Committee on Resources

Witness Testimony

Statement of
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Introduction

As this Committee has discovered, there is great distress throughout the country regarding the proposal of President Clinton to implement his American Heritage Rivers Initiative. There is good reason for such concern. For the legacy of these types of well-intentioned, pleasant-sounding, feel-good programs is of broken promises. The American people are told that such programs are for their benefit, to assist them in fulfilling their environmental and economic objectives while being assured that their rights will be protected and their liberties secure.

We are told, for example, that there is a self-defense provision in the Endangered Species Act, yet in the only instance of a man compelled to make use of that provision--Mountain States Legal Foundation's (MSLF's) client John Shuler of Dupuyer, Montana--the provision has been rendered a nullity by federal officials. Mr. Shuler, who killed a grizzly bear after being attacked late one night, is told that he is at fault for going into the "zone of imminent danger;" that is, his own yard.

We are told, on the adoption of wilderness legislation, that "valid existing rights" will be protected, that no private land will be taken into the wilderness area without the consent of the owner, that only federal land will become wilderness, and that no buffer zones will be created. Yet in the Upper Peninsula of Michigan, MSLF's client Kathy Stupak-Thrall has been compelled to fight, for nearly a decade, government lawyers who assert that those provisions have no meaning, or at least no applicability to her private property and her valid existing rights. (These are the lawyers who have the audacity to assert that when Congress adopted the "valid existing rights" language it had no idea what that phrase meant and therefore the federal government can interpret it in any manner it wishes.)

We are told that the prohibition against motorized vehicles in wilderness areas will be interpreted in a common sense fashion, that it is not a strict liability provision and thus requires what almost every federal law requires, mens rea, or criminal intent. Yet when a man, in the midst of a dangerous, howling blizzard, accidentally, or out of necessity, or out of emergency, finds himself in such a wilderness area on a motorized vehicle, he is told he is guilty regardless of his intent or the need or the emergency. Common

sense and more importantly, the law, takes a back seat to a radical agenda.

To whom do such victims turn when the provisions ostensibly adopted for their protection are ignored, or worse yet, violated? Certainly not to Congress, where the essential compromises that permitted federal legislation to go forward are too quickly forgotten and the victims are told that intervention by Congress should not take place since "the matter is in litigation." No wonder the American people are concerned with President Clinton's rivers initiative.

One Reason for Concern: The National Natural Landmarks Program

One reason for the public's concern is what took place regarding the National Natural Landmarks program, which first came to the public's attention in a seven-part series of articles written by the late Warren Brookes that began on January 17, 1991, and ran through January 29, 1991, in **The Washington Times**.

Under the National Natural Landmarks program, the National Park Service (NPS) designated property as a National Natural Landmark. Ostensibly this program was established under the authority of the Historic Sites Act of 1935, 16 U.S.C. 461, et seq. However, the Historic Sites Act speaks only of a "prehistoric or historic district, site, building, structure, or object . . . ." 16 U.S.C. 470w. The word "natural" is nowhere to be found in the Historic Sites Act. Nonetheless, citing the Historic Sites Act, federal regulations defined a National Natural Landmark as any area "within the boundaries of the United States . . . that contains an outstanding representative examples(s) of the nation's natural heritage, including terrestrial communities, aquatic communities, landforms, geological features, habitats of native plant and animal species, or fossil evidence of the development of life on earth." 36 C.F.R. Ch. 1 (July 1, 1992 Edition) 62.2.

While the NPS insists that such a designation carries no special meaning, the National Natural Landmark designation exposes the land to local land-use restrictions, and to local, state, and federal bureaucrats. The NPS, for example, used the designation to target future land acquisitions. More than 587 such landmarks were designated throughout the country. In the process it seems National Park Service employees have violated the law by surveying private property without the permission of the landowner. A 1992 investigation revealed that "land may have been evaluated, nominated, and designated without the landowners' knowledge or consent." According to one NPS document, "The question of secrecy and publicity is a hot topic which will undoubtedly come back to haunt us over the years if this document becomes generally available to the public."

While this particular program has been applied throughout the nation, Western landowners were singled out for abuse, intrusions, and attempts to seize their property. In 1989, a landowner in Idaho discovered that the National Park Service, without his knowledge or permission, had proposed that his property be designated as a National Natural Landmark. As a result of that proposal, to which the landowner objected strenuously, federal officials refused to issue permits or to take actions requested by the landowner. To make matters worse, it appears the proposed designation took place at the request of a private citizen who then used the National Park Service's listing of the property as grounds for attempting to prevent the issuance of various permits and other authorizations to the landowner. No wonder the American people are concerned.

The Initiative Violates Federal Law and the Constitution

A.Only Congress May Make Rules and Regulations Respecting Federal Lands and Resources.

The U.S. Constitution grants specific powers to each of the three branches of Government. Under the

Property Clause, the United States Congress is given exclusive and unlimited power over public lands and resources retained by the United States and not passed to the states or individuals.

The Congress shall have Power to dispose of and make **all** needful Rules and Regulations respecting the Territory or other Property belonging to the United States;

U.S. Constitution, Article IV, 3, Cl. 2. (Emphasis added). Title to lands under navigable waters were passed to the states, unless there was a federal reservation, Pollard v. Hagan, 44 U.S. 212, 230 (1845). Lands under non-navigable waters were retained by the United States. State of North Dakota v. United States, 972 F.2d 235, 236 (1992).

The Property Clause establishes "full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them." Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917). See also McKelvey v. United States, 260 U.S. 353, 359 (1922) (stating that under the Property Clause, Congress "may sanction some uses [of the federal lands] and prohibit others, and may forbid interference with such as are sanctioned."). Congress may also use this power to achieve objectives not within the scope of enumerated federal concerns. In Light v. United States, 220 U.S. 523 (1911), the Court held that the United States possessed plenary power to control the use of public lands and could exercise that power for any "national and public purpose." Id. at 536.

Congress may also legislate against activity taking place off federal property when such legislation is necessary to effectuate the Government's power to regulate the use and occupancy of federal lands and to protect these lands from damage. The authority for such legislation is found in the Necessary and Proper Clause. U.S. Constitution, Art. I, 8. It empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution" the powers enumerated elsewhere in the Constitution. In order to justify federal action under this Clause, the government must show the existence of a means-to-end relationship between the action and the exercise of one of its enumerated powers. McCulloch v. Maryland, 17 U.S. 316, 421 (1819), contains the classic statement of this rule:

Let the end be legitimate, let it be within the scope

of the Constitution, and all means which are

appropriate, which are plainly adapted to that end . . .

are constitutional.

This grant of authority over federal lands does not extend to the Executive branch. The Presidents' legislative authority is limited to "recommending to [Congress'] Consideration such Measures as he shall judge necessary and expedient." U.S. Constitution, Article II, 3, Cl. 1. The President is also empowered to "take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States." Id. at Cl. 4. The President may not act as a lawmaker in the absence of a delegation of authority or mandate from Congress. Independent Meat Packers Asso. v. Butz, 526 F.2d 228, 235 (8th Cir. 1975), cert. den., 424 U.S. 966.

Specifically, the President cannot develop and enact the American Heritage Rivers initiative without Congressional authority or mandate. The American Heritage River initiative will impact federal lands under non-navigable rivers, federal lands under navigable rivers that were reserved to the United States, and all

federal lands adjacent to all selected rivers. Since the Property Clause grants Congress exclusive control over federal lands, the American Heritage River initiative exceeds the President's Constitutional powers and deprives Congress of its Constitutional responsibility of open debate and vote on issues and legislation involving federal public lands. The President cannot act on this program until he receives such authority or such a mandate.

B.Only Congress May Regulate Interstate Commerce.

The power of the United States over waters that can be used as interstate highways arises from the Commerce Clause of the Constitution.

The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Constitution, Article 1, 8, Cl. 3. This power includes the power to regulate navigation so that waterways can be utilized for the interests of the commerce of the whole country. United States v. Appalachian Electric Power Co., 311 U.S. 377, (1940). See also Gilman v. City of Philadelphia, 70 U.S. 713, 724-725 (1866). Congress' power over interstate navigation not only includes keeping the waterways clear of obstructions, but also includes the power to improve and enlarge their navigability. United States v. Chandler-Dunbar Co., 229 U.S. 53, 59 (1913).

This grant of authority over United States waters does not extend to the Executive branch. The Presidents' legislative authority is limited to "recommending to [Congress'] Consideration such Measures as he shall judge necessary and expedient." U.S. Constitution, Article II, 3, Cl. 1. The President is also empowered to "take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States." Id. at Cl. 4. The President may not act as a lawmaker in the absence of a delegation of authority or mandate from Congress. Independent Meat Packers Asso. v. Butz, 526 F.2d 228, 235 (8th Cir. 1975), cert. den. 424 U.S. 966.

Specifically, the President cannot develop and enact the American Heritage Rivers initiative without Congressional authority or mandate. The American Heritage River initiative will impact navigable and non-navigable rivers, thus impacting interstate commerce. Since the Commerce Clause grants Congress exclusive control over interstate commerce and United States waters, the American Heritage River initiative exceeds the President's Constitutional powers and deprives Congress of its Constitutional responsibility of open debate and vote on issues and legislation involving interstate commerce and United States waters. The President cannot act on this program until he receives such authority or such a mandate.

C.President Clinton's Initiative Usurps Inherent State Powers Reserved Under the Tenth Amendment.

The Constitution of the United States created a federal Government of enumerated powers. James Madison wrote:

[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.

U.S. v. Lopez, 115 S.Ct. 1624, 1626 (1995) (citing The Federalist, No. 45, pp. 292-293).

Under the federal system, federal and state governments coexist. The federal government is one of limited,

enumerated powers, while state governments have inherent undefined powers. The Tenth Amendment states:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Constitution, Amendment 10. Enumerated federal powers were included to protect the fundamental liberties of the people, and the adoption of the Bill of Rights strengthened the protection of fundamental rights by placing restrictions upon federal governmental actions. The Supremacy Clause modifies this coexistence by nullifying state laws that conflict with the Constitution, treaties, or other laws of the United States. This Clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution, Article 6, 2.

When Congress exercises one of its enumerated powers and intends to occupy an entire field of law, such as commerce, or the President exercises one of his enumerated powers, the federal government has plenary power and the states have residual power in that specific field. The control and regulation of fields of law such as land-use and zoning, property, and water have traditionally been left within the province of the individual states, in that they are not part of the enumerated powers designated in the Constitution.

President Clinton cannot develop and enact the American Heritage Rivers initiative without Congressional authority or mandate. The American Heritage River initiative infringes upon powers reserved to the states. Thus, the American Heritage River initiative exceeds the President's enumerated powers and violates the Tenth Amendment.

D.The President's Initiative Violates NEPA and FLPMA.

1.National Environmental Policy Act.

In creating the National Environmental Policy Act of 1969 (NEPA), Congress declared:

[I]t is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

42 U.S.C. 4331(a). This national environmental policy also sets forth the proposition that the federal government would:

(3) attain the widest range of beneficial uses of the environment . . . . (4) preserve . . . . wherever possible, an environment which supports diversity and variety of individual choice; (5) achieve a balance between population and resource use which will permit high standards of living . . . .

42 U.S.C. 4331(b). In an effort to implement NEPA, Congress created the threshold requirement imposing a

duty on federal agencies to prepare an environmental impact statement (EIS) for major federal actions.

[A]ll agencies of the Federal Government shall---

(C) **include in every recommendation or report on** proposals for legislation and other **major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official** on---

(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented . . . . Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the . . . . public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes.

42 U.S.C. 4332(C) (emphasis added).

In order to comply with NEPA, the federal government has published 40 C.F.R. 1500, et seq., to ensure that all agencies act according to the letter and spirit of the law. The regulations specifically state, "All agencies of the Federal Government shall comply with these regulations." 40 C.F.R.

1507.1. In an effort to simplify an agency action dealing with "major" or "significantly", the Council on Environmental Quality (CEQ) adopted 40 C.F.R. 1508.18, creating a "unitary standard." Under the standard, if a court determines an action is "significant," it should also find that the action is "major." National Ass'n for advancement of Colored People v. Wilmington Medical Center, Inc., 584 F.2d 619 (3d Cir. 1978). A finding that a federal action is "major" and "significantly" impacts the environment requires the preparation of an EIS.

a. Major Federal Actions

"Major" federal actions are described as:

[A]ctions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (40 C.F.R. 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities . . . new or revised agency rules, regulations, plans, policies, or procedures . . . .

40 C.F.R. 1508.18.

Despite these guidelines, most courts have approached the "major" determination on a case-by-case basis. Since generalization is quite difficult when dealing with NEPA cases, cases appear to turn on the magnitude and size of the action to determine if the action has a potential impact on the human environment. Large

projects with the potential of substantial impacts will be "major" actions. The following are examples of cases that have identified "major" actions:

Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972) - a $14 million bridge with 60 percent federal funding;

Jones v. United States Dep't of Housing and Urban Development, 390 F.Supp. 579 (E.D.La. 1974) - the conversion of a large federally subsidized housing project with a major change in use;

NRDC, Inc. v. Grant, 341 F.Supp. 356 (E.D.N.C. 1972) - a 66-mile water channel project costing $1.5 million with $706,000 of federal funding;

Douglas County v. Lujan, 810 F.Supp. 1470 (D.Or. 1992) - the designation of critical habitat for endangered species affecting approximately 6.9 million acres.

Catron County v. U.S. Fish and Wildlife Service, No. 94-2280, 1996 U.S. App. Lexis 1479 (10th Cir. Feb.2, 1996) - NEPA and ESA are not mutually exclusive and the FWS must follow regulations in designating critical habitat.

It is readily apparent that the American Heritage Rivers initiative is a major federal action. It has the potential of effecting all fifty states, depending upon the individual rivers selected for designation. Once selected and designated, management activities and projects on the river can impact federal, state, and local government lands and private lands. Thus, an EIS should have been prepared for this initiative.

b. Significant Actions

"Significantly" is described as:

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context*. This means that the significance must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action . . . .

(b) *Intensity*. This refers to the severity of impact . . . . The following should be considered in evaluating intensity . . . .

(1) Impacts that may be both beneficial or adverse. . .

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial . . . .

(5) The degree to which the possible effects on the human environment are highly uncertain . . . .

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about future consideration . . . .

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts . . . . Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts . . . .

40 C.F.R. 1508.27.

When deciding on the need to prepare an EIS, an agency must evaluate whether the nature of the action is such that significant environmental impacts could occur, not whether the agency has adequately considered the significance of the federal action. Daniel R. Mandelker, NEPA Law and Litigation, 8.06[4][a] (2d Ed. 1995). The Court of Appeals for the Tenth Circuit has held that when reviewing administrative decisions not to issue an EIS, the court must, first, utilize the "hard look" doctrine, and, second, if a "hard look" was utilized, determine whether the agency's decision was arbitrary and capricious. Park County Resource Council, Inc. v. USDA, 817 F.2d 609 (10th Cir. 1987) and Committee to Preserve Boomer Lake Park v. Department of Transportation, 4 F.3d 1543 (10th Cir. 1993). A "hard look" will include an evaluation of the possible effects of the proposed action, which effects have been broadly defined by NEPA.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable . . . . Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

40 C.F.R. 1508.8.

The American Heritage Rivers initiative will significantly affect the environment of each watershed or community containing a designated heritage river. The federal government will be providing funds and expertise to assist in implementing measurable results, such as water resource protection, river restoration, protection of historic and cultural resources, revitalization of local and regional economies, and implementing sustainable development. The Executive branch failed to evaluate any potential effects associated with this initiative, thus violating NEPA. An EIS must be prepared.

2. Federal Land Policy and Management Act.

The Property Clause establishes "full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them." Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917). See also McKelvey v. United States, 260 U.S. 353, 359 (1922) (stating that under the Property Clause, Congress "may sanction some uses [of the Federal lands] and prohibit others, and may forbid interference with such as are sanctioned."). Congress may also use this power to achieve objectives not within the scope of enumerated federal concerns. In Light v. United States, 220 U.S. 523 (1911), the Court held that the United States possessed plenary power to control the use of federal lands and could exercise that power for any "national and public purpose." Id. at 536.

Utilizing its enumerated power found in the Property Clause, Congress declared that it is the policy of the

United States that the present and future use of federal lands be projected through a land-use planning process coordinated with other federal and State planning efforts, that Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate federal lands for specified purposes, and that Congress also delineate the extent to which the Executive may withdraw lands without legislative action. 43 U.S.C. 1701(a).

In enacting FLPMA, Congress retained its authority over federal lands by limiting the role of the President and the Executive branch to specific federal land withdrawal limits and to resource inventorying and management activities. Congress did not delegate federal land dedication and designation powers to the President or the Executive branch. Without congressional authority, the development and implementation of the American Heritage Rivers initiative violates FLPMA.

Conclusion

Finally, I would draw the attention of Congress to the decision of the United States Supreme Court in Printz v. United States, its last decision before adjourning in June. It was in Printz that the Court held the Brady Act, and its requirement that state officers enforce a federal program, unconstitutional.

The opinion makes fascinating and educational reading as Justice Scalia gives a history lesson on the origins of our federal system, the views of its creators, and the manner in which it has been interpreted for 200 years. Although Justice Scalia based his holding on the Tenth Amendment ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."), he noted that "numerous constitutional provisions" ensure "dual sovereignty."

To those who assert that those provisions are "formalistic" impediments to the "era's perceived necessity," Scalia responded, "[T]he Constitution protects us from our own best intentions . . . the temptation to concentrate power in one location as an expedient solution to the crisis of the day." Justice Scalia's statement has particular meaning to those of us who have heard, much, much too often, that there is an environmental crisis, so we must give up our right to own and use private property as well as other constitutional guarantees.

We are the inheritors of the greatest political system ever devised by humankind, which recognizes, uniquely, that "all men are created equal, [and] are endowed by their Creator with certain unalienable rights, [including] life, liberty, and the pursuit of happiness." However, with that freedom comes an obligation, as the Constitution commands, to "secure the blessings of liberty to ourselves and our posterity. . . ."

We hear a lot today about the legacy that we pass on to our children and grandchildren--our posterity--the national debt, the environment, our diverse society. However, the most important legacy we can leave, that we are duty bound to leave, is the Constitutional system entrusted to us by our Founding Fathers. It would be the greatest tragedy if out of apathy, or expediency, or short-term self interest, we allowed the destruction of the only thing that ensures that we remain a free people.

As Justice Oliver Wendell Holmes once wrote, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way. . . ."

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