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What Happened to Multiple-Purpose Resource Development - A Plea for Reasonableness

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In an attempt to caution against an overemphasis of the aesthetic factors arising in any evaluation of resource development plans, Professor Moses examines recent decisions and suggests reasons for refusing to humbly defer to the preservationist.

WHAT HAPPENED TO MULTIPLE-PURPOSE RESOURCE DEVELOPMENT?--A PLEA FOR REASONABLENESS

*Raphael J. Moses**

> An industrial nation needs highways, electric power, minerals, and timber. But a nation of city-dwellers also needs an unspoiled wilderness to which peaceful retreats may be made. The task of accommodating these competing interests is a difficult one. But the challenge must be faced.
>
> *Justice William O. Douglas*[1]

ECHO PARK, Storm King Mountain, High Mountain Sheep, Hualapai and Marble are all multi-purpose projects which were rejected in the name of "Conservation." Is this new conservation the savior of society or a roadblock in the path of progress? What is happening to resource development? Where are the courts headed?

In this article, an effort will be made to trace the development of the current awareness of environmental preservation, and to speculate on the direction and extent to which the courts may go in balancing resource development—one kind of conservation—against preservation of natural conditions—another kind of conservation, and to raise a small voice in favor of multi-purpose resource development including a goodly share for recreation.

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1. 1 LAND & WATER L. REV. at vii (1966).

The impact of efforts to preserve environmental integrity has reached a new high following the landmark decision in the *Scenic Hudson* case, decided by the Second Circuit in 1966[2].

In that case, Consolidated Edison Company of New York had been granted a license to construct a pumped storage hydroelectric project on the west side of the Hudson River at Storm King Mountain in Cornwall, New York. On appeal from the Commission's order, the Court reversed.

The Commission had stated, in its decision:

> We must compare the Cornwall project with any alternatives that are available. If 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 Court noted this statement with approval, and then had this to say about the proposed site:

> The Storm King project is to be located in an area of unique beauty and major historical significance. The highlands and gorge of the Hudson offer one of the finest pieces of river scenery in the world. The great German traveler Baedeker called it "finer than the Rhine."[3]
>
> . . . . .
>
> "Recreational purposes" are expressly included among the beneficial public uses to which the statute[4] refers. The phrase undoubtedly encompasses the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites."[5]

This statement seems inadequately supported by the Court's footnote.[6] However, the *Namekagon Hydro Com-*

2. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (1965).
3. *Id.* at 613.
4. Federal Power Act, 16 U.S.C. § 803(a) (1964).
5. *See* Scenic Hudson Preservation Conference v. FPC, *supra* note 2, at 614.
6. Note 10 of the opinion, *supra* note 2, at 614 reads:

> The clear intention of Congress to emphasize "recreational purposes" is indicated by the fact that subsection (a) [of 16 U.S.C. § 803] was amended in 1935 by substituting the present language "plan for improving or developing . . . including recreational purposes" for "scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses." Senate Rep. No. 621, 74th Cong., 1st Sess., page 45 stated that the amendment was intended to add an express provision that the Commission may include consideration of recreational purposes.

pany case[7] is authority for protecting the fishing, canoeing and the scenic attraction of a "beautiful stretch of water," and, on balance, the remand of the matter to the Commission for further consideration of alternative methods does not appear unreasonable.

In addition to the scenic features threatened, the Court was concerned about the effect of the development on the major spawning grounds for the "distinct race of Hudson river striped bass."[8]

That this concern for Hudson river striped bass was a proper subject for judicial attention was confirmed by the ruling of the United States Supreme Court in the *High Mountain Sheep* case.[9]

In that case, the Court speaking through Mr. Justice Douglas, specifically refused to pass on the merits of the controversy but remanded the matter to the Federal Power Commission for exploration by it of the issues of "whether deferral of construction would be more in the public interest than immediate construction and whether preservation of the reaches of the river affected would be more desirable and in the public interest than the proposed development."[10]

Undergirding the remand is the expressed concern of the Court for recreational purposes, including protection of anadromous fish (salmon and steelhead), and for wildlife, including elk, deer, partridge, small game, ducks, geese and mourning doves.

The time has long since passed to question the right of legislative bodies to exercise aesthetic control.

Berman v. Parker[11] held: "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled."

The police power has been held to authorize the control of architectural design to preserve residential beauty[12] or his-

7. Namekagon Hydro Co. v. FPC, 216 F.2d 509, 511-12 (7th Cir. 1954).
8. *See* Scenic Hudson Preservation Conference v. FPC, *supra* note 2, at 623.
9. Udall v. FPC, 387 U.S. 428 (1967).
10. *Id.* at 499.
11. 348 U.S. 26, 33 (1954).
12. State *ex rel* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955).

toric structures,[13] and even to support a ban on clotheslines in front yards.[14]

Caution should be exercised in assuming that the above cases are the majority rule.[15] However, they seem to be significant straws in the wind, warning those who place utility ahead of beauty (or even on the same plane) that they have an increasingly difficult burden to sustain.

Does this then mean the end to resource development whenever the aesthetic argument is raised? At the present time, the record would seem to weigh strongly against the prospect of future large-scale resource development on rivers or in areas with even modest scenic assets.

The resource developers appear to be unduly submissive, and to tend to throw up their hands in despair, without mounting any effective campaign for reasonable balance. A serious believer in the benefits of Hualapi Dam can argue his thesis at length, only to be defeated by a single "Save the Grand Canyon" bumper sticker.

Reasonable balance must eventually prevail. Even ardent conservationists believe this as evidenced by Mr. Justice Douglas' statement at the beginning of this article.

> The endless arguments between exploiters and conservationists needs no recapitulation. Granted the premise that some rivers should be preserved, the inquiry then becomes a determination of the means necessary to incorporate these values into the natural resource decision-making process. In answer to this inquiry, Mr. Justice Douglas' answer is simple: "Wilderness values are greater than any price that can be placed upon the hydro-electric power of its rivers." He attempts to equate protection of these values with the constitutional guarantees contained in the Bill of Rights, thus concluding that advocates of wilderness areas such as a wild river are entitled to the guarantee that "large areas of the original America be preserved in perpetuity." However, the analogy between wilderness values and

13. Vieux Carre Property Owners & Associates, Inc., v. New Orleans, 246 La. 788, 167 So. 2d 367 (1964).
14. People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963).
15. Gooder, *Brakes for the Beauty Bus*, JUNKYARDS, GERANIUMS AND JURISPRUDENCE: AESTHETICS AND THE LAW (A.B.A. 1967). *See also* Netherton, *Police Power vs. Eminent Domain, Id.*; Train, *The Law and the Environment, Id.*

> human rights does not seem valid. Mr. Justice Douglas draws 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. The fallacy in this assertion is that all groups—commercial exploiters, 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 is difficult to distinguish, as a general proposition, between the demands of the water-skier for an accessible lake and those of the canoeist for the solitude of a wild river. Neither claim should be excluded from consideration by those who must decide on the optimum use of an area. The problem is obviously complex, for not every river can be preserved in its natural state due to the many legitimate claims against our natural resources. But it is equally clear that not every spectacular river gorge need be a dam site. Comprehensive water recreation planning which accommodates a variety of preferences is needed."[16]

A case in point may well be Lake Powell behind Glen Canyon Dam. Prior to the construction of Glen Canyon Dam, some 1,600 people had visited Rainbow Natural Bridge, a truly phenomenal natural wonder which was accessible only to the handful able to withstand a multi-day horseback ride to the nearest bridge. During 1963, the first year that the lake permitted the public to ride, in a boat, to a point only a mile from the bridge, 443,061 people visited the bridge, and since that time, the count has reached 3,968,748.[17]

Where does the balance lie? Wherein is the greatest good for the greatest number?

In a land where water is so precious as to be inestimable in its worth, must future large-scale reclamation projects be forever banned, or is there a middle ground where the water can be saved, the ravage of floods curtailed, and—by the same works—recreation be provided for the overwhelming majority of the 200,000,000 citizens of the United States. These people are neither pillagers of nature nor rabid preservationists and they also have rights. They have a right

16. Tarlock, *Preservation of Scenic Rivers*, 55 KY. L. REV. 745, 748 (1967) (citations omitted).
17. Letter from R. W. Gilbert, Asst. Acting Regional Director, Region 4, U.S. Bureau of Reclamation, Mar. 5, 1968.

to a reasonable use of our water resources and they have a right to accessible recreation areas.

What about the great and vital wood products industry? It has been able, albeit at the insistence of the public, to maintain a viable industry and yet to prevent the pillage of our forests that spurred conservation measures sixty years ago.

The California Redwood Association, an industry-financed organization, claims that "new young-growth trees may equal the height of thousand-year-old giants in less than a man's lifetime" and that a study by the National Park Service indicates redwood growth will equal removal by 1965 and that sawtimber growth and removal will reach a balance by 1985.[18]

Furthermore, recreational use of privately owned forest lands appears to be substantial and growing. Two surveys, one made in 1956 and another in 1960, show an increase of such lands available to all without the necessity for a permit increased in the four year period from 70.0 percent to 73.4 percent. The acreage surveyed amounted to 46,263,852 acres in 1956 and 58,140,936 in 1960. In both years, more than 92 percent were open to hunting either with or without permit. 97.4 percent was open to fishing. The number of recreational visits to industry lands was placed at 6,057,660.[19]

The successful multi-purpose experience of the U.S. Forest Service demonstrates that there can be successful timber operations conducted simultaneously with a large scale grazing program, both coordinated with heavy public recreation uses.[20]

What about our dwindling supply of minerals, needed not only to correct our imbalance of payments, but to provide

18. *Our Growing Redwoods*, American Forest Products Industries, Inc., Washington, D.C., 1965.
19. *Recreation on Forest Industry Lands*, American Forest Products Industries, Inc., Washington, D.C., 1960.
20. In Region 2 of the U.S. Forest Service, total receipts of $1,727,644.70 were derived in fiscal 1967 from the following sources:

Timber	607,961.21
Grazing	847,435.85
Land Rentals	38,230.82
Recreation (other than admission fees)	185,543.72
Power	9,532.15
Minerals	3,968.45
Admission and User Fees	34,972.50

metals, both base and exotic for our increasingly complex technology? Are we to close all government lands to exploration, or are we to permit development under regulations geared to the reasonable preservation of aesthetics?

The scales of justice were never intended to be forever tilted into one imbalance, but to weigh evenly and to reach a reasonable equilibrium.

Perhaps the answer lies in a highly diverse panel of leading citizens, not oriented exclusively toward conservation in the preservationist sense, as the President's Outdoor Recreation Committee appears to be, but an expanded group such as Marion Clawson suggested to study public land use. He proposed:

> A highly diverse group such as this would rarely agree; that would not be its purpose. Instead, it should seek to bring out issues clearly, to sift fact from rumor, to sharpen up the policy issues, to delineate the real alternatives of public action. Its work would call public attention to public lands. Policies would still have to be settled by political process; public land managers would still have to make decisions on programs. But the air could be cleared greatly, so that attention could focus on hard facts, real alternatives, and major policies—rather than their reverse, of rumor, fantasy, and dreams.[21]

Regardless of the technique employed, it seems apparent that something should be done to restore some measure of balance to the public clamor now heard on every side. Multi-purpose proponents have a valid case to present, and it appears they are overcome by the popular appeal of the preservationist. As one speaker put it: "Just as there once were men who would shave all the hills, we now hear the urban voices of saviors who would pickle every pine and deep freeze every fir."[22]

The 999 who really desire multi-purpose use of natural resources need to find spokesmen as eloquent as the spokesman who speaks for the single preservationist.

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21. Clawson, *What is the Future of Public Lands?*, AMERICAN FORESTS, Mar.-Aug., 1965.
22. Address by Dave James, *People and Trees in the West*, Public Land Law Rev. Comm'n, Sept. 16, 1960.