

BOOK REVIEW

THE FOREST SERVICE: A STUDY IN PUBLIC LAND MANAGEMENT. By Glen O. Robinson. Johns Hopkins University Press, 1975. Pp. xv, 337. \$16.95.

*Reviewed by A. Dan Tarlock**

The Forest Service is charged with managing our nation's public timber resources. To accomplish this, the agency must balance competing demands from industry for increased timber sales, from the recreation industry for more intense development of outdoor recreation areas, and from environmentalists for more wilderness and wildlife protection areas. This balancing is done through the statutory authority to classify public lands under its jurisdiction for various uses and to adopt management plans.¹ In this manner the Forest Service determines the allocation of a substantial part of our forest resources. This broad power has long been acknowledged, but until recently it has not been subjected to careful legal analysis, let alone judicial scrutiny. Heir to a long and proud tradition stemming from the progressive conservation era, the Service is the classic example of the expert management agency. It has developed a strong concept of non-political resource management in the public interest. This professionalism combined with the vagueness of the agency's organic legislation has helped to shield the Service from legal scrutiny.

Today the Forest Service no longer enjoys a broad immunity from criticism. In recent years the Service has become embroiled in a series of bitter environmental controversies over the use of the lands it manages. Decisions to allow ski resorts in scenic areas,² to harvest timber

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THE FOLLOWING CITATION WILL BE USED IN THIS REVIEW:

G. ROBINSON, THE FOREST SERVICE: A STUDY IN PUBLIC LAND MANAGEMENT (1975) [hereinafter cited as FOREST SERVICE].

1. Forest Management Act of 1897, 30 Stat. 34-36, *as amended* 16 U.S.C. §§ 551 *et seq.* (1970).

2. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

by clear-cutting,³ and to study lands for possible inclusion in the wilderness system⁴ have all been litigated. Furthermore, the very processes by which the Service arrives at its decisions have been seriously questioned.⁵

Forest Service decision-making depends for its legitimacy on a mix of rational counting procedures which attempt to reduce disparate values to a common denominator so that the costs and benefits of alternative choices can be measured and compared, as well as political procedures which attempt to gauge the intensity of value preferences for a given allocation. Such allocations are generally ad hoc and affect diffuse rather than discrete classes of winners and losers. For these reasons much Forest Service decision-making falls outside both of the traditional administrative law categories—adjudication and rulemaking. The Service plans and manages more than it adjudicates and makes rules. Modern administrative law scholarship is just beginning to recognize the limits of the two traditional categories of administrative functions in analyzing the administrative process but no coherent new model has emerged.

The role the legal system can and should play in Forest Service decision-making is not at all clear. The past few years have produced a number of judicial decisions which attempt to reform the process of allocating resources by mandating a systematic balancing of the costs and benefits of alternative courses of action.⁶ If this "new" judicial

3. *Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975).

4. *Parker v. United States*, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972).

5. Environmentalists, for example, advance two criticisms of Forest Service decision-making which, upon further examination, appear to be inconsistent. The first proceeds from Dicey's dictum that the exercise of discretion is inconsistent with the rule of law. A. DICEY, *LAW OF THE CONSTITUTION* 184 (8th ed. 1927). Clearer congressional guidelines, the establishment of more single-use areas, and stricter standards of judicial review of agency implementation of its mandate are therefore urged. Note, *Managing Federal Lands: Replacing the Multiple Use System*, 82 *YALE L.J.* 787 (1973). The second urges the Service to think comprehensively and imaginatively of ways to promote environmental quality, in short to exercise its broad discretion in favor of environmental protection. Reich, *The Law of the Planned Society*, 75 *YALE L.J.* 1227 (1966). Both these approaches provide little insight into understanding the difficult resource choices that an agency such as the Forest Service must make, for they both proceed on the unwarranted assumption that environmental considerations should consistently be accorded a preference over other national goals. The case for preferential recognition of environmental values is that they have been historically ignored in agency decision-making and thus should be given equal weight alongside the traditional developmental approach promoted by the Forest Service. Yet, it should readily be conceded that one cannot completely substitute environmental values for developmental ones, for the human costs would be too great.

6. See Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 *U. PA. L. REV.* 509 (1974).

intervention has not produced a fundamental reordering of priorities, it at least has caused some environmental decisions to be made that would not otherwise have been made, has produced a more explicit identification of environmental costs, and has created more responsive procedures for decision-making. Still, those who would reform Forest Service decision-making need to know a great deal more about the processes of resource allocation and the available criteria for judging the merits of an allocation than is currently available.

Professor Glen O. Robinson is a lawyer who understands the need for systematic study of the process of allocation before attempting to suggest what role law can play in this process. His book, *The Forest Service: A Study in Public Land Management* is a properly modest step in this direction. The book is not primarily a legal study; rather it is a synthesis of existing scholarship, supplemented by interviews recounting what economists, historians and public administrators have had to say about the Forest Service. Apparently, they have a great deal to say, and this book accurately captures it. As a result of Professor Robinson's synthesis, some persistent myths are negated and some fresh insights into policy questions are presented.

For example, the book's careful analysis of the history of the Forest Service puts to rest a myth that is becoming widely accepted among environmentalists. Environmentalists argue that the agency has been captured by the timber industry, and hence its policies are designed to serve only this interest. It is true, as Professor Robinson suggests, that the Forest Service's long attention to timber production may have led to an excessive emphasis on timber production compared to other competing resources,⁷ yet there was no need for anyone to capture the agency for this to occur. Gifford Pinchot, the founder and guiding spirit of the Service, was a practical scientist influenced by German theories of scientific management; he argued that federal timber management was necessary because the federal government could grow this commercial crop for harvest more efficiently than private industry. Thus, the Service is doing exactly what it was set up to do. Mission agencies are increasingly being tagged with the sin of tunnel vision but too often reformers suggest that opening up the agency to more influences instead of undertaking a basic restructuring of the agency's mission will bring needed balance. *The Forest Service* is a welcome contribution to the literature of administrative reform because it correctly focuses on the need to assess a particular agency's mission before tinkering with agency procedure.

7. FOREST SERVICE 101.

Professor Robinson is one of a number of younger law professors who became attracted to the use of economics as a means of analyzing the merits of government allocation and distribution programs not subject to the discipline of the market. In employing this approach the author turns to a series of case studies which illustrate the application of the Service's operating principle of multiple use. Specific use conflicts involving timber production, outdoor recreation, wilderness preservation, range use, wildlife protection, and watershed management are usefully explored. The book's major theme is that forest resources should be allocated by the market or market criteria whenever possible. Although there is no constitutional requirement that government be efficient, there is a growing consensus that it ought to be unless there is good reason for subsidizing an activity. Income redistribution is the usual reason for subsidization, and Professor Robinson echoes the conclusions of many welfare economists that natural resource use policies are not especially good vehicles for income redistribution. Welfare economics is thus a powerful and legitimate tool with which to critique government allocation programs. As *The Forest Service* predictably illustrates, an economic analysis works best when the government program has roughly the same objectives as an activity carried out by private industry, and the author's chapters on timber harvesting, outdoor recreation, and range management make several positive, if familiar, suggestions for policy changes.

Allocation of forest resources has always been controversial. The issue with respect to timber production and range use is the extent to which private interests should be able to claim rights in public resources; the outdoor recreation controversy involves the question whether available space should be allocated administratively or by the market. Applying an economic analysis to these problems, Professor Robinson suggests that there is no need for the Forest Service to accelerate timber production substantially; our national forests cannot supply all our nation's needs, and excess current production might result in pricing timber too low. Timber is a scarce resource and a rise in price is "an efficient means of rationing scarce resources and signaling new production, through new technology or redirection of resources employed in other enterprises."⁸ This is an especially sound suggestion for, although not stressed by the author, considerable doubt exists about the capacity of forest soils to support the continued harvesting and regeneration of timber over the long run. Western cattle interests have long argued that range use ought to be allocated by permits which resemble

8. *Id.* at 102.

term leases and are transferable.⁹ The Service has maintained that Taylor Act grazing permits are only licenses and has restricted them to local cattle raisers.¹⁰ Professor Robinson comes down in favor of firmer entitlements, transferability, and allocation by auction.¹¹ In addition, he has quite useful things to say about the appropriate fee structure and overgrazing.

The debate over outdoor recreation has centered on the government's unwillingness to allocate use of recreation areas by price rationing, for example, user fees. Professor Robinson sees no reason not to do this, arguing: "[P]utting equity aside, the only thing one can say [for administrative allocation] is that it rewards the early riser and those who are fortuitously close to the site; neither person seems morally more deserving than the person who expresses the intensity of his interest by the money he is willing to pay for the privilege."¹² Economists might quibble with this analysis for rationing by queuing is arguably quite efficient since it allows people to vote by spending time as well as money.¹³ This quibble aside, price rationing seems the best solution to the persistent overcrowding of fragile federal recreation areas, and the *Forest Service's* analysis of this problem is a model critique of bureaucratic rigidity.

Two brief chapters on wildlife and watershed management are less successful in applying economic analysis to policy problems since wildlife and water have not traditionally been thought of as "for sale" by the federal government. Water is a scarce resource in the West. Under the reserved rights doctrine the federal government can perfect water rights, in some instances superior to state created rights, to support the purposes for which public lands were withdrawn from entry.¹⁴ However, the federal government probably cannot capture this water and sell it for non-federal purposes. Therefore, as the chapter points out,¹⁵ there is little incentive for the Forest Service to increase the yields from federally managed watersheds. Generally it is desirable to limit federal water rights because they interfere with state-based expectations. But, since

9. See *id.* at 209-13; UNITED STATES PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND ch. 6 (1970).

10. See FOREST SERVICE 210, 219; Note, *Managing Federal Lands*, *supra* note 5, at 790.

11. FOREST SERVICE 213-14, 218-21.

12. *Id.* at 144.

13. See Nichols, Smolensky & Tideman, *Discrimination by Waiting Time in Merit Goods*, 61 AM. ECON. REV. 312 (June 1971).

14. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES 459-71 (1973) (contains a thorough summary of the reserved rights doctrine and the problems it presents for coordinating state and federal water administration).

15. FOREST SERVICE ch. IX.

increased yields will produce water that would not otherwise have been available to those claiming under state law, there is no reason, as Professor Robinson argues, not to let the federal government capture this and sell it.

The federal government has not thought of selling wildlife for different reasons. Until the Multiple-Use and Sustained Yield Act of 1960¹⁶ wildlife management had no explicit recognition in Forest Service enabling legislation. Historically the federal government has managed wildlife habitat, and the states have administered wildlife conservation laws on the theory that they "owned" the wildlife. Professor Robinson lucidly outlines the debate over the limits of federal and state jurisdiction, sketches the case for increased federal control, and reiterates the plea for more reliance on user charges to recapture the benefits of federal expenditures on wildlife management.¹⁷

An extensive chapter is devoted to the problem of wilderness preservation. It has long been argued that wilderness preservation is an ethical issue and thus cannot be debated in economic terms. Professor Robinson persuasively demonstrates that any policy of wilderness preservation must at some point take into account the opportunity cost of the decision to preserve. Unfortunately, however, the chapter contributes little beyond this to answering the question of how wilderness preservation decisions should be made. As have many others who have studied the difficulty in reconciling spiritual and utilitarian values he can only conclude:

What this suggests is that it is probably futile to seek consensus on the broad issues of wilderness preservation. Attention to the general, abstract issues can only exacerbate the conflict among partisans on both sides of the preservation controversy, and make compromise more difficult. Instead, the general issues must be broken down into their smallest components and each of these examined as individual problems, with, it is hoped, a modest degree of rationality and a minimum amount of moralizing.¹⁸

This is an honest, typically lawyerlike solution to a difficult problem. It is also an incomplete and unsatisfactory answer. As philosophers such as John Passmore¹⁹ and legal scholars such as Laurence Tribe have shown,²⁰ it is possible to apply philosophical, legal and economic

16. 16 U.S.C. §§ 528-31 (1970).

17. Unfortunately such fees are prohibited under the 1972 Amendments to the Land and Water Conservation Fund Act. Pub. L. No. 92-347, 86 Stat. 459 (July 11, 1972).

18. FOREST SERVICE 189.

19. J. PASSMORE, *MAN'S RESPONSIBILITY FOR NATURE* (1974).

20. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974).

concepts to the wilderness preservation issue, with rational results, as well as to suggest an approach to the design of new processes to make these admittedly difficult decisions.

The lawyer reading this book to discover how the discretion of an agency which has a broad grant of authority to manage public resources can be controlled will, at first, be disappointed. The book is not, as the author admits in the Preface,²¹ a "Nader study" with neat, if simple, solutions to the perceived problems. Nonetheless, *The Forest Service* is a successful examination of the substance of Forest Service policy, and can serve as a model for other legal studies of agency policymaking. Through his analysis of many problems not traditionally considered within the dominion of lawyers, for example, decisions concerning allocation of wilderness areas, Professor Robinson illuminates some of the hard choices which the law must confront when it attempts to control the allocation of resources through primarily administrative rather than market processes.

21. FOREST SERVICE xv.

