Committee on Resources

Witness Testimony

Testimony of
RUSSELL J. GALLIAN
Washington County Commissioner (UTAH)
Regarding Federal Endangered Species Act
Before the Committee on Resources
March 20, 1996

On behalf of the citizens of Washington County, we appreciate the opportunity to provide our point of view with respect to the actual problems encountered with the Federal Endangered Species Act from the firing lines of local reality. It would be our understanding that the major reason that we have been asked to testify before the Resources Committee is because of our extensive experience with the Endangered Species Act and, in particular, with Habitat Conservation Plans ("HCPs"). Washington County Utah has become an environmental focus area because of its high Federal ownership (about 80%), and its beautiful red rock backdrops in Zions National Park. Washington County currently has ten listed species, including four fish and the Desert Tortoise. There are also approximately fifty species on the candidate list, some of which are likely, under the current rules, to be listed in the near future. Accordingly, Washington County has had the unfortunate experience of being one of the most heavily impacted Counties in the United States. We have undertaken two major environmental efforts. First, in February 1996, Washington County received a permit under 10 of the Act to establish a Habitat Conservation Plan allowing the take of Desert Tortoise in our area in exchange for substantial mitigation, primarily in the form of establishing an approximate 60,000 acre preserve. A complete copy of our Plan, as well as the related Environmental Impact Statement is already in the hands of the Committee. We adopt that plan as part of our testimony. Our Habitat Conservation Plan represents over five years of gut-wrenching effort, including the expenditure of over 1 million dollars to get the Plan approved. Approximately 9 million dollars will be expended by Washington County in cooperation with other local municipal authorities over a 20 year period to try to make this plan work. The Federal Government will be putting up over 200 million dollars worth of its property to provide for exchanges of private, and Utah State School Trust Lands to establish the preserve. These land exchanges are the major mitigation feature. Secondly, Washington County, through its Washington County Water Conservancy District is working on establishing the Virgin River Management Plan in cooperation with applicable Federal and State Agencies, including the Fish and Wildlife Service. This Plan is in effect a Habitat Conservation Plan which deals with fish and river related species. In addition, the Conservancy District has entered into a Conservation Agreement which fortunately resulted in stopping the listing of the Virgin River Spinedace. Thus, Washington County has had as much experience with the Endangered Species Act as perhaps any other county in the United States.

THE VALUE OF HABITAT CONSERVATION PLANS

Having recently received a permit for perhaps the most complicated Habitat Conservation Plans ever approved, Washington County is in agreement with the premise that habitat conservation plans represent the reasonable way to deal with the recovery of species and protecting biological diversity. It is in the best interests of the people of the United States, including states, local governments, federal government and private land owners to try to work in partnership to preserve biodiversity and recover saveable species. Having made that statement, let us emphasize that the current Endangered Species Act, as regulated and implemented by the Fish and Wildlife Service, makes it difficult, if not impossible, to achieve that lofty goal. Conservation of endangered species or, indeed, providing for the healthy survival of natural wildlife, is best accomplished in an atmosphere that promotes a healthy economy founded on the principles of respect for voluntary involvement of local communities. Perhaps the biggest problem that we have seen with the actual regulation of the Endangered Species Act by the Fish and Wildlife Service is their draconian use of the Act to take people's private property without compensation and, in some cases, to insist upon totally unreasonable mitigation that keeps an owner from being able to use all, or part, of their property. It is unnecessary and counter-productive for the Federal Government to destroy local economies, or any individual economically, in their quest to protect species. Indeed, it is our experience that the Endangered Species Act is being used by the Fish and Wildlife

Service and environmental groups not necessarily for the preservation or enhancement of any particular species, but as a tool for second agenda purposes. These include stopping healthy growth, stopping reasonable development of natural resources, and making it more difficult for us to develop necessary water, particularly in the desert environment that we must contend with. We request that you restore some balance to the Act which, in its conception, was a good idea, but in its actual implementation, has become a nightmare for hundreds of communities around the United States. This nightmare will only worsen as the extreme environmental community continues to use this misinterpreted Act to further their second agenda purposes of stopping development. We endeavor to make suggestions to the Committee to improve current Endangered Species Act legislation. We make these suggestions not just to obtain relief for our people, but to insure that the Act will fulfil its purpose of assisting threatened and endangered species in surviving. The reality that we see is that once these species are listed, the practical results of the listing are often counter-productive to the survival of the species. In short, there is a better way to preserve biodiversity and give reasonable and workable partnership solutions with state and local government and the affected private property owners. To this end we make the following suggestions supported by examples of our actual experience. We also wish to boldly state that the regulations promulgated by the Fish and Wildlife Service under the Act, are probably more of the problem than the Act itself. And, finally, the arrogant and draconian manner in which the officials of the Fish and Wildlife Service interpret and carry out the Act is the biggest problem of all. This, by itself, practically killed our HCP and continues to harbor distrust and promote inefficiency in implementing the HCP.

SUGGESTIONS FOR IMPROVEMENT OF THE ENDANGERED SPECIES ACT

1. Clarify and Protect Private Property Rights Private property rights must be clarified and protected. In our case the Fish and Wildlife Service have approved an HCP that requires the procurement of 13,000 acres of State School Trust Lands and 7,000 acres of private lands. By reviewing the maps of our area, it is easy to see that much of this property stands immediately adjacent to other developed property and, in many cases, significant portions of this acreage were already mastered planned for golf courses, communities, thousands of homes, with all the rights-of-ways and water and utilities secured. The Federal Government has taken the position that the private property to be acquired must be devalued, because of listing the Desert Tortoise! Essentially the Federal Government is saying: We want you to voluntarily exchange or sell your property to create a preserve while we devalue your property in the process. It is our view that the Constitution of the United States clearly supports compensation for this. Unfortunately, the Courts have not always seen it this way and legislation is necessary to correct this. Biodiversity can only be preserved by creating habitat areas for the specie that are managed for their benefit. It is rather obvious that if the Federal Government desires to establish a preserve that it cannot do so without compensating owners. If the Federal Government is allowed to continue to list animals and place critical habitat designations on private property without compensation, those private property owners will simply not cooperate, and the Plan cannot be accomplished. We are still facing this situation inasmuch as we have not completed any significant purchase or trades in our HCP. Indeed, our HCP will ultimately fail if we are unable to complete the trades. Our people will not stand for receiving less than a fair price for their property. Accordingly, if the Federal Government truly desires to have Habitat Conservation Plans work, it cannot expect them to work unless it is willing to pay the price of obtaining the property necessary for successful plans.

2. Eliminate the Requirement for NEPA Compliance in Establishing HCPs. It is our feeling that NEPA should be eliminated entirely because it has had the effect of creating virtual gridlock in all Federal land management decisions. In our case, NEPA compliance added almost a year to our process and about $100,000.00 in costs. In the case of our HCP, we did not have a significant opposition from the environmental community. This is why we were able to get it done as "fast" as we did. Had there been the usual appeals and litigation from the environmental community, we would not have the HCP done to this day, which would have killed it. Inasmuch as the HCP process is largely a voluntary process, particularly when you consider the involvement of local and state government, Congress should make it easier to establish HCPs not harder. The paperwork involved in NEPA compliance, and the potential for extensive extended litigation is unreasonable, unnecessary, and cost prohibitive. There were many times during our process when we threw up our hands and almost quit. NEPA compliance causes that kind of reaction. I can truly tell you that the NEPA compliance process is the hammer that the environmental community uses to try and get its way and to raise funds for its causes.

3. Require That the Decision Making Process of the Fish and Wildlife Service be Based on Objective Scientific

Data and Logical Reasoning. A process must be in place where the so-called scientific reasoning can be challenged. Peer review is fundamentally essential. Our actual experience with the Desert Tortoise and our HCP is that the best scientific information available (according to the Fish and Wildlife Service) is basically whatever Fish and Wildlife says. A good example is the Critical Habitat Designation that was placed in our area. A junior-level biologist for the Fish and Wildlife Service set the parameters for the critical habitat in our area with inadequate science. She essentially took the areas of the preserve that the Fish and Wildlife Service wanted, painted a fairly significant boundary around them and called that critical habitat, notwithstanding our pointing out to them with copious information that massive areas of the critical habitat designation had no known tortoises in it! Areas that we had set aside in the plan for the purpose of providing for other species, or for providing for new areas for translocation of the Desert Tortoise were included as critical habitat. Not only did the Fish and Wildlife Service not have the scientific basis for doing that, they affirmatively knew that there was no tortoises in literally thousands of acres that they called critical to the survival of the specie. This is only one example. During the course of preparing our HCP, the Fish and Wildlife Service changed its position on significant issues we thought we had mutually agreed to. The Fish and Wildlife Service is a rogue agency that operates completely independent of supervision. This leads to the situation we have now of power abuse. Our view is not unique. Other Federal land managers and, in particular, the BLM, frequently disagreed with Fish and Wildlife Service positions. What we have found is that sayings and doings of the Fish and Wildlife Service are largely based upon speculation or, in some cases, are a pure fabrication. We will have more examples of this in the following points.

4. The HCP Should take Priority Over 7 Consultation Privileges of the Fish and Wildlife Service (in other words, "a deal is a deal." [Bruce Babbitt] The Fish and Wildlife Service takes the position that they can make decisions completely the opposite of what had been agreed to in our Habitat Conservation Plan, under the theory that they have consultation privileges on Federal ground (i.e. BLM). For example, when we put through our HCP, we had agreed that a certain area, known as the Babylon area, which was added into the plan as a potential translocation site (it currently has no known tortoises on it) was permissible to allow historical grazing rights to be utilized. Accordingly, we did not provide for any money in our budget to buyout these unfortunate grazers. The Fish and Wildlife Service is now taking the position, that the BLM is required, in connection with the consultation process, to revoke these grazing permits in this area on the theory that it is interfering with the Desert Tortoise (even though the Desert Tortoise does not exist on this ground). This refers back to Bruce Babbitt's famous statements "a deal is a deal." What we find in real life is a deal is not a deal. We have a plan that has only been in effect for a period of weeks and we are already seeing that the Fish and Wildlife Service does whatever it pleases. We can assure you that this puts a dampening effect on anyone's desire to do an HCP. You can spend years of effort and hundreds of thousands of dollars only to find that the Fish and Wildlife Service is not bound to their own permit (or, at least, they so claim).

5. Introduce Human Needs and Economics Into the Equation of Evaluating Whether a Species is Listed and Whether any Particular Mitigation is Reasonable Under the Circumstances. In the case of Washington County, we have always questioned whether or not the Desert Tortoise should have been listed in the first place. It is a species that exists in a very vast area, by the hundreds of thousands of animals. It is in our view that where declines are being noted in a particular species (which is the reason that the Desert Tortoise was listed in 1989), that other things should be tried prior to locking up massive areas. In general, the Fish and Wildlife Service's view of mitigation is extremely unreasonable, has virtually no standard by which to measure it against and often results in extreme hardship. One would have to wonder whether or not our HCP would ever occur if subjected to the light of reasonable economics. Washington County (whose entire general fund budget is approximately seven to eight million dollars per year) will be spending 9 million dollars over the next twenty years on the Desert Tortoise. This is in furtherance of a take permit of approximately 1,600 animals (which we personally believe will never occur), in an effort to assist in a population estimated at a little over 8,000 animals. Perhaps the most stunning numbers, however, is the fact that the Federal Government, if it completes its part of the deal, will be trading (or spending) probably over 200 million dollars worth of its own property in order to complete fair market value trades. The property that will be used to accomplish this will be property that has been identified as appropriate for disposal by the Federal Government (in other words, property that you can sell and use the money for other purposes). In exchange, it will receiving property that will be designated as critical habitat and has no traditional economic value. It will, of course, have tremendous habitat and biodiversity value,

but the real economic cost of our program cannot be ignored.

6. Fish and Wildlife Service Should be Compelled During the Process to Provide Meaningful Consultation and Advice that Communities Can Rely on. One of the reasons that our Plan cost so much and took so long is because we could not obtain the reliable feedback from the Fish and Wildlife Service during the process. Indeed, when we got what we thought was feedback, we found later that the answers were so completely different than anything that we had ever discussed, we wondered if we had showed up to the same meetings as the Fish and Wildlife Service had. After we had submitted our first Plan in December of 1992, involving some 44,000 acres of property, the following April we were stunned to receive a reply which would require us to set up the preserve for almost 80,000 acres of property. This included massive areas that we had never even discussed before. Another example is the Fish and Wildlife Service at one point, required that we euthanize any taken animals, a position that we never felt particularly comfortable with especially considering the nature of the Desert Tortoise. We did not understand why so-called "taken" animals would not be given a chance for survival, particularly considering the massive areas of our preserve. Nevertheless, we were required to do that by the Fish and Wildlife Service. Sometime later we found out that they had taken some heat from animal rights advocates and completely changed their position and said that we would only euthanize diseased animals.

7. Listing of Animals Should Only Occur Where Absolutely Necessary and After a Recovery Plan has been Peer Reviewed. The effects of a listing on a specie can be devastating, not only to mankind, but to the specie itself. It would be far preferable to work in partnership with state wildlife agencies, local governments and interested private individuals with assistance and adequate funding from the Federal Government to figure out ways to conserve the species prior to having them listed. We also believe that where reasonably possible, that conservation agreements should be multi-species in nature because these animals are often interdependent, share the same habitat or other living sources (such as streams and rivers), and positive management for one specie is often a positive help for another specie (with respect to fish, for example). However, a plan which involves bigger areas and multiple species may be more difficult and expensive to do. Accordingly, the Federal Government should offer incentives in connection with approving such types of agreements, including but not limited to, financial incentives and incentives to stop species from being listed, and incentives to private property owners to cooperate, including the possibility for tax credits and estate and gift tax relief.

8. Captive Propagation of a Species Should be Legislatively Encouraged. A number of times during the preparation of our HCP, the possibility for reproducing and releasing tortoises was discussed and every time the issue was brought up it was brushed aside by the biological community and the Fish and Wildlife Service. We frankly believe that the reason they have taken this attitude is because they a realize that it will work and if it works it will lead to the quicker delisting of species and the loss of their power. A good example of this is the Sea Turtle in the Caribbean. On the Cayman Islands there exists a very successful project which has virtually brought the Sea Turtle back from the brink of extinction. The Sea Turtle was down to 200 to 300 known animals a number of years ago when the project was started to try to assist the species in raising its young to a point where it could better survive in the wild. It is a creative program that involved not only propagating the species, but utilizing the products of the animals in an actual turtle ranching operation to help pay for it. This kind of project could probably never occur under the Endangered Species Act. The Desert Tortoise, for example, is a species that would be very susceptible to this kind of effort. Scientific information that we have acquired indicates that a very high percentage of young desert tortoises do not survive in the wild primarily due to predation. Through careful and scientific management, the number of young that could survive to young adulthood and then be turned out could be greatly enhanced. In fact, the Bureau of Land Management, prior to the listing of the Desert Tortoise, did just that. They grew Desert Tortoises in our area and put them out in areas that included private property. These areas are now considered critical habitat. We have reason and logic on our side that many species could benefit from this kind of approach and we see no reason why the Desert Tortoise could not. Notwithstanding this issue being brought up many times during our HCP process, it was consistently rejected by the Fish and Wildlife Service for the reasons that I have stated above. If we were able to save these species through this method, they would not have the ability to list the species. If they do not have the ability to list a species, they loose their power. The great power of the Endangered Species Act, as is currently being used, is being able to deny people the right to use their property, or to be able to restrict the Federal Governments land managers (BLM, Forest Service, etc.) and their use of the property for legitimate multiple use.

9. Legislation Needs to Strengthen and Make Binding Deadlines Established for the Completion of Consultation. The Fish and Wildlife Service, even if it has a statutory imposed deadline to observe, ignores these and boldly tells you that if you push them on the deadline, they will simply give you an adverse biological opinion. Legislation should be enacted requiring that the agency meet their deadlines or cause that the action would deemed to be in compliance.

10. In Connection with Attempting to Recover Species, the Law Needs to Provide for Truly Risk-Free Introductions Into New Areas. One of the biggest fears that local government and private property owners have with experimental programs, or reintroductions of species or expansions of areas of habitat, is the general view that once the animals are on your property, they own your property. In reality, the actions of the Fish and Wildlife Service tend to support this sadly amusing view as reality. A good example of this is the current attempts to reintroduce the California Condor in our area. Based upon maps that have been produced by the Fish and Wildlife Service, they expect the range of the reintroduced Condors to go into Southern Utah on a boundary dotted by Interstate 15 (why this boundary has been set, makes no logical sense to us, but, nevertheless, that is the reality). The Fish and Wildlife Service does not clarify in their rules what the affect will be, or the protection accorded to these animals that are theoretically scientific and experimental. Virtually no one would have the problem of the reintroduction of these species if the introduction was truly without risk to private property owners, or for example, public works projects. The problem is that the Fish and Wildlife Service tells the public that there will be no problem, that they are experimental, non-essential, and then they turn right around and say that they have the same protective status as a threatened animal. Anyone who is familiar with the Act is aware that the protection accorded to a threatened animal is virtually the same as an endangered animal. If the Fish and Wildlife Service wishes to expand habitat into a new area, or wishes to introduce into a new area for experimental reasons, it should be clear that there will be no long or short term adverse economic effects from this. This would remove most of the objections that there would otherwise be to such projects.

11. Congress Needs to Legislatively Limit the Greatly Expanded Standard for What Constitutes "take" of Animals and Habitat as Currently Administered Under the Regulations of the Fish and Wildlife Service. This issue needs to be addressed because the Supreme Court supported the position of the Fish and Wildlife Service in the famous Sweet Home case. Essentially, the Fish and Wildlife Service expands its control over areas that it deems to be habitat when, in fact, the relationship to the habitat is minimal or nonexistent. The most famous example of this, of course, if the Spotted Owl. Our experience is similar. When our critical habitat designation was put on, as indicated in the earlier testimony, there were massive areas for which the Fish and Wildlife Service had absolutely no evidence that the animals were present or anywhere near the property. Indeed, some of the areas that they included were above their known range (over 4,000 feet) and some areas were included where the animals could not physically go unless they were physically carried there by humans (for example, the Babylon area previously testified to). Fish and Wildlife Service likes to rely on the general theory of gene flow corridors between known habitat areas. In our experience, they use that theory to generalize for massive corridors in property for which they have no scientific evidence. Indeed, the evidence in our area better points to the fact that the animals in the developed portion of Washington County probably got there not because of natural migration, but because of being carried there as pets. Although it is impossible to prove that premise one way or another, it is clear that some of our local population of Desert Tortoises were transported here as pets and released from homes or merely dumped when they were not sold to the public. The Fish and Wildlife Service takes the attitude that it does not matter how an animal gets to any particular place, once it is there it is their habitat, and their home and they will be protected. The potential for environmental terrorism is obvious. We have already had incidents of that in our area. Some of our local citizens have been almost financially ruined by having animals "found" on their property, followed by an anonymous telephone call to the Fish and Wildlife Service.

12. Give Credit in Habitat Conservation Plans for Animals that are "taken", but Nevertheless Saved. Under the rules of the Fish and Wildlife Service, an animal is deemed "taken" under a take permit if you do nothing more than pick it up and move it. Under the terms of the permit, the undocumented idea behind this, as we understand it, is the contact with humans may somehow taint the animal for reintroduction into the wild. Accordingly, such animals are required to be put in an experimental situation somewhere else. We have no problem with segregating these populations until better knowledge is gained about this. However, all of these animals are

considered "taken," and therefore presumed legally dead, even though they are very much alive and transferred to another suitable habitat. In the case of the Desert Tortoise, since so many of them already were pets, it is very obvious that the animal has done just fine having had some human contact. Indeed, as we indicated above a good number of the tortoises in our area were grown by the BLM in the captive breeding program prior to the listing of the animal. These animals are significant parts of the existing populations today. A good deal of effort is going to be put forth in order to help save these animals, even though they are deemed taken and experimental in nature. Credit should be given for this in the overall view of the species preservation.

13. Critical Habitat Should Not be Designated on Private Property Without the Consent of the Private Property Owner or Without Payment of Compensation. The prior administration did not, generally speaking, designate critical habitat on private property. The current administration has taken it upon themselves to do just that. The designation of critical habitat on a piece of private property essentially sentences that property to economic oblivion. The Fish and Wildlife Service boldly argues that a critical habitat designation has no affect on private property unless there is a federal nexus. What they fail to tell the public in their public pronouncements however, is that under 9 of the Act, if you disturb their habitat, or harm or harass the animals in any way, (including habitat modifications), you are in violation of the Act and they will take action against you. This kind of double talk is part of the problem. The reality of this situation is if you are painted into critical habitat for any particular animal, the only way that you can do anything on your property is by doing a private HCP on your property and get relief under 10. You are then subjected to the standardless and unreasonable mitigation standards of the Fish and Wildlife Service which renders your property far less valuable than it was before. The Regional Solicitors for the Fish and Wildlife Service have indicated to us that they have no problem with this, that as long as any teeny portion of your property is otherwise useable, then they do not consider this to be a taking under the Constitution. Indeed, there is some logic to their argument based upon the court cases that have followed their theory. Accordingly, it is up to Congress to fix this vast inequity. Especially in the west, where there is so much public land, we see no reason to subject private property owners to these kinds of problems. Indeed, we view this as a Federal policy and if Federal policy is going to economically damage a piece of private property and, if it is otherwise necessary to do so because of the species, the Federal Government should compensate these people. It is perhaps this one point alone that cause much of the contention about the Act.

14. Provide for a Reasonable Cost-Sharing Formula and Actual Funding, or Provide for Corresponding Relief. The Endangered Species Act is a particularly cruel, unfunded mandate. We believe that local and state governments are willing to do their part, but Congress should recognize that this is indeed a Federal policy that carries with it a potentially huge unfunded cost. If the Federal Government is not willing to do their part because of budgetary restraints, then it should not also impose the restrictions that go along with the Act. There ought to be some kind of a process that if relief cannot reasonably be obtained, in an economic way, that the sanctions of the Act be lifted or relaxed. One of the biggest problems with the Endangered Species Act is its black and white, all or nothing approach to protection of species. There are many middle ground measures that would do a lot of good at a reasonable economic cost. Because of the black or white nature of the Act, very often times nothing gets done because the solutions desired by the Fish and Wildlife Service are simply too expensive. That is why we say that when a species is listed, it is probably doomed because, in most cases, little or nothing is done other than to provide physical protection for the animal and its habitat. While the physical protection of the animal in its habitat is in some cases valuable, in many other cases, there are numerous other reasons why this species is disappearing that the law can do nothing about. If you really want to recover these species, then creative ways need to be addressed to do affirmative action, otherwise, the species will be lost. Affirmative action may require creative solutions such as occurred with the Sea Turtle in the Grand Cayman Islands. These kinds of positive and creative efforts are simply difficult, if not impossible, under the current Act.

CONCLUSION

The Endangered Species Act needs to be set up so the management and preservation of species is truly a partnership between the federal, state and local governments, and interested private entities. The process that we must currently endure with HCPs is difficult and offensive because of the dictatorial powers of the Fish and Wildlife Service, their lack of being held to any particular scientific standard, and their failure to take into account reasonable human needs and economics in most cases. All of these elements need to be introduced into the working of the Act in order to make

it actually work. We certainly appreciate the opportunity to relate our views to Congress. We are on the battle lines. We represent the people who must actually struggle with these issues on a day-by-day basis. We are not removed from the action, we are in the action. It seems to us that this particular Act, as currently administered, has been a failure. Whatever successes that the Fish and Wildlife Service can point to in their so-called down listing decisions are relatively minor compared to the tragedy of the economic destruction that this Act has foisted upon the people of this Country. The idea behind the Endangered Species is a good one. The implementation of Habitat Conservation Plans on a reasonable basis should be a good way to protect and preserve all sorts of species, not just threatened and endangered species. We believe in the concept and we have put our money where our mouths are toward that end, but the process need not be as difficult has it has been. We should not have to view our Federal Government, and in particular, the Fish and Wildlife Service as our enemy, as we currently do. We should be able to view them as our partners instead of our task master. The fix for this problem is in the hands of Congress and we respectfully request your assistance in adopting the suggestions that you find have merit. We thank you for this opportunity and we stand ready to supplement our testimony with any additional information which you may require.

Russell J. Gallian
Washington County Commissioner
179 E. Tabernacle Street
St. George, UT 84770

###