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GOOD POLITICS, BAD POLICY: CLINTON'S AMERICAN HERITAGE RIVERS INITIATIVE

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“The AHRI creates, by executive fiat, the most all encompassing regulatory regime ever to be imposed on private landowners. Most other land use programs have been designed to protect Federal Land. And in the case of the Clean Water Act and the Endangered Species Act, Congress passed these regulations. Never has an executive dared to assert so much control over private property through his own declaration.”

— *Nancie Marzulla, president and chief counsel,
Defenders of Property Rights*

During the 1997 State of the Union address, President Bill Clinton announced a new federal program entitled the American Heritage Rivers Initiative (AHRI), which he intended to support communities in their efforts to restore and protect rivers across the United States. To many, this lofty goal sounds good. But, on closer inspection, the pristine image it paints becomes murky, revealing a program that violates many constitutional and statutory provisions, involves the federal government further in local and state environmental issues, is inefficient and wastes tax dollars, and threatens personal property rights.

Nevertheless, President Clinton appears ready to begin implementing his initiative, although he has neither the constitutional authority to do so nor the intention of asking Congress for such authority. He also appears unconcerned that promoting this initiative could suggest to many that, for his Administration, the “era of big government” is not over. Congress should consider taking immediate action to block Clinton’s river initiative before it floods America’s communities with layers of federal bureaucracy and further muddies the balance of power in Washington, D.C.

IMPLEMENTING A NEW FEDERAL PROGRAM BY DECREE

President Clinton unveiled new details about how he plans to implement his new American Heritage Rivers Initiative when he issued Executive Order 13061 on September 11, 1997.¹ Through executive order, Clinton has established an American Heritage Rivers Interagency Committee to oversee implementation of the initiative. Members of the committee will include the secretaries of the Departments of Agriculture, Commerce, Defense, Energy, Housing and Urban Development, Interior, and Transportation; the attorney general; the administrator of the Environmental Protection Agency; the chairpersons of the Advisory Council on Historic Preservation, the National Endowment for the Arts, and the National Endowment for the Humanities; or designees at the assistant secretary level or their equivalent.

To nominate a river for designation as an American Heritage River, a local community must submit a river nomination packet to the President's Council on Environmental Quality. The packet must include: a description of the river or river area² to be considered, its notable resource qualities,³ a clearly defined vision for protecting the area and a specific plan of action to achieve it, evidence that a range of citizens and organizations in the community support the nomination and plan of action, and evidence that individuals in the community have had an opportunity to discuss and comment on the nomination and plan of action.

The Council on Environmental Quality will select a panel of experts to review the nominations and make recommendations to the President. From these recommendations, the President would select ten rivers or river areas to designate as American Heritage Rivers. These American Heritage Rivers would receive preferential treatment for federal dollars and the support of other federal programs.

On the surface, President Clinton's program looks appealing. Rivers have played a vital role in the country's history, culture, recreation, health, environment, and economy. Finding ways to encourage states and local communities across the country to become involved in improving the water quality of their rivers and revitalizing their waterfronts is commendable. The AHRI, however, will amount to little more than a surface ripple in accomplishing these goals.

Impediments to achieving the AHRI's lofty goals have more to do with the design of the program than with the intentions of communities. The notable problems with President Clinton's initiative are that:

1. It violates a number of constitutional and statutory provisions;
2. It is wasteful and inefficient;
3. It reduces the role and authority of the states;
4. It threatens property rights; and
5. It "serve[s] political purposes."

Upon close examination, it becomes clear that the AHRI is bad policy and unconstitutional and, like many of President Clinton's other initiatives, will become another political pork-barrel program designed to send federal dollars to politically important jurisdictions across the United States.

1. *Federal Register*, Vol. 62, September 15, 1997, p. 48445.

2. The nominated "river" may vary from a short stretch of a river to its entire length. The designated area can include land immediately adjacent to the river, such as the waterfront and streamside areas, or span the entire watershed. It may also cross jurisdictional boundaries.

3. "Resource quality" refers to how the natural, economic, agricultural, scenic, historic, cultural, or recreational resources connected with the river are distinctive or unique.

HOW THE AMERICAN HERITAGE RIVERS INITIATIVE VIOLATES THE U.S. CONSTITUTION

Above almost all else, Americans love the beauty and resources of their country. They clearly understand that the U.S. Constitution establishes a system of government to protect their individual rights, and that the federal government should be expressly limited in its ability to usurp those rights. They may disagree, at times, about how much power is given each branch of the federal government to settle disputes and to limit personal freedoms, but there is no dispute that the Founding Fathers intentionally and explicitly designed a balance of power to prevent legislative, judicial, or executive arrogance and abuse of power. Americans expect their elected leaders to abide by the separation of powers delineated in the Constitution, and they want the federal judiciary on guard to make sure they do.

Rather than honor these expectations, President Clinton's American Heritage Rivers Initiative violates both the intent and the letter of the U.S. Constitution. It gives the President as well as his executive agencies authorities that clearly and constitutionally belong to the legislative branch of government, and it confiscates the land use and zoning powers of the states.

Altering the Constitutional Separation of Power

“The Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.”

—*New York vs. United States*, 112 S.Ct. 2408 (1992)

Under the U.S. system of checks and balances, the legislative branch has the power to create laws and appropriate funding, the executive branch is authorized to implement and enforce the laws, and the judiciary is given power to interpret those laws in disputes.⁴ To explain to hesitant colonists why this separation of powers was important, James Madison wrote in *Federalist* No. 47 that the “accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed or elective, may justly be pronounced the very definition of tyranny.”⁵

The Supreme Court historically has recognized the importance of the separation of powers among the President, Congress, and the judiciary. In the case of *Youngstown Sheet & Tube Co. v. Sawyer*,⁶ the Supreme Court was asked to decide whether President Harry S Truman (during the Korean War) was acting within his constitutional power when he issued an executive order directing the Secretary of Commerce to take possession of and operate most of the country's steel mills. The government's position was that the president's action was necessary to avert a national disaster that inevitably would result from the stoppage of steel production, and that in meeting this grave emergency, the President was acting within the aggregate of his constitutional powers. The Supreme Court found in *Youngstown* that, even with the threat of a national catastrophe, the President's order could not be sustained as an exercise of his authority. In this case, the Supreme Court found no statute that expressly authorized the President to take property as President Truman's executive order intended, or any act of Congress from which such authority could be inferred. The Supreme Court concluded that the power to adopt such public policies as those proclaimed by the executive order is beyond question by Congress, and that the Constitution does not subject this law-making power of Congress to the President.⁷

4. U.S. Constitution, Articles I, II, and III.

5. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* No. 47 (Madison).

6. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)

7. *Ibid.*

Supreme Court precedent suggests that President Clinton's Executive Order No. 13061 runs contrary to the separation of power provisions of the Constitution. To implement the AHRI, President Clinton is claiming for himself and future Presidents powers that belong to Congress: specifically, authority over interstate commerce, water rights, property rights, and the appropriation of money. Through executive order, Congress would be relegated to a role of trying to stop presidential programs from being implemented, rather than creating and approving them based on the will of the people and funding them as authorized in the Constitution.

Walking Around the Property Clause

The Property Clause in Article IV of the Constitution states that "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."⁸ Executive Order No. 13061, however, gives the executive branch control and authority over the country's rivers and their associated resources located on federal lands, a power specifically assigned to Congress. In order for the executive branch to have authority to govern and control these rivers and associated resources, this power must be delegated to it by an act of Congress. Congress has not given the executive branch such authority.

Trampling the Tenth Amendment

The Tenth Amendment to the Constitution stipulates that the "powers not delegated to the United States [federal government] by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."⁹ Under the Tenth Amendment, then, state and local governments retain the authority to engage in land use planning and local zoning for public health, safety, and welfare. President Clinton's program, however, sets a new precedent by giving federal regulators a greater role in land use planning, local zoning, and other aspects of a river's surroundings, including "characteristics of the natural, economic, agricultural, scenic, historic, cultural, or recreational resources of a river that render it distinctive or unique."¹⁰ The President has no authority under the Constitution to engage in land use planning and local zoning; thus, Executive Order No. 13061 violates the Tenth Amendment.

HOW THE AHRI VIOLATES NUMEROUS STATUTES

In addition to altering the constitutional separation of powers, the AHRI implementation process outlined in Executive Order No. 13061 also conflicts directly with two significant environmental laws: the National Environmental Policy Act (NEPA) and the Federal Land Management and Policy Act (FLMPA).

The National Environmental Policy Act

The Clinton Administration has cited the National Environmental Policy Act of 1969 as the legal basis for establishing the AHRI. The NEPA is primarily a policy statute mandating that federal government agencies consider the environmental effects of major federal actions. The idea behind the NEPA is that, by requiring federal agencies to consider and gather information about the environmental consequences of proposed actions, the agencies will make wiser environmental decisions.¹¹ President Clinton states that the NEPA provides a grant of authority to establish the AHRI under authority of Section 101(b) of the NEPA. This section only sets out the broad goal to be achieved by the NEPA, however; it provides no authority for action. The only authorities mandated to the executive branch under the NEPA are to prepare reports; interpret and administer federal policies, regulations, and public laws in accordance with the NEPA; provide information, alternatives, and recommendations; and provide international and national coordination efforts.¹² President Clinton apparently has interpreted these duties to mean that the NEPA

8. U.S. Constitution, Article IV, Section 3, Clause 2.

9. U.S. Constitution, Amendment 10.

10. Executive Order 13061, September 11, 1997, Section 2(b)(1).

11. 42 U.S.C. § 4321.

also gives the executive branch broad authority to develop programs. Such authority, however, was given specifically to Congress, not the President, and Congress has not delegated such powers explicitly to the President. Consequently, citing the NEPA as the legal basis for implementation of the AHRI is questionable.

The Federal Land Management and Policy Act

Even if it can be argued successfully that President Clinton's action is consistent with the purpose of the NEPA, the NEPA, as written, does not trump the requirements of other statutes. And, in the case of the Federal Land Management and Policy Act, the President is expressly restricted in his ability to designate or manage federal lands. Congress enacted the FLMPA in 1976 in order to reestablish its authority over the designation or dedication of federal lands for specified purposes, and to circumscribe the authority of the President and executive branch to manage federal lands.¹³

In the FLMPA, Congress declared that "it is the policy of the United States that Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes" and delineate the extent to which the executive branch may withdraw lands without legislative action.¹⁴ Congress thus asserted its authority to create, modify, and terminate designations for national parks, national forests, wilderness, Indian reservations, certain defense withdrawals, national wild and scenic rivers, national trails, and other national recreational areas and national seashores.¹⁵

In fact, Congress has not withdrawn, designated, or dedicated any federal lands for President Clinton's American Heritage Rivers Initiative, nor has it authorized the development of the program by the executive branch. The legislative process for obtaining a favored status designation for federal land and resources is clearly established. Consider, for example, the Wild and Scenic Rivers Act adopted by Congress on October 2, 1968.¹⁶ The act provides for the selection, by Congress, of American rivers that, along with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values. The rivers selected are protected for the benefit and enjoyment of present and future generations.¹⁷ Since 1968, Congress has designated 154 Wild and Scenic Rivers under this act, amounting to 10,814 miles of river.¹⁸ In fact, Congress acted as recently as November 12, 1996, when it designated 11.5 miles of the Lamprey River in New Hampshire and 6.4 miles of the Elkhorn Creek in Oregon,¹⁹ following the designation of 51.4 miles of the Clarion River in Pennsylvania on October 19, 1996, as part of the Wild and Scenic Rivers program.²⁰ Congress is currently considering legislation to designate three more rivers. Representative Norman Dicks (D-WA) introduced H.R. 1477 to designate 51 miles of the Columbia River in Washington State; Senator Patty Murray (D-WA) introduced a companion bill (S. 200) in the Senate. Representative Martin Meehan (D-MA) introduced H.R. 1110 to designate the Sudbury Assibet and Concord Rivers in Massachusetts for the Wild and Scenic Rivers program, and Senator John Kerry (D-MA) introduced the companion bill (S. 469) in the Senate. Clearly, when Members of Congress believe there is reason to act, they will act.

If President Clinton wants to see his initiative implemented properly, then he first should propose legislation to Congress and allow Congress to approve or reject the initiative based on the merits of the proposal and the will of the people. Because Congress has not designated or dedicated any federal lands for the AHRI, or authorized the development of the AHRI, the actions of the President in creating and implementing the AHRI through Executive Order No. 13061 violate the FLMPA.

12. *Ibid.*

13. 43 U.S.C. § 1701(a).

14. 43 U.S.C. § 1701(a)(4).

15. Legislative History, *The Federal Land Policy and Management Act of 1976* (Public Law 94-579), Vol. 1 at 439 (1978).

16. 16 U.S.C. §§ 1271 *et seq.*

17. *Ibid.*

18. *Wild and Scenic Rivers Reference Guide*, Interagency Wild and Scenic Rivers Coordination Council, 1997.

19. Public Law 104-333.

20. Public Law 104-314.

HOW THE AHRI THREATENS PROPERTY RIGHTS

The protection of personal property in the Constitution is under increasing assault by all levels of government. The right to own and use property free from unreasonable or arbitrary government interference is fundamental to American freedom and the U.S. Constitution. In fact, the Framers of the Constitution considered the protection of property rights so important that they included it in the Third, Fourth, Fifth, and Sixth Amendments. Today, in an era of almost daily documented cases of unreasonable and arbitrary interference by government agencies, it is not surprising that the Clinton Administration does not seem to recognize or agree with the Founders on the importance of individual property rights.

This lack of appreciation for personal property rights is an undercurrent in President Clinton's AHRI. The right of individuals who own property along designated rivers to use their property free from unreasonable and arbitrary government interference is threatened by the AHRI. The Administration has resisted adding a mandatory opt-in provision to allow the property of landowners along designated American Heritage Rivers to be included in a nomination only in cases in which owners have given their written permission. Such a provision would have shown that President Clinton indeed was concerned about the property rights of those Americans whose land is located along designated rivers. The lack of such a provision means property owners have no guarantee that their property rights are protected.

The regulation of wetlands under the Clean Water Act affects hundreds of thousands of acres of property across the United States. Implementing the AHRI will add hundreds of thousands of acres of dry land to the federal government's control in perpetuity. Rather than increase the access of people to federal resources and protect their rights, the AHRI will increase the access of federal bureaucrats to private property across the United States.

HOW THE AHRI TREADS ON STATES' RIGHTS

The Founders believed that government closest to the people works best. The Tenth Amendment addresses the empowerment of state and local communities to govern. It recognizes that the federal government—as an entity—should have only limited powers, and that its powers should be specifically enumerated. Water rights and land-use planning are not stipulated powers of the federal government; historically they are subject to regulation and control at the levels of state and local elected government. As Chief Justice William Rehnquist has argued, taking the control of water from the legislatures of the various states and territories at the present time would be nothing less than suicidal. If the appropriation and use were not under the provisions of state law, the utmost confusion would prevail.²¹

President Clinton, through his executive order, is attempting to establish and exert federal control over something that clearly is under state jurisdiction. By allowing the intervention of the federal government through federal bureaucrats, known as “river navigators,” who are appointed by the President, Executive Order No. 13061 will interject the federal government heavily into the local decision-making process.

The Clinton Administration claims that river navigators will not interfere in the local planning and zoning process, yet it resists incorporating a provision to prohibit them and all other federal employees involved with the initiative from intervening in local zoning and other decisions affecting private property and water rights. Such a provision would ensure that the states and local communities continue to control areas that are rightfully under their jurisdiction. The AHRI appears to be the program of a President who believes Washington, D.C., knows best and can govern best every aspect of life in every American community.

21. *California v. U.S.*, 438 U.S. 645 (1978).

HOW THE AHRI IS WASTEFUL, DUPLICATIVE, AND INEFFICIENT

The Clinton Administration claims that the AHRI will help “reinvent government.” But President Clinton’s understanding of reinventing government seems to mean creating additional layers of bureaucracy. The American Heritage Rivers Initiative, in fact, is similar to an existing program, the National Rural Development Partnership (NRDP) established by President George Bush in 1991 by executive order. The NRDP is a flawed program: President Bush had no congressional authority over water rights, property rights, or the appropriation of funding when he initiated it; therefore, it also violates a number of constitutional provisions.

Like the AHRI, the NRDP planned to create a collaborative relationship among federal, state, local, and tribal governments, and private, nonprofit, and community-based organizations within each state and some territorial areas, in order to establish a comprehensive and strategic approach to rural development efforts in each state. A comparison of the descriptions of these programs from their respective World Wide Web sites reveals further similarities.

According to the Web site of the National Rural Development Partnership,²² the NRDP’s objectives are to:

- **Encourage and support** innovative approaches to rural development and more effective resolution of rural development issues;
- **Develop** innovative approaches;
- **Build** partnerships among, federal, state, local, and tribal governments and the private sector;
- **Encourage** local empowerment;
- **Involve** the Departments of Agriculture, Commerce, Defense, Energy, Housing and Urban Development, Interior, Justice, and Transportation, the Environmental Protection Agency, and the Army Corps of Engineers; and
- **Use** existing federal personnel and funds to work with the states to bring public and private resources together for solutions to local problems.

According to the Web site of the American Heritage Rivers Initiative,²³ the AHRI is supposed to:

- **Encourage** community revitalization by providing federal programs and services more efficiently and effectively;
- **Develop** strategies that lead to action;
- **Build** a partnership between federal, state, tribal, and local officials, as well as private for-profit, nonprofit, and community-based organizations;
- **Encourage** community-led efforts;
- **Involve** the secretaries of the Departments of Agriculture, Commerce, Defense, Energy, Housing and Urban Development, Interior, and Transportation; the attorney general; the administrator of the Environmental Protection Agency; and the chairs of the National Endowment for the Arts, the National Endowment for the Humanities, and the Advisory Council on Historic Preservation; and
- **Use** existing federal staff, resources, and programs to assist communities.

22. “National Mission and Goals Statement,” National Rural Development Partnership, at www.rurdev.usda.gov/nrdp/goals.html.

23. Council on Environmental Quality, “American Heritage Rivers Initiative,” at www.epa.gov/rivers/fedreg2.html.

Reinventing government usually does not imply duplicating a federal program already operating in 38 states that has the same objective: promoting community involvement and development. Besides sharing the NRDP's objective, the AHRI will create three new costly layers of bureaucracy. The AHRI:

1. Creates an American Heritage Rivers Interagency Committee that will be responsible for implementing the AHRI;
2. Establishes a panel to review the river nomination packets and recommend rivers to the President for designation. The panel will include representatives from natural, cultural, and historic resources concerns; scenic, environmental, and recreation interests; tourism, transportation, and economic development interests; and industries such as agriculture, hydropower, manufacturing, mining, and forest management.²⁴
3. Gives the Interagency Committee the authority to transfer funds from other legitimate and congressionally authorized federal programs to fund ten new river navigators appointed by the President. The new bureaucrats would be paid approximately \$100,000 each year to assist officials in the ten communities selected by the President to locate existing federal programs and money that would be used to improve their waterfronts and rivers. Funds also would be transferred to compensate engineers, biologists, and foresters who would provide studies and expertise in implementing the initiative. The salaries of the river navigators would cost \$1 million per year (which would be compounded annually because ten new river areas would be designated per year), and the cost of the engineers, biologists, and foresters would be added to the already estimated \$4 million annual cost of the program. It is unclear whether such authority on the part of the Interagency Committee is a violation of the Spending Clause in Article I of the Constitution because the Spending Clause gives Congress—and only Congress—the power and authority to “draw [monies] from the Treasury.”²⁵

President Clinton is planning to implement the AHRI at a time when the country is clamoring for Congress to downsize the federal government and give more control back to the states. The true definition of reinventing government is to make government smaller and more efficient. It is difficult to comprehend how creating another federal program—and one that is similar to an existing program—and adding new layers of federal bureaucracy will facilitate an efficient method of cleaning up America's great rivers. Secretary of the Interior Bruce Babbitt, in a recent speech entitled “United by Waters—How and Why the Clean Water Act Became the Urban Renewal Act That Actually Works,” stated:

Finally in 1972 Congress enacted a new law...[t]he Clean Water Act proclaimed a simple if awkwardly stated goal; make the nation's rivers, lakes, and shores “swimmable and fishable.” As American cities used the Act to clean up and restore their waters, those waters, in turn have begun to heal and restore our American cities.

Even as the Clinton Administration touts the effectiveness of the Clean Water Act in restoring and protecting American rivers, it boldly declares that the country also needs the AHRI. If Secretary Babbitt believes the goals of the Clean Water Act already are being achieved, then one must ask: What is the real reason behind the Clinton Administration's new initiative?

AHRI'S POLITICAL AGENDA FROM A WHITE HOUSE MEMO

One of the best ways to build or strengthen political support in a community is by selecting it to receive a massive infusion of federal funds. Representative Christopher Cannon (R-UT) stated on July 15, 1997, at a House Resources Committee hearing on the AHRI that three to five congressional districts could be covered by each of the ten rivers designated by President Clinton. Using these figures, by the next presi-

24. *Ibid.*

25. U.S. Constitution, Article I, Section 9, Clause 7.

dential election in 2000, the President would have targeted federal funds to go to between 90 and 150 political districts. The American Heritage Rivers Initiative is classic pork-barrel politics.

At the same House Resources Committee hearing, a memo from the Council on Environmental Quality surfaced that read:

Selection committee will recommend more AHR's [American Heritage Rivers] than are actually designated, giving someone else (the President?) a further choice. This could ensure that designated AHR's:

- SERVE POLITICAL PURPOSES
- Are located where agencies can staff them
- Are diverse (river, landscape, community, geography, etc.)²⁶

The Administration memo indicates that politics could well play a role in the designation of 10 rivers in early 1998, as well as the designation of an additional 20 rivers before the 2000 presidential election. The AHRI allows the White House to target federal dollars to communities in a way that could be politically advantageous.

CONCLUSION

At a time when the country wants to downsize government and revitalize the importance of the Tenth Amendment, and Congress is recognizing the necessity of empowering local communities and states even more, the American Heritage Rivers Initiative chooses the wrong approach for preserving some of America's great resources, its many rivers. Although there often has been a lack of political will in Congress to tackle these kinds of issues—even with flagrant violations of law and terrible policy—several Members of Congress recognize the problems with President Clinton's initiative and have begun to focus their attention on it.

For example, on June 10, 1997, Representative Helen Chenoweth (R-ID) and 46 cosponsors introduced H.R. 1842 to terminate funding by any federal agency for the AHRI. The bill passed the House Resources Committee by voice vote on November 5, 1997. In addition, on December 10, 1997, Representatives Chenoweth, Richard Pombo (R-CA), and Bob Schaffer (R-CO), and House Resources Committee chairman Don Young (R-AK) filed a lawsuit in U.S. District Court for the District of Columbia to challenge the constitutional authority of the President to implement this initiative.

Because President Clinton plans to designate the first ten rivers in early February, the time has come for every Member of Congress to take a long, hard, and honest look at the AHRI program. It is an indefensible waste of taxpayer dollars. Through its Wild and Scenic Rivers Program and numerous other water quality initiatives, Congress already has devoted considerable resources to cleaning, restoring, and enhancing America's rivers with great success. But even more disturbing than the waste, the AHRI program seriously undermines congressional authority and upsets the delicate balance of power so carefully crafted in the U.S. Constitution.

Congress must exercise its proper statutory and constitutional authority to bring this program to an end before it is launched.

26. Council on Environmental Quality, Draft Memo, "The American Heritage Rivers Initiative," provided to the House Resources Committee and the basis for questioning at a hearing on the Initiative. See *Oversight Hearing on the Clinton Administration's American Heritage Rivers Initiative*, House Report 105-36, 105th Congress, 1st Session, July 15, 1997, pp.81-82.

