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Assistant Director, CED - Roy J. Kirk

Deputy General Counsel - Harry VanCleve

Wild and Scenic Rivers Act--Interpretation
of Condemnation Limitations (File B-125035)

David Utzinger, Chicago Regional Office, asked us to interpret several provisions of the Wild and Scenic Rivers Act. Mr. Utzinger also asked about the legality of the Park Service's destruction of land acquisition records. Since that question is separate from the questions concerning the Wild and Scenic Rivers Act, it is being dealt with in a separate memorandum.

QUESTION 1: Has the National Park Service (NPS) made a proper interpretation concerning the 100 acre per mile limitation in the Wild and Scenic Rivers Act?

ANSWER: We believe the NPS position is correct as to islands, but incorrect as to water surface areas. In our opinion, islands should be excluded, but water surface areas should be included when calculating the 100 acre per mile limitation.

QUESTION 2: Do you agree with the Forest Service's legal interpretation that section 6(a) of the Wild and Scenic Rivers Act applies only to acquisitions made after passage of the Act?

ANSWER: Yes. We agree that section 6(a) applies only to acquisitions made subsequent to the passage of the Wild and Scenic Rivers Act, rather than total Federal ownership within the river area.

These issues are explained more fully in the attached analysis.

cc: Mr. Eschwege, CED
Mr. Utzinger, CRO
Index and Files
Index Digest

ATTACHMENT

WILD AND SCENIC RIVERS ACT--INTERPRETATION
OF CONDEMNATION LIMITATIONS

DIGESTS:

1. Islands should be excluded, but water surface areas should be included when calculating 100 acre per mile limitation under Wild and Scenic Rivers Act. 92 Stat. 912.
2. Section 6(a) of Wild and Scenic Rivers Act applies only to acquisitions made after passage of Act, rather than total Federal ownership within the river area.

I. The Wild and Scenic Rivers Act

The Wild and Scenic Rivers Act, Pub. L. No. 90-542, 92 Stat. 912, was designed to preserve certain free-flowing rivers because of their qualities as wild, scenic, or recreational river areas. The Act designates eight rivers to become components of the national wild and scenic rivers system upon its enactment; other rivers can be added by Act of Congress. See, e.g., Pub. L. No. 93-621, 88 Stat. 2094 (January 3, 1975); Pub. L. No. 92-560, 86 Stat. 1174 (October 25, 1972). *16 USC 1271 note*

The boundaries for each river area are limited by section 3(b) to an average of not more than 320 acres per mile on both sides of the river. The Secretaries of the Interior and Agriculture are authorized to acquire land and interests in land within the boundaries of the river areas. However, acquisition in fee title is limited by section 6(a) to an average of not more than 100 acres per mile on both sides of the river. *16 USC 1274*

II. Interpretation and Implementation of the Act

Section 3(b) provides in pertinent part:

(b) The agency charged with the administration of each component of the national wild and scenic rivers system designated by subsection (a)

of this section shall, within one year from the date of this Act, establish detailed boundaries therefor (which boundaries shall include an average of not more than three hundred and twenty acres per mile on both sides of the river); * * *."

Section 6(a) provides in pertinent part:

"Sec. 6. (a) The Secretary of the Interior and the Secretary of Agriculture are each authorized to acquire lands and interests in land within the authorized boundaries of any component of the national wild and scenic rivers system designated in section 3 of this Act, or hereafter designated for inclusion in the system by Act of Congress, which is administered by him, but he shall not acquire fee title to an average of more than 100 acres per mile on both sides of the river * * *."

The Department of the Interior, Bureau of Outdoor Recreation (BOR), issued a memorandum to its regional directors, dated October 25, 1969, interpreting the acreage limitations. The memorandum stated that the limitations of sections 3(b) and 6(a) apply only to the land extending back from both sides of the river, and that islands and the riverbed ^{1/} itself may be excluded in calculating the 100 and 320 acre limitations. The BOR memorandum was referred to and relied upon by the

^{1/} The bed of a river is the land contained between its banks (the elevation of land that confines the waters of the river in their natural channel). It is the soil that is usually submerged by the water, but may be alternately covered and left bare, depending upon the supply of water. The riverbed includes the shores (the spaces between the high and low water marks).

National Park Service (NPS) and the other St. Croix Planners in the Master Plan for the management and development of the Lower St. Croix River.

The boundaries of the St. Croix river area and the total acreage to be acquired in fee under the Plan raise questions in terms of the statutory limitations. The federally administered segment of the river is 27 miles. Thus, under one reading of the statute, the boundaries of the river area should not exceed 8640 acres (27 miles multiplied by 320 acres per mile) and total fee acquisition should not exceed 2700 acres (27 miles multiplied by 100 acres per mile). The area within the Federal boundary totals 9225 acres, of which 550 are incorporated villages and 2610 are islands and adjacent water surface areas. ^{2/} Of the remaining 6065 acres, the Plan proposes that 2700 acres be acquired in fee. In addition to the 2700 acres, all of the privately owned islands are proposed for fee acquisition. Therefore, if the islands and water surface areas are counted, both the boundary and fee acquisition limitations would be exceeded.

The Final Master Plan for the Lower St. Croix states, with regard to the ownership of the islands:

"Island ownership in the river is varied. Many of the islands have not been surveyed and are a part of the public domain. In some instances, patents may have been issued. In other cases, the States may claim title under the Swamplands Act. Presently, 24 islands, including nearly 105 acres, are Federally owned. An additional 15 islands (45 acres) are in State ownership and 20 islands (60 acres) are in private lands." (P. 14)

^{2/} This refers to waters that are diffused over the surface of the ground, derived from rain, melting snow, and flooding, that do not flow in a defined water-course. See I Clark, Waters and Water Rights, §52 (1967).

The Plan provides for the acquisition in fee of all privately owned islands. Some islands are expected to be used for overnight docking by houseboats and for primitive camping.

III. Legislative Background

The legislative history of the Wild and Scenic Rivers Act does not show whether Congress intended that islands and water surface areas be excluded by planners when determining the amount of land to condemn. Congress probably did not consider this issue when it designed the limitation, since the debates, reports, and hearings describing the application of the condemnation authority only refer to acquiring strips of land along both sides of the river.

For example, one analysis explains that the condemnation provisions:

"set forth the general authority of each Secretary to acquire property within the boundaries of national scenic river areas, but restrict each Secretary's authority to acquire a fee title on both sides of the river to a total of not more than 100 acres per mile. This envisions the fee acquisition of a strip of land generally not more than 400 feet from either side of the river." H.R. Rep. No. 1623, 90th Cong., 1st Sess. 24 (1968) (Emphasis added.)

The legislative history also indicates that the main purpose for authorizing land condemnation was to permit public access to the river area by providing a border, not necessarily surrounding the river evenly. This interpretation of legislative intent is in line with the additional statutory limitation that where 50 percent or more of the land within a river area's boundaries is publicly owned, no land may be condemned, as that amount of publicly owned land would be sufficient for public access and facilities. Act, §6(b).†

This is illustrated by a colloquy between Senators Mondale and Nelson during floor debate in the Senate:

"Mr. MONDALE: In allowing the Secretarys [sic] to acquire up to 100 acres per mile in fee title, was it the committee's intention that they should in fact exercise that authorization to the fullest extent possible?

"Mr. Nelson: No. As a matter of fact, the committee's intention was just the opposite. We intended the Secretarys' powers of condemnation to be used to protect scenic and wild rivers from commercial and industrial destruction, not for indiscriminate acquisition. The bill is not a land grab, and the condemnation power is primarily for acquisition of appropriate public access sites." 113 Cong. Rec. 811,128 (daily ed. Aug. 8, 1967). (Emphasis added.)

Congress intended that protection of the river areas be accomplished to the extent possible by scenic easements. For example, where 50 percent or more of the area is publicly owned, and condemnation in fee title is therefore unauthorized, the Act confers the power to take scenic easements. Where public ownership is less than 50 percent and acquisition therefore authorized, scenic easements were considered ample to protect, where necessary, the lands that were not taken in fee title.

In summary, it was intended that as little land as possible be condemned. Obtaining public access sites was the principal purpose for authorizing condemnation. Protection of the river area was intended to be accomplished principally by taking scenic easements.

IV. Condemnation Authority

The exercise of the power of eminent domain is vested in the legislature. 2953.15 Acres of Land v. United States, 350 F.2d 356 (5th Cir. 1965). In other words, the power to condemn land, inherent in the Federal Government

because of its sovereignty, may be exercised only by virtue of legislation expressly authorizing it. 3/ The condemnation power lies dormant until enactment of such legislation. United States v. 20.53 Acres of Land, 263 F. Supp. 694 (D. Kansas 1967). Thus, if the authorizing statute limits the amount of land to be condemned, no more than that amount may be taken. See, Joslin Manufacturing Co. v. City of Providence, 262 U.S. 668 (1923).

Section 6(a) of the Wild and Scenic Rivers Act, which grants the necessary condemnation authority, also circumscribes the amount of land that may be condemned. The net result is that the provision grants authority to condemn land within the boundaries of the river area, but limits condemnation on both sides of the river to 100 acres per mile. As discussed above, the legislative history indicates that this authority was probably intended to apply to land bordering a river, and the fact that some rivers might contain islands apparently was not considered. The islands are within the boundaries of the river area, and we think the authority to condemn would apply to them. However, since the limitation applies to land on both sides of the river, and the islands are in the center, they would not be counted toward the 100 acre per mile limitation. For the same reason, BOR's exclusion of riverbed areas also appears correct.

Additionally, a riparian owner of land bounded by a non-navigable stream owns the land in the riverbed to the center or thread of the stream. Any islands in his "half" of the stream are owned by that riparian owner. See, Port of Portland v. An Island in the Columbia River, 479 F.2d 549 (9th Cir. 1973). Most significantly, a grant of land bordering a non-navigable stream carries title to the center of the stream, unless otherwise stated. Thus, any islands in that half of the river also pass with the grant of land. Rauman v. Choctaw-Chickasaw Nations, 333 F.2d 785 (10th Cir.), cert. denied, 379 U.S. (1964); Choctaw Nation v. Cherokee Nation, 393 F. Supp. 224 (E.D. Okla. 1975).

3/ The legislature may delegate its power to authorize condemnation. 350 P.2d at 359.

Therefore, when the Government takes a strip of land along the shore of a non-navigable river, unless specifically excluded, the privately owned riverbed and islands to the center automatically are included in the grant. However, since they are not on the "side" of the river, they need not be counted toward the limitation. Also, the riverbed may constitute many acres of land, and if it were not excluded, a large part of the condemnation might be under water, a result that could not have been intended by Congress.

In contrast, the NPS's exclusion of water surface areas from both the boundary and fee condemnation limitations is incorrect. The BOR memorandum, relied upon by the St. Croix planners, appears to have been misunderstood. The BOR memorandum states that the acreages of the riverbed itself need not be counted toward the limitation. However, the Master Plan for the St. Croix states that the BOR determination excludes adjacent water surface areas other than the main channel from the maximum allowable acreage. These two areas are distinct from each other. The riverbed is the land between the banks of a river, i.e., the soil that is usually submerged by the water. (See p. 2 n. 1.) Surface water areas are those waters diffused over the ground's surface that do not flow in a defined water course. These are lands that extend out beyond a river's banks. (See p. 3 n.2.)

Therefore, the NPS is incorrect for two reasons. First, the BOR memorandum was misread by NPS, as it simply does not provide authority for exclusion of water surface areas from the limitation. Second, the Act itself contains no exclusion for adjacent water surface areas. Moreover, these areas extend beyond the river banks, and may extend back for many miles. This is land along the "sides" of the river, to which the limitation specifically applies.

V. Conclusion

Section 6(a) grants authority to condemn land within the boundaries of a scenic river area. Up to 100 acres per mile may be taken along the sides of the river. Islands may be condemned in fee without being counted

toward this limitation. Adjacent water surface areas are not excepted by the Act and should be counted toward the limitation.

QUESTION 2: The Forest Service believes that section 6(a) applies only to acquisitions made after the passage of the Wild and Scenic Rivers Act, rather than to total Federal ownership within the river areas. We agree with this interpretation.

The 100 acre per mile provision limits the authority of the Federal government to acquire new land within the scenic river area. It does not state that, where the Federal government already owns land within the area, total Federal ownership may never exceed an average of 100 acres per mile.

The only limitation regarding previous public ownership is set out specifically in section 6(b):~~X~~ If 50 percent or more of the river area is already publicly owned, no further land may be condemned in fee title (with certain exceptions). It follows that if less than 50 percent of the land is publicly owned, up to an additional 100 acres per mile may be taken in fee.

SPECIAL STUDIES AND ANALYSIS

By: Doreen S. Stolzenberg