Book Review. A Wilderness Bill of Rights by W. O. Douglas

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BOOKS

Reviewed


Modern technology, which gives millions a shorter work week and the affluence to enjoy this new leisure, has contributed significantly to the demand for recreational areas. As a result, the debate over public management of our natural resources is focusing not only on questions of regulation of commercial exploitation but also on questions of preservation and development of resources for outdoor recreational use.

The dichotomy between preservation and development is manifested by two clearly recognizable camps into which outdoor recreationists have split. The general outdoor recreationist maintains that commercial exploitation can often be reconciled with recreational purposes and that the goal of each development should be to permit both recreational and commercial use of the site. This type of development is exemplified by Lake Powell, now forming behind the Glen Canyon Dam on the Colorado River. The lake generates hydroelectric power and permits the Upper Colorado Basin states to store water for their own use and for delivery to the Lower Basin states and Mexico in accordance with the 1922 Colorado River Compact; simultaneously the lake has motel facilities and camping sites and is a mecca for power-boaters.

Challenging those who propose dual recreational and commercial use are the conservationists who believe many potential recreational sites should be preserved as wilderness areas by restricting permitted uses to those compatible with the stability of the biotic community. They would apply the definition of wilderness contained in the 1964 Wilderness Act: “A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain.” Such conservationists would not have

1. The Outdoor Recreation Resources Review Commission has adopted a sixfold classification of outdoor areas: high-density, general outdoor, natural-environment, unique natural, primitive, and historic and cultural sites. See Clawson & Knetsch, Outdoor Recreation Research: Some Concepts and Suggested Areas of Study, 3 NATURAL RESOURCES J. 250, 260 (1963). For purposes of this Review, the general outdoor and natural-environment classifications will be combined to contrast the preferences of their users with the preferences of those who advocate unique natural and primitive areas.
2. Arizona, Colorado, New Mexico, Utah, and Wyoming.
3. The construction of Glen Canyon Dam makes it possible for the Upper Basin states to store surplus water in wet years and release it in dry years to meet their delivery obligation.
built the Glen Canyon Dam but would have preserved the natural character of the canyon by limiting its use to hikers, naturalists, and rapids-running enthusiasts.

Mr. Justice Douglas is our nation’s most prestigious conservationist. In his latest book, A Wilderness Bill of Rights, he states the case for wilderness preservation; but, more important, he proposes what he believes are the necessary administrative regulations and laws for wilderness preservation. His thesis is simple: Natural-resource management decisions requiring the decision-maker to choose among wilderness preservation, commercial exploitation, and general outdoor recreation should be made in favor of wilderness preservation because its value is greater than the value of technological growth or general outdoor recreation.

This reviewer agrees that wilderness preservation is an urgent and worthy national goal but is unwilling to make it the controlling factor in the range of situations suggested by Mr. Justice Douglas. The sweep of his proposals raises two fundamental and unanswered policy questions. (1) Why must the recreational needs of a large majority of our citizens, principally those who live in urban areas, be subordinated to the preferences of a few conservationists? (2) To what extent should economic criteria enter into wilderness preservation decisions in view of the potential impact of these decisions on the nation’s economy? This Review examines the basic assumptions of Mr. Justice Douglas’ thesis and two of his specific proposals in light of these questions and suggests an approach to making resource management decisions.

Mr. Justice Douglas recognizes that the initial stumbling block faced by conservationists is that “[w]ilderness values may not appeal to all Americans.” He meets this problem by arguing that while wilderness defenders may be an idiosyncratic minority, the values they represent are “important in a free society.” And, since one function of a democratic government is to protect the rights of minorities, wilderness advocates are entitled to the guarantee “that large areas of the original America will be preserved in perpetuity.”

The analogy between wilderness values and minority rights does not seem valid. Mr. Justice Douglas uses the analogy to argue that the values gained from wilderness preservation are superior to those which would be gained from any other use of the area. But all groups—the commercial exploiters, the general outdoor recreationists, and the conservationists—have valid claims against our natural resources; the problem is choosing which one or ones to recognize in a given instance. For example, it

5. P. 25.
7. Ibid.
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is difficult to distinguish, as a general proposition, between the demands of the skier for accessible slopes and those of the backpacker for the solitude of a primitive area. But neither claim should be excluded from consideration by decision-makers who must decide on the optimum use of an area. Consequently, in choosing between wilderness preservation and some form of development, the decision-maker ought to be more responsive to the recreational habits of the American people than Mr. Justice Douglas suggests.

Thus, in arriving at decision-making criteria it is necessary to know the recreation preferences of the citizens affected by the decision. Unfortunately, little empirical research has been done to date on this subject, but perhaps the following generalizations can be made. Wilderness-users are primarily persons in middle and upper income brackets who have both the inclination and money to travel substantial distances for extended periods. Many more people prefer general outdoor recreation—water or winter sports facilities, developed camping grounds, and cabin sites. Moreover, since ninety per cent of the population will soon be concentrated in urban areas and will be enjoying increased leisure, accessible recreational sites must be provided for them. Yet Mr. Justice Douglas seems to suggest that the demands of urban dwellers and those who prefer general recreation should not be considered where the demands conflict with wilderness preservation objectives. He would partially resolve the conflict by changing their preferences. He asks, “How can we get more American families out of their cars into hiking shoes and backpacks . . . ? How can we introduce more wilderness adventure into American life?”

The danger of this approach becomes apparent when applied to an area such as southern California. In the near future this region must make a number of decisions involving development of wilderness areas within a one- or two-hour drive from Los Angeles. If Mr. Justice Douglas' approach were followed none of these areas would be developed for general outdoor recreation, and those desiring general outdoor recreation would incur substantial burdens by having to travel long distances to find it.8

8. Clawson & Knetsch, supra note 1, at 259. Figures cited by Mr. Justice Douglas show that the average annual income of a wilderness-user was $7,500, with 50% of these users having an income over $8,000. The figures also indicate that 65% of the users had college training and that 50% were of the managerial class. P. 18.


10. In discussing a recent controversy over development of a wilderness area near Los Angeles, Mr. Justice Douglas said, “If noses were counted and a majority vote allowed to govern, San Gorgino would be quickly converted to skiing, for the number of prospective skiers would far exceed the hikers and campers . . . . An appreciation of America in its wilderness state is important for all young people. Preserving such a training area near a large metropolitan area such as Los Angeles in contrast to its conversion into ski runs, ski lifts, hotels, restaurants, and roads, is reason enough for the decision of the Forest Service [to preserve the wilderness].” P. 96. The disturbing aspect about this comment is not Mr. Justice Douglas’ position on a particular controversy but his bias against general outdoor recreation.
The discussion has to this point assumed the problem to be one of deciding conflicts between recreationists with different preferences. This assumption does not take into account the needs of the urban poor, often minority groups, most of whom do not have the financial ability to pursue outdoor recreation. However, it seems safe to assume that as their standard of living improves, their preferences for outdoor recreation will be similar to those of the general outdoor recreationist. In anticipating their needs, decision-makers should provide areas accessible to, yet removed from, the city and capable of handling large numbers of people. In this way the urban poor will be encouraged to spend their leisure time outside the ghetto. Hopefully, the availability of usable recreational facilities will help to reduce the tensions which result from being confined to the ghetto. The problem of the urban poor is another reason for not restricting recreational areas surrounding a metropolitan area to wilderness uses for the effect of restriction may be to confine to the urban center those who most need an exposure to a nonurban environment.

Certainly the demand for general recreational areas must be balanced against the need for wilderness areas. But Mr. Justice Douglas' approach is too rigid when applied to primitive areas surrounding a large metropolitan center. What is needed is a master plan for recreation that accommodates both preferences, rather than a policy which tolerates only wilderness.\footnote{11} In the second chapter, "Wilderness and Its Values," Mr. Justice Douglas describes the specific values which justify the need for wilderness preservation. He contends that wilderness aids in understanding America's heritage, is necessary for certain forms of wildlife, and "is also a refuge for automated man."\footnote{12} Preservation can be economically justified because it "is critical in the search for botanical and biological specimens useful to man."\footnote{13} Such justifications recognize the difficulty of incorporating wilderness values into the economic formulas used in making other resource management decisions. It is easier, for example, to calculate the cost-benefit ratio\footnote{14} in deciding the feasibility of a project than it is to quantify the more subjective benefits derived from designating an area as a wilderness. This difficulty has led conservationists to seek to eliminate economic considerations from all wilderness preservation.

\footnote{11} For a discussion of the type of regional planning that encompasses recreational needs, see U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, OPEN SPACE FOR URBAN AMERICA 21 (1965).
\footnote{12} P. 31.
\footnote{13} P. 36.
\footnote{14} A formula used by the federal government to determine whether a public works project, such as a multipurpose dam, is economically justified. Basically, the ratio is derived by calculating the costs of the project and comparing them to the primary project benefits (value of products and services directly resulting from the project) and attributable secondary benefits (value added to the economy in addition to the primary benefits). If the ratio exceeds 1:1, the project is deemed feasible. See generally Trelease, Policies for Water Law: Property Rights, Economic Forces, and Public Regulation, 5 NATURAL RESOURCES J. 1, 12 (1965). For a penetrating criticism of the current use of the ratio, see Hammond, Convention and Limitation in Benefit-Cost Analysis, 6 NATURAL RESOURCES J. 195 (1966).
tion decisions on the theory that the subjective values are more important.

To this reviewer, wilderness decisions require a choice among competing uses. A rational system of decision-making should try to find a common denominator among the values represented by each of the competing uses. The most promising solution may be in the attempt to assign dollar values to recreational benefits. Economists have agreed that the dollar value of a recreational project can theoretically be computed by determining the "value added" to the local economy and the value of the recreation to the user. These calculations would determine the benefits gained from a given recreation decision.

To measure the cost of the decision, these benefits can be compared with the benefits derived from alternative choices. For example, if the dollar benefits derived from preserving an area as wilderness are less than those which would be obtained if the area were opened to general outdoor recreation or commercial exploitation, the decision-maker could estimate the added cost of the decision to preserve wilderness. The determination of this cost is important because in many instances Mr. Justice Douglas and other conservationists are in effect demanding a subsidy. They are asking those who do not use the wilderness areas to bear part of the costs of wilderness preservation for the benefit of those who do. Society may well decide that it desires to grant the subsidy, but at least basing the natural resources allocation decision expressly on "values involved or foregone" may help to "provide a more objective basis for decision making than now exists."

Much of the foregoing discussion presupposes highly developed economic models. Unfortunately, present-day recreation economists simply do not know how to assign dollar values to many of the benefits allegedly arising from wilderness use. This does not make the approach less valid as an ultimate goal; rather it calls for more intensive research into the economics of recreation. Nor would such an approach demand that natural-resources decisions become merely a matter of applying predetermined formulas, for economists are now beginning to realize that a proper resource decision involves a number of social and political, as well as economic, factors. However, if the conservationist wishes to be accorded a significant voice in natural-resource management decisions—as Mr. Justice Douglas desires him to be—he must be prepared to answer the kinds of economic questions asked in making other resource management decisions.

In the chapter entitled "Ingredients of a Bill of Rights" Mr. Justice

15. See Trelease, supra note 14, at 20–21.
16. Clawson & Knetsch, supra note 1, at 266.
17. Id. at 272.
Douglas discusses the current natural-resource management policies of the federal government, such as the congressional preference for multiple use,\(^{18}\) the Bureau of Land Management's requirement that grazing lands be fenced, and the allowance of certain kinds of motorized vehicles on forest trails. He criticizes these policies as destructive of wilderness and urges the adoption of policies aimed at preservation. He also proposes reforms in the decision-making procedures to ensure greater access for citizens to federal agencies through more mandatory public hearings and expanded definitions of standing to contest administrative actions.\(^{19}\)

Although Mr. Justice Douglas makes a wide range of suggestions, the remainder of this Review examines only two of his suggested approaches to wilderness preservation: his standards for withdrawing land from commercial exploitation to create national parks or wilderness areas and his plan to restrict hydroelectric dam construction.

Proposals to create a wilderness area or national park, either by purchasing land or by withdrawing land from entry for commercial exploitation, are generally opposed by regional interests fearing a severe decline in the local economy. To date decision-makers have been content to allow commercial exploitation to continue until a specific decision for purchase or withdrawal is made. Mr. Justice Douglas is discontent with this ad hoc method of making decisions and concludes, "Our need for wilderness should keep us from destroying it merely to keep loggers and road builders employed."\(^{20}\) However, there may be another approach which could help to accommodate the competing interests of the conservationist and the commercial exploiter, namely government aid in finding new sources of income for the regional economy to replace those lost by the decision to create a national park or wilderness preserve.

The usefulness of such an approach can be seen in the current controversy over the proposed Redwood National Park in northern California. A good case can be made that in the long run the park will bring in sufficient income to offset the losses to the lumber industry. Nonetheless, the regional economy will suffer, at least in the short run. Sawmills may have to curtail their operations, and people will be out of work. Since the

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18. The Multiple Use Act §§ 1–2, 16 U.S.C. §§ 528–29 (1964), provides: "It is the policy of Congress that the national forests . . . shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. . . . The Secretary of Agriculture is authorized . . . to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom." Multiple use is defined as "[t]he management of all of the various renewable surface resources . . . so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services . . . ." Multiple Use Act § 4, 16 U.S.C. § 531 (1964).


20. P. 95.
park would be used primarily during the summer, it probably would not generate sufficient full-time jobs to replace those displaced by its creation. Since the redwoods are removed from any metropolitan area, the demands of—and the dollar value of benefits to—the general outdoor recreationist are not as great as in the earlier examples. Consequently, the total economic benefits of creating the park probably would be less than the economic benefits of the existing commercial exploitation and limited recreational activities.

However, since the primary problem is whether or not the redwoods should be preserved, the controversy presents an excellent case for basing the final decision on noneconomic criteria. The redwoods are a unique phenomenon, and thus there is a strong argument that the decision must be made in favor of wilderness lest the qualities of the area be lost forever.

This reviewer believes that Congress should lessen the impact of a wilderness preservation decision by adopting a system for compensating the region for economic losses resulting from such a decision. In the case of the redwoods, the problem is one of protecting the regional economy when the public has decided the highest use of the redwoods is to preserve them. The federal government should help the regional economy find replacement sources of income by using the remaining resources of the area. Bodies such as the Appalachian Regional Commission, which is empowered to "encourage private investment in industrial, commercial, and recreational projects," could be established for this purpose.

Mr. Justice Douglas' discussion of hydroelectric dams reflects traditional conservationist concern with the construction of dams. Conservationists maintain that rivers which have scenic qualities should be preserved in their free-flowing state. Jurisdiction over dam construction on navigable waterways, which are the primary areas of concern, rests either with Congress or with the Federal Power Commission, depending on whether the dam will be built with federal funds or with state or private funds. Each authority presents its own peculiar problems for the conservationist. With Congress the problem is bringing political pressure to bear in order to defeat authorization of the project. With the FPC the problem is to make

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21. Appalachian Regional Development Act of 1965, § 102(6), 40 U.S.C. § 102(6), app. A (1965). A step in this direction was taken in one of the legislative proposals for a Redwood National Park which provides for payments to local taxing districts for a five-year period to give them transitional financial aid for the reduction of their tax rolls caused by the creation of the park. S. 2962, 89th Cong., 2d Sess. (1965).

22. Congress has practically unlimited power to construct dams under the commerce and general welfare clauses. See Morseale, Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation, 3 NATURAL RESOURCES J. 1, 17 (1963); Goldberg, Interposition—Wild West Water Style, 17 STAN. L. REV. 1, 34-35 (1964). However, Congress often prefers state or private to public development. If Congress decides not to develop a navigable stream with public funds, jurisdiction to license individual, corporate, or state development for purposes of generation of hydroelectric power rests with the FPC. Federal Power Act § 202(e), 16 U.S.C. § 797(e) (1964).
the project's impact on the scenic qualities of the river a determining fac-
tor in the decision to grant or deny a license application.

Mr. Justice Douglas would solve both problems with the standard that
"dams for hydroelectric power and dams for flushing rivers of sewage
should be deemed presumptively harmful to the public interest." Political
realities make it unlikely that Congress will ever adopt such a restric-
tive standard for itself or impose it on the FPC. However, a more limited
and thus possibly more acceptable standard is suggested by a recent Second
Circuit decision.

In *Scenic Hudson Preservation Conference v. FPC* the FPC licensed
a pump storage project on the Hudson River at historic Storm King Moun-
tain. The issue as framed by the Commission was "[i]f on this record
Con Edison has available an alternative source for meeting its power
needs which is better adapted to the development of the Hudson River
for all beneficial uses, including scenic beauty, this application should be
denied." The FPC granted the license. The court set aside the license
and remanded the case for further proceedings because the FPC had
failed to consider sufficiently the feasibility of alternative sources of power
which would not impair the scenic qualities of the area. Read narrowly,
the decision only reverses the FPC for failing to follow its own rigorous
conservation standard. But the broad language of the opinion indicates
the court desired to place an affirmative burden on the
FPC to demon-
strate that alternative sources of power are not feasible whenever a project
will adversely affect a unique scenic area.

The court based its result in part on a construction of section 10(a)
of the Federal Power Act, which requires a project to "be best adapted
to a comprehensive plan for improving or developing a waterway or
waterways for the use or benefit of interstate or foreign commerce . . . and
for other beneficial public uses, including recreational purposes." Section
10(a) had previously been construed to give the Commission the dis-
cretion to deny a license for a hydroelectric dam when it would impair
such unique qualities of the river as the habitats for wildlife and the
opportunities for fishing and canoeing. *Scenic Hudson* can be read to
make denial of a license mandatory under section 10(a) when a feasible
alternative source of power is available.

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23. P. 139.
24. 354 F.2d 608 (2d Cir. 1965).
25. Id. at 612.
27. In *Namekagon Hydro Co. v. FPC*, 216 F.2d 509 (7th Cir. 1954), the court sustained
the FPC's denial of a license with the following words: "We think that the Commission was well within
its powers in determining that even at the expense of a relatively small water-power development, the
unique and special recreational values of the lower 22 miles of the Namekagon River should not be
destroyed." Id. at 512. The court described the river in language rarely seen in a case report: "Passing
by heavily wooded banks of either side, with no noise or sound to be heard from highways or rail-
rroads, the canoeist has the illusion of being in a forest primeval, far from civilization." *Ibid.*
The *Scenic Hudson* case invites a fundamental review of national power policy and its relationship to the preservation of free-flowing rivers. The policy has traditionally been based on a preference for hydroelectric power. However, technology has developed new sources of energy which do not require the construction of dams. The possibility is real that in the near future energy derived from nuclear fission and the sun may sharply decrease the demand for hydroelectric power. Thus, it may be possible to reconcile the need for cheap sources of energy with preservation of the scenic qualities of our rivers.

This reviewer believes hydroelectric power developments should not be preferred when feasible alternative sources exist. In such a situation the arguments advanced by Mr. Justice Douglas for preserving scenic qualities are applicable.

These arguments should be reflected in an amendment to the Federal Power Act. Section 10(a) should be amended to ensure that whenever a proposed project will impair the unique scenic, recreational, and wildlife qualities of a river the Commission’s decision to grant a license will be sustained only upon a showing that no feasible alternative sources of power are available. The standard should be limited to unique qualities of free-flowing water because these are the types of rivers which most need to be preserved rather than developed for general outdoor recreation. A broader standard may impede projects which have desired general outdoor recreational benefits. The standard of “unique scenic qualities” is admittedly vague, but much of the vagueness is inherent in the nature of the problem with which it attempts to deal. It is a standard with which the courts have previously worked, thus indicating that the standard can be made workable.

*A Wilderness Bill of Rights* was written to make the general public aware of the need to incorporate wilderness considerations into natural-resource management decisions. But the sweep of Mr. Justice Douglas’ approach and his failure to consider the conflicting societal needs for use of wilderness land assure that his book will be convincing only to those already converted. To have an effective voice in the decision-making process, the conservationist must heed such warnings as the one recently sounded by the chairman of the Midwest Open Lands Association:

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28. Glenn T. Seaborg, chairman of the Atomic Energy Commission, predicts that “within thirty-five years all new private power plants will be operating on nuclear energy.” *N.Y. Times*, May 17, 1965, at 34, col. 2.

29. See *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 688 (2d Cir. 1966); *Namekagon Hydro Co. v. FPC*, 216 F.2d 509 (7th Cir. 1954); *Cascade Town Co. v. Empire Water & Power Co.*, 181 F. 1011 (D. Colo. 1910), rev’d, 205 F. 123 (8th Cir. 1913).