Eisenstein Consulting

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September 8, 2010

Michael Miller, President
North Delta Conservancy
PO Box 1217
Walnut Grove, CA 95690

Dear Mr. Miller:

I am writing to follow up on a research request from the presentation about National Heritage Areas (NHAs) that I made at the July 12th, 2010 meeting of the North Delta Conservancy Board as part of the Delta Protection Commission's feasibility study for potential designation of the Delta as an NHA. The request was for an example of a "verbiage agreement" or charter pertaining to private property rights between local land owners and the NHA management entity in any existing National Heritage Areas which are similar to the Sacramento-San Joaquin Delta.

Since receiving this request, I have done extensive research on other NHAs to determine if such documents exist. I contacted the management entities of several existing NHAs, including Silos and Smokestacks NHA in Iowa, Erie Canalway National Heritage Corridor in New York, Delaware and Lehigh National Heritage Corridor in Pennsylvania, Schuylkill River Valley NHA in Pennsylvania and Yuma Crossing NHA in Arizona. I have also discussed this request with Linda Stonier of the National Park Service, who is the NHA co-coordinator for the Pacific West Region.

None of the individuals whom I spoke with were aware of such agreements or charters developed specifically between NHA management entities and local landowners, but also felt that there was no inherent reason why such an agreement could not be created. Because most of the people whom I spoke with are well connected and knowledgeable about other NHAs as well, this finding also leads me to believe that these sorts of agreements may not have been developed in any existing NHA (which are too numerous to consult individually). The individuals with whom I spoke suggested that this may be the case primarily because federal enabling legislation for many NHAs clearly states that land use authority is not granted to the NHA management entity. Much of the enabling legislation examined through this research also states that the NHA management entity may not use federal funds to acquire property. See Attachment 1 for excerpts from current relevant legislation.

There are, however, examples of other documents that have been developed in the NHA process (in addition to the enabling legislation) which protect landowners from additional land use restrictions. Some NHA management plans, such as in the Erie Canalway National Heritage Corridor management plan (see Attachment 2), include relevant language on the issue. Additionally, local government resolutions can be passed to ensure that the NHA and its boundary are not used as a criterion for land use or property rights decisions in existing governmental planning processes, as was done in the Yuma Crossing NHA (see Attachment 3).

Though not conclusive or binding on the Delta Protection Commission, my research suggests that local private property owners and an NHA management agency may be able to develop and agree upon a document that clarifies the NHA's relationship to private property rights, local government planning processes, or other matters of concern. This idea has been incorporated into a table of concerns and potential solutions (see Attachment 4) which we have been compiling and which will be used as a basis for discussion throughout the Delta NHA feasibility study process. Such concerns could also be explicitly addressed in the enabling legislation, incorporated into the NHA management plan, and/or adopted through local resolutions, if appropriate. Of course, any such proposed agreement would be subject to further legal review by the intended parties before execution.

Please let me know if you have any questions or comments on this, or require further research. Thank you very much for your interest and engagement in these issues.

Sincerely,

Alex Westhoff
Consultant to the Delta Protection Commission

cc: Members, Delta Protection Commission
Linda Stonier, National Park Service

Attachment 1 – Excerpts from samples of NHA enabling legislation relevant to property rights

Abraham Lincoln National Heritage Area

- Enabling Legislation:
  http://www.lookingforlincoln.com/doc/public_law_110-229.pdf

  - **SEC. 446. LOCAL COORDINATING ENTITY.**
    (c) PROHIBITION ON ACQUISITION OF REAL PROPERTY.—The local coordinating entity may not use Federal funds authorized under this subtitle to acquire any interest in real property.

  - **SEC. 448. PRIVATE PROPERTY AND REGULATORY PROTECTIONS.**
    Nothing in this subtitle—
    (1) abridges the rights of any property owner (whether public or private), including the right to refrain from participating in any plan, project, program, or activity conducted within the National Heritage Area;
    (2) requires any property owner to permit public access (including access by Federal, State, Tribal, or local agencies) to the property of the property owner, or to modify public access or use of property of the property owner under any other Federal, State, Tribal, or local law;
    (3) alters any duly adopted land use regulation, approved land use plan, or other regulatory authority of any Federal, State, Tribal, or local agency, or conveys any land use or other regulatory authority to any local coordinating entity, including but not necessarily limited to development and management of energy, water, or water-related infrastructure;
    (4) authorizes or implies the reservation or appropriation of water or water rights;
    (5) diminishes the authority of the State to manage fish and wildlife, including the regulation of fishing and hunting within the National Heritage Area; or
    (6) creates any liability, or affects any liability under any other law, of any private property owner with respect to any person injured on the private property.

America's Agricultural Heritage Partnership (Silos and Smokestacks)

- Enabling Legislation:
  http://bulk.resource.org/gpo.gov/laws/104/publ333.104.pdf

  - **SEC. 706. LAND USE REGULATION AND PRIVATE PROPERTY PROTECTION.**
    (a) REGULATION.—Nothing in this title shall be construed to modify, enlarge, or diminish any authority of Federal, State, and local governments to regulate any use of privately owned land provided by law or regulation.
    (b) LAND USE.—Nothing in this title shall be construed to grant the powers of zoning, land use, or condemnation to the Partnership Management Entity, the Secretary or any other Federal, State, or local government entity.

Augusta Canal National Heritage Area

- Enabling Legislation:
  http://bulk.resource.org/gpo.gov/laws/104/publ333.104.pdf

  - **SEC. 307. ACQUISITION OF REAL PROPERTY.**
    The Augusta Canal Authority may not use any Federal funds that it may receive pursuant to this title to acquire real property or an interest in real property.

  - **SEC. 309. LAND USE REGULATION.**
    Nothing in this title shall be construed to— modify, enlarge, or diminish any authority of Federal, State, and local governments to regulate any use of land as provided for by law or regulation; or grant powers of zoning or land use to the Augusta Canal Authority.

Essex National Heritage Area

- Enabling Legislation:
  http://bulk.resource.org/gpo.gov/laws/104/publ333.104.pdf

  - **SEC. 506. PRIVATE PROPERTY.**
    No privately owned property shall be included within the boundaries of the Area unless the government of the county, city, or town in which the property is located agrees to be so included and submits notification of such agreement to the Secretary.

Mississippi Gulf Coast National Heritage Area

- Enabling Legislation:
  http://msgulfcoastheritage.ms.gov/downloads/final-MGCNHAMP.pdf

  - **SEC. 708. EFFECT OF ACT.**
    Nothing in this Act--
    (1) affects or authorizes the coordinating entity to interfere with--
    (A) the right of any person with respect to private property; or
    (B) any local zoning ordinance or land use plan;
    (2) restricts an Indian tribe from protecting cultural or religious sites on tribal land;
    (3) modifies, enlarges, or diminishes the authority of any State, tribal, or local government to regulate any use of land under any other law (including regulations);
    (4)(A) modifies, enlarges, or diminishes the authority of the State to manage fish and wildlife in the Heritage Area, including the regulation of fishing and hunting; or
    (B) authorizes the coordinating entity to assume any management authorities over such lands; or

(5) diminishes the trust responsibilities or government-to-government obligations of the United States to any federally recognized Indian tribe.

Ohio & Erie Canal National Heritage Corridor

- Enabling Legislation:
  http://bulk.resource.org/gpo.gov/laws/104/publ333.104.pdf

  - **SEC. 807. MANAGEMENT ENTITY.**
    (e) PROHIBITION OF ACQUISITION OF REAL PROPERTY.—The management entity for the corridor may not use Federal funds received under this title to acquire real property or any interest in real property.

  - **SEC. 810. LACK OF EFFECT ON LAND USE REGULATION AND PRIVATE PROPERTY.**
    (a) LACK OF EFFECT ON AUTHORITY OF GOVERNMENTS.—Nothing in this title shall be construed to modify, enlarge, or diminish PUBLIC LAW 104–333—NOV. 12, 1996 110 STAT. 4275 any authority of Federal, State, or local governments to regulate any use of land as provided for by law or regulation.
    (b) LACK OF ZONING OR LAND USE POWERS.—Nothing in this title shall be construed to grant powers of zoning or land use control to the Committee or management entity of the corridor.
    (c) LOCAL AUTHORITY AND PRIVATE PROPERTY NOT AFFECTED.—Nothing in this title shall be construed to affect or to authorize the Committee to interfere with—
    (1) the rights of any person with respect to private property; or
    (2) any local zoning ordinance or land use plan of the State of Ohio or a political subdivision thereof.

Steel Industry Heritage Project

- Enabling Legislation:
  http://bulk.resource.org/gpo.gov/laws/104/publ333.104.pdf

  - **SEC. 406. AUTHORITIES AND DUTIES OF MANAGEMENT ENTITY.**
    (c) PROHIBITION ON THE ACQUISITION OF REAL PROPERTY.—
  - The management entity may not use Federal funds received under this title to acquire real property or an interest in real property. Nothing in this title shall preclude any management entity from using Federal funds from other sources for their permitted purposes.

Attachment 2 - Excerpt from NHA management plan relevant to property rights

Erie Canalway National Heritage Corridor

- Management Plan:
  http://www.eriecanalway.org/about-us_preserve-manage.htm

    - Page 1.9: The Commission is not empowered to purchase or otherwise control property, enact laws or regulations, or direct the expenditure of public funds by other governmental entities. The individual municipalities and organizations in the Corridor will be encouraged to take advantage of the opportunities to work with the National Heritage Corridor, and to voluntarily implement their own plans and projects within the armature of the Plan.

RESOLUTION NO. R2004-43

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF YUMA, ARIZONA, ADOPTING A POLICY REGARDING THE YUMA CROSSING NATIONAL HERITAGE AREA DESIGNATION AND BOUNDARY AND DIRECTING THE CITY ADMINISTRATOR TO IMPLEMENT SAID POLICY THROUGHOUT THE VARIOUS DEPARTMENTS OF THE CITY OF YUMA.

WHEREAS, the Yuma Community has received Congressional designation as a National Heritage Area in October of 2000; and,

WHEREAS, the Yuma Crossing National Heritage Area Corporation (Heritage Area Corporation), is a private non-profit entity responsible for the management of the Yuma Crossing National Heritage Area (Heritage Area) through partnership and community-based planning and implementation of a variety of projects to conserve, enhance and interpret the historic, natural and environmental assets of the community as defined in the approved and adopted Yuma Crossing National Heritage Area Management Plan (Plan); and,

WHEREAS, the enabling legislation for the designation of the Heritage Area (Public Law 106-319) confers no regulatory powers to the designation, boundary or Heritage Area Corporation; and

WHEREAS, the City of Yuma is a major partner in the implementation of the Plan and is desirous of adopting a policy clarifying and directing the City Administration as to the appropriate use of said Heritage Area Designation and resulting Boundary.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Yuma, Arizona, as follows:

SECTION 1: It shall be the policy of the City of Yuma that the boundary of the Yuma Crossing National Heritage Area shall not be used as the basis for actions by the City that would restrict, limit or otherwise alter the lawful use and enjoyment of private property. This boundary is defined in an act of the United States Congress, P.L. 106-319 as 12th Street on the South, the Colorado River on the North and West and Avenue 7E on the East. This policy shall apply to any future boundary amendments as legislated by the United State Congress.

SECTION 2: No current regulations exist or apply to private property because of the designation of the boundaries of the Yuma Crossing National Heritage Area as defined in P.L. 106-319 as 12th Street on the south, the Colorado River on the north and west and Avenue 7E on the east. Therefore it shall be the policy of the City of Yuma that its Officials, Staff, Agents or Assigns shall not use said boundary as a basis for regulating the use, development or enjoyment of private property within or outside of said

boundary. This policy shall remain in full force and effect for said boundary should it be amended through an act of the US Congress.

SECTION 3: If any of the terms, parts, articles, or provisions of this resolution are for any reason invalid or unenforceable, the remaining terms, parts, Articles, or provisions are nevertheless valid and enforceable.

Passed and adopted this 19th day of May 2004.

APPROVED:

Lawrence K. Nelson
Mayor

ATTESTED:

Brigitta K. Kuiper
City Clerk

APPROVED AS TO FORM:

Steven W. Moore
City Attorney

For discussion purposes only. Potential solutions have not been vetted by the Delta Protection Commission or legal counsel.

Concerns and potential solutions raised by local stakeholders during the feasibility study process for a National Heritage Area in the Sacramento-San Joaquin Delta.

	Concern	Potential Solution
Direct Concerns/Potential Solutions from Local Stakeholders	While the NHA itself is non-regulatory, and has no effect upon land use, the designation might have the effect of triggering other federal and state regulatory statutes or processes.	Include disclaimers to the state legislation relative to its possible adoption and/or to CEQA. If it is not possible to so amend NEPA or the federal NHA authorizing statute, state law could also memorialize legislative intent to have these principles apply to implementation of the NHA in the Delta and related federal action.
	The NHA boundaries might include communities that are not interested in being included.	Include an opt-in or opt-out provision in the legislation.[1] Consider opt-in or opt-out capabilities to apply to geographical units such as reclamation districts, groups of reclamation districts, towns, municipalities, and/or counties.
	The NHA management entity might be interpreted by some to have land use authority.	Develop verbage agreement document between management entity and property owners within the NHA boundary that explicitly states that the management entity will have no land use authority.
	Decisions might be made in non-democratic ways.	Have a ballot or other democratic methods to make decisions.
Concerns From Cited References that Have Been Identified by Local Stakeholders	Local governments might change zoning ordinances to conform to land use plans suggested by the NHA board.	Maintain local control through having a relatively small-sized NHA so that local stakeholders have sufficient opportunities to influence decisions.[2]
	Different agencies responsible for zoning might have individual interpretations of what it means to own property in and around the boundaries of the NHA. NHAs that are too large will have insufficient funds to run the project on a self-sustaining basis.	Have a well defined geographic scope to include cultural, historic and environmental areas that can be developed into self-sustaining economic zones.[3]
	Heritage Area matching funds might be used to purchase property or issue easements.	Legislation authorizing the NHA could prohibit funds being used to buy private property or purchase any form of easement. This is to ensure that private property stays on the tax rolls and is not retired. It will also ensure that land is not 'donated' by the NHA to create or expand a National Park.[4]

[1]Note that Sec. 127 of Public Law 111-88_Oct. 30, 2009 states: *Any owner of private property within an existing or new National Heritage Area may opt out of participating in any plan, project, program, or activity conducted within the National Heritage Area if the property owner provides written notice to the local coordinating entity.*
[2]Harold Maxwell, "Get Involved to Protect Your Property Rights," at http://www.ndfb.org/?id=69 (July 2010).
[3]*Ibid.*
[4]*Ibid.*