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Book Notes

This Land Is Your Land

Public Lands and Private Rights: The Failure of Scientific Management. By Robert H. Nelson.* Lanham, Maryland: Rowman & Littlefield Publishers, Inc., 1995. Pp. xxiii, 373. \$24.95 (pbk.).

I

A new breed of lawmaker has come to town—to Washington, D.C., that is—with guns blazing in the direction of a whole range of government agencies and programs. In *Public Lands and Private Rights*, Robert H. Nelson could well be supplying “wanted” posters to Speaker Gingrich and his deputies, identifying a villain in one of big government’s biggest responsibilities: over 350 million acres of federal land that occupy almost forty-eight percent of eleven Western states (p. 206).

Nelson, an economist and eighteen-year veteran of the Department of the Interior’s Office of Policy Analysis, has done much more than supply “dead or alive” warrants spelling out the misdeeds of the Forest Service, the Bureau of Land Management (BLM), and other federal agencies that administer public lands. His latest book provides an intellectual springboard for anyone looking to rethink, retool, or even dismantle the federal land management system.

That project may well be underway. The 104th Congress, led by Republicans from Western states who head up public land and natural resource committees, is delving into public land management.¹ In 1995, bills were introduced to mandate specific levels of logging in Alaska’s Tongass National Forest,² to open up the Arctic National Wildlife Refuge to oil drilling,³ and to allow development of twenty million acres of federal land in Utah.⁴ Other

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1. Timothy Egan, *In Utah, a Pitched Battle over Public Lands*, N.Y. TIMES, Nov. 13, 1995, at A1, A14.

2. S. 1054, 104th Cong., 1st Sess. (1995); see also *Alaska Splintered Over Plan to Boost Tongass Forest Logging*, CHI. TRIB., Sept. 10, 1995, § 5, at 9 (providing background to legislation).

3. H.R. 2491, 104th Cong., 1st Sess. (1995); see also Tom Kenworthy, *Natural Resources: Battle Looms on Arctic Refuge*, WASH. POST, Nov. 18, 1995, at A18 (describing budget provisions).

4. S. 884, 104th Cong., 1st Sess. (1995); H.R. 1745, 104th Cong., 1st Sess. (1995); see also Egan, *supra* note 1, at A1 (discussing Utah land controversy).

measures contemplate reforming the distribution of federal lands for mining,⁵ overturning federal grazing regulations,⁶ and closing some national parks.⁷ Nelson's analysis of federal land management's failings provides ammunition for some (though not all) of these assaults on the status quo. It also offers an intellectual compass that appears to be lacking in this legislative flurry.⁸

II

As the subtitle of the book suggests, Nelson is in part telling a story of federal land management gone wrong, of "one bad public land policy after another" (p. 5). He begins the descriptive level of his analysis with the history of how the federal government came to be in the "land business," detailing the often-bumbling evolution of land policy from homesteading-style land disposal to federal stewardship of the remaining parks, forests, and rangelands. In addition to providing a useful primer for readers unfamiliar with the government's role as Western landlord, the opening chapter introduces Nelson's nemesis—the Progressive ideal of scientific management—as the latest fashion in a long history of government "mistakenly applying the lessons of the past to new and different problems in the present" (p. 34).

Nelson goes on to explain how scientific management has failed on public lands. For example, the Forest Service's rhetoric of "scientific forestry" (pp. 48–49) has served as a facade for economically nonsensical (even "obviously silly") timber-harvesting policies (pp. 81–82). BLM efforts to allocate rangeland investments according to complex economic and environmental analyses have routinely cost more than the rangeland itself is worth (pp. 115–16). Comprehensive land-use planning has proven to be a "hollow exercise" (p. 133) that consumes tremendous resources, is swayed by politics, and has little impact on land-use decisions (pp. 133, 143). Nelson sees these bureaucratic misadventures not as failures of implementation, but as symptoms of the emptiness of the scientific management ideal itself—"there is no separation of politics and administration, fact and value, science and religion" possible in the management of public lands (p. 145).

Having made a strong case for how federal public land management has long been broken, Nelson moves to a second level of analysis: how to fix it.

5. H.R. 1977, 104th Cong., 1st Sess. § 322 (1995); see also Kenworthy, *supra* note 3, at A18 (noting mining reform measures).

6. H.R. 1713, 104th Cong., 1st Sess. (1995); see also Bob Benenson & Allan Freedman, *Provisions on Parks, Grazing Win Approval from Panels*, 53 CONG. Q. WKLY. REP., Sept. 23, 1995, at 2892 (describing grazing controversy).

7. H.R. 260, 104th Cong., 1st Sess. § 102 (1995); see also Benenson & Freedman, *supra* note 6, at 2892 (recounting dispute over national parks).

8. To be fair, Nelson did not write this book in search of a role as cheerleader or strategist for the new congressional leadership. *Public Lands and Private Rights* is a compilation of essays, articles, and policy papers written in the mid-1980s during his tenure at the Department of the Interior.

In his eyes, any reexamination of the basic purposes of federal land policy “offer[s] surprisingly little support for the status quo” and considerable grounds for change (p. 203). But change ideally is based on a policy rationale, and Nelson soundly rejects the leading candidates: expert scientific management (a “misguided” fiction (p. 145)) and its opposite number, interest group accommodation (unprincipled and inefficient (p. 236)). Thus, he must look for new decision rules to specify the government’s role in public land management. For these guideposts, he chooses two popular principles of American government: federalism and the free market (p. 203). These principles in turn supply the ideological footing for his land reform proposals.

From the federalism prong, for example, Nelson draws the directive that the federal government should administer only lands of truly “national” interest (pp. 219, 321). While the criteria for identifying those areas are left unspecified, they apparently embrace the national parks, wildlife refuges for “species of national concern,” and selected recreation areas (p. 219).

Reliance on free-market forces, in turn, could lead to administrative reforms such as bidding-driven selection of federal coal leases (p. 292), or the elimination of below-cost timber sales (p. 279) and grazing leases (p. 264). Nelson’s application of this principle also produces a much more dramatic proposal: He would put public land commodities *directly* in Adam Smith’s invisible hands by selling off timber reserves (p. 221), selling or leasing rangelands (pp. 222, 271), and privatizing many coal reserves (p. 314). Only lands that provide public goods undersupplied by the market—Nelson offers the lone example of “dispersed recreation” such as hiking (p. 211)—would continue to be publicly held, although (drawing on the federalism principle) their ownership would generally be transferred to the states (p. 220).

Buttressing Nelson’s inductive analysis is an evolutionary theory of property rights that guides him at a third level, that of implementing reform. Drawing on the property theories of Charles Reich⁹ and George Stigler,¹⁰ Nelson suggests that private parties who are permitted to use the public lands—whether in the form of grazing rights, river-use permits, or park access—develop at least partial property rights in those “privileges.” Nelson argues that any transfer of land out of the federal portfolio will have to build in protections for the continuation of these current entitlements (pp. 197–98). This prescription is both explicitly pragmatic—grandfathering would defuse opposition from current rights holders fearing loss of “their” property (p. 345)—and implicitly normative, in that Nelson implies that the existing partial property rights deserve protection and recognition (pp. 33–34, 352–54). Nelson also argues for expanding these property rights to include alienability

9. See, e.g., Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 785–87 (1964) (arguing for recognition of property-style rights to government largess).

10. See, e.g., GEORGE J. STIGLER, *The Theory of Economic Regulation*, in THE CITIZEN AND THE STATE 114, 114–15 (1975) (observing that regulated entities acquire rights to government action).

and ultimately full ownership (pp. 346–47), again as a natural evolutionary process that government ought to ratify (pp. 349–50, 352).

In sum, Nelson's proposals essentially would take the federal government out of the land management business. Indeed, one of the book's last chapters is a blueprint for the dismantling of Nelson's alma mater, the Department of the Interior (pp. 319–28). He is aware that his ultimate scenario—scattered federal parks and state recreation areas, and the privatization of the (large) remainder—represents a radical departure from nearly a century of federal involvement in public lands. In his view, however, “[r]ather than always bailing the boat, a new design may . . . be preferable” (p. 228).

III

The litany of policy misadventures that Nelson describes is compelling, particularly coming from a source inside one of the offending institutions. The Forest Service, BLM, and federal land management itself clearly need to be subjected to critical review. Accepting that public land management is in need of reform, however, does not require that the reader follow Nelson all the way to the sweeping endgame that he proposes. There are pitfalls in the three levels of his analysis that permit detours to different conclusions about the future of federal land policy.

First, there is the preliminary question of the extent to which reform is needed at all. Nelson is never entirely clear as to what defines a program or policy as a failure. His historical accounts brand as “failed” policies that variously do not produce the results Congress intended (p. 33), do not reflect current patterns of private behavior (p. 33), do not produce economically efficient results (p. 79), do not pay for themselves (pp. 114–15), do not achieve political insulation (p. 85), and do not anticipate political opposition (p. 191). Indeed, the only land policy success story that Nelson finds is the small-scale, largely unremarked-upon creation of the first national parks (p. 26). While none of these policy characteristics are desirable, are they all equally fatal? Using an expansive definition of policy failure makes Nelson's decision to abandon ship and start anew too easy and too subjective. He would do better to target particular areas of concern and measure policies against identifiable yardsticks. For example, focusing his critiques on inefficient uses of natural resources, which economists and environmentalists alike decry,¹¹ would still allow Nelson to appeal to his free-market principle without toppling quite so many pillars of the public lands system.

Alternatively, it is possible to agree that broad reform of the public lands system is needed, but to disagree with Nelson at the next level of analysis—the

11. See Karl Hess Jr. & Johanna H. Wald, *Battlefields of the West*, WASH. TIMES, Oct. 13, 1995, at A23.

principles on which a reform proposal should be based. Nelson adopts federalism and the free market—politically popular choices in a time of “block grant” transfers to states and curbs on regulation—as his lodestars for charting the federal government’s appropriate course. But while these principles are certainly reasonable starting points for policy reform, embracing them does not inevitably lead to the reforms Nelson proposes. Their content is open to debate, particularly in the context of managing over 350 million acres of federal land.

For example, classic precepts of Nelson’s second guiding principle, market economics, underlie his preference for ending government involvement in land commodities such as timber and forage. But it is far from clear that this pure form of economic theory should be applied to public lands. As Nelson presents the case, uneconomic timber sales, below-cost grazing fees, and other inefficiencies will be eliminated when the lands are in private hands because “the owner of the property [will have] the long-run incentive to take care of it” (p. 332). Economists are quick to acknowledge, however, that faith in the incentives of private ownership alone is misguided if the costs and benefits of using the property are not fully internalized. While Nelson makes much of private timber companies’ own incentives to reforest, he himself understands the lesson that “[p]rivate industry . . . would practice good forestry *when it could make money in doing it*” (p. 62) (emphasis added). Conversely, when private landowners do not see financial benefits in streambed buffer zones or do not bear the full costs of species loss—that is, when the bottom line is less than fully representative of social costs and benefits—they will maximize their own, but *not* societal, returns. To be fair, Nelson frequently remembers to add caveats and safeguards to his free-market proposals (pp. 102–06, 295). But real-world market imperfections cast shadows on Nelson’s cheery faith in economic forces and suggest that caution is in order whenever a proposal is motivated solely by a desire to make way for the market.

Similarly, Nelson’s market principles (mixed with his belief in small government) lead him to the more specific conclusion that lands should be publicly held only when the government alone can provide or efficiently administer a public good such as dispersed recreation (pp. 211–13). Other public goods, such as species protection, that ordinary regulation of private property could achieve he considers insufficient grounds for public land *ownership* (p. 211). But, as Nelson himself notes, regulatory land-use controls are now coming under fire as “takings” of property (p. 339), and government faces “many barriers to effective public control over use of privately owned property” (p. 289). In the current political climate, it seems naive to assume that privatization will be accompanied by the safeguard of heavy land-use regulation. Government provision of environmental goods on publicly owned land may in fact be more reasonable—and more efficient. Nelson’s market-based rule that “[a]ctivities that can reasonably be carried out in the private sector should be done privately” (p. 320) does not dictate that this (or any)

particular privatization proposal is optimal. The content and implications of Nelson's guiding principles (here, the free market) are not fixed; that flexibility in turn opens the door to alternative policies.

Finally, it is also possible to depart from Nelson's analysis at the level of implementation. Even if Nelson is correct in seeking to divest the federal government of most of its public landholdings, his prescriptions for just how that handoff should proceed are problematic. Drawing from failed land reform efforts of the 1980s,¹² as well as from his own evolutionary theory of property rights, Nelson recommends safeguarding existing land-use patterns (such as grazing permits) in the course of any transfer (p. 353). Political pragmatism favors this course because it defuses a source of opposition. Nelson takes a less defensible step, however, by recommending ratification of *any* current pattern of rights holding: "[T]he best response to the new property is to formally recognize it and to transform the existing de facto rights into de jure rights" (p. 358). Yet he never justifies this normative leap from "what is" to "what ought to be." For example, cattle ranchers currently hold grazing permits, and wilderness proponents could theoretically make Coasean bargains when they place a higher value on the absence of grazing. Yet neither federalism nor market principles dictate that the ranchers "should" be the holders of the initial entitlements.¹³ Ironically, Nelson points to this same logical flaw to discredit the alternative policy of interest group balancing when he charges that "any course of government is rationalized because it simply shows the current distribution of political power" (p. 236). Substitute "property rights" for "political power," however, and Nelson's prescription for land transfer policy is revealed. His own lament, "[w]hat happened to such old-fashioned ideals as equity, liberty, justice, and efficiency in government?" (p. 236), could just as well come from the reader.

In the current political climate, what for Nelson was originally an intellectual exercise—discarding scientific management and revising the government's landholding role according to federalist and free-market principles—could very well become the program of House and Senate reformers. The proposals outlined in the book could provide ammunition for conservative reformers as they turn to public lands. The shootout at the Capitol Corral, however, need not end with the death of federal land management. Even starting from Nelson's analysis, alternative policies are within reach.

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12. Several chapters detail efforts during the 1980s to transfer land to states and private actors. Nelson attributes their failure in part to the opposition of Westerners with vested interests in land-use patterns (pp. 181, 190–98).

13. Unless, that is, we have faith in the complete absence of market imperfections and believe that any resource allocation currently in existence represents a society-wide, Pareto-optimal equilibrium. To hold such a faith, however, would be to ignore both economists' acknowledgement of market imperfections and Nelson's own compelling tale of economically inefficient land management practices.