

Statement of Douglas P. Wheeler, Partner
Hogan Lovells US LLP
On Behalf of Donald L. Smith

Testimony on H.R. 976, "To Terminate Certain Hydropower
Reservations, and For Other Purposes"

December 2, 2011

Mr. Chairman, and Members of the Subcommittee.

I am Douglas P. Wheeler, an attorney with Hogan Lovells, LLP in Washington. I appreciate the opportunity to appear this morning on behalf of my client, Donald L. Smith of Fresno, California, in support of H.R. 976.

Mr. Smith is a private citizen who owns two adjoining parcels of real property in Madera County, California totaling 144.58 acres which was lawfully acquired from the United States by patent in separate transactions. The first conveyance, of 103.26 acres, occurred in 1983, and the second, in 1987, consisted of 41.32 acres.

The problem addressed by H.R. 976 concerns a "flowage easement", a so-called Section 24 reservation, which was included by the United States in the first conveyance. The easement would permit inundation of Mr. Smith's land in the event of nearby hydropower development. The reservation was thought to be needed because in 1920 Southern California Edison had obtained withdrawal of federal lands, including the property now owned by Mr. Smith, for development of Power Project No. 105. Power Project No. 105 was never built, but Southern California Edison developed the Mammoth Pool Dam and Reservoir at a different downstream site in 1958-1960.

Eventually, in 1986, the Federal Energy Regulatory Commission (FERC) vacated all such non-essential power site withdrawals, including the land that had been withdrawn for Power Project No. 105. Thus ended the prospect that a flowage easement over Mr. Smith's land would ever be needed for hydropower purposes. In fact, when the Bureau of Land Management conveyed a second parcel to Mr. Smith in 1987, it did not include a flowage easement for the obvious reason that inundation was no longer a possibility. Nonetheless, the flowage easement on the first parcel has remained in place, a cloud on Mr. Smith's title, despite a quarter-century effort to have it removed as a useless encumbrance.

Although every interested party, including Southern California Edison, FERC, the U.S. Forest Service and the Bureau of Land Management itself, has disclaimed any further interest in retention of the flowage easement, the Bureau is apparently powerless to vacate the reservation of this easement through administrative action. A Department of the Interior Solicitor's Opinion (November 20, 2006) states that

"the Secretary of the Interior lacks the authority to accommodate Mr. Wheeler's request and [that] the passage of legislation is needed to remove from Mr. Smith's Madera County property the right of entry, occupancy and use, now reserved to the United States".

While he regrets that it is apparently necessary to involve the Congress, Mr. Smith is grateful to Rep. Denham and Senator Feinstein for their sponsorship of legislation to finally resolve this riddle, and to remove the cloud on his title. With the easement in place, he would leave to his heirs an imperfect legacy, probably susceptible of no economic use. Similarly, it is highly unlikely that a buyer could obtain financing, so long as clear title is threatened by these no longer appurtenant claims of the United States. Because it is surrounded by the Sierra National Forest at a high elevation, and

isolated from population centers, the Smith land is most likely useful only for recreational purposes, with very limited development potential. Even these prospects are dimmed, however, by the existence of a flowage easement.

Members will note that two separate subsections of H.R. 976 both purport to terminate the hydropower reservations, even though only the first parcel (Patent Numbered CA 6313) is actually burdened by an easement. BLM contends that subsection (b) is necessary because of its belief that an easement *should* have been included in Patent Numbered 19394, and that its termination is therefore necessary.

Thank you for your consideration of my testimony. I'd be pleased to answer your questions.