever-increasing budgets for increased staffing and burgeoning salaries and undoubtedly welcomed a plea-bargained settlement with The Center for Biological Diversity (CBD) to promulgate increased funding. The CBD achieves its goals of listing over 757 species and receives government grants for conducting science studies used to support the listings. This gives the CBD a powerful voice as the premiere environmental advocacy organization driving national ESA edicts. The other supporting scientists referenced all receive Federal funding for their studies and repeat work is always ensured with consensus to every ESA listing. Finally, the “independent” peer review panels likewise garner repeat business for consensus.

Our Franklin County NRAC found two scientists, E. A. Shaw and Reed C. Rollins, that have been cited for numerous ESA listings of bladderpods since the 1973 signing of the ESA into law by President Nixon. A 40-year career to date in naming species and subspecies. It appears that scientists, environmental organizations, and peer review panels all have economic incentives for ESA listings and have strayed from fact-driven science to become biodiversity conservation advocates. Selection for these advocates occurs for each science contributor and for Federal agency employees. This bias has become the gold standard driving ESA expansion. Pre-determined bias has supplanted factual sciences in the 40 year evolution of the Endangered Species Act.

Defects in the methodology and process used to reach the determination that the White Bluffs Bladderpod as a threatened species are evident. There is a problem with unpublished supporting data. The Federal government generally requires all documents used by or paid for by federal tax dollars to be published for public scrutiny. A key document, an unpublished manuscript by Florence E. Caplow, et al., entitled “Evidence for the Recognition of *Physaria tuplashensis* (Brassicaceae)” 2005, is the cornerstone upon which the finding was made in the USFWS Assessment Sheet in 2010. In the Federal Register on page 23987, a document of this name is also cited as the basis, but with a date of 2006. No publisher, or means to obtain it are listed. Searches on the USFWS websites for the

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document were not successful. It appears that the same document was used as before, but with a one year later date and no mention of it being unpublished manuscript status. All of this type of information should have been published and publicly available. Under the Data Quality Control Act, this type of documentation should not be used as it is not credible.

Secondly, there is an issue in lack of attention by peer reviewers. The USFWS states that four peer reviewers - all experts in their field - were engaged to review the proposed listing. The USFWS acknowledges that there appear to be no investigations in the literature of the Taxon using modern DNA techniques. Yet, no peer reviewer noted that modern, inexpensive techniques were available to fill that gap of knowledge. It seems that a broader background in peer reviewers as to updated technology would have increased the probability that the USFWS would have been informed that their science supporting the White Bluffs Bladderpod listing was lacking and to have received that critique in a timely fashion. Having the requirement that DNA testing be used as a precursor to all other supporting science studies would be more time sensitive and economically prudent to possibly deter all subsequent expenses. This fortifies the argument that this listing was a rush to judgment to expedite terms of the mega settlement and verifies referenced science critiques that more time was needed for research and in the case of one science report, this White Bluffs Bladderpod was an ecotype, not a subspecies.

There is diverse interpretation of the ESA's Section 4 requirement for the use of best available science. It's interpretation by the public, scientists, and agency employees indicate very divergent viewpoints. The book "Best Available Science, Fundamental Metrics for Evaluation of Scientific Claims" by A. Alan Moghissi, et al. should be used as the definitive standard for ensuring the integrity of the ESA listings process.

In regard to the White Bluffs Bladderpod, the process for proposing an ESA listing requires a Small Business Administration analysis where USFWS is able to self-certify to avoid compliance with the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 et seq.). This allowance is instead, self serving. All USFWS had to do for determining economic impact on a substantial number of small entities is to conduct a purposely undervalued Draft Economic Analysis and thereby avoid the Regulatory Flexibility Analysis and its' mandated public comment period. Land values were averaged by using income figures for hundreds of thousands of acres within the

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Columbia Basin Irrigation Project and the year 2007 was “cherry-picked” as the year for economic analysis. Commodity values for farmland and a commensurate increase in land values have both increased dramatically in the years subsequent to 2007. In understating economic impact and contending there were only very small entities involved, the agency Director erroneously ascertained no RFA was required. This kept the listing process quiet, as the comment period was deemed not necessary.

The results of the DNA testing was based upon the testing of 7 fresh plant samples, including the alleged subspecies *tuplashensis* that were taken from the northern end, middle, and southern end of the 10.6 mile range of the White Bluffs Bladderpod population corridor established by the USFWS. A sample of the common *Physaria douglasii* was collected in Grant County. In addition, the Stillinger Herbarium at the University of Idaho provided 8 preserved samples from 4 additional counties in Washington state, and one sample each from Idaho and Oregon.

Thus, 15 plant samples were analyzed for DNA sequencing. Segments of DNA (loci) were taken from areas pre-determined to always show species differentiation. Thus, one loci from the nucleus and 3 loci from chloroplasts from each plant sample were amplified and compared for nearly 3,000 base pairs of adenine, guanine, cytosine, and thymine (nucleotides) from each plant. If a subspecies does exist, one would expect variations in 4 - 10 genes. The results clearly showed there was a 100% match to all plants and no gene variations whatsoever within the loci that would differentiate species. Therefore, the White Bluffs Bladderpod, *Physaria douglasii* ssp. *tuplashensis* is NOT a subspecies. It is merely the same plant as the more common *Physaria douglasii*. In addition, the DNA testing proved that there was “gene flow” between this proclaimed isolated population and other distant populations of bladderpods. That means there has been ongoing genetic transfers in order to have maintained the 100% genetic uniformity of the tested loci. The ESA listing was based upon unreliable and subjective morphological differences without proper accounting for the diverse soil habitats that lead to phenotypical variations.

As evidence of soil type influence on phenotypic expression (phenotype being a set of observable characteristics of a plant from the interaction of its genotype with the environment), we happened to have a farmer whose interest in natural plants found in our native shrub-steppe habitats led he and his wife to plant a “natural” plant garden in their sandy loam soils

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behind their house. Two years ago, one of the plants they transplanted happened to be a White Bluffs Bladderpod (from private land). This natural plant garden receives no irrigation and plants only receive an initial watering following transplanting to prevent shock and to re-establish the root system. The transplanted "*tuplashensis*" bladderpod exhibits completely different morphology now that it is growing in a more neutral pH soil. It bloomed in 2012 and this spring, because of substantial rain (we are in a desert climate with typically less than 7 inches of precipitation per annum), there are over 100 new seedling growing. There are now 6 blooming mature plants bearing seed pods. Based upon the criteria used by scientists supporting the listing of the White Bluffs Bladderpod, this more robust transplant shows much varied phenotypic expression from when it grew in alkaline, highly calcareous paleosol soils (ancient buried soils now exposed at ridge caps due erosion) along the White Bluffs. Thus, it would be considered a different species than its contemporaries left growing along the White Bluffs. DNA testing proved this transplant was identical to all the other plant samples.

The DNA results clearly illustrate that DNA testing is far more economical and definitive than the 17 years of studies and research that have occurred to promote this erroneous ESA listing effort. DNA sequencing should be the precursor to any ESA listing. However, a process that ensures transparency and integrity of molecular laboratory DNA testing is critical to prevent yet another participant in the machination that has become the ESA. It is interesting to note that the USFWS has a proposed budget at \$602,000 for its first-year management budget should the White Bluffs Bladderpod be listed in defiance of DNA test results.

Some of the questionable expenses in the proposed first-year management budget are \$100,00 per annum for hand weeding. Yet this bladderpod only grows in soils where it has limited or no competition. Furthermore, the USFWS management plan shows they want no attempts by firefighters through "foot traffic" to fight wildfires, in fear of damage to plants. But, hand weeding requires far more extensive "foot traffic". There is even \$50,000 for studying the effects of climate change on the White Bluffs Bladderpod! This for a plant that has endured the toughest of environments since the Ringold soils that comprise the White Bluffs were deposited by the repeated massive floods of Lake Missoula in Montana. Any efforts and hundreds of thousands of dollars spent prior or budgeted for future management could have been saved but for the lack of intent to utilize the

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best available science for a mere \$20,000. Our DNA testing was deemed to be the world's FIRST for any bladderpod species.

The DNA test results are included as a 10-page attachment. Our Franklin County NRAC and Board of Commissioners entered the DNA results into record on the last day of the public comment period this past July 22, 2013. Copies were delivered to the USFWS by electronic mail to the Washington office at Lacey, Washington and hand delivered to the USFWS Manager at the Mid-Columbia River National Wildlife Refuge at Burbank, WA. The agency is required to consider this evidence prior to rendering its' decision to list or cease listing efforts. It remains to be seen if Secretary of Interior Sally Jewel's testimony before this Committee on Natural Resources that utilizing best available science is the prevailing consideration trumping the rush for USFWS to comply with the time limitations of the mega settlement.

Certainly, this case of attempts to list the White Bluffs Bladderpods shows best available science has been avoided in favor of using consensus biodiversity conservation science to expedite compliance with the mega settlement. It also points out the shortcomings purposely practiced to avoid notification to those impacted by ESA listings.

Our Franklin County NRAC stands ready to collaborate with the USFWS in expanded testing of bladderpods to determine the full geographic distribution of the common *Physaria douglasii*. Based upon our results being the first DNA sequencing ever conducted for bladderpods, there are over 100 bladderpod species named nationwide that want for best available science. There are currently 3 additional bladderpod listings pending before the USFWS: the Short's Bladderpod, the San Bernardino Mountains Bladderpod, and the Zapata (Zapata County, Texas) Bladderpod.

The DNA results should serve as a watershed moment illustrating the need for DNA testing as a precursor for ALL plant and animal species nationwide that are proposed for listings and also, to be used retroactively for all species currently listed under ESA protection. The ruse of the ESA process as it currently operates is ripe for reform. Our economy cannot withstand this economic plunder, property losses, and other ESA transgressions any longer.

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Thank you for the opportunity to provide written comments and testimony before the House Committee on Natural Resources. We hope our Commissioners, NRAC, farmers, landowners, and agricultural businesses and organizations collective efforts in funding this DNA testing has served as a poignant illustration for many needed ESA reforms.

Sincerely,

Kent D. McMullen
Chairman,
Franklin County NRAC