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BOOK REVIEW

The Forest Service: A Study in Public Land Management

by

GLEN O. ROBINSON

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Lawyers finally have a book about the Forest Service.¹ Kaufman² and Frome³ both have produced important anecdotal books about the practical workings of the agency; Dana⁴ and Gates⁵ have written comprehensive and excellent histories of the Forest Service. The Nader Task Force's critique⁶ and *The Forest Killers* by Jack Shepherd⁷ provide many a unique insight but are frankly styled as attacks on Forest Service Policy. Similarly, Clawson's analysis of economic, environmental, and silvicultural issues⁸ is directed toward forest policy, not law. Thus, as of 1975, the lawyer was left with no single book which would provide an introduction to basic administrative practices in the Forest Service.

This vacuum in the legal literature is not surprising in light of the truly extraordinary dearth of judicial review of, and congressional direction over, Forest Service activities. The Forest Service was in the Supreme Court in 1911 in *Light v. United States*⁹ and did not return on anything approaching a major issue until 1972.¹⁰ No lower court struck down any significant action by the agency until 1970.¹¹ These facts, mind you, relate to an agency which administers more

1. G. ROBINSON, *THE FOREST SERVICE: A STUDY IN PUBLIC LAND MANAGEMENT* (1975) [hereinafter cited as *FOREST SERVICE*]. The author, a former administrative lawyer and law professor at the University of Minnesota, is now a Commissioner of the Federal Communications Commission. He recently co-authored an innovative casebook on administrative law which departs from the traditional approach toward the subject by focusing on specific agencies. G. ROBINSON & E. GELLHORN, *THE ADMINISTRATIVE PROCESS* (1974).

2. H. KAUFMAN, *THE FOREST RANGER* (1960).

3. M. FROME, *THE FOREST SERVICE* (1971).

4. S. DANA, *FOREST AND RANGE POLICY, ITS DEVELOPMENT IN THE UNITED STATES* (1956).

5. P. GATES, with a chapter by R. SWENSON, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* (1968) [hereinafter cited as *GATES*].

6. D. BARNEY, *THE LAST STAND* (1974).

7. J. SHEPHERD, *THE FOREST KILLERS* (1975).

8. M. CLAWSON, *FORESTS FOR WHOM AND FOR WHAT?* (1975).

9. 220 U.S. 523 (1911).

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

11. *Parker v. United States*, 448 F.2d 793 (10th Cir. 1971), cert. denied, 405 U.S. 989 (1972), aff'g 309 F. Supp. 593 (D. Colo. 1970).

than 186 million acres of public land.¹² Our National Forests offer some of the world's prime recreational and wilderness land,¹³ and hold mineral and timber resources of inestimable economic value.¹⁴

Historically, Congress has given the Forest Service a long leash with which to manage these resources, which comprise some 7% of our nation's land area. Presidents McKinley, Taft, and especially Theodore Roosevelt set aside huge forest reserves, now National Forests, in the 1890s and early 1900s.¹⁵ For half a century the reserves were managed principally according to the extremely broad legislative mandate of the Organic Act of 1897.¹⁶ In 1960, at the urging of the Forest Service, Congress passed the Multiple Use-Sustained Yield Act which very generally described the competing multiple uses for which the National Forests are to be managed—timber, wildlife, range, watershed, and recreation.¹⁷ In 1964, the more specific Wilderness Act set aside approximately 9.1 million acres for wilderness use and directed the agency to study an additional 5.4 million acres for potential inclusion in the National Wilderness Preservation System.¹⁸

In the late 1960s, however, it became apparent that fundamental changes had occurred in policy-making within the Forest Service. Before World War II, the agency had served mainly in a caretaker role, pioneering the wilderness concept and developing extensive recreational facilities,¹⁹ while providing a steady flow of wood prod-

12. Most of this acreage is in the west, although there are important National Forests in the east. See FOREST SERVICE at 27; UNITED STATES PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 19-30 (1970).

13. FOREST SERVICE chs. V and VI. The Forest Service has responsibility for the National Wilderness Preservation System. See 16 U.S.C. § § 1131-36 (1974).

14. FOREST SERVICE at 85-103; GATES, *supra* note 5, at 699-722. The economic importance of national forests as watersheds should not be overlooked; they provide the major source of water for some 1800 cities and towns. M. CLAWSON & B. HELD, THE FEDERAL LANDS 36-42 (1957), [hereinafter cited as FEDERAL LANDS].

15. After the creation of forest reserves was authorized in 1891, President Harrison set aside thirteen million acres; President Cleveland reserved thirteen additional forests that were twice the size of the Harrison reserves; and President Roosevelt reserved a total of over 148 million acres, including massive reserves in twenty-one new forests which were signed into law by Roosevelt shortly before Congress passed an act which required that any future withdrawals must be specifically approved by Congress. See, e.g., FEDERAL LANDS, *supra* note 14, at 27-29; S. UDALL, THE QUIET CRISIS 97-108 (1963); GATES, *supra* note 5, at 580-82.

16. 16 U.S.C. § 473-78, 479-82, 551 (1974).

17. The Multiple Use-Sustained Yield Act, 16 U.S.C. § § 528-31 (1974). The Act is analyzed in McCloskey, *The Multiple Use-Sustained Yield Act of 1960*, 41 Ore. L. Rev. 49 (1961).

18. The Wilderness Act, 16 U.S.C. § § 1131-36 (1974).

19. FOREST SERVICE 119-151, 156-161. It was the great conservationist Aldo Leopold, then an assistant district forester, who in 1924 initiated the wilderness concept by securing the designation of more than 700,000 acres of the Gila National Forest in the Southwest as the first official wilderness area. *Id.* at 156-57.

ucts which totaled only 5% of the national supply.²⁰ The Service reacted to the post-war housing boom, however, by dramatically increasing timber production.²¹ The controversial practice of clear-cutting became a major harvesting technique during the 1960s,²² and environmentalists leveled serious charges of mismanagement against the agency, particularly in regard to Montana's Bitterroot and West Virginia's Monongahela National Forests.²³ After oversight hearings, a Senate subcommittee agreed with most of the charges.²⁴

As a result, in the 1970s judicial and congressional oversight of the Forest Service became intense. Logging contracts were enjoined in California and Wyoming on the ground that logging in roadless areas required NEPA statements.²⁵ Logging operations in the White River National Forest in Colorado were halted because the disputed area was subject to review under the Wilderness Act.²⁶ Logging in the Boundary Waters Canoe Area in Minnesota was also prohibited under NEPA and the Wilderness Act.²⁷

Most dramatically, the so-called *Monongahela* decision effectively prohibited clear-cutting and some thinning practices in the Fourth Circuit.²⁸ The District Court in Alaska struck down an existing timber contract on the same ground.²⁹ Thinning is a common forestry practice and clearcutting, unsightly though it may be, is the accepted method of harvesting the great Douglas Fir resources of the Pacific Northwest.³⁰ The timber industry and the environmentalists had long been at each other's throats, but now the gauntlet had been thrown down for good. The Forest Service was in the middle.

20. FOREST SERVICE 7-14; *West Virginia Division of the Izaak Walton League of America v. Butz*, 552 F.2d 945, 954-55 (4th Cir. 1975).

21. *Id.* at 955; FOREST SERVICE 14-15, 91; CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, AN ANALYSIS OF FORESTRY ISSUES, 92ND CONG., 1st SESS. (Comm. Print 1971).

22. Clearcutting is particularly controversial in the Eastern hardwood forests. Before 1964, these forests were harvested through selection and shelterwood cutting. Regeneration of hardwoods is significantly different from that necessary for the softwoods of the Pacific Northwest. See FOREST SERVICE 75-85; SUBCOMM. ON PUBLIC LANDS, COMM. ON INTERIOR AND INSULAR AFFAIRS, REPORT ON CLEARCUTTING ON FEDERAL LANDS, 92ND CONG., 2d SESS. (Comm. Print 1972).

23. S. DOC. NO. 91-115, 91ST CONG., 2d SESS. 13-16, 19-28 (1970); FOREST SERVICE 77-80.

24. Subcomm. on Public Lands, *supra* note 22.

25. *Sierra Club v. Butz*, No. C-72-1455 (N.D. Cal. Aug. 29, 1972); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).

26. *Parker v. United States*, 448 F.2d 793 (10th Cir. 1971).

27. *Minnesota Public Interest Research Group v. Butz*, 402 F. Supp. 1276 (D. Minn. 1975).

28. *West Virginia Division of the Izaak Walton League of America v. Butz*, 552 F.2d 945 (4th Cir. 1975).

29. *Zieske v. Butz*, 406 F. Supp. 258 (D. Alas. 1975).

30. FOREST SERVICE 75-85.

These events forced Congress to act. The Resources Planning Act of 1974 requires the Forest Service to submit proposed long-term plans and programs to Congress, which can in turn amend the documents.³¹

In 1975, the *Monongahela* decision forced an even deeper Congressional probing into forest policy. Industry-supported bills were introduced providing for little more than simple retroactive overruling of the *Monongahela* decision.³² Senator Randolph introduced a bill, drafted and backed by environmentalists, which would provide statutory standards for a broad range of forest management activities.³³

After a battle royal which went to the House floor and a conference committee,³⁴ compromise legislation was adopted in October 1976.³⁵ The National Forest Management Act of 1976 permits clearcutting only when it is the "optimum" harvesting technique; sets guidelines for clearcutting when it is permissible; directs the agency to take action against collusive bidding on timber contracts and sets sealed bidding as the normal practice; limits the use of thinning; and writes into law, though in a somewhat diluted fashion, the Forest Service's conservative "non-declining even flow" policy. The specificity of the legislation would have been unthinkable even as recently as five years ago.

Given this unprecedented intensity of legal controversy surrounding the Forest Service, the Robinson book is especially timely and necessary. Though plainly intended for both legal and non-legal readers, the book serves as a primer for the lawyer dealing with federal forestry issues. An historical overview is provided.³⁶ Informal workings within the agency are discussed in an enlightening way.³⁷ Administrative procedures are explained with emphasis on the key area of timber sales,³⁸ which certainly will be more commonly litigated under the provisions of the 1976 Act. Long range planning techniques, including the recent reliance on computers, are analyzed.³⁹ Finally, agency practices are examined in each of the multiple-use categories and in the Wilderness System.⁴⁰

Robinson has not dealt with all of the current legal issues, both

31. Forest and Rangeland Renewable Resources Planning Act, 16 U.S.C. §§ 1601-10 (1974). The Act is described in Note, 15 Nat. Res. J. 603 (1975).

32. See, e.g., S. 3091, 94th Cong., 2d Sess. (1975).

33. S. 2926, 94th Cong., 2d Sess. (1975).

34. H.R. Rep. No. 94-1735, 94th Cong., 2d Sess. (1976).

35. National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (1976).

36. FOREST SERVICE at 1-20.

37. *Id.* at 21-53.

38. *Id.* at 37-47, 70-73.

39. *Id.* at 39-53; 265-270.

40. *Id.* chs. IV-IX.

because events have been breaking too fast and because the book is not intended to be a comprehensive legal treatise. Thus the *Monongahela* decision is not treated in depth and the current action in Congress could not be dealt with at all. The implications for the Forest Service of the *Redwood National Park* case, handed down after publication, could not be analyzed.⁴¹ That case, though it dealt with the Park Service, can be read to impose a trustee's duty on the Forest Service.⁴² If such were to become the law, Forest Service discretion would be narrower and far more amenable to review by the courts.⁴³ The cases involving the Department of Interior's duty

41. *Sierra Club v. Dep't. of Interior*, 376 F. Supp. 90 (N.D. Cal. 1974) and 398 F. Supp. 284 (N.D. Cal. 1975). The Sierra Club sought a mandatory injunction requiring the National Park Service to "exercise its powers" to protect Redwood National Park from logging operations on adjacent lands. The court found that the Park Service had "general fiduciary obligations" in regard to Park lands, 376 F. Supp. at 93, and held that injunctive relief was proper even though the logging operations were not taking place on Park lands. The case may be limited to the specific statutes involved. The Redwood National Park Act expressly gives the Park Service authority to take action with regard to "owners of land on the periphery of the park." 16 U.S.C. § 79c(e). The court also relied upon the duty of the Park Service in its Organic Act to leave park land "unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. That section was an independent ground for imposing a "general trust duty" on the Park Service. 398 F. Supp. at 287.

42. The *Redwood National Park* case notwithstanding, it is too early to reach a conclusion as to whether Forest Service action must meet fiduciary standards. *Light v. United States*, 220 U.S. 523, 537 (1911), stated in *dictum* that Forest Service lands are "held in trust" but subsequent cases have not used that language. *Knight v. United Land Association*, 142 U.S. 161, 181 (1891), also used general trust language, seldom followed in later cases, to describe the duty of the Secretary of the Interior toward lands held by that department. *C.f.*, *United States v. Blaylock*, 159 F. Supp. 874, 877 (N.D. Cal. 1958); *aff'd per curiam*, 270 F.2d 809 (9th Cir. 1959); *United States ex rel. Roughton v. Ickes*, 101 F.2d 248, 252 (D.C. Cir. 1938); and *Hannifin v. Morton*, 444 F.2d 200, 202 (10th Cir. 1971), for cases, all of which can be limited to their facts, using trust language to describe the Secretary of Interior's duty toward the public lands.

The *Redwood National Park* case, *supra* note 41, remains the only direct treatment of the issue. Though that case did rely on National Park Service statutes, *supra* note 42, the courts could find that a trust duty has been imposed on the Forest Service by the general provisions of the Multiple Use-Sustained Yield Act of 1960, *supra* note 17, or by the 1976 legislation, *supra* note 35. The Wilderness Act of 1964, which provides that those lands must be left "unimpaired for future use and enjoyment as wilderness," 16 U.S.C. § 1131(a), is virtually identical to the Park Service Organic Act language relied upon in the *Redwood National Park* case. See note 42, *supra*.

It is also possible that courts will find that a fiduciary duty arises simply from the fact of public ownership apart from any specific statutory language. *C.f.*, the cases cited in note 42, *supra*.

43. The application of the public trust doctrine to Forest Service lands would almost certainly have farreaching consequences. For the leading authority on that doctrine and its ramifications, see generally, Sax, *The Public Trust Doctrine in National Resources Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970). The doctrine's most generalized impact would probably be in actions for judicial review under The Administrative Procedure Act. Perhaps the most commonly used review provision is 5 U.S.C. § 706(1), permitting relief against agency action which is "arbitrary, capricious, or otherwise not in accordance with law." Normally, the courts accord agencies broad discretion when review is sought under that section. But Forest Service discretion would be narrowed if exacting

as trustee for land held for American Indian tribes demonstrate that the imposition of trust standards on the Forest Service could drastically alter agency practices.⁴⁴ But any such limitations result from publishing schedules and Robinson's own perfectly proper definition of the book's scope. The fact remains that this book breaks new ground.

CHARLES F. WILKINSON*

fiduciary standards were applicable. The scope of review under that important section would accordingly be broader.

44. The Federal-Indian trust relationship has been a major factor in recent cases in Indian Law, which has established extremely broad court review of Bureau of Indian Affairs actions. See, e.g., *Morton v. Ruiz*, 415 U.S. 199 (1974); *Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973). For a highly analytical treatment of the Federal-Indian trust relationship, see generally Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213 (1975). *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1972) is particularly relevant, because it concerned the diminishment of the value of the Pyramid Lake, a natural resource, as a trust asset. The court enjoined upstream diversions of water by a federal dam and reclamation project. The case suggests that when there is a conflict between the trust responsibility and other actions of federal agencies, those actions must be administered to avoid interference with the trust property.

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