

Wild and Scenic Rivers and the Use of Eminent Domain

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Table of Contents

INTRODUCTION 1

STATUTORY BACKGROUND 2

FACTS CONCERNING THE USE OF EMINENT DOMAIN 2

Table 1: Eminent Domain on Federally Administered Rivers 4

Table 2: Summary of the Use of Eminent Domain 17

Wild and Scenic Rivers and the Use of Eminent Domain

INTRODUCTION

The Wild and Scenic Rivers Act (Act) establishes a national policy to protect certain of the nation's outstanding rivers, "with their immediate environments," in their free-flowing condition. Rivers included in the National Wild and Scenic Rivers System (National System) possess one or more "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural or other similar values." Each river is to be "administered in such a manner as to protect and enhance the values which caused it to be included in said system. . . ." (Section 10(a)). This provision of the Act has been interpreted as requiring a "nondegradation and enhancement policy for all designated river areas" (*Interagency Guidelines*).

The Act provides federal agencies, state and local governments, and local citizens a valuable set of tools to protect outstanding rivers. Some of these tools are straight-forward and direct. For example, federally licensed hydroelectric projects are prohibited on all wild and scenic rivers and new mining claims and mineral leases are prohibited on federal lands in wild river areas. Other tools are not so obvious, such as the increasingly important and dynamic interplay between locally adopted zoning ordinances, cooperative agreements and comprehensive management plans to protect rivers flowing through private lands. Within limits, federal river-administering agencies can acquire land or interests in land.

Although eminent domain (condemnation)¹ has never been a prominent method of acquiring lands within wild and scenic rivers, and has almost ceased to be used after the early 1980s, it is still a contentious issue when rivers are being considered for addition to the National System. The purpose of this paper is to show how infrequently eminent domain has been used. Another technical paper in the *Wild and Scenic Rivers Reference Guide*, "Protecting Resource Values on Non-federal Lands," describes how and why land acquisition in general, and eminent domain in particular, are no longer prominent land protection tools.

¹ Eminent Domain: The governmental right to acquire private property for public use after payment of just compensation.

STATUTORY BACKGROUND

The Act provides for limited authority to purchase interest in lands in order to protect river values on federally administered components of the National System. Boundaries (generally) are limited to no more than an average of 320 acres per mile, of which no more than an average of 100 acres per mile may be acquired in fee.²

Unless Congress specifies otherwise for a particular river, there are no limitations on the use of eminent domain to clear title or to acquire scenic or access easements³ within river boundaries. There are, however, a number of limitations on the use of eminent domain to acquire fee title:

- Lands owned by a state may be acquired only by donation or exchange.
- Eminent domain cannot be used to acquire lands from an Indian tribe or political subdivision if they are following a plan for management and protection which the administering Secretary finds adequate.
- The use of eminent domain to acquire fee title is not allowed when over half the land in the boundary is in public ownership.
- Private lands within the boundary cannot be condemned if they are within any incorporated city, village, or borough which has in force and applicable to such lands a duly adopted, valid zoning ordinance that protects river values.

FACTS CONCERNING THE USE OF EMINENT DOMAIN

The Bureau of Land Management (BLM) has condemned in fee only along New Mexico's Rio Grande. The U.S. Forest Service (USFS) has condemned in fee only along Missouri's Eleven Point River. The National Park Service (NPS) has condemned in fee along two rivers -- the St. Croix River (Minnesota/Wisconsin) and Tennessee's Obed River. The Rio Grande, Eleven Point, and St. Croix Rivers were among the original eight rivers included in the National System in 1968; the Obed was designated in 1976. The total acreage of condemned property in fee along these four rivers is 1,413 acres. The U.S. Fish and Wildlife Service (USFWS) has never used eminent domain to acquire fee title along a wild and scenic river (see Table 1).

² Fee: When all of the interests in land are acquired, it is owned in fee-simple.

³ Easement: An interest in real property that conveys use, but not ownership, of a portion of an owner's property. Such "use" does not necessarily, or even customarily, include physical access. Instead, easements along wild and scenic rivers typically protect the public interest in the land's scenic and conservation values.

The BLM has condemned easements along Oregon's Rogue River and New Mexico's Rio Grande. The USFS has condemned easements along four rivers -- the Middle Fork Clearwater (Idaho), Eleven Point, Rogue, and Flathead (Montana). The NPS has condemned easements along the St. Croix and Obed Rivers. The total acreage of condemned easements on these eight rivers is 6,339.7 acres. The USFWS has never used eminent domain to acquire an easement for a wild and scenic river (see Table 2).

The following tables show how many acres the federal agencies have acquired via eminent domain on wild and scenic rivers, both in fee and easements. Although these figures demonstrate the relatively infrequent use of eminent domain, they may even overstate the negative aspects of its use. Though some view condemnation as a hostile action, it is not always so in practice. For example, condemnation is sometimes initiated in order to obtain a judicial determination of clear title to property. In these instances, it is a necessary prerequisite for the federal government to purchase property. In other instances, a condemnation action is initiated with a willing seller as a means to negotiate a purchase price in excess of the government's appraised value.

Federally Administered Rivers⁴ as of June 1998

Table 1

River and Public Law	State	Administering Agency⁵	Mileage	Private Lands at Designation	Condemnation in Fee (Acres)	Condemnation of Easement (Acres)
Middle Fork Clearwater (Public Law (P.L.) 90-542)	ID	USFS	185.0	Y	N/A ⁶	1266 ⁷
Eleven Point (P.L. 90-542)	MO	USFS	44.4	Y	657 ⁷	2614 ⁷
Feather (P.L. 90-542)	CA	USFS	77.6	Y	N/A ⁶	0
Rio Grande (P.L. 90-542)	NM	BLM and USFS	56.0	Y N	72 ⁷	2.7 ⁷
Rio Grande (P.L. 103-242)	NM	BLM	12.0	N		
Rio Grande (P.L. 95-625)	TX	NPS	191.2	Y	0	0

⁴ Under the Act, there is no federal authority for land acquisition on state-administered rivers (under Section 2(a)(ii)).

⁵ Army Corps of Engineers (ACOE), Bureau of Land Management (BLM), National Park Service (NPS), U.S. Fish and Wildlife Service (USFWS), U.S. Forest Service (USFS)

⁶ Not applicable (N/A) because condemnation is prohibited by (a) and/or (b):

- a) If 50% or more of acreage within the river area is in public ownership, condemnation in fee is prohibited under Section 6(b), and/or
- b) Condemnation is prohibited by special provision.

⁷ See Table 2 for more detail.

Federally Administered Rivers as of June 1998

Table 1, *Cont.*

River and Public Law	State	Administering Agency	Mileage	Private Lands at Designation	Condemnation in Fee (Acres)	Condemnation of Easement (Acres)
Rogue (P.L. 90-542)	OR	BLM USFS	47.0 37.5	Y Y	N/A ⁶ N/A ⁶	518 ⁷ 751 ⁷
St. Croix (P.L. 90-542)	MN, WI	NPS	200.0	Y	496 ⁷	689 ⁷
St. Croix, Lower (P.L. 92-560)	MN, WI	NPS	27.0	Y	120 ⁷	470 ⁷
Middle Fork Salmon (P.L. 90-542)	ID	USFS	104.0	Y	N/A ⁶	0
Salmon (P.L. 96-312)	ID	USFS	125.0	Y	N/A ⁶	0
Wolf (P.L. 90-542)	WI	NPS	24.0	Y	0	0
Chattooga (P.L. 93-279)	GA, NC, SC	USFS	56.9	Y	N/A ⁶	0
Snake (P.L. 94-199)	ID, OR	USFS	66.9	Y	N/A ⁶	0
Rapid (P.L. 94-199)	ID	USFS	26.8	Y	N/A ⁶	0
Missouri (P.L. 94-486)	MT	BLM	149.0	N		
Missouri (P.L. 95-625)	NE, SD	NPS	59.0	Y	0	0
Missouri (P.L. 102-50)	NE, SD	NPS	39.0	Y	0	0
Flathead (P.L. 94-486)	MT	USFS and NPS	219.0	Y Y	N/A ⁶ N/A ⁶	14 ⁷ 0
Obed (P.L. 94-486)	TN	NPS	45.3	Y	68 ⁷	15 ⁷

Federally Administered Rivers as of June 1998

Table 1, *Cont.*

River and Public Law	State	Administering Agency	Mileage	Private Lands at Designation	Condemnation in Fee (Acres)	Condemnation of Easement (Acres)
Pere Marquette (P.L. 95-625)	MI	USFS	66.4	Y	0	0
Skagit (P.L. 95-625)	WA	USFS	157.5	Y	N/A ⁶	0
Delaware, Upper (P.L. 95-625)	NY, PA	NPS	75.4	Y	0	0
Delaware, Middle (P.L. 95-625)	NJ, PA	NPS	35.0	N		
North Fork American (P.L. 95-625)	CA	USFS	26.3	Y	N/A ⁶	0
		BLM	12.0	Y	N/A ⁶	0
Saint Joe (P.L. 95-625)	ID	USFS	66.3	N		
Alagnak (P.L. 96-487)	AK	NPS	67.0	Y	N/A ⁶	0
Alatna (P.L. 96-487)	AK	NPS	83.0	Y	N/A ⁶	0
Aniakchak (P.L. 96-487)	AK	NPS	63.0	Y	N/A ⁶	0
Charley (P.L. 96-487)	AK	NPS	208.0	Y	N/A ⁶	0
Chilikadrotna (P.L. 96-487)	AK	NPS	11.0	N		
John (P.L. 96-487)	AK	NPS	52.0	Y	N/A ⁶	0
Kobuk (P.L. 96-487)	AK	NPS	110.0	Y	N/A ⁶	0

Federally Administered Rivers as of June 1998

Table 1, *Cont.*

River and Public Law	State	Administering Agency	Mileage	Private Lands at Designation	Condemnation in Fee (Acres)	Condemnation of Easement (Acres)
Mulchatna (P.L. 96-487)	AK	NPS	24.0	Y	N/A ⁶	0
North Fork Koyukuk (P.L. 96-487)	AK	NPS	102.0	Y	N/A ⁶	0
Noatak (P.L. 96-487)	AK	NPS	330.0	Y	N/A ⁶	0
Salmon (P.L. 96-487)	AK	NPS	70.0	Y	N/A ⁶	0
Tinayguk (P.L. 96-487)	AK	NPS	44.0	N		
Tlikakila (P.L. 96-487)	AK	NPS	51.0	N		
Andreafsky (P.L. 96-487)	AK	USFWS	262.0	Y	N/A ⁶	0
Ivishak (P.L. 96-487)	AK	USFWS	80.0	N		
Nowitna (P.L. 96-487)	AK	USFWS	225.0	Y	N/A ⁶	0
Selawik (P.L. 96-487)	AK	USFWS	160.0	Y	N/A ⁶	0
Sheenjok (P.L. 96-487)	AK	USFWS	160.0	N		
Wind (P.L. 96-487)	AK	USFWS	140.0	N		
Beaver Creek (P.L. 96-487)	AK	USFWS BLM	16.0 111.0	N N		

Federally Administered Rivers as of June 1998

Table 1, *Cont.*

River and Public Law	State	Administering Agency	Mileage	Private Lands at Designation	Condemnation in Fee (Acres)	Condemnation of Easement (Acres)
Birch Creek (P.L. 96-487)	AK	BLM	126.0	N		
Delta (P.L. 96-487)	AK	BLM	62.0	N		
Fortymile (P.L. 96-487)	AK	BLM	392.0	N		
Gulkana (P.L. 96-487)	AK	BLM	181.0	N		
Unalakleet (P.L. 96-487)	AK	BLM	80.0	N		
Smith (P.L. 101-612)	CA	USFS	296.4	Y	N/A ⁶	0
Verde (P.L. 98-406)	AZ	USFS	40.5	Y	N/A ⁶	0
Tuolumne (P.L. 98-425)	CA	USFS	26.0	Y	N/A ⁶	0
		NPS	54.0	N		
		BLM	3.0	N		
Au Sable (P.L. 98-444)	MI	USFS	23.0	Y	N/A ⁶	0
Owyhee (P.L. 98-494)	OR	BLM	120.0	Y	N/A ⁶	0
Illinois (P.L. 98-494)	OR	USFS	50.4	Y	N/A ⁶	0
Horsepasture (P.L. 99-530)	NC	USFS	4.2	Y	0	0

Federally Administered Rivers as of June 1998

Table 1, *Cont.*

River and Public Law	State	Administering Agency	Mileage	Private Lands at Designation	Condemnation in Fee (Acres)	Condemnation of Easement (Acres)
Cache la Poudre (P.L. 96-590)	CO	USFS	64.0	Y	N/A ⁶	0
		NPS	12.0	N		
Black Creek (P.L. 99-590)	MS	USFS	21.0	Y	N/A ⁶	0
Saline Bayou (P.L. 99-590)	LA	USFS	19.0	Y	N/A ⁶	0
Klickitat (P.L. 99-663)	WA	USFS	10.0	Y	0	0
White Salmon (P.L. 99-663)	WA	USFS	9.0	Y	0	0
Merced (P.L. 100-149)	CA	USFS	29.5	Y	N/A ⁶	0
		NPS	81.0	Y	N/A ⁶	0
Merced (P.L. 102-432)		BLM	12.0	Y	N/A ⁶	0
Kings (P.L. 100-150)	CA	USFS	25.5	N		
		NPS	55.5	N		
Kern (P.L. 100-174)	CA	USFS	124.0	Y	N/A ⁶	0
		NPS	27.0	N		
Wildcat Brook (P.L. 100-554)	NH	USFS	14.5	Y	N/A ⁶	0
Sipsey Fork West Fork (P.L. 100-547)	AL	USFS	61.4	Y	N/A ⁶	0

Federally Administered Rivers as of June 1998

Table 1, *Cont.*

River and Public Law	State	Administering Agency	Mileage	Private Lands at Designation	Condemnation in Fee (Acres)	Condemnation of Easement (Acres)
Big Marsh Creek (P.L. 100-557)	OR	USFS	15.0	Y	N/A ⁶	0
Chetco (P.L. 100-557)	OR	USFS	44.5	Y	N/A ⁶	0
Clackamas (P.L. 100-557)	OR	USFS	47.0	Y	N/A ⁶	0
Crescent Creek (P.L. 100-557)	OR	USFS	10.0	Y	N/A ⁶	0
Crooked (P.L. 100-557)	OR	BLM	15.0	Y	N/A ⁶	0
Deschutes (P.L. 100-557)	OR	USFS	54.4	Y	N/A ⁶	0
		BLM	119.0	Y	N/A ⁶	0
Donner und Blitzen (P.L. 100-557)	OR	BLM	72.7	Y	N/A ⁶	0
Eagle Creek (P.L. 100-557)	OR	USFS	27.0	Y	N/A ⁶	0
Elk (P.L. 100-557)	OR	USFS	19.0	Y	N/A ⁶	0
Grande Ronde (P.L. 100-557)	OR	USFS	18.9	Y	N/A ⁶	0
		BLM	24.9	Y	N/A ⁶	0
Imnaha (P.L. 100-557)	OR	USFS	77.0	Y	N/A ⁶	0
John Day (P.L. 100-557)	OR	BLM	147.5	Y	N/A ⁶	0

Federally Administered Rivers as of June 1998

Table 1, *Cont.*

River and Public Law	State	Administering Agency	Mileage	Private Lands at Designation	Condemnation in Fee (Acres)	Condemnation of Easement (Acres)
Joseph Creek (P.L. 100-557)	OR	USFS	8.6	Y	N/A ⁶	0
Little Deschutes (P.L. 100-557)	OR	USFS	12.0	N		
Lostine (P.L. 100-557)	OR	USFS	16.0	Y	N/A ⁶	0
Malheur (P.L. 100-557)	OR	USFS	13.7	N		
McKenzie (P.L. 100-557)	OR	USFS	12.7	Y	N/A ⁶	0
Metolius (P.L. 100-557)	OR	USFS	28.6	Y	N/A ⁶	0
Minam (P.L. 100-557)	OR	USFS	39.0	Y	N/A ⁶	0
North Fork Crooked (P.L. 100-557)	OR	USFS	14.7	Y	N/A ⁶	0
		BLM	17.6	Y	N/A ⁶	0
North Fork John Day (P.L. 100-557)	OR	USFS	54.1	Y	N/A ⁶	0
North Fork Malheur (P.L. 100-557)	OR	USFS	25.5	N		
North Fork of the Middle Fork of the Willamette (P.L. 100-557)	OR	USFS	42.3	N		
North Fork Owyhee (P.L. 100-557)	OR	BLM	9.6	Y	N/A ⁶	0

Federally Administered Rivers as of June 1998

Table 1, *Cont.*

River and Public Law	State	Administering Agency	Mileage	Private Lands at Designation	Condemnation in Fee (Acres)	Condemnation of Easement (Acres)
North Fork Smith (P.L. 100-557)	OR	USFS	13.0	N		
North Fork Sprague (P.L. 100-557)	OR	USFS	15.0	Y	N/A ⁶	0
North Powder (P.L. 100-557)	OR	USFS	6.0	N		
North Umpqua (P.L. 100-557)	OR	USFS	25.4	Y	N/A ⁶	0
		BLM	8.4	Y	N/A ⁶	0
Powder (P.L. 100-557)	OR	BLM	11.7	Y	N/A ⁶	0
Quartzville Creek (P.L. 100-557)	OR	BLM	12.0	Y	N/A ⁶	0
Roaring (P.L. 100-557)	OR	USFS	13.7	N		
Salmon (P.L. 100-557)	OR	USFS	25.5	Y	N/A ⁶	0
		BLM	8.0	Y	N/A ⁶	0
Sandy (P.L. 100-557)	OR	USFS	12.4	N		
		BLM	12.5	Y	N/A ⁶	0
South Fork John Day (P.L. 100-557)	OR	BLM	47.0	Y	N/A ⁶	0
Squaw Creek (P.L. 100-557)	OR	USFS	15.4	N		
Sycan (P.L. 100-557)	OR	USFS	59.0	Y	N/A ⁶	0

Federally Administered Rivers as of June 1998

Table 1, *Cont.*

River and Public Law	State	Administering Agency	Mileage	Private Lands at Designation	Condemnation in Fee (Acres)	Condemnation of Easement (Acres)
Upper Rogue (P.L. 100-557)	OR	USFS	40.3	Y	N/A ⁶	0
Wenaha (P.L. 100-557)	OR	USFS	21.6	Y	N/A ⁶	0
West Little Owyhee (P.L. 100-557)	OR	BLM	57.6	Y	N/A ⁶	0
White (P.L. 100-557)	OR	USFS BLM	22.1 24.7	Y Y	N/A ⁶ N/A ⁶	0 0
Bluestone (P.L. 100-534)	WV	NPS	10.0	Y	N/A ⁶	0
Rio Chama (P.L. 100-633)	NM	USFS and BLM	24.7	Y Y	N/A ⁶ N/A ⁶	0 0
East Fork Jemez (P.L. 101-306)	NM	USFS	11.0	Y	N/A ⁶	0
Pecos (P.L. 101-306)	NM	USFS	20.5	Y	N/A ⁶	0
Clarks Fork Yellowstone (P.L. 101-628)	WY	USFS	20.5	Y	N/A ⁶	0
Niobrara (P.L. 102-50)	NE	NPS and USFWS	104.0	N Y	0	0
Bear Creek (P.L. 102-249)	MI	USFS	6.5	Y	N/A ⁶	0

Federally Administered Rivers as of June 1998

Table 1, *Cont.*

River and Public Law	State	Administering Agency	Mileage	Private Lands at Designation	Condemnation in Fee (Acres)	Condemnation of Easement (Acres)
Black (P.L. 102-249)	MI	USFS	14.0	Y	N/A ⁶	0
Carp (P.L. 102-249)	MI	USFS	27.8	Y	N/A ⁶	0
Indian (P.L. 102-249)	MI	USFS	51.0	Y	N/A ⁶	0
Manistee (P.L. 102-249)	MI	USFS	26.0	Y	N/A ⁶	0
Ontonagon (P.L. 102-249)	MI	USFS	157.4	Y	N/A ⁶	0
Paint (P.L. 102-249)	MI	USFS	51.0	Y	N/A ⁶	0
Pine (P.L. 102-249)	MI	USFS	25.0	Y	N/A ⁶	0
Presque Isle (P.L. 102-249)	MI	USFS	57.0	Y	N/A ⁶	0
Sturgeon (Hiawatha National Forest) (P.L. 102-249)	MI	USFS	43.9	Y	N/A ⁶	0
Sturgeon (Ottawa National Forest) (P.L. 102-249)	MI	USFS	25.0	Y	N/A ⁶	0
Tahquamenon, East Branch (P.L. 102-249)	MI	USFS	13.2	Y	N/A ⁶	0
Whitefish (P.L. 102-249)	MI	USFS	33.6	Y	N/A ⁶	0

Federally Administered Rivers as of June 1998

Table 1, *Cont.*

River and Public Law	State	Administering Agency	Mileage	Private Lands at Designation	Condemnation in Fee (Acres)	Condemnation of Easement (Acres)
Yellow Dog (P.L. 102-249)	MI	USFS	4.0	Y	N/A ⁶	0
Allegheny (P.L. 102-271)	PA	USFS	86.6	Y	N/A ⁶	0
Big Piney (P.L. 102-275)	AR	USFS	45.2	Y	N/A ⁶	0
Buffalo (P.L. 102-275)	AR	USFS	15.8	Y	N/A ⁶	0
Cossatot (P.L. 102-275)	AR	USFS ACOE	15.5 4.6	Y Y	N/A ⁶ N/A ⁶	0 0
Hurricane Creek (P.L. 102-275)	AR	USFS	15.5	Y	N/A ⁶	0
Little Missouri (P.L. 102-275)	AR	USFS	15.7	Y	N/A ⁶	0
Mulberry (P.L. 102-275)	AR	USFS	56.0	Y	N/A ⁶	0
North Sylamore Creek (P.L. 102-275)	AR	USFS	14.5	Y	N/A ⁶	0
Richland Creek (P.L. 102-275)	AR	USFS	16.5	Y	N/A ⁶	0
Sespe Creek (P.L. 102-301)	CA	USFS	31.5	Y	N/A ⁶	0
Sisquoc (P.L. 102-301)	CA	USFS	33.0	N		

Federally Administered Rivers as of June 1998

Table 1, *Cont.*

River and Public Law	State	Administering Agency	Mileage	Private Lands at Designation	Condemnation in Fee (Acres)	Condemnation of Easement (Acres)
Big Sur (P.L. 102-301)	CA	USFS	19.5	N		
Great Egg Harbor (P.L. 102-536)	NJ	NPS	129.0	Y	N/A ⁶	0
Maurice (P.L. 103-162)	NJ	NPS	35.4	Y	N/A ⁶	0
Red (P.L. 103-170)	KY	USFS	19.4	Y	N/A ⁶	0
Farmington, West Branch (P.L. 103-313)	CT	NPS	14.0	Y	N/A ⁶	N/A ⁶
Clarion (P.L. 104-314)	PA	USFS	51.7	Y	N/A ⁶	0
Lamprey (P.L. 104-333)	NH	NPS	11.5	Y	N/A ⁶	N/A ⁶
Elkhorn Creek (P.L. 104-333)	OR	USFS BLM	5.8 0.6	N N		

Summary of the Use of Eminent Domain as of June 1998

Table 2

River and Public Law	State	Administering Agency	Private Acres Acquired Since Designation			
			Acres In Fee ⁸	Acres in Fee Condemned	Acres of Easement Acquired ⁹	Acres of Easement Condemned
Middle Fork Clearwater (P.L. 90-542)	ID	USFS	221.0	N/A ⁶	3783.0	1266.0
Eleven Point (P.L. 90-542)	MO	USFS	2465.0	657.0	4534.0	2614.0
Rio Grande (P.L. 90-542)	NM	BLM	151.0	72.0	774.0	2.7
Rogue (P.L. 90-542)	OR	BLM USFS	2354.0 1870.0	N/A ⁶ N/A ⁶	1912.0 1421.0	518.0 751.0
St. Croix (P.L. 90-542)	MN, WI	NPS	20986.0	496.0	10158.0	689.0
St. Croix, Lower (P.L. 92-560)	MN, WI	NPS	4696.0	120.0	3487.0	470.0
Flathead (P.L. 94-486)	MT	USFS	2947.0	N/A ⁶	2016.0	14.0
Obed (P.L. 94-486)	TN	NPS	2333.0	68.0	1081.0	15.0
TOTALS			38023.0	1413.0	29166.0	6339.7

⁸ Total acres acquired by purchase, donation, exchange, or condemnation.

⁹ Total acres of easement acquired by purchase, donation, or condemnation.

