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Public Water Reserves: The Metamorphosis of a Public Land Policy

Part 1

by

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In editing the article, the publisher made a mistake in footnoting. Footnote 106 should read *Improvement, supra.*, 80.

Public Water Reserves: The Metamorphosis of a Public Land Policy

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I. INTRODUCTION

"It was an axiom of the 'cow country,'" writes historian Ernest Osgood, "that water controlled the range."[1] And what was true for the western range livestock industry in the late nineteenth century still holds for ranchers in the twenty-first century. Today the struggle for control of water on public lands is as fierce as it was over a hundred years ago. However, rather then pitting rancher against rancher, it is now ranchers and the federal government who vie for the control and ownership of water.

"Despite the importance of water to the preservation and use of the federal rangelands," Legislative Attorney Pamela Baldwin has noted, "remarkably little analysis of the history of stockwatering on the federal lands is available."[2] Legal scholars and historians have written a considerable extent on many aspects of grazing on federal lands, but questions involving water have received little more than passing reference. This is particularly true of public water reserves.

The first public water reserves were created in 1912 by the Department of the Interior (DOI) as a means of preventing the monopolization of public rangelands by ranchers who were quickly gaining control of various streams, springs, and water holes throughout the West. In 1926, a blanket withdrawal of springs and water holes was issued. Known as Public Water Reserve No. 107,[3] this executive order was sweeping in its effect, for the withdrawal affected:

> [T]hat every smallest legal subdivision of the public-land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use.[4]

Today, many of the reserved water right claims on federal rangelands administered by the Bureau of Land Management (BLM) are for water sources withdrawn by Public Water Reserve No. 107. Water law lawyers, however, have

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[1] Ernest Staples Osgood, *The Day of the Cattleman* 184 (4th ed., The U. of Chicago Press 1966).

[2] Pamela Baldwin, *Legal Issues Related to Livestock Watering in Federal Grazing Districts: CRS Report for Congress*, CRS Rpt. 94-688 A77 (Cong. Research Serv. Aug. 30, 1994).

[3] *Selections, Filings, or Entries of Lands Containing Springs or Water Holes—All Prior Instructions Amended*, 51 Land Dec. 457 (U.S. Govt. Printing Off. 1927) [hereinafter *Selections*]; Land Dec. becomes Int. Dec. starting with vol. 53.

[4] *Id.*

little understanding of Public Water Reserve No. 107, or public water reserve policy in general. What little they know has largely come from reading the plain language of legislation and Public Water Reserve No. 107 itself, limiting comprehensive understanding on such a pervasive topic.

A close look at public water reserve policy reveals how it initially sought to maintain the status quo of free and unrestricted grazing on the public domain by preserving access to water needed by those who grazed livestock. At the time, however, the policy was used to assure homesteaders of water in more arid regions, preserve watering places for travelers crossing deserts, and to protect the domestic water supply of communities.[5]

The issuance of Public Water Reserve No. 107 transformed public water reserve policy into a conservation measure. The withdrawal order still sought to protect ranchers and settlers from the monopolization that could occur as a consequence of the private acquisition of water sources, but as of 1926 it also sought to ensure that water would be reserved to the federal government when Congress enacted legislation providing for the regulated use of the public range. For without control of the water on the public range, officials with the DOI realized that administration of public rangelands would be impossible.

That was not the only transformation that public water reserve policy has gone through. At first the withdrawals were seen as only affecting the land reserved. The water itself was not considered reserved to the federal government. However, the withdrawal of the public lands with streams, springs, and water holes prevented individuals from appropriating the water within the public water reserves, for they would have to trespass upon the withdrawn lands to make the diversion necessary to secure water rights under the laws of the states. It was not until 1947 that the DOI asserted a reserved right to the water within public water reserves, and sometime even later that the United States Supreme Court would give credence to idea of reserved water rights on public lands.[6]

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[5] The U.S. Geological Survey (USGS) was the agency primarily responsible for public water reserves from 1912 to 1935. Most of its files on public water reserves appear to have been destroyed. Working files kept on each withdrawal by the USGS, as well as most of the agency's correspondence files on the subject have not been found. It is assumed these files were transferred to the Grazing Service (Division of Grazing), when that agency assumed responsibility of public water reserves in 1935. Only one incomplete correspondence file, however, has been found among the records of the Grazing Service. This researcher speculates that the USGS's files were destroyed a decade ago at the Washington National Records Center, when several boxes entitled "Public Water Reserves" were destroyed in accordance with the Bureau of Land Management's (BLM's) record disposal schedule. A detailed inventory of the destroyed material, however, has not been located.

[6] *Federal Power Commn. v. Oregon*, 349 U.S. 435 (1955).

II. CHAOS ON THE COMMONS

Public Water Reserve No. 107 was the consequence of an outgrowth of the problems plaguing the practice of grazing on the public domain.[7] In 1926, grazing on the public domain was open and free to all those wishing to graze livestock on those lands. It was this policy of unrestricted grazing that resulted first in the establishment of a public water reserve policy, and then the issuance of Public Water Reserve No. 107.

The western livestock industry came into prominence in the years after the Civil War. The war had depleted cattle herds in both the North and South, and along with increasing demand for meat, beef prices rose. Texas cattlemen, whose herds had grown during the war, due to the state's isolation, were the first to take advantage of this situation. Taking advantage of the extension of railroads into the Great Plains, Texans trailed herds to the railheads in Kansas and Nebraska for shipment to eastern stockyards.[8]

Texas cattlemen who drove their herds north to the railroads found it advantageous to fatten and mature their stock on the grasses of the Great Plains. Many of these individuals established ranches in the region. The number of these ranches multiplied in the 1870s with the eradication of the buffalo, the removal of Native Americans to reservations, and increasing beef prices.[9]

The phenomenal growth of the cattle industry, as well as the sheep business, occurred not just on the Great Plains but across the West. Texas herds spread as far as Idaho, Arizona, and Nevada. Herds in California, Oregon, and Washington spread eastward into the Upper Columbia Basin and elsewhere. Ranches dotted the landscape throughout this region by the late 1870s and stockraising became an important influence in the West.[10]

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[7] The term public domain is indefinite, its meaning having changed with time. For the purposes of this study, public domain, and its counterpart, public lands, refers to the federal lands which were vacant, unappropriated, and unreserved. Lands withdrawn as military reservations, national forests, Indian reservations, public water reserves, and other public purposes are not considered part of the public domain. *See generally* E. Louise Peffer, *Which Public Domain do you Mean?*, 21 Agric. History 140 (1949).

[8] Edward Everett Dale, *The Range Cattle Industry: Ranching on the Great Plains from 1865 to 1925*, at 20–30, 70–76 (2d ed., U. of Okla. Press 1960); Osgood, *supra* n. 1, at 27–38.

[9] Dale, *supra* n. 8, at 20–30, 70–76; Osgood, *supra* n. 1, at 59-88.

[10] *See generally* Clarence Gordon, *Report on Cattle, Sheep, and Swine, Supplementary to Enumeration of Live Stock on Farms in 1880* in *Tenth U.S. Census: Reports on Agricultural Production*, vol. III, 32-47; Terry G. Jordan, *North American Cattle-Ranching Frontiers: Origins, Diffusion, and Differentiation* (U. of N.M. Press 1993); Edward Norris Wentworth, *America's Sheep Trails: History, Personalities* (The Iowa St. College Press 1948).

The free grass of the public domain was "the foundation upon which rested the social, economic, and political strength of western stockraisers."[11] When the first stockraisers established themselves on the public lands in the trans-Missouri West, there were millions of virgin, vacant acres of prime grasslands. Open access to this free range made substantial investment in land and range improvements unnecessary. Many early ranches consisted of little more than a crude dwelling and a simple stable and corral for horses. Livestock was the chief capital investment. The animals were usually turned out onto the public range to fend for themselves and were only rounded up for the branding of calves or for sending to market. When a particular range was grazed over, stockraisers simply moved on to better pasture.[12]

By the mid-1870s, however, parts of the public range began to get crowded. Many ranchers reported ranges as being overstocked.[13] But new ranching operations continued to be established into the early 1880s. Many were the result of eastern and foreign capitalists eager to take advantage of the profits to be made. This rapid expansion, particularly of cattle interests, threatened the economic stability of the western livestock industry. Cattle numbers exceeded demand, driving prices downward. "Worse, the overexpansion threatened the cornerstone of [stockraising] business: use of the public domain."[14]

"It was the division of these spears of grass . . .," contends historian Ernest Osgood, "that constituted the real problem of the cattleman's frontier."[15] In the early years, when there were few ranches and plenty of vacant public range, "'squatter sovereignty'" was sufficient to protect the interests of individual stockraisers. As more and more livestock were crowded onto the range, it was impossible for stockraisers to use this "prescriptive right" to an "'accustomed range'" to keep other outfits off "their" range. As one contemporary Montana rancher observed, "the ranges were free to all and no man could say with authority when a range was overstocked."[16]

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[11] James Muhn, *The Mizpah-Pumpkin Creek Grazing District: Its History and Influence on the Enactment of a Public Lands Grazing Policy, 1926-1934* 6 (unpublished M.A. thesis, Mont. State U. 1987) (copy on file with Mont. St. U. Lib.).

[12] *Id.* at 8.

[13] Gordon, *supra* n. 10, at 53, 55–56, 59, 68–69, 105, 108, 110–111, 120, 128, 135–136, 142, 144; Pub. Lands Commn., *Report of the Public Land Commission Created by the Act of March 3, 1879, Relating to Public Lands in the Western Portion of the United States and to the Operation of Existing Land Laws*, 46 H.R. Exec. Doc. 46, at 21, 36, 82, 208, 266, 294, 312, 337, 360, 425, 499, 511, 514–16 (Feb. 25, 1880) (reprinted in *Use and Abuse of America's Natural Resources* (Stuart Bruchey & Eleanor Bruchy, eds., Arno Press Inc. 1972) [hereinafter *Report of the Public Land Commission*].

[14] Muhn, *supra* n. 11, at 8.

[15] Osgood, *supra* n. 1, at 182 (quoting 4 Cheyenne Live Stock Journal 85 (1884)).

[16] *Id.* at 182 (quoting Granville Stuart, *Forty Years on the Frontier* vol. 2 (Cleveland 1925)).

Stockraisers recognized that they had a problem. Crowding of the ranges was resulting in the deterioration of forage conditions. Poorer grass meant lighter weight cattle, which in turn brought less money at market and made the livestock more susceptible to disease and the effects of drought and harsh winters. Something had to be done.[17]

Public land policy, however, did not favor the interests of stockraisers. After the Civil War, public land policy increasingly favored settlers. The sale of large tracts of public lands in unlimited quantity at public auction was largely restricted to timbered regions. Large grants of public land to the railroads had ended in 1871. By that time, many of the public ranges were showing signs of crowding, but 1,120 acres was the most land an individual could acquire through the use of the Preemption,[18] Homestead,[19] Timber Culture,[20] and Desert Land[21] laws.[22] It was the family farmer Congress sought to assist, not the stockraisers who often needed thousands of acres of land.[23]

State, territorial, and local livestock associations passed rules to protect their member's ranges by attempting to exclude newcomers. They would often do this by denying participation in roundups, the use of common corrals, and protection against Indians, rustlers and predators. The groups also advertised their ranges and warned others to keep off. Such efforts, even when backed by threats and acts of violence, proved ineffective, for new cattle herds, bands of sheep, and settlers still came.[24]

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[17] Gordon, *supra* n. 10, at 53, 68, 105–07, 109–11, 120, 126, 128–29, 135–37, 141, 144; *Report of the Public Land Commission*, *supra* n. 13, at 21, 82, 239, 252, 292–293, 294, 337, 414, 425, 429, 495, 499–500, 511, 514–16; Muhn, *supra* n. 11, at 9.

[18] 19 Stat. 35 (1876).

[19] 26 Stat. 1097 (1891).

[20] 18 Stat. 21 (1874).

[21] 19 Stat. 377 (1877).

[22] Prior to 1891, the amount of public land one could acquire varied in the western United States. Ranchers in most areas could acquire up to 1,120 acres by using the Preemption (160 acres), Homestead (160 acres), Timber Culture (160 acres), and Desert Land (640 acres) laws in combination. However, Congress did not extend the provisions of the Desert Land Act to Colorado until 1891. Consequently, only 480 acres could be acquired in Colorado. In the western portion of Colorado, ceded by the Utes in 1880, only the Preemption and Mineral Land laws applied to those lands prior to 1891, effectively restricting one to patenting 160 acres. In California, Nevada, Oregon and Washington, ranchers could enter an additional 160 acres under the Timber and Stone Act, increasing the area they could acquire to 1,280 acres. Other variations existed because of how Congress applied the land laws to each state and territory.

[23] Paul Wallace Gates, *The Homestead Law in an Incongruous Land System*, in *The Public Lands: Studies in the History of the Public Domain* 315, 315–348 (Vernon Carstensen, ed., The U. of Wis. Press 1968); James Muhn & Hanson R. Stewart, *Opportunity and Challenge: The Story of BLM* 21–23 (U. S. Govt. Printing Off. 1988).

[24] Sen. Exec. Doc. 48-127, at pt. 1, 21–22 (Mar. 17, 1884); Dennen Rodgers Taylor, *From Common to Private Property: The Enclosure of the Open Range* 49-70 (unpublished Ph.D dissertation, U. of Wash. 1975) (on file with U. of Wyo. Lib.).

State and territorial legislatures enacted laws intended to protect range rights. These laws prohibited newcomers from mixing their herds with those of resident ranchers or driving livestock from their customary ranges; however, these statutes proved difficult to enforce.[25] Stockraisers, particularly the larger, capitalized outfits, needed a way to protect their interests. If they could not acquire title to or gain legal control of the ranges necessary to sustain their livestock, other methods had to be found. An effective means of doing that was to control the water sources on the range. In the arid and semiarid West, water is a precious commodity and that livestock must have to survive. A stream or water hole might be the only source of water for miles around, and a rancher could control the range for miles around by "corralling" such water sources.[26]

Cattleman Henry Metcalf of Elbert County, Colorado, drove home this fact in testimony he gave to the Public Land Commission in 1879.[27] "The water," he stated, "controls the land. Wherever there is any water, there is a ranch."[28] His ranch had two miles of running water. In one direction, the next water source was 23 miles away. "No man," he explained, "can have a ranch between these two places. I have control of the grass the same as though I owned it."[29] That was the way it was all over the West—he who controlled the water, controlled the adjacent range.

This fact was not lost on stockraisers. While an individual rancher could only acquire 1,120 acres of public land using the agricultural land laws, additional public land could be obtained to control water sources through fraudulent means. Large outfits often had their cowboys and others make entries under the various agricultural land laws, and when the men received patents, the claims would be purchased by their employer.[30]

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[25] Taylor, *supra* n. 24, at 78–80; *Sheep and Cattle, Ranges and Courts*, 25 Idaho Yesterdays 57, 57–59 (Spring 1981).

[26] *Report of the Public Land Commission*, *supra* n. 13, at 14, 36–7, 51, 79–80, 99, 100–01, 108, 120, 249–50, 252, 253, 263, 285–86, 297, 302, 311, 363, 374, 458, 500, 578; Joseph Nimmo, Jr., *Report in Regard to the Range and Ranching Cattle Business of the United States*, Treas. Dept. Doc. 690, at 42-43 (reprinted in *Use and Abuse of America's Natural Resources* (Stuart Bruchey & Eleanor Bruchey, eds., Arno Press Inc. 1972)); Thomas Donaldson, *The Public Domain: Its History, With Statistics* 541 (U. S. Govt. Printing Off. 1884); Gordon, *supra* n. 10, at 56, 76, 78, 96, 106, 109, 121, 127, 142; Taylor, *supra* n. 24, at 78–80; Victor Westphall, *The Public Domain in New Mexico 1854–1891* 48, 67–69 (The U. of N.M. Press 1965); *Sheep and Cattle, Ranges and Courts*, *supra* n. 25, at 57–59.

[27] *Report of the Public Land Commission*, *supra* n. 13, at 297.

[28] *Id.*

[29] *Id.*

[30] Sen. Exec. Doc. 48-127, at pt. 1, 14–19, 24 (Mar. 17, 1884); Sen. Exec. Doc. 47-61, at 4, 17, 56 (Feb. 8, 1883); *Report of the Public Land Commission*, *supra* n. 13, at 249–50, 302; Everett Dick, *The Lure of the Land: A Social History of the Public Lands from the Articles of Confederation to the New Deal* 224–33 (U. of Neb. Press 1970); Osgood, *supra* n. 1, at 203–05.

In regions where railroad companies had received large land grants consisting of alternate sections of land, some ranchers would either lease or buy the railroad lands. This allowed them to effectively control access to the intermingled public lands, blocking up large areas for their exclusive use.[31]

Some ranchers also fenced public lands to keep out the herds of others. The introduction of inexpensive barbed wire in the late 1870s provided a means for stockraisers to fence in large blocks of public land. These enclosures, which excluded settlers as well as livestock, could cover hundreds of thousands of acres. In 1882, the General Land Office (GLO) began to report on the problem. By 1884, the area of public lands under fence was reported to be nearly 4.5 million acres.[32]

The efforts of the large livestock companies to control the public rangelands angered the general public. Cattle barons were roundly condemned by newspapers for their attempts to monopolize the range at the expense of the smaller ranchers and settlers. The outcry prompted DOI reaction to these and other frauds occurring on the public lands. A corps of special agents charged with investigating fraud was created in 1882. The DOI also ordered illegal fences to be removed, an order assisted by the passage of the Unlawful Enclosures Act of 1885.[33]

These efforts on the part of the DOI began to reduce the problems associated with fraudulent land entries and illegal fencing. Hundreds of fraudulent land claims were cancelled and thousands of miles of barbed wire fence were torn down. Congress also assisted by repealing some of the more abused land laws and reducing the amount of acreage individuals could acquire. By 1891, the attempts by some stockraisers to monopolize the public range had largely been undone.[34]

That the public lands were to be open and free to all, was confirmed by the Supreme Court of the United States in 1890. In the case *Buford v. Houtz*,[35] the Court stated:

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[31] Harold Hathaway Dunham, *Government Handout: A Study in the Administration of the Public Lands 1875–1891*, at 112–13, (Da Capo Press 1970) (1941 dissertation).

[32] H.R. Rpt. 1325, at 2, 5–6 (Mar. 14, 1884); Sen. Exec. Doc. 48-127, at pt. 1, 3, 5, 13, 18–25, 30–40, 43, pt. 2, 2 (Mar. 17, 1884); Sen. Exec. Doc. 47-61, at 4, 9, 11, 29, 31 (Feb 8, 1883); *Annual Report of the Commissioner of the General Land Office*, H.R. Exec. Doc. 48-1, at 147 (Nov. 1, 1884) [hereinafter ARGLO followed by year of the report]; ARGLO 1883, HR. Exec. Doc. 48-1, at 30, 210 (Nov 1, 1883); ARGLO 1882, H. Exec. Doc. 1 Pt. 5, at 13, 14 (Nov. 1, 1882); Dunham, *supra*, n. 31, at 141; Gordon, *supra* n. 10, at 141; Osgood, *supra* n. 1, at 190–92.

[33] 23 Stat. 321 (1885) (codified at 43 U.S.C. §§ 1061–1066); Muhn & Stewart, *supra* n. 23, at 23, 26; Dunham, *supra*, n. 31, at 108–12.

[34] Muhn, *supra* n. 11, at 11–12; Muhn & Stewart, *supra* n. 23, at 11–12; Dunham, *supra* n. 31, at 179–81.

[35] 133 U.S. 320 (1890).

> We are of the opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use.[36]

So until Congress decided otherwise, no one could deny anyone else the privilege of grazing their livestock on the public domain.

Accordingly, some stockraisers and others sought changes to the public land laws which would recognize and facilitate their use of the public lands. Along with politicians and government officials, these ranchers supported proposals that called for public lands, chiefly valuable for grazing purposes, to be sold at public auction in unlimited quantities, opened to larger homestead entries, leased, or be ceded to the states. Proponents of these ideas, however, were unable to reach a consensus and public opinion was generally against any law which would favor livestock interests over settlers.[37]

A few people, perhaps recognizing that Congress would not enact any law that would allow stockraisers to obtain the lands they needed, suggested that water sources be reserved and controlled by the federal government. The idea arose as early as 1879 in statements made to the Public Lands Commission. E. O. F. Hastings of California thought the only way to prevent monopoly of the range was "for the government to hold in reserve the water (with a certain amount of land in conjunction with it), and not sell it at all, but leave it open to the people and the public, the whole community being allowed to take their stock there to water."[38] In this manner, Hastings felt, monopoly would be prevented, for access to water would be guaranteed to all.[39]

Jerome Madden, an agent with the Southern Pacific Railroad Company echoed Hastings sentiments. He felt that there had been "a great injustice done to the people at large by holding the water separate from the land."[40] A person could patent forty acres and then control thousands more simply because he had the only water. Madden felt the public lands should be surveyed with reference to the water, for "the only true way of disposing of these lands is to divide up the water proportionately to the land."[41] He recommended that a person be given "enough [water] to make a living on, and would make [the excess] water wholly

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[36] *Id.* at 326.
[37] Muhn, *supra* n. 11, at 12–15.
[38] Pub. Lands Commn., *supra* n. 13, at 12–15.
[39] *Id.*
[40] *Id.*
[41] *Id.*

free to all within reasonable limits."[42] To accomplish that, Madden said, he would "compel" a person to put lanes through his land so others could have access to the water.[43]

Others were "favorably impressed with the idea that the government should hold the water and make small tracts on . . . water-courses national reserves."[44] Such an idea, however, was not popular. When the Public Lands Commission asked a Colorado rancher if he felt it would be beneficial to enact a law "which would make water common property and [would] provide that the cattle from any range should be allowed to drink of that water," the rancher responded that he did not think it would be.[45] The Commission apparently held the same opinion, since it did not advocate such an idea in its plan for revising the public land laws.[46]

Commission member Thomas Donaldson, however, did recommend in 1883 that legislation be enacted as soon as possible which would reserve in all public lands sold "an easement to the public for highways."[47] Donaldson remarked that this would "prevent the holding of water fronts on streams by individuals to the exclusion of settlers in the rear."[48] Secretary of the Interior (SOI) Lucius Q. C. Lamar agreed. In his annual report for 1886, Lamar worried about the monopolization of water in the West. "There can," he reasoned,"be no permanent residence in a country where water is not public."[49] Lamar felt that to encourage and insure the settlement of the region, settlers needed to be assured "a limited area and a common right to the public water."[50]

In 1888, Congress considered the idea of guaranteeing public access to water courses on public lands.[51] The House of Representatives was considering a wide-ranging public land reform bill. Congressman J. B. Weaver of Iowa recommended an amendment to the measure that read:

> And along all water-courses and on each side thereof immediately adjoining the low-water mark there shall be reserved to the United States for public use alternate strips of land, 100 feet wide and 1,000 feet long, lying parallel to said streams and following the meander thereof. Like reservations shall be made along all lake and sea shores

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[42] *Id.*
[43] *Id.* at 107.
[44] *Id.* at 14, 100–01, 171.
[45] *Id.* at 297.
[46] *Id.* at sections V–C.
[47] Donaldson, *supra* n. 26, at 551.
[48] *Id.*
[49] H. Exec. Doc. 49-1, Pt. 5, at 39 (Nov. 1, 1886).
[50] *Id.* at 40.
[51] 19 Cong. Rec. 5592 (1888).

> where they adjoin the public lands of the United States. All patents for lands disposed of after the passage of this act shall expressly cite this reservation.[52]

The amendment, explained Weaver, along with a section which provided for the reservation of "highway" rights of way along section lines of township surveys, was meant to "prevent mischief."[53] It sought to end the efforts of certain individuals to monopolize the public domain by gaining control of streams and lakes. "No injury can arise from carrying out this amendment I have proposed," stated Weaver, "but, on the contrary, it is for the purpose of benefitting the settlers on the public lands."[54]

Weaver found support for his measure from William McAdoo of New Jersey. McAdoo saw the amendment as one of the most important which had been added to the bill under consideration. He noted that "the man who controls the right to a living stream of water is virtually the lord of the territory as far back as he chooses to go."[55] The proposed amendment would have given the poor and small ranchers equal access to the public lands that the larger outfits were attempting to monopolize. McAdoo, therefore, wanted "this vital thing of water . . . preserved to the people of this country."[56]

Heated debate followed. One opponent of the amendment, Arizona delegate Marcus A. Smith, argued that the "fear of cattle kings of which we hear so much amounts to nothing in our country."[57] Furthermore, he argued it would be impossible for any one entity to gain control of the entire course of a stream and eventually all the streams and springs in the arid West would be used for irrigation purposes.[58] The amendment was then voted on and rejected.[59]

Congressman McAdoo then attempted to introduce another amendment on the same subject. This provision called for the withdrawal from settlement and other appropriation "sufficient public lands . . . to give passage for man and beast adjoining any living spring, stream, creek, or river."[60] The amendment further provided that "such land shall be and remain a common, to give free

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[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.* at 5592–5593.
[56] *Id.*
[57] *Id.* at 5594.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 5595.

ingress and egress to use such water for legitimate and necessary purposes."[61] The provision, however, was rejected without discussion.[62]

In 1902, John F. Lacey of Iowa sought to provide open and free access to water on the public domain in a public rangeland leasing measure he introduced. The bill sought:

> [T]o give homestead settlers and holders of small farms the opportunity, in the arid region, to improve, use, and protect the grass upon the public domain in the vicinity of their holdings, so as to prevent the further deterioration and monopolization of the range by the owners of large herds of live stock [sic].[63]

To accomplish that intent, the bill provided for the lease of public lands and the:

> [R]eservation of watering places and streams where practicable, so as to render them accessible from the leased lands in the vicinity; and also the necessary right of way across other leased lands in order to enable any lessee to have access with his stock to and from the lands leased by him.[64]

However, the bill was opposed for other reasons by the GLO and was not considered by Congress.[65]

Some changes to the public land laws, however, did occur. In 1897 Congress passed a management act for the national forests that allowed the DOI to regulate grazing within those reserves. The national forests, the first of which had been established in 1891, embraced summer pastures that many ranchers depended upon. The number of cattle and sheep, and the seasons they used the forests, were now controlled in a manner that sought to prevent crowding and overgrazing of those rangelands.[66]

That same year, 1897, Congress also enacted the Stock-Water Reservoir Act.[67] This law provided that:

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[61] *Id.*

[62] *Id.*

[63] Letter from Commr., GLO, to SOI (May 28, 1902) (on file with the Natl. Archives: GLO, Division "P", Letters Sent to Registers and Receivers and Miscellaneous, Vol. 362, 478 Record Group 49: NA).

[64] *Id.*

[65] *Id.*; 35 Cong. Rec. 546 (1902).

[66] William D. Rowley, *U.S. Forest Service Grazing and Rangelands: A History* 22–54 (Tex. A & M U. Press 1985).

[67] 29 Stat. 484 (1897).

> [A]ny person, live-stock company, or transportation corporation engaged in breeding, grazing, driving, or transporting live stock may construct reservoirs upon unoccupied public lands . . . not mineral or otherwise reserved, for the purpose of furnishing water to such live stock, and shall have control of such reservoir, under regulations prescribed by the Secretary of the Interior.[68]

Reservoir sites could not exceed 160 acres and they had to be unfenced and held "open to the free use of any person desiring to water animals of any kind."[69]

The law was intended to facilitate the movement of stock on the public lands by permitting stockraisers to establish public watering places. By 1899 a large number of declaratory statements had been filed under the law. These filings reserved the land from appropriation under other public land laws, leading many individuals to make filings for speculative purposes. In 1900, nearly 13,000 stock-watering reservoir applications awaited adjudication, but a large number were cancelled because they were found to be fraudulent.[70]

The laws enacted in 1897, however, did nothing to end the chaos stockraisers had to deal with on the public domain. Regulated grazing in the national forests, if anything, only worsened the situation on the public lands. Livestock herds denied access to range in the forests were forced to use the public ranges still available more intensively. The Stock-Water Reservoir Act, by making the water developed open and free to all, only helped to maintain the chaos on the public range.

Congress' unwillingness to resolve the problems faced by ranchers using the public domain led to a resurrection of fraudulent land entries and illegal fencing problems by the turn of the century. These problems had never totally disappeared, but as matters on the public domain continued to deteriorate, more and more stockraisers turned to such activities to protect their interests.[71]

The DOI vigorously fought attempts by ranchers to gain illegal control of public rangelands. At the same time, however, President Theodore Roosevelt tried to resolve the public land grazing imbroglio. In 1903 he appointed a Public Lands Commission to study, among other matters, the public rangeland problem. This commission came out strongly in favor of regulating grazing on the public domain through the adoption of a leasing system. Many stockraisers and

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[68] *Id.*

[69] *Id.*

[70] ARGLO 1899, H.R. Doc. 56-5 (Oct. 4, 1899); ARGLO 1900, H.R. Doc. 56-52, at 67 (Nov. 28, 1900).

[71] Muhn, *supra* n. 11, at 15–16.

livestock associations supported the idea, but as before, Congress would not enact the needed legislation.[72]

As before, the main obstacle to passing a grazing lease law were the homesteaders. It is difficult today to understand the hold the homestead philosophy had on the nation's consciousness. Since the days of Thomas Jefferson, the family farmer had been held up as the ideal American. Agriculture was seen as the foundation of the country, as more people at this time still lived in rural areas than cities. The strength of that foundation was the farmer who owned and worked his own land. Passage of the Homestead Act in 1862 reaffirmed the agrarian ideal. Homesteading failed, in many ways, to fulfill its promise to expand and strengthen the number of family farmers. Yet, homesteading and the idea of turning America's frontier landscape into a garden maintained a strong hold on popular imagination, especially to a people worried about the moral decay they felt increased urbanization and industrialization had brought to the Nation. Homesteading offered an opportunity to reaffirm and strengthen the country's values, and it was unthinkable to favor stockraisers, who were perceived as land grabbers, over the individuals seeking farms and new lives.[73]

In the early 1900s, therefore, the homestead ideal maintained a firm grasp on the thinking of Congress. Furthermore, agricultural developments of the time promised to turn public lands once thought only useful as rangeland into cultivated fields of grain and other crops. Congress' enactment of the Reclamation Act of 1902[74] led to the rapid expansion of irrigated lands in the West and provided homes for thousands of families. More important, the development of dry-farming practices opened many of the public lands outside of irrigation projects to farmers. The hope of this type of agriculture led to the passage of the Enlarged Homestead Act in 1909.[75] Congress now offered settlers 320 acres of public land, provided it was nonmineral, nonirrigable, and had no merchantable timber.[76] The Three-Year Homestead Act of 1912 reduced the amount time a settler had to prove up on his entry and allowed homesteaders to

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[72] Phillip O. Foss, *Politics and Grass: The Administration of Grazing on the Public Domain* 41–44 (U. of Wash. Press 1960); E. Louise Peffer, *The Closing of the Public Domain: Disposal and Reservation Policies, 1900–50* 77–89 (Stanford U. Press 1951) (reprinted in *Use and Abuse of America's Natural Resources* (Stuart Bruchey & Eleanor Bruchey, eds., Arno Press Inc. 1972)); Arthur R. Reynolds, *Land Frauds and Illegal Fencing in Western Nebraska*, 23 Agric. History 173, 173–79 (1949); Muhn, *supra* n. 11, at 16–18.

[73] Stanford J. Layton, *To No Privileged Class: The Rationalization of Homesteading and Rural Life in the Early Twentieth-Century American West* 5–59 (Brigham Young U. 1988); Henry Nash Smith, *Virgin Land: The American West as Symbol and Myth* 123–260 (Harvard U. Press 1950).

[74] 32 Stat. 388 (1902).

[75] 35 Stat. 639 (1909).

[76] *Id.*

leave their entry for a portion of the year to earn money for improving their claim.[77] The rush for land was on and tens of millions of acres were taken up by land-hungry homesteaders.[78]

For cattle and sheep interests dependent upon the public rangelands for their livelihood, the homesteading boom of the early 1900s was devastating. The area available for their use was diminishing as homesteaders took up claims and plowed under the grass their animals needed. Constriction of the public range only meant that there would be worse crowding and more intensive use. It was first come, first served. Ranchers could ill afford to not take advantage of any grass found on the public domain, for others were more than willing to let their livestock graze it.[79]

The large livestock operations were particularly threatened. Many began to use scrip and similar types of selection rights to acquire watering places.[80] The advantage of scrip was that users need not reside, cultivate, or improve the public lands entered to obtain title. There were many types of scrip and analogous rights available to stockraisers on the open market. Much of the scrip or selection rights came in 40 to 160-acre increments, but its price made purchase of large acre amounts difficult. Ranchers, therefore, concentrated on locating their "scrip" on water sources. This activity was not illegal, but it was clearly an attempt to monopolize the public lands. Officials in the DOI perceived what was happening and they looked for a means to prevent stockraising interests from monopolizing segments of the public domain.[81]

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[77] 37 Stat. 123 (1912).

[78] Muhn & Stewart, *supra* n. 23, at 34–35; Letter from Commr, GLO (May 28, 1902), *supra* n. 63.

[79] Will C. Barnes, *The Story of the Range* 8–9 (U.S. Govt. Printing Off. 1926).

[80] Scrip and other similar types of selections are complicated subjects. Scrip was generally a certificate that allowed its user to locate a specified number of acres of public land. For discussions of the various types of "scrip" that were available, *see generally* ARGLO 1905, H.R. Doc. 60-5, at 35–36 (Dec. 31, 1905); S.W. Williams, *Rights Analogous to Scrip*, in *Report of the National Conservation Commission*, vol 3, 35–36 (U.S. Govt. Printing Off.1909); BLM, *Many Kinds of Scrip*, 5 Our Pub. Lands 10, 10–11, 15 (Oct.–Dec. 1955).

[81] *Improvement and Regulation of Grazing on the Public Lands of the United States: Hearings Before the Committee on the Public Lands, House of Representatives on H.R. 19857*, H.R. Doc. 62-N, at 80, 95 (1912) [hereinafter cited as *Improvement*]; *Report of Select Committee on Appropriations for and Employees Engaged in the Detection and Prevention of Fraud in and Depredations Upon the Public Service Appointed under House Resolution No. 480, With Testimony*, H.R. Rep. No. 2320, at 283–85 (Mar. 3, 1909); ARGLO 1907, H.R. Rpt. 60-5, at 16–17 (Dec. 31, 1907); George Otis Smith et al., *The Classification of the Public Lands*, USGS, Bull. No. 537, at 43 (1913); E. O. Wooton, *The Public Domain of Nevada and Factors Affecting Its Use*, in *U.S. Dept. of Agric. Technical Bulletin No. 301* 33–35 (Apr. 1932); Gordon, *supra* n. 10, at 106; Sanford A. Mosk, *Land Policy and Stock Raising in the Western United States*, in *The Public Lands: Studies in the History of the Public Domain* 411 (Vernon Carstensen, ed., 2d General ed., The U. of Wis. Press 1968); James A. Young & B. Abbot Sparks, *Cattle in the Cold Desert* 93–94 (Ut. State U. 1985); Romanzo Adams, *Public Range Lands—A New Policy Needed*, 22 Am. J. of Sociology 324, 331–35, 344, 347–49 (Nov. 1916); *Do You Want Lands?* (Collins Land Co. 1917).

III. THE BEGINNINGS OF PUBLIC WATER RESERVE POLICY

In 1911, the idea of regulating grazing on the public domain began receiving new attention. The new SOI, Walter L. Fisher, noted in his first annual report that the public range could not be "properly administered under the existing law."[82] To stop the destruction of these lands, Fisher advocated a leasing system "under the broad administrative discretion of the Secretary of the Interior, so that the leases can be adapted to actual conditions and legitimate interests of the sheep and cattle men."[83]

In March 1912, First Assistant Secretary Samuel Adams, apparently in response to the urgings of officials in the U.S. Geological Survey (USGS) and GLO who were concerned about attempts of large livestock outfits to monopolize public ranges,[84] asked the Director of the USGS "for a report on the legality, desirability, and feasibility of withdrawing from entry public lands in desert regions on which springs or other small water supplies exist . . . ."[85] In response, Director George Otis Smith pointed out that the Act of June 25, 1910[86] allowed the president to make temporary withdrawals for "'water-power sites, irrigation, classification of lands, *or other public purposes to be specified in the orders of withdrawals*.'"[87] The other public purposes provision, the director argued, clearly gave the needed authority for the type of withdrawal under consideration.[88]

The Act of June 25, 1910, commonly known as either the Pickett or General Withdrawal Act, had been one of the most controversial public land laws enacted by Congress. Prior to its passage, Congress had on occasion given presidents the authority to make withdrawals, but presidents had also exercised this power on their own. The withdrawal of public lands was seen as an inherent part of the responsibility of the executive branch to supervise and regulate the public lands. The exercise of this authority without specific legislation, which the

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[82] *Annual Report of the Department of the Interior*, H.R. Rep. 62-120, at 9–10 (Dec. 1, 1911) [hereinafter cited as ARDOI followed by the year].

[83] *Id.*

[84] Smith, *supra* n. 81, at 43. Also, the DOI was considering withdrawing public lands at the headwaters of streams so they too could be protected for public use. ARDOI 1912, H.R. Doc. 62-933, at 21–22 (Dec. 2, 1912).

[85] Letter from George Otis Smith, Dir., USGS, to Walter L. Fisher, SOI (Mar. 26, 1912) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, General, Pt. 2, RG 48, NACP).

[86] 36 Stat. 847 (1910).

[87] *Id.* (emphasis added).

[88] Letter from Smith (Mar. 26, 1912), *supra* n. 85.

United States Supreme Court recognized[89] as being legitimate, had generally been used sparingly and applied in cases of some needful public purpose.[90]

In 1906, however, President Theodore Roosevelt pushed the withdrawal authority of the executive to its fullest. In Roosevelt's mind, "it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws."[91] Bolstered by that philosophy, Roosevelt withdrew millions of acres of public land known or suspected to be valuable for coal. The action was taken to prevent fraudulent acquisition of that resource and to prevent its monopolization. He followed the same courses of action for other public land resources he felt were threatened.[92]

Roosevelt's successor, William Howard Taft, was not sure of the president's power to withdraw public lands and asked Congress to clarify the situation. The result was the Pickett or General Withdrawal Act in 1910. This legislation, however, was not enacted without much rancorous debate. The issue pitted conservation and anti-conservation forces in Congress against each other. To a certain extent the law was a compromise, but it gave the president authority to withdraw public lands for certain specific purposes, and more importantly, it specified that withdrawals could be made for "other public purposes to be specified in the orders of withdrawal."[93]

The Director of the USGS noted that the Pickett or General Withdrawal Act would, "make possible the continued unrestricted public use of watering places and of the public lands adjacent to them."[94] Director Smith felt this was desirable because, after all, the United States Supreme Court had held that grazing of domestic livestock on the public domain came by virtue of an implied license that required those lands be held open for free and unrestricted use to

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[89] *U.S. v. Midwest Oil Co.*, 236 U.S. 459 (1915).

[90] For a general discussion of the policy of withdrawing public lands prior to the Pickett Act of 1910; *see Senate Committee on Public Lands, Public Lands Withdrawn from Settlement, Etc.* Sen. Doc. 57-232 (Feb. 28, 1902); Charles F. Wheatley, Jr., There are also numerous contemporary rulings and opinions of the DOI and Atty. Gen. which provide useful insights into the exercise of this power. Among some of the more insightful, *see generally, Opinion*, 34 Land Dec. 144 (U.S. Govt. Printing Off. 1906); *Harkrader v. Goldstein*, 31 Land Dec. 87 (U.S. Govt. Printing Off. 1903); *Henry C. Linn*, 13 Land Dec. 607 (U.S. Govt. Printing Off. 1892); *John Campbell*, 6 Land Dec. 317 (U.S. Govt. Printing Off. 1888); *Military Reservation—Entry—Power of President*, 1 Land Dec. 30 (U.S. Govt. Printing Off. 1887); *Memorandum of Different Provisions Bearing Upon the Subject of Reservations by the President*, 1 Land Dec. 702 (U.S. Govt. Printing Off. 1887).

[91] Theodore Roosevelt, *Theodore Roosevelt: An Autobiography* 371–72 (2d ed., Charles Scribner's Sons 1919).

[92] *Id.* at 378, 380–81, 416–17, 420, 427; Peffer, *supra* n. 72, at 69–71, 105–09.

[93] Peffer, *supra* n. 72, at 112–19 (quoting Pub. L. No. 303, 36 Stat. 847 (1910)).

[94] Letter from Smith (Mar. 26, 1912), *supra* n. 85.

everyone.[95] The withdrawal of needed watering places would ensure this policy was followed.[96]

In the arid part of the western United States, Smith pointed out that water controlled use of the public rangelands. To gain this advantage, many ranchers were using scrip to obtain title to water sources on public lands. In Smith's opinion, it was "distinctly in the public interest and indeed . . . essential to the safeguarding of the public rights recognized by the Supreme Court, that the powers given the President by the withdrawal act be exercised to prevent the acquisition by private parties of these strategic points in the western and southwestern deserts."[97]

Three days later, the Director of the USGS sent First Assistant Secretary Adams a withdrawal order for 16,300 acres covering about 32 springs or watercourses essential to the use of nearly 4,000 square miles of public rangeland in western Utah.[98] Smith said the withdrawal was "recommended in order that the right to the use of the water, and consequently of the adjacent range, may remain in the public."[99] Secretary Fisher favorably referred the order, along with the Smith's explanation, to President Taft that same day, and the President signed Public Water Reserve No. 1, Utah No. 1,[100] without any apparent question or comment.

On April 9, the Director of the USGS recommended two more public water reserve withdrawals. Both involved public lands in Wyoming and were based on USGS work completed in 1907 and 1908. The first embraced some 32,500 acres in the southern portion of Wyoming's Red Desert, and the other included 30,405 acres near Rock Springs. The memoranda transmitting the orders again recommended the withdrawals so that the "right to use the water," as well as the adjacent range, would remain in the public.[101] The President signed both orders on April 19.[102]

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[95] *Buford*, 133 U.S. 320.

[96] Letter from Smith (Mar. 26, 1912), *supra* n. 85.

[97] *Id.*

[98] Memo. from George Otis Smith, Dir., USGS, to Walter L. Fisher, SOI, *Memorandum for Secretary Adams* 1 (Mar. 29, 1912) (on file with Natl. Archives: CCF 1907–1934, File 2-153: Withdrawals under Act of June 25, 1910, Utah, Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[99] *Id.*

[100] *Order of Withdrawal: Public Water Reserve No. 1, Utah No. 1* (Mar. 29, 1912) (on file with the National Archives: DOI, CCF 1907–1934, File 2-153: Withdrawals under Act of June 25, 1910, Utah, Water Reserves, Withdrawals, Pt. 1, RG 48, NACP). It was common practice for withdrawals made by the USGS to be numbered withdrawals by the type of resource being reserved and then by the state or territory where the withdrawn lands were located.

[101] Letter from George Otis Smith, Dir., USGS, to Walter L. Fisher, SOI (Apr. 12, 1912) (on file with the Natl. Archives: DOI, CCF 1907-1934, File 2-153: Withdrawals under Act of June 25, 1910, Wyo., Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[102] *Id.*; Letter from George Otis Smith, Dir., USGS, to Walter L. Fisher, SOI (Apr. 9, 1912) (on file

In May 1912, the making of these three public water reserves came to the attention of Congressman Frank W. Mondell of Wyoming. On May 22, Mondell asked SOI Fisher to explain the type of withdrawals that had been made, their purpose, and locations.[103] The Department responded to the congressman with the statement that "the object of [the] reserves is to preserve to the public generally the use of the water supply and prevent the acquisition of the same by individuals, who might thereby secure a practical monopoly of the surrounding district."[104] Mondell was undoubtedly dissatisfied with the explanation. The Wyoming congressman was a steadfast opponent of public land conservation policies. He believed wholeheartedly that the Nation's public land policy should be the transfer of the public domain to individuals. To Mondell, in the words of his political biographer, "no other policy would be consistent with the American system of government."[105]

Mondell made his opposition to the public water reserve policy clear to SOI Fisher even before he received the DOI's explanation to his May 22 inquiry. In hearings before the House Committee on Public Lands, on a bill that would have provided for the lease and regulation of grazing on the public domain, the SOI brought up the matter of public water reserves. Fisher noted that when leasing public lands for grazing purposes, watering places should be "carefully reserved."[106] The DOI, he noted, was aware that there was a "more or less concerted movement to take up those portions of the public domain that have water on them and that are valuable chiefly in connection with grazing land adjacent to that water."[107] In response, the DOI had adopted a policy of reserving "water holes, or what are equivalent to water[ing] places, and reserving them from private entry of any kind."[108] The withdrawals, Fisher explained, did:

> [N]ot mean that [the water sources] are reserved from private uses; on the contrary, it means that those private uses are encouraged and permitted, because nobody is building fences around these water[ing]

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with the Natl. Archives: DOI, CCF 1907–1934, File 2-153: Withdrawals under Act of June 25, 1910, Wyo., Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[103] Letter from Frank W. Mondell, Congressman for Wyo., to Walter L. Fisher, SOI (May 22, 1912) (on file with the Natl. Archives: DOI, CCF 1907–1934, File 2-153: Withdrawals under Act of June 25, 1910, General, Pt. W, RG 48, NACP).

[104] Letter from Samuel Adams, First Asst. SOI, to Frank W. Mondell, Congressman for Wyo. (May 31, 1912) (on file with Natl. Archives: DOI, CCF 1907–1934, File 2-153: Withdrawals under Act of June 25, 1910, General, Pt. 2, RG 48, NACP).

[105] Donald H. Wernimont, *Frank W. Mondell as a Congressman* (unpublished M.A. Thesis, U. of Wyo. 1956) (on file with U. of Wyo. Lib.).

[106] *Id.*

[107] *Id.*

[108] *Id.*

> places, and anyone using the public domain for grazing purposes has full access to these watering places, and the result is that they are utilized for that purpose, the purpose for which they are most valuable.[109]

Since these watering places controlled much of the adjacent range around them, he felt the policy of making public water reserves should be continued under the grazing lease law.[110]

Later in the SOI's testimony, Congressman Mondell asked Mr. Fisher about the DOI's "water-hole withdrawals."[111] Asked by what authority the withdrawals were made, the SOI noted that reservations were set aside under the provisions of the Pickett or General Withdrawal Act of June 25, 1910. Mondell, however, questioned whether these withdrawals were a "public purpose," to which Fisher replied that they were.[112] Mondell questioned whether the SOI felt that the DOI's policy called for the withdrawal from homestead settlement of "every tract of land on the public domain that borders on a creek or stream or that has a spring upon it or a small basin in which water settles?"[113] The SOI, quite offended by the question, said, "most emphatically no."[114]

So where did Fisher, asked the Wyoming congressman, "draw the line?"[115] The SOI replied that when the withdrawal was "absolutely essential to the use and occupation of the adjacent lands" and where, if patented, the water source would give the owner a control of "several square miles of territory."[116] If that was the case, Mondell continued, why was the SOI "not authorized and justified" in withdrawing every water source where control by private parties would affect the use of adjacent public lands?[117] Fisher only responded that the DOI had not done that "for the reason that they do not, in my opinion, have that effect."[118]

Mondell continued his badgering of Fisher by asking if any homesteaders had petitioned to have public water reserves set aside, whether the policy worked to the advantage of large livestock operations, or if withdrawals

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[109] *Id.*
[110] *Improvement, supra* n. 81, at 80.
[111] *Id.*
[112] *Id.* at 94–96.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* at 95; The SOI's response is somewhat ambiguous. It does not appear to answer Mondell's question. The SOI, however, may be expressing the opinion that not every water source in a particular area or along a particular stream had been withdrawn by the three orders issued up to that time.

would prevent further settlement in many areas. The congressman also wondered if the DOI's action was "a rather wide assumption of authority?"[119] To this SOI Fisher remarked that he "did not think so, or [he] would not have done it."[120] The exchange between Mondell and Fisher continued to deteriorate, finally forcing the committee chairman to change discussion to another matter.[121]

Congressman Mondell's pointed questions about the recently created public water reserves gave SOI Fisher pause. Consequently, Fisher began to reassess the Department's public water reserve policy. He started by asking the USGS to express its views on public water reserves. Director Smith told the SOI that all public water reserve withdrawals that had been made were based on the "definite knowledge" of GLO inspectors or USGS field crews.[122] No tracts, therefore, were made based on "purely office information or upon cursory field examination."[123] Notably, not all tracts identified as possible public water reserves had been withdrawn. No withdrawals had been made in areas where there were numerous perennial streams or "where water supply of the area is so abundant that public control of the watering places is unnecessary to the free use of the range."[124] Lands embraced by homestead or desert land entries had been excluded, except if there was evidence that the entry had not been made in good faith. Tracts that had agricultural values and could be successfully cultivated were also excluded.[125]

Director Smith went on to say that while he believed it "highly desirable to protect the privilege of free grazing on the public domain by the creation of public water reserves, [he was of the] opinion that it would be a matter of great regret if thereby any lands were withheld from actual settlement in good faith under the homestead and desert land laws."[126] He felt confident that the careful manner in which the withdrawals were prepared eliminated "any real danger that agricultural lands suitable for home-making have been included in the withdrawals."[127] To assure this, Smith advocated instituting a procedure that would allow settlers to petition to have the lands within a public water reserve reclassified and restored to entry under the public land laws.[128]

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[119] *Id.*

[120] *Id.*

[121] *Id.* at 95–96.

[122] Letter from George Otis Smith, Dir., USGS, to Walter L. Fisher, SOI (July 25, 1912) (on file with Natl. Archives: DOI, CCF 1907–1934, File 2-153: Withdrawals under Act of June 25, 1910, General, Pt. 2, RG 48, NACP).

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

After the SOI reviewed the USGS's memorandum, he sent it to the GLO for comment. Commissioner of the GLO, Fred Dennett, took issue with the policy the USGS had followed in making public water reserve withdrawals. In Wyoming, he observed, long stretches along creeks had been withdrawn. In one case, Bitter Creek, the withdrawal covered a distance of seventy miles. He also noted that two or three of the withdrawn streams were in the same township. Dennett did not know if any of this land had agricultural value, but even if it didn't, the withdrawal effectively excluded the establishment of new ranches. Stockraisers needed assurance of water, and the only assurance those people now had was to own it in fee. He also felt that large livestock operators could, through the control of railroad lands and the public water reserves, monopolize the public range along Bitter Creek.[129]

A better policy, Dennett suggested, would be to withdraw only one or two of the best watering places in each township, with each tract withdrawn not to exceed 160 acres.[130] He saw no need for extensive withdrawals, for he did not believe, due in part to the price of scrip, that any one company would be able to acquire enough scrip to acquire complete control of the springs and streams in an area.[131] If, however, the DOI wished to pursue a policy of "large contiguous withdrawals," then settlers should be afforded the opportunity to have the withdrawn land reclassified as not of value as a public watering place.[132]

The commissioner of the GLO wanted it understood that he "heartily" favored the public water reserve policy where such withdrawals were necessary to ensure free use of the public range.[133] Dennett reiterated, however, that he believed this could be accomplished by withdrawing only one or two "'water holes'" in each township, and by so doing settlement would still be encouraged.[134] As an example, he submitted a proposed withdrawal involving public lands in California. The order included springs and other water places that

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[129] Letter from Fred Dennett, Commr., GLO, to Walter L. Fisher, SOI (Aug. 19, 1912) (on file at the Natl. Archives: GLO, 1910 Miscellaneous Letters Received, File 255821, RG 49, NA).

[130] Withdrawals of this size would be the same as the maximum area allowed for stock watering reservoirs under the Act of January 13, 1897, 29 Stat. 484; *Regulations for Rights of Way Over Public Lands and Reservations*, 36 Land Dec. 567, 576–579 (U.S. Govt. Printing Off. 1908).

[131] Commissioner Dennett's contention was corroborated by one leading scrip dealer. The Collins Land Company noted that "all the special scrip of general application . . . would not be sufficient to establish a fair-sized ranch for a Montana stockman." *Do You Want Lands?*, *supra* n. 81, at 13. That there was little danger of complete monopolization by any one livestock concern through the control of water was pointed out by Romanzo Adams in 1916. Professor Adams, who wrote about the need for a new public rangeland policy, felt it was nearly impossible for any one outfit to gain complete control of the public range through the monopolization of water resources. Adams, *supra* n. 81 at 333, 335, 347–48; A. F. Potter, *The Public Range* in *Report of the National Conservation Commission* vol 3, 358 (U.S. Govt. Printing Off. 1909).

[132] Letter from Dennett (Aug. 12, 1912), *supra* n. 129.

[133] *Id.* at 5.

[134] *Id.*

were no closer together than the distance of one township and that withdrew no more than 160 acres in each township. This method, the commissioner believed, was "amply sufficient . . . to preserve the integrity of the range within a distance of at least ten miles of each 'water hole' withdrawn."[135]

Commissioner Dennett's reply undoubtedly hit a responsive cord with SOI Fisher. Fisher was very interested in the inauguration of a regulated grazing policy on the public domain, however, he firmly believed that such a policy should not interfere with the settlement of the public lands. He articulated this opinion as early as December 8, 1911 in a letter to T. W. Tomlinson, the secretary of the American National Live Stock Association. Fisher said he supported the organization's proposal that grazing be regulated on the public lands. However, he stated that the policy of the federal government should be "directed first to the encouragement of permanent settlement, second to the protection of the ranchmen who graze a small number of stock on the public range adjacent to their ranches, and third to the encouragement of range conservation and the live stock [sic] industry as a whole."[136] But Fisher was a realist and he knew that many parts of the public domain were too rugged for cultivation or unsuited for settlement; and it was those public lands he wanted to set aside and lease to stockraisers.[137]

Fisher followed this policy position in a meeting he had with the director of the USGS and the commissioner of the GLO on the public reserve policy on August 24, 1912. The secretary remarked that he had not been aware of the extent of the Bitter Creek withdrawal in Wyoming. He felt that withdrawals like Bitter Creek were "rather forcing the proposition."[138] He would not order revocation of the withdrawal, but in the future he wanted public water reserves to "include only the most available and best situated . . . water holes along such a stream."[139] Where reserves covered practically all the water in the region, he agreed that individuals should be allowed to ask for a reclassification and revocation of part of the withdrawal order. It also appears that Fisher reinforced the policy that agricultural lands that could be successfully cultivated be excluded from withdrawal as public water reserves "except in regions where

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[135] *Id.*

[136] Letter from Walter L. Fisher, SOI, to T.W. Tomlinson, Sec., Am. Natl. Live Stock Assn. (Dec. 8, 1911) (on file with the Natl. Archives: DOI, CCF 1907–1936, File 2-147: Grazing on Public Lands, General, Pt. 2, RG 48, NACP).

[137] Letter from Walter L. Fisher, SOI, to O.M. Holmes, Sec., Great Falls Commercial Club (Feb. 4, 1913) (on file with the Natl. Archives: DOI, CCF 1907–1935, File 2-147: Grazing on Public Lands, General, Pt. 3, RG 48, NACP).

[138] Letter from George Otis Smith, Dir., USGS, to Mr. Mendenhall (Aug. 24 1912) (on file with the Natl. Archives: USGS, Central Classified Files 1912–1953, File 721, Record Group 57 NACP).

[139] *Id.*

most of the watering places have passed into private ownership and it becomes imperative to reserve water for stock, even at the expense of settlement."[140]

If SOI Fisher felt that the problems with the newly inaugurated public water reserve policy were taken care of, he was soon to know otherwise. On October 11, 1912, Congressman Frank Mondell sent the SOI a telegram "earnestly" asking that the Rock Springs withdrawal be revoked.[141] Three days later, Wyoming's Senator Francis E. Warren echoed Mondell's request by stating, "the withdrawal is working hardship on many small stock owners."[142] In response to Senator Warren, Fisher stated he was "not sufficiently advised" on the question but was asking the DOI for more information.[143] He also added he could "not understand how [the withdrawals could] work a hardship on small stock owners . . . . Water holes are withdrawn from entry not from use. Purpose is to keep them available for small stock owners and for public range."[144]

Back in Washington, the Director of the USGS, George Otis Smith, prepared a memorandum for the SOI on the public water reserve withdrawal near Rock Springs. Smith was of the opinion that "in no case will it be found that bona fide agricultural development is hampered in the least by these withdrawals in Sweetwater County, and I cannot understand how the interests of the small stockman can be other than protected."[145] In any case, entrymen had, under the DOI policy established by the SOI himself, an opportunity to have the withdrawal revoked upon proper showing that the land was not needed for the purpose it had been withdrawn.[146] Fisher sent a copy of the memorandum to both Mondell and Warren.[147]

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[140] Smith, *supra* n. 81, at 192.

[141] Telegram from Frank W. Mondell, Congressman for Wyo., to Walter L. Fisher, SOI (Oct. 11, 1912) (on file at the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Wyo., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[142] Telegram from Francis E. Warren, Sen., to Walter L. Fisher, SOI (Oct. 15, 1912) (on file at the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Wyo., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[143] Telegram from Walter L. Fisher, SOI, to Francis E. Warren, Sen., Wyo. (Oct 15, 1912) (on file at the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Wyo., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[144] *Id.*

[145] Letter from George Otis Smith, Dir., USGS, to Walter L. Fisher, SOI (Oct. 16, 1912) (on file at the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Wyo., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[146] *Id.*

[147] Letter from Walter L. Fisher, SOI, to F.W. Mondell, Congressman, Wyo. (Nov. 7, 1912) (on file at the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Wyo., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP); Letter from Walter L. Fisher, SOI, to Francis E. Warren, Sen., Wyo. (Nov. 7, 1912) (on file at the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Wyo., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

Mondell was unswayed by the USGS's explanation of the withdrawals. The congressman stated that "the entire theory on which these withdrawals have been made is so at variance with my views of the law and the authority of the DOI, and of the policy that ought to be pursued in the development of the West."[148] To Mondell, the DOI's action was predicated on the belief "that Congress ought to enact legislation for the Federal control of grazing lands and that, if it should, such a policy could be better carried out if all streams and water holes are retained in public ownership."[149] Even if there was authority for the withdrawals, they had been made in a manner which discouraged settlement, for they were "altogether too frequent and continuous."[150] No one, he contended, supported the policy, except large livestock outfits, "who would naturally suggest, approve, and justify, such a course."[151] Mondell had a "lively interest" in the well-being of the large stock operations, but he fervently believed that the "very best possible use of our public lands depends upon the encouragement of the settlement and development which the policy in question seriously hampers and, so far as it is extended, permanently prevents."[152]

Secretary Fisher could not agree with Mondell's arguments. In a lengthy rebuttal, Fisher countered that it was "far from the practice of the Department to retain title to all springs and water holes" in anticipation of the passage of legislation that would regulate grazing on the public domain.[153] Furthermore, it was not the intent of the public water reserve policy to prevent settlement, since the DOI gave entrymen an opportunity to have public water reserve withdrawals revoked so they could make filings upon those lands. Nature and not the DOI was responsible for the situation. Most of southwestern Wyoming was not susceptible to dry farming agriculture and the water sources set aside were insufficient for irrigation. Nor could Fisher see how the policy discriminated against small ranchers, for it was the "conviction of [the] Department that with the lands controlling the water in public ownership pending adequate legislation, an equal opportunity will be afforded to all who may desire to use the water for stock purposes."[154]

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[148] Letter from Frank W. Mondell, Congressman, Wyo., to Walter L. Fisher, SOI, 1 (Dec. 3, 1912) (on file at the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Wyo., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[149] *Id.*

[150] *Id.* at 2.

[151] *Id.*

[152] *Id.*

[153] Letter from Walter L. Fisher, SOI, to Frank W. Mondell, Congressman, Wyo., 1–2 (Jan. 10, 1913) (on file at the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Wyo., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[154] *Id.* at 4.

There were others who agreed with SOI Fisher's stance that the public water reserves were necessary to prevent monopolization of public rangelands. In southwestern Utah, a number of stockraisers were concerned about attempts by certain "capitalists" to gain title to water source with the use of scrip.[155] If successful, the stockraisers contended, those individuals would be able to monopolize the public range and force the smaller outfits to sell out or leave the area. The stockraisers noted they were aware that some springs in western Utah had been withdrawn as public watering places and wondered if anything could be done in their locality.[156] Another group sought similar action on the Arizona Strip in northwestern Arizona.[157]

In March 1913, the presidency of Woodrow Wilson began and a new SOI, Franklin K. Lane, was appointed. No sooner had Lane assumed his responsibilities than he was confronted with protests against public water reserve withdrawals. One came from a squatter in the Arizona Strip about the recent withdrawal of a place called Wolf Hole Lake. Lane responded to the protest by pointing out that the withdrawal had been made at the request of local stockraisers and that the interests of the squatter were fully protected under the law if he had made a bona fide settlement prior to the withdrawal order.[158]

A far more serious challenge to the policy came from the Utah State Board of Land Commissioners. The Board contended that public water reserve withdrawals were "detrimental to the State and calculated to interfere with the State in the sale, settlement and administration of its lands, and . . . encroaches upon the laws enacted by the State for the appropriation and beneficial use of its public waters."[159]

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[155] Letter from E.A. Griffin, Garfield County Commr., to Reed Smoot, Sen., Utah (May 31, 1912) (on file at the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Utah, General, Pt. 1, RG 48, NACP); Letter from Reed Smoot, Sen., Utah, to Walter L. Fisher, SOI (May 31, 1912) (on file at the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Utah, General, Pt. 1, RG 48, NACP).

[156] *Id.*

[157] Letter from George Otis Smith, Dir., USGS, to Walter L. Fisher, SOI (Feb. 19, 1913) (on file with the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Ariz., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[158] Letter from Franklin K. Lane, SOI, to George Sutherland, Sen. (Mar. 24, 1912) (on file with the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Ariz., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP); Letter from George Otis Smith, Dir., USGS, to Reed Smoot, Sen., Utah (Mar. 27, 1913) (on file with the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Ariz., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[159] Letter from Sec., Utah State Board of Land Commrs., to George Sutherland, Sen. (Mar. 3, 1913) (on file with the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Ariz., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP); Letter from W.D. Candland, to Utah State Board of Land Commrs. (Feb. 19, 1913) (on file with the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Ariz., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

Lane defended the policy inaugurated by his predecessor. He pointed out that he was familiar with the problem of grazing of the public domain and how these lands could be monopolized through the control of watering places, which was being accomplished by the use of scrip applications. "This practice," the SOI contended, "not only contravenes the purpose for which the public domain has consistently been thrown open as a public range, but in the overcrowded condition of the grazing areas of most of the West and the consequent bitter competition, it unduly favors the large stockman on account of his great ability to purchase scrip."[160] This "evil" was recognized by many in the West, as was reflected by the petitions of Utah stockraisers asking that public water reserve withdrawals be made. As for the withdrawals interfering with the making of state indemnity selections,[161] the withdrawals were limited in their extent and he regretted if the withdrawals interfered with state selection. However, he did not feel that state selection, or any other form of scrip, "should be used primarily for the acquirement by private parties of monopolistic control over the public range through the acquisition of critical watering places."[162] Preventing this, while perhaps retarding the state's income from the sale of state selection rights, would be counterbalanced by the prosperity that would come from the prevention of monopoly.[163]

As for the assertion that the withdrawals "encroached upon the laws enacted by the State for the [appropriation] and beneficial use of its public waters," SOI Lane contended that public water reserves did "nothing more than withdraw from all forms of disposition the lands containing and surrounding the watering places."[164] Lane held the view that there was "no attempt on the part of the Government to interfere with the appropriation or utilization of waters which originate upon, or flow across such reserves. It is difficult, therefore, to see how the reserves can interfere with the State laws for the appropriation and utilization of water."[165]

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[160] Letter from Franklin K. Lane, SOI, to George Sutherland, Sen. (Apr. 12, 1913) (on file with the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Ariz., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[161] Indemnity selections, also called lieu selections, are made when an entity applies for lands other than those it was originally entitled to. This is often done because the original tract cannot be taken. In the case of state indemnity selections, the reason was usually because a school grant section, which often was sections 16 and 36, could not be granted to the state because it was in an area withdrawn by the federal government for some public purposes. The state would then apply for an equal area some place else to replace the lands denied them because of the withdrawal.

[162] Letter from Lane (Apr. 12, 1913), *supra* n. 160.

[163] *Id.*

[164] *Id.*

[165] *Id.*

Under Lane, the DOI continued to set aside public water reserves. The purposes for the withdrawals remained the same as under SOI Fisher: To preserve the values the public ranges possessed until Congress enacted more appropriate laws for their disposition and "the prevention of indirect control of large bodies of public lands by individuals or companies through the ownership of small areas containing watering places."[166] It was not the intent of the withdrawals to deny any stockraisers access to the water sources affected, but to ensure that everyone had access.

It is also clear that SOI Lane, like Fisher before him, was not interested in using the reserves to retard the settlement and development of the public domain. Lane was committed to the homestead ideal. He felt that events were demonstrating that public lands once thought only valuable for grazing purposes were being transformed into farm land through dry farming techniques and irrigation.[167] Furthermore, as the USGS would say during Lane's tenure, the public water reserves ensured "fair play . . ., and [made] possible future settlement where conditions warrant[ed]."[168]

Lane also continued to follow the policy of making public water reserve withdrawals of only those watering places necessary to prevent monopoly of the public ranges for the benefit of both stockraisers and settlers. The policy was pursued not only on the initiative of the DOI, but in response to petitions from local residents and livestock associations.[169] The result was that by 1916 more than 190,000 acres of land had been withdrawn as public water reserves by the Department of the Interior.[170]

Still there was some question as to the appropriateness of public water reserves. In late 1914, this question was posed by the DOI to the office of the Assistant Attorney General. The matter was studied by an assistant attorney named O. W. Lange. Lange felt the legality of public water reserves hinged on the question of whether or not the withdrawals were made for a "public purpose"

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[166] Letter from Franklin K. Lane, SOI, to George E. Brimmer, Carbon County Sheep and Cattle Company (Feb. 14, 1914) (on file with the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Wyo., Public Water Reserves, Restorations, Pt. 1, RG 48, NACP).

[167] *See generally* ARDOI 1915, H.R. Doc. 64-90 (Nov. 20,1915); ARDOI 1914, H.R. Doc. 63-1475 (Nov 14, 1914); Peffer, *supra*, n. 72 at 174–75.

[168] *State of Utah*, 45 Land Dec. 551, 553 (U.S. Govt. Printing Off. 1917) (holding that the DOI has the authority to reject claims to unapproved selected lands which were withdrawn by Congress under the Act of June 25, 1910).

[169] *Id.* at 552–54; Memo. from George Otis Smith, Dir., USGS, to the Franklin K. Lane, SOI (Sept. 30, 1916) (on file with the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Wash., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP); Memo. from George Otis Smith, Dir., USGS, to Franklin K. Lane, SOI (Feb. 29, 1916) (on file with the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Ariz., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[170] Table, *see* appendix.

as required by the Act of June 25, 1910.[171] A public purpose, Lange pointed out, was not restricted to just governmental uses, but had a much "wider interpretation" that included public uses. He noted that "some particular uses for water, and the construction of works for its supply, have always been regarded as public uses, or public purposes."[172] He cited as examples water supplies for municipal purposes and water supplied for community irrigation projects. "Similarly," Lange remarked, "I would be of the opinion that the supplying of water for cattle in a grazing neighborhood would be a public use, providing the water is supplied for the use of the general public."[173] He noted that the State of South Dakota had a law providing for the dedication of public watering places needed for domestic or livestock purposes. Lange, therefore, reached the conclusion that "a withdrawal of lands containing springs in a grazing community to prevent monopolization of the range by particular individuals, and to reserve the waters for the use of the general public, is a public purpose within the meaning of the act of June 25, 1910."[174]

Assistant attorney general Preston C. West agreed with Lange's assessment. In a memorandum to First Assistant Secretary A. A. Jones, West reiterated much of Lange's reasoning, and expressed the "opinion, that, so far as the naked legal question is concerned, [the Pickett or General Withdrawal Act] is sufficient authority for such withdrawals, if it [was] deemed good policy to continue making them."[175]

The DOI held fast to its policy of making public water reserves as evidenced by Assistant Secretary Bo Sweeney's statement in October 1916. Sweeney made the policy statement in a decision of an appeal case involving the rejection of school indemnity selection made by the state of Utah that embraced a tract set aside as a public water reserve. The assistant secretary, quoting a USGS memorandum, noted that the reserves were established to prevent monopolization of public rangelands and to also assist settlers wanting to take up public lands.[176] As for the appropriateness of making public water reserves, he noted that if, as the United States Supreme Court had held:

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[171] Letter from O.W. Lange, Asst. Atty., to Mr. West, Asst. Atty. Gen. (Dec. 26, 1914) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Ariz., Public Water Reserves, Withdrawals, Pt.1, RG 48, NACP).

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] Letter from Asst. Atty. Gen., to Bo Sweeney, First Asst. SOI (Dec. 26, 1914) (copy on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Ariz., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[176] *State of Utah*, 45 Land Dec. at 552–53.

> [T]he public lands are to be "free to the people," then an administrative action which tends to carry this public policy into effect and for which authority of law exists is justified. It has been shown that continued access to water is essential to the use of the public range in common. This can only be insured by the retention in public ownership of the lands on which the water is situated so that they may not be fenced and the public excluded therefrom. This, it is believed, constitutes a public purpose.[177]

There was a recognition within the DOI, however, that public water reserve policy exacerbated deterioration of the public rangelands. By preventing monopolization, the withdrawals continued the unregulated free-for-all on the public domain and encouraged overgrazing practices. Yet, while it was a "matter of regret that the public range must . . . run itself," it was felt that until Congress enacted appropriate legislation, it was best that the competition among stockraisers for public lands continue.[178] The opinion was, that once the small outfits were "crowded off the range," it would be difficult for them to return to the business.[179]

Public water reserve policy came under increasing criticism. The *State of Utah* case indicates that there were interests who were critical of the policy and questioned the legality of the withdrawals.[180] The DOI, however, recognized that such questioning would continue unabated until Congress sanctioned the policy. In late 1915, DOI officials had reason to believe Congress might do just that. Consequently, they ordered that proposed public water reserve withdrawals be suspended as much as possible to prevent any new controversies in hopes that Congress would be inclined to enact legislation that "might tend in a greater or less degree to eliminate the questions which arise in connection with such reservations."[181]

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[177] *Id.* (quoting *Buford*, 133 U.S. 320).

[178] Memo. from Smith (Sept. 30, 1916), *supra* n. 169, at 21.

[179] *Id.*

[180] In his annual report for 1917, the director of the USGS remarked that there had been appeals before the DOI "over the validity of the withdrawals for public water reserves." He assumed these cases had been pushed somewhat vigorously by large livestock interests. *Annual Report of the United States Geological Survey 1917* 157 [hereinafter ARUSGS followed by the year of the report] (U.S. Govt. Printing Off. 1917).

[181] Memo. from Commr., GLO, to A.A. Jones, First Asst. SOI (Jan. 7, 1916) (on file with Natl. Archives:DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Idaho, Public Water Reserves, Withdrawals Pt. 1, RG 48, NACP).

IV. THE STOCK RAISING HOMESTEAD ACT AND PUBLIC WATER RESERVE POLICY

In late 1916, DOI officials got the legislation they had hoped for. In Section 10 of the Act of December 29, 1916, commonly called the Stock Raising or Grazing Homestead Act, Congress provided:

> That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act [for entry] but may be reserved under the provisions of the Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe.[182]

The law also provided for the establishment of stock driveways across public lands, and stipulated that one purpose of those withdrawals was to "insure access by the public to water places [which had been] reserved."[183]

The primary purpose of the Stock Raising Homestead Act was to encourage the development of small stock ranches on the public domain. The law provided for the entry of a section, 640 acres, of public land that had been designated as being "chiefly valuable for grazing and raising forage crops," and that did not have any merchantable timber, was not irrigable from any known source of water, and was of a character that could reasonably support a family.[184]

The law was a triumph for the advocates of homesteading over those who advocated a system by which grazing on the public domain would be regulated through leases administered by the federal government. But the Stock Raising Homestead Act did not imply that Congress was uninterested in the conservation of public rangelands. "Conservation," as historian Stanford Layton so adroitly points out, "was inextricably linked to the basic issue."[185] It was the deteriorating condition of the range that had brought about the introduction of the grazing homestead and lease bills. The proponents of both ideas "differed not on the end but only on the means . . . . The question was whether federal administration or private ownership would best promote" the improvement of the

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[182] Pub. L. No. 64-290, § 10, 39 Stat. 862, 865 (1917).
[183] *Id.*
[184] *Id.*
[185] Layton, *supra* n. 73, at 63.

public range.[186] For many, the Stock Raising Homestead Act was an appropriate answer to the question many conservationists had struggled with in the early 1900s: How could the remnants of the public lands be saved from "monopolization or misuse without abandoning the old policies of encouraging development."[187]

Furthermore, some supporters of the Stock Raising Homestead Act did not see the law as the final answer to the public land grazing issue. When the first grazing homestead bill, which Congress did not pass, was introduced, its sponsor pointed out that even after the lands suitable for settlement under the law were taken up, there would remain an "immense area" for which some sort of regulated grazing scheme might be necessary.[188] It was this kind of thinking that led Congress to include the withdrawal of public water places in the Stock Raising Homestead Act. The provision was not in the original version of the bill, but was added in the House of Representative's Committee on Public Lands.[189] The new section was added, the House report stated, so that persons could not monopolize or control large areas by locating homesteads on the only available water source in a particular area.[190] The portion of the section on stock driveways, unlike the final Act, made reference as to their purposes being for, among other matters, access to the public watering places that might be withdrawn.[191]

Clearly those who supported the provision wanted to do more than ensure water to those trying to establish grazing homesteads. They also wanted grazing to remain open on the adjacent public rangelands, and for those who felt that Congress would have to eventually enact some form of regulated grazing legislation, the provision allowed for the reservation of water sources necessary to successful implementation of such a system.

This was brought out in a hearing before the Senate Committee on Public Lands. A spokesman for the National Wool Growers' Association was asked if

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[186] *Id.* at 64.

[187] ARDOI 1910, at 11 (U.S. Govt. Printing Off. 1910).

[188] 52 Cong. Rec. 1807 (1915).

[189] Who was responsible for the introduction public water reserve provision? In his study on withdrawal policy, Charles F. Wheatly, Jr., says the provision was "prompted" by the state of Utah's challenge of the policy in 1916, indicating that the DOI probably proposed the provision. Charles F. Wheatly, Jr., *Study of Withdrawals and Reservations of Public Domain Lands*, vol. II, 187–88 (unpublished study, rev. ed., Sept. 1969) (copy on file with Lib. DOI). Commissioner of the GLO, Clay Tallman, speaking in 1919, said the provision was "doubtless inserted at the instance [sic] of stock interests." Clay Tallman, *The Public Domain and the Stock Industry: An Old Subject*, Proc. of the 22d Annual Conv. of the Am. Natl. Live Stock Assn. 33–34 (Am. Natl. Live Stock Assn. 1919). Since Tallman was commissioner when the Stock Raising Homestead Act became law, it is probable that stockraising interests did suggest that the provision be inserted into the legislation.

[190] H.R. Rpt. 64-35, at 18 (Jan. 11, 1916).

[191] *Id.*

the public water reserve provision was "wholesome" and would "protect" stock; he answered, yes. He urged, however, that public land adjacent to the withdrawn watering places be set aside for holding areas where sheep being trailed could stop and graze while they watered.[192]

There was some question if there were any watering places to be withdrawn. One stockraiser stated that it was "probably a fact that there is not a single water hole west of the one hundredth meridian that is not in some way taken up and claimed by somebody."[193] While this brought up the question of whether any public water reserves would be made, there was no opposition to the proviso, which was seen as protecting water sources for common use.[194]

When the grazing homestead bill was debated on the floors of the House and Senate, the public water reserve proviso evoked some discussion. One congressman asked if it were not possible under the measure for an entryman to locate "along a watercourse," and thereby "destroy the entire value of the land lying back of it either to the Government or anybody else."[195] In response, Congressman Edward Taylor of Colorado, sponsor of the Stock Raising Homestead Act, stated, "that matter is specifically and very carefully covered" by the public water reserve proviso proposed by the Committee on Public Lands.[196] Taylor further assured his colleague that an entryman "can not take up [such locations] at all if they control the only available water supply for a large region."[197] The public water reserve amendment was then added to the bill without further comment.[198]

In the Senate, without explanation, Section 10 of the grazing homestead bill was amended. After the word "shall" in the original version, the words "while so reserved" were added, so that the section read: "such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use."[199] The additional words were evidently added to ensure that there was no question that the water sources on public lands were reserved and open to the public only as long as they were still withdrawn. Another amendment suggested by the SOI provided for stock driveway withdrawals "to insure access by the public to water places reserved" under the act.[200] These amendments were agreed

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[192] Sen. Comm. on Pub. Land, *Stock Raising Homesteads: Hearings on H.R. 407*, 64th Cong. 41 (Feb. 4–5, 1916) (statement of Hugh Sproat).

[193] *Id.* at 53–54, 66–67.

[194] *Id.*

[195] 53 Cong Rec. 1127 (1916).

[196] *Id.*

[197] *Id.*

[198] *Id.* at 1234.

[199] *Id.* at 14131.

[200] *Id.*

to by both houses without protest and soon after the Stock Raising Homestead Act was signed into law.[201]

For the DOI's public water reserve policy, the new legislation was significant because, through it, Congress expressly recognized and approved of the policy pursued by the DOI since 1912. There was no question as to the legality or purpose of the withdrawals made previous to, or which would follow, the passage of the Stock Raising Homestead Act. As the commissioner of the GLO remarked, the purpose of that policy was to "withdraw all [the] smallest legal subdivisions upon which public springs or other water is found."[202] This would prevent monopolization of the public range by holding "the waters forever open to the public."[203]

Congressional sanction of the DOI's public water reserve policy prompted the USGS to expand its program of identifying public water placing. A more systematic and thorough method of locating public water reserves seemed appropriate. Prior to this time, public water reserves were handled as time and other priorities allowed. The USGS had made many of the first public water reserve withdrawals using field work completed years earlier by men doing geological or topographical investigations. The demands made by other more pressing classification work, such as designations under the Enlarged Homestead Act, coal land investigations, and water power and reservoir site examinations, did not permit the USGS to direct considerable attention to identifying public watering places. The agency, however, was able, through its other work, to begin to amass data that assisted them in locating critical water sources on the public range, and the agency made withdrawal recommendations as rapidly as the information became available.[204]

The GLO also participated in identifying and protecting public watering places. It was expanding the investigations done by its special agents and cooperating with the USGS in the examination and classification of public lands.

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[201] 54 Cong. Rec. 639, 642–46, 680–89 (1916).

[202] ARGLO 1917, 52–53 (U.S. Govt. Printing Off. 1917).

[203] *Id.* at 53.

[204] Smith, *supra* n. 81, at 43, 192; *Thirty-Third Annual Report of the Director of the United States Geological Survey to the Secretary of the Interior* 88 (U.S. Govt. Printing Off. 1912); *Thirty-Fourth Annual Report of the Director of the United States Geological Survey to the Secretary of the Interior* 161–62 (U.S. Govt. Printing Off. 1913); *Thirty-Fifth Annual Report of the Director of the United States Geological Survey to the Secretary of the Interior* 143 (U.S. Govt. Printing Off. 1914); *Thirty-Sixth Annual Report of the Director of the United States Geological Survey to the Secretary of the Interior* 167 (U.S. Govt. Printing Off. 1915); *Thirty-Seventh Annual Report of the Director of the United States Geological Survey to the Secretary of the Interior* 164 (U.S. Govt. Printing Off. 1916); Letter from Smith (Mar. 26, 1912), *supra* n. 85; Letter from Smith (July 25, 1912), *supra* n. 122; Memo. from Smith (Mar. 29, 1912), *supra* n. 98; Letter from Dir., USGS, to SOI (Apr. 15, 1921) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Colo., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

In April 1912, special agents for the GLO were directed to report any watering places necessary to maintaining free use of public ranges. The special agents also investigated scrip locations that might embrace such sites and examined areas where local stockraisers and settlers requested public water reserves be set aside.[205]

It was the USGS, however, that had primary responsibility for setting aside public water reserves. The USGS, through the Land Classification Board, assembled the data on water sources, determined which water sources should be reserved, and prepared the orders of withdrawal. The GLO, however, was asked to review each withdrawal recommendation.[206]

In 1917, USGS wanted to enlarge "the scope of the investigations undertaken to locate lands principally valuable for stock-watering places, which control grazing privileges on public lands."[207] It anticipated that land classification investigation under the Stock Raising Homestead Act would probably result in the identification of a "large number of water reserves."[208] The USGS sought the assistance of the GLO in this effort.[209] In January 1917, the Director of the USGS told the Commissioner of the GLO that enactment of the Stock Raising Homestead Act demanded a more "systematic and thorough efforts" to locate and withdraw public water reserves.[210] Since the acquisition of public water reserve sites was continuing at the same time as state indemnity selection and other types of selections, as well as homestead and isolated tract

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[205] Smith, *supra* n. 81, at 192; ARGLO 1912, 15–22 (U.S. Govt. Printing Off. 1912); *Thirty-Third Annual Report of the Director of the United States Geological Survey to the Secretary of the Interior, supra* n. 204, at 88, 161–162; Memo. from E. C. Finney (Jan 6, 1913) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under the Act of June 25, 1910, Cal., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP); Letter from Franklin K. Lane, SOI, to Commr., GLO (Jan. 16, 1913) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under the Act of June 25, 1910, Cal., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP); Letter from First Asst. SOI, to Congressman Kettner (June 28, 1913) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under the Act of June 25, 1910, Cal., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP); Memo. from George Otis Smith, Dir., USGS, to Franklin K. Lane, SOI (Jan. 6, 1915) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under the Act of June 25, 1910, Ariz., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP); Letter from George Otis Smith, Dir., USGS, to Franklin K. Lane, SOI (Feb. 29, 1916) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under the Act of June 25, 1910, Ariz., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[206] *Thirty-Third Annual Report of the Director of the United States Geological Survey to the Secretary of the Interior, supra* n. 204, at 20–22; Memo. from George Otis Smith, Dir., USGS, to Mr. Mendenhall (Aug. 24, 1912) (on file with Natl. Archives: USGS, CCF 1912–1953, File 721: RG 57, NACP); Letter from Lane (Jan.16, 1913), *supra* n. 205.

[207] *Thirty-Eighth Annual Report of the Director of the United States Geological Survey to the Secretary of Interior* 157 (U.S. Govt. Printing Off. 1917).

[208] *Id.*

[209] *Id.*

[210] Letter from George Otis Smith, Dir., USGS, to Commr., GLO (Jan. 6, 1917) (on file with Natl. Archives: Additional Records, Field Service Division, Correspondence with the USGS, 1910–1917, RG 49, NA).

entries, some sort of procedure was needed which would ensure that no lands valuable as public watering places would be inadvertently patented. The DOI suggested that certain types of land applications which were at the time clearlisted[211] without field examination by the GLO's special agents, be investigated in the future.[212] He also suggested that entries which were investigated for determination of mineral or water power values be examined for the existence of watering places.[213]

The GLO agreed with the USGS that some course of action was necessary in light of the passage of the Stock Raising Homestead Act. The special agent force had a considerable backlog of cases, but the GLO could think of no better plan than that proposed by the USGS.[214] Therefore, the USGS agreed to complete the necessary field examinations as rapidly as possible.[215] In addition, the GLO, in response to an earlier USGS request, had already ordered its surveying crews to identify potential public water reserves. By instructions issued in March 1916, survey crews were to note "the location of streams, springs or water holes, which, because of their location, may be deemed by them to be of value in connection with the utilization of public grazing lands and which may be designated as public watering places."[216] The water sources were to be listed separately, with their legal land descriptions provided, and submitted with all survey returns sent to the GLO in Washington.[217] The lists were then forwarded to the USGS.[218] The result of the concerted effort by the USGS and GLO would be the addition of about 165,000 acres to the area of public water reserves between 1917 and 1926.[219]

In their effort to identify and protect public watering places, the DOI officials felt the USGS was becoming somewhat overzealous. In April 1917, First Assistant Secretary Alexander T. Vogelsang told the USGS to be more careful in making withdrawals because many new withdrawals embraced homestead entries. While such claims were protected from the actions, the First

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[211] Clearlisting applied to various state, railroad, and other grants of public lands. It was a determination made by the GLO that there was no objection to the patenting of lands applied for.

[212] Letter from Smith (Jan. 6, 1917), *supra* n. 210.

[213] *Id.*

[214] SOI Lane encouraged this cooperation between the bureaus and endorsed it in instruction he issued during the summer of 1917. *Stock Raising Homesteads: Instructions*, 46 Land Dec. 252, 255 (U.S. Govt. Printing Off. 1919).

[215] Letter from Commr., GLO, to Dir., USGS (Feb. 7, 1917) (on file with Natl. Archives: GS-CCC, Stock Driveways, File SOI—Commr. of the GLO, RG 49, NA Denver).

[216] Letter from Commr. GLO, to Dirs., USGS, Surveyors General, and others (Mar. 2, 1916) (on file with Natl. Archives: 1910 Misc. LR, File 591512: RG 49, NA); Letter from Commr. GLO, to Surveyors Gen. (Mar. 2, 1916) (on file with Natl. Archives: 1910 Misc. LR, File 591512: RG 49, NA).

[217] *Id.*

[218] *Id.*

[219] Table, *see* appendix.

Assistant Secretary did not feel homesteads made in good faith should be included within the withdrawals. He also did not feel that it was the "intent of Congress in recognizing the withdrawal of water holes in the arid and semiarid region to defeat *bona fide* homestead claims."[220] In addition, Vogelsang "doubt[ed] the advisability of including within the withdrawal so many points along the river in close proximity."[221] The point, the First Assistant Secretary stated, was that "good policy dictates that a minimum area of public lands should be withdrawn from disposition under applicable laws, the lands to be withdrawn to be of such character and situation as to be really necessary and valuable for the purpose indicated."[222]

The opinion that public water reserves should be limited was shared by others within the DOI. Edward C. Finney, a member of the Board of Appeals, felt that withdrawals should be restricted to only those lands described in the Stock Raising Homestead Act. In other words, to public lands "containing water holes and other bodies of water needed or used by the public for watering places."[223] He did not "believe the law [contemplated] or that the DOI should sanction the withdrawal of lands on which private parties have sunk wells and developed water,[224] or that the banks of streams in the public land areas should be tied up by water-hole withdrawals."[225] Nor was it believed that public water reserve withdrawals should embrace public lands that did not have water sources, but were made to guarantee access to such sites.[226] That could be accomplished

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[220] Letter from Alexander T. Vogelsang, First Asst., SOI, to Dir., USGS (Apr. 5, 1917) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Mont., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[221] *Id.*

[222] *Id.*

[223] Memo. from Finney (Apr. 9, 1917) (on file with Natl. Archives: GS-CCC, Stock Driveways, Maps, and Correspondence, 1917–1921, File SOI—Commissioner of the GLO, RG 49).

[224] Despite Finney's remark, the DOI did adopt a policy of reserving well sites. For example, a public water reserve withdraw was made for a tract where the USGS planned to do exploratory drilling. Memo. from Dir., USGS, to Franklin K. Lane, SOI (Jan. 29, 1920) (on file with Natl. Archives: DOI., CCF 1907–1936, File 2-153: Withdrawals under Act June 25, 1910, Cal., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP). Another withdrawal was made for a group of settlers who planned to drill for water. Memo. from the Dir., USGS, to the SOI (Feb. 14, 1922) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act June 25, 1910, Idaho, Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP). The DOI also withdrew tracts where abandoned oil and gas wells produced water. Memo. from Dir., USGS, to Albert Fall, SOI (May 31, 1921) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act June 25, 1910, Cal., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP). Congress recognized this latter practice with a law that permitted the SOI to develop water from abandoned oil and gas wells and withdraw the tracts as public water reserves. 30 U.S.C. § 229(a) (1994); *Regulations under Section 40 of the Mineral Leasing Act*, 56 Int. Dec. 401, 402 (U.S. Govt. Printing Off. 1939); Letter from Acting Sol., to SOI (July 20, 1937) (on file with Natl. Archives: GLO, 1910 Misc. LR, File 1218080: RG 49, NA).

[225] Memo. from Finney (Apr. 9, 1917), *supra* n. 223.

[226] Letter from First Asst. SOI, to Dir., USGS (Mar. 8, 1917) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Mont., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

by the establishment of stock driveways, as provided for in the Stock Raising Homestead Act.

Secretary Lane undoubtedly agreed with the opinions of his subordinates. Lane did realize that the there would be lands "too arid" in character for classification under the Stock Raising Homestead Act,[227] but he also believed the law would "leave to the Government hardly enough grazing land to be worth consideration."[228] He wanted the new settlement policy to be given a fair chance to prove itself.[229] Therefore, Lane opposed any legislation regulating public rangeland if it interfered with the settlement and development of the public lands.

This does not mean Lane opposed making public water reserves. When a group of stockraisers in Idaho wanted the area between Blackfoot and Minidoka withdrawn for grazing purposes, contending the region was fit for only sheep grazing in the winter and spring, the SOI was unwilling to consider the idea.[230] He did, however, send the petition to the USGS asking the bureau to look into the advisability of setting aside public water reserves in the area.[231] The SOI also acted on many petitions from settlers and stockraisers asking the DOI to set aside public water reserves. He approved such petitions when he felt they served the use of the adjacent public range or aided settlement.[232] In fact, in his instructions to the USGS on implementation of the provisions of the Stock

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[227] *Stock Raising Homesteads: Instructions*, 46 Land. Dec. at 253–54.

[228] Letter from Franklin K. Lane, SOI, to Congressman Hayden, 2 (May 2, 1918) (on file with Natl. Archives: GLO, CCF 1907–1936, File 2-147: Grazing on Public Lands, Pt. 4, RG 48, NACP).

[229] Letter from Franklin K. Lane, SOI, to Klamath Cattle and Horse Assn. (June 14, 1919) (on file with Natl. Archives: GLO, CCF 1907–1936, File 2-147: Grazing on Public Lands, Pt. 5, RG 48, NACP); Letter from Franklin K. Lane, SOI, to Sen. Kellogg (July 17, 1919) (on file with Natl. Archives: GLO, CCF 1907–1936, File 2-147: Grazing on Public Lands, Pt. 5, RG 48, NACP); Letter from Franklin K. Lane, SOI, to Pres. (Aug 11, 1919) (on file with Natl. Archives: GLO, CCF 1907–1936, File 2-147: Grazing on Public Lands, Pt. 5, RG 48, NACP); Letter from Franklin K. Lane, SOI, to Chairman, Sen. Comm. On Pub. Lands (Oct. 24, 1919) (on file with Natl. Archives: DOI, Legislation, File 2-147: Grazing on Public Lands, 66th Cong., S. 1516, RG 48, NACP).

[230] The reason for his unwillingness was the fact that Lane, like SOIs before and after him, felt he could withdraw public lands for grazing purposes in the absence of legislation providing for the lease and regulation of those lands for grazing purposes.

[231] Letter from Congressman Smith, to Franklin K. Lane, SOI (Dec. 27, 1919) (on file with Natl. Archives: GLO, 1910 Misc. LR, File 887472: RG 49, NA); Letter from Franklin K. Lane, SOI, to Congressman Smith (Jan. 16, 1920) (on file with Natl. Archives: GLO, 1910 Misc. LR, File 887472: RG 49, NA).

[232] Memo. from George Otis Smith, Dir., USGS, to Franklin K. Lane, SOI (Feb.10, 1916) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Ariz., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP); Memo. from Dir., USGS, to Franklin K. Lane, SOI (Jan. 31, 1917) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Idaho, Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP); Memo. from Dir., USGS, to Franklin K. Lane, SOI (Feb. 27 1919) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Colo., Public Water Reserves, Withdrawals, Pt. 1, NACP); Memo. from Dir., USGS, to Franklin K. Lane, SOI (Apr. 26, 1920) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Mont., Public Water Reserves, Withdrawals, Pt. 1, NACP).

Raising Homestead Act, he directed the USGS to consider any applications or petitions for public water reserves and make such field investigations as were necessary.[233]

At the end of Lane's tenure, the USGS was following a strict policy toward the creation of public water reserves. "Withdrawals," the director of the USGS told newly appointed SOI Albert Fall in April 1921, "are recommended only in case the water supply of the area is so scarce that public control of the watering places is necessary to the free use of the range."[234] Furthermore, these withdrawals were only to be made if the "surrounding public range is of sufficient area to warrant such action unless information available shows that the watering place proposed for withdrawal is vital to the success of nearby settlers."[235]

The DOI also supported making public water reserves for purposes other than the need for stock watering places. In fact, very early in the administration of the public water reserve policy, the DOI made withdrawals for various public purposes.[236] Springs needed by travelers using the public lands were set aside.[237] So were water sources needed by homesteaders or by communities for domestic water supplies.[238] Other purposes were included over the years, including sites

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[233] *Stock Raising Homesteads: Instructions*, 46 Land Dec. at 255.

[234] Letter from Dir., USGS, to SOI (Apr. 15, 1921) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Colo., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[235] *Id.*

[236] Letter from First Asst. SOI, to Congressman Kettner (July 10, 1916) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Cal., General, Pt. 1, RG 48, NACP); Memo. from George Otis Smith, Dir., USGS, to Franklin K. Lane, SOI (Feb. 15 , 1916) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Nev., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP); Memo. from Dir., USGS, to Franklin K. Lane, SOI (Jan. 15, 1919) (on file with Natl. Archives: Department of Int., CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Ariz., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[237] Memo. from Smith (Feb. 15 , 1916), *supra* n. 236.

[238] Memo. from Acting Dir., USGS, to the SOI (Nov. 17, 1922) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Ariz., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP); Memo. from Dir., USGS, to Franklin K. Lane, SOI (Sept. 30, 1918) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Ariz., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP); Memo. from Acting Dir., USGS, to the SOI (Aug. 6, 1921) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Cal., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

for exploratory wells,[239] and works associated with irrigation projects,[240] as long as the irrigation was for a public and not a private entity.[241]

While the policy of making public water reserve withdrawals was generally accepted as wise, preventing the monopoly of the public rangelands by keeping watering places open and free to all brought about its own problems. Uncontrolled use resulted in the destruction of the range at many watering places and the water at some places was also being polluted.[242] The USGS recognized the problem as early as 1920, and recommended that private parties be encouraged to develop and protect the reserves from damage and pollution. This could be done, it was pointed out, by issuing rights of way permits under authority of the Act of February 15, 1901.[243]

The Act of February 15, 1901 provided for the construction of water conduits and reservoirs for the "supplying of water for domestic, public, or any other beneficial uses" on public lands, national parks, and other types of reservations.[244] Such rights-of-ways were handled under regulations devised by the SOI and Congress specifically provided that the granting of permission for such works conferred no right, easement, or interest in the lands crossed or occupied.[245]

Furthermore, under the provisions of the Stock Raising Homestead Act, the DOI was authorized to make such rules and regulations it felt necessary to keep and hold open the public water reserves.[246] However, the DOI chose not to act on the USGS's recommendation[247] to encourage private parties to develop and protect the reserves. This failure forced some stockraisers to take action on their own to protect public water reserves by fencing the sites. Such fences were

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[239] Memo. from Dir., USGS, to Franklin K. Lane, SOI (Jan. 29, 1920) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Cal., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[240] Memo. from Dir., USGS, to Hubert Work, SOI (Mar. 4, 1924) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Cal., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[241] Letter from Edward Finney, First Asst. SOI, to Hubert Work, SOI (Jan. 21, 1924) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Cal., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[242] *State of Utah*, 45 Land Dec. at 552.

[243] *Forty-Second Annual Report of the Director of the United States Geological Survey to the Secretary of the Interior* 96 (U.S. Govt. Printing Off. 1921); Letter from Acting Dir., USGS, to Franklin K. Lane, SOI (July 30, 1919) (on file with Natl. Archives: DOI, CCF 1907–1935, File 2-153: Withdrawals under Act of June 25, 1910, Idaho, Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[244] *Regulations for Rights of Way Over Public Lands and Reservations*, 36 Land Dec. at 579–83.

[245] 31 Stat. 790–791 (1901).

[246] Pub. L. No. 64-290, § 10, 39 Stat. 862, 865 (1917).

[247] *State of Utah*, 45 Land Dec. at 553.

illegal under the Unlawful Enclosures Act of 1885 and special agents of the GLO ordered the fences removed.[248]

Despite pleas that the fences be allowed to stay and permission be granted for the construction of new fences, the DOI was firm in its stand against fencing. First Assistant Secretary Edward Finney recognized that there were "many cases wherein some hardship is worked by the enforcement" of the Unlawful Enclosures Act.[249] The uniform holdings of courts, however, made "no distinction . . . between fences upon the public lands which are detrimental to the public interests and those which are beneficial to certain settlers in a community."[250] The only relief available to individuals would be through legislation.[251]

In 1923, Congress amended the Stock Watering Reservoir Act of 1897 so as to permit the fencing of such reservoirs "in order to protect live stock, to conserve water, and to preserve the quality and conditions."[252] The fences, however, could only be erected with the permission of the DOI, and furthermore, the reservoirs had to be open to the free use of any person and any kind of animal. Any fences permitted could also be ordered to be removed at the discretion of the DOI.[253] No legislation was introduced to permit fencing or development of public water reserves.

In late 1924, the state of California asked that regulations be promulgated that would allow for the development of public water reserves. First Assistant Secretary Edward Finney was reluctant to act. He "realize[d] that some development of waters in some of the water reserves might be beneficial," but was "also afraid of the possibility of their being monopolized if we grant permits for their use and development."[254] The director of the USGS supported California's idea and he told Finney "the value of public water reserves can be materially enhanced if the sources of water are developed and protected."[255]

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[248] Letter from Edward Finney, First Asst. SOI, to Sen. Ralph Cameron (Jan. 30, 1922) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-61: Fences on Public Lands, Pt. 2, RG 48, NACP); Letter from William Spry, Commr., GLO, to Chief of Field Div., Salt Lake City, Utah (July 26, 1924) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-31: Illegal Fencing, Ariz., Pt. 1, RG 48, NACP).

[249] Letter from Edward Finney, First Asst. SOI, to Sen. Ralph Cameron (June 2, 1921) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-6: Fences on Public Lands, Pt. 2, RG 48, NACP); Letter from Edward Finney, First Asst. SOI, to Sen. William King (Jan. 30, 1922) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-61: Fences on Public Lands, Pt. 2, RG 48, NACP).

[250] *Id.*

[251] *Id.*

[252] Pub. L. No. 67-480, 42 Stat. 1437 (1923).

[253] *Permits for Fencing Stock-Watering Reservoirs—Instructions*, 49 Land Dec. 577, 577–78 (U.S. Govt. Printing Off. 1923).

[254] Letter from Edward Finney, First Asst. SOI, to Dir., USGS (Dec. 26, 1924) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-166: Public Water Reserves, Pt. 1, RG 48, NACP).

[255] Letter from Dir., USGS, to Edward Finney, First Asst. SOI (Feb. 7, 1925) (file on copy with Natl.

Furthermore, the director felt, that "[o]ften the purpose of the reserve may be wholly defeated unless the watering place is protected from stock."[256]

Convinced of the need, the DOI, in August 1925, issued regulations that permitted the use and improvement of public water reserves, with such use and development governed under the provisions of the Act of February 15, 1901.[257] Only citizens or companies incorporated under state law were allowed to file applications. The applicants were required to provide a detailed plan for the improvement and care of the public water reserve and had to state "the public necessity for such improvement, the reasons why such plan will be more conducive to the public good and better conserve the waters for public use, and any other facts and circumstances pertinent thereto."[258] Applications were subject to field investigation by the GLO with the USGS reviewing the improvement plan as to its feasibility. The commissioner of the GLO was also directed to recommend any stipulations or agreements he deemed "necessary or proper for the protection of the public interest and the most economical conservation and use of such waters."[259] Applicants had to agree to any terms that might be required to "safeguard the public interests" before a permit would be issued.[260]

The regulations also provided that if waters were to be conducted outside the boundaries of a public water reserve, the applicants were to show that they had applied to the proper state officials for permission to appropriate the waters to be diverted to the uses contemplated. A certificate from the state approving the appropriation had to be filed with the GLO within a year of the issuance of a permit under these regulations. Applicants might be called upon to file a reservoir declaratory statement under provisions of the Stock Water Reservoir Act of 1897.[261]

The issuance of these regulations signified a new attitude toward public water reserves.[262] DOI officials were now willing to improve and regulate the use of the withdrawals. The change of position appears to have come as a consequence of a change in the DOI's attitude toward Congress enacting a policy to regulate the use of public rangelands. This change took place in 1924 under

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Archives: GLO, 1910 Misc. LR, File 1042712: RG 49, NA).

[256] *Id.*

[257] *Use of Lands Withdrawn as Public Water Reserves—Regulations*, 51 Land Dec. 186, 186–87 (U.S. Govt. Printing Off. 1927).

[258] *Id.* at 187.

[259] *Id.*

[260] *Id.* at 186.

[261] *Id.* at 187.

[262] *See generally* James Muhn, *Early Public Water Reserve Policy and the Development of Such Sites Under General Land Office Circular No. 1028, With Specific Reference to Ruby Spring, California* (1988) (manuscript on file with BLM).

SOI Hubert Work. Initially, like many SOIs before him, Work opposed any regulated grazing legislation that withdrew lands from entry and development under the public land laws.[263] The new SOI was not prepared to call the Stock Raising Homestead Act a failure and pointed to statistics to illustrate "the practical operation and beneficial effect of the law."[264]

Work's commissioner of the GLO, William Spry, disagreed with the SOI's position.[265] Spry had been engaged in the sheep business in Utah, where he had also served as governor.[266] In his annual report for 1923, Spry argued that most of the lands suitable for entry under the Stock Raising Homestead Act had been taken up. He further argued that the law had "fulfilled its part in our public-land scheme, and should now give way to a broader and more adaptable plan for the utilization of our grazing lands."[267] He recommended legislation that would authorize the SOI to set aside grazing reserves and allow for the lease of those lands in a manner that would preserve the public rangelands. The commissioner, however, echoed his superior, by advocating that homesteading and mining be allowed within the grazing reserves after their establishment.[268] Spry's comments motivated the DOI to draft a bill based on his recommendations.[269] Congress did not enact this bill, but over the next two years the DOI continued to advocate the passage of a regulated grazing bill, as well as call for the repeal of the Stock Raising Homestead Act.[270]

In 1926, it appeared that a grazing measure might finally be enacted. Attention centered on a bill introduced by Senator R. N. Stanfield. As originally drafted, the proposed legislation was unacceptable to the DOI. However, after hearings, a revised measure was reported by the Senate Committee on Public

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[263] Letter from Hubert Work, SOI, to William Kent (Mar. 29, 1923) (on file with Natl. Archives: DOI, CCF 1907–936, File 2-147: Grazing on the Public Lands, General, Pt. 5, RG 48, NACP); Letter from Herbert Work, SOI, to Sec., Dept. of Agric. (Sept. 5, 1923) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-147: Grazing on the Public Lands, General, Pt. 5, RG 48, NACP); Letter from Herbert Work, SOI, to Sec., Dept. of Agric. (Nov.16, 1923) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-147: Grazing on the Public Lands, General, Pt. 5, RG 48, NACP).

[264] Letter from Work (March 29, 1923), *supra* n. 263.

[265] ARGLO 1923, 8-9 (U.S. Govt. Printing Off. 1923).

[266] *The Public Lands: Studies in the History of the Public Domain* 509 (Vernon Carstensen ed., U. Wis. Press 1962); Farrington Carpenter, *Confessions of a Maverick: An Autobiography* 131 (St. Hist. Socy. of Colo. 1984); *Introducing the New Heads of the Land Department*, 5 Land Serv. Bull. 2 (April 1, 1921); *Death of Governor Spry*, 13 Land Serv. Bull. 67 (May 1, 1929).

[267] *Forty-Fourth Annual Report of the Director of the United States Geological Survey to the Secretary of the Interior* 8–9 (U.S. Govt. Printing Off. 1923).

[268] *Id.*

[269] S. 2325, 65 Cong. Rec. 1179 (1924); Letter from Herbert Work, SOI, to Chairman, Sen. Comm. on Pub. Lands and Surveys, Grazing on Public Lands (Dec. 18, 1923) (on file with Natl. Archives: DOI, Legislation, 1905–1936, File 2-147: 68th Congress, S. 2325, RG 48, NACP).

[270] ARGLO 1923, *supra* n. 265, at 8–9 (U.S. Govt. Printing Off. 1923); ARGLO 1924, 10–11 (U.S. Govt. Printing Off. 1924); ARGLO 1925, 33–34 (U.S. Govt. Printing Off. 1925); *Annual Report of the Department of the Interior for the Fiscal Year Ended June 30, 1925*, at 4–6 (U.S. Govt. Printing Off. 1925).

Lands and Surveys.[271] The revised bill was reported on March 31 and within the DOI, there was much excited anticipation. The bill, while not perfect, offered a opportunity to end the chaos on the public rangelands and start the process of improving those lands. It is in this context that the DOI decided to make a radical change to the public water reserve policy.

V. PUBLIC WATER RESERVE NO. 107

On April 17, 1926, upon the recommendation of SOI Work, President Calvin Coolidge signed Public Water Reserve No. 107. This withdrawal, unlike its predecessors, did not specifically identify the public lands being reserved. It was a "blanket" withdrawal. The order read:

> Under and pursuant to the provisions of the act of Congress approved June 25, 1910 (36 Stat. 847), entitled "An Act To authorize the President of the United States to make withdrawals of public lands in certain cases," as amended by act of Congress approved August 24, 1912 (37 Stat. 497), it is hereby ordered that every smallest legal subdivision of the public-land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of Section 10 of the act of December 29, 1916 (39 Stat. 862), and in aid of pending legislation.[272]

It was a sweeping withdrawal that had significant meaning then and continues to have to this day.

The reasons behind the making of Public Water Reserve No. 107 are not all known. In sending the order to the President, SOI Work used the same justifications that had been used when the public water reserve policy was inaugurated in 1912. Work told the president:

> The control of water in the semiarid regions of the west means control of the surrounding grazing areas, possibly in some regions of millions of acres, and in view of the pending bill to authorize the leasing of grazing lands upon the unreserved public domain, it is believed important to retain the title to and supervision of such springs and water

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[271] Sen. Comm. on Pub. Lands & Surveys, *Grazing Facilities on Public Lands: Hearings on S. 2584*, 69th Cong. (Feb. 15–Mar. 11, 1926).

[272] *Selections*, 51 Land Dec. at 457 (quoting Exec. Or. Pub. Water Reserve No. 107 (April 17, 1926)).

> holes on the unreserved public lands as have not already been appropriated. Private parties have used various lieu selection and scrip acts as a vehicle of acquiring small areas surrounding these springs and water holes, thus withdrawing them from the common use of the general public, this prime essential to stock grazing, and for this reason, as well as the pendency of the grazing legislation mentioned, it is believed advisable to make a temporary general order of withdrawal.[273]

The order of withdrawal appears to have been the idea of First Assistant Secretary Edward C. Finney. On April 15, 1926, Finney sent a note to the Commissioner of the GLO[274] asking that a blanket public water reserve withdrawal order be prepared. Since the note has not been located, it is unknown why Finney proposed the action. There are, however, clues to what Finney wanted Public Water Reserve No. 107 to accomplish.

In the months after Public Water Reserve No. 107 was signed by the president, first assistant SOI Finney explained the order on several occasions. Senator John B. Kendrick was one of the first individuals to ask for a reason why the withdrawal had been made.[275] In response, Finney told the senator:

> The order was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. It is construed to withdraw those springs and water holes capable of providing enough water for general use for watering purposes. It is not construed as applying to or reserving from homestead or other entry lands having small springs or water holes affording only enough water for the use of one family and its domestic animals.
>
> The order is in line with the purpose expressed by Congress in section 10 of the stock-raising homestead law of December 29, 1916, which authorizes the withdrawal of "water holes or other bodies of water

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[273] Letter from Hubert Work, SOI, to Pres. (Apr. 17, 1926) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act June 25, 1910, General, Pub. Water Reserves, Pt. 1, RG 48, NACP). It should be noted, in 1925, the Commr. of GLO urged Congress to enact legislation that would require scrip and other analogous rights be used within two years. This would have alleviated the situation, but no such legislation was enacted at that time. ARGLO 1925, *supra* n. 270 at 38 (U.S. Govt. Printing Off. 1925).

[274] The files of the Office of the SOI, GLO, and USGS have been reviewed for this note, but the instructions were not found. The only reference to the note is found in a USGS letter to the SOI. Letter from W. Mendenhall, Acting Dir., USGS, to Hergert Work, SOI (Apr. 16, 1926) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act June 25, 1910, General, Public Water Reserves, Pt. 1, RG 48, NACP).

[275] Letter from E.C. Finney, First Asst. SOI, to William Spry, Commr., GLO (May 5, 1926) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-188: Streams, Springs and Water Holes, Pt. 1, RG 48, NACP).

> needed or used by the public for watering purposes." It was also thought that the order would be of material aid in event of the passage of grazing legislation of the type proposed in S. 2584.[276]

Thus, just as in 1912, the justification of Public Water Reserve No. 107 was to ensure that the public range remained open and free to all by preventing monopolization of water sources by parties using scrip and other analogous selection rights. In addition, the concern over the patenting of public reserve waters had again become a very real threat by 1926 when the reserve was issued. After making the first public water reserves in 1912, the DOI took steps to protect potential public watering places from patenting by various selection rights. In 1914, the DOI made a ruling which held that no vested right attached to certain types of selections prior to the approval of the selection.[277] Therefore, the unapproved lands selected could not be exempted from any withdrawals made under the Act of June 25, 1910.[278] This, and the more active field examinations made by the USGS and GLO after passage of the Stock Raising Homestead Act of 1916, prevented the alienation of many valuable public watering places.[279] The GLO noted this fact in 1919, when it pointed out that nearly two-thirds of the soldiers' additional homestead rights[280] made that year were for lands in the grazing regions of California, Nevada, and Wyoming. The locations apparently were made in an effort to gain control of watering places on the public lands.[281] Field investigation, coupled with the withdrawal of many of the tracts, had saved those watering sources for public use.[282]

In 1921, however, the United States Supreme Court, in a series of decisions, severely handicapped the DOI efforts to prevent the use of scrip for locating public watering places.[283] The rulings, in essence, held that the right to selected land vested at the time when an individual had done all that was

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[276] *Id.*

[277] *Administrative Ruling*, 43 Land Dec. 293 (U.S. Govt. Printing Off. 1915); *see State of Utah*, 45 Land Dec. at 554 (holding that the DOI has the authority to reject claims to unapproved selected lands which were withdrawn by Congress under the Act of June 25, 1910).

[278] *Id.*

[279] *State of Utah*, 45 Land Dec. at 551. There was some question within the DOI as to the propriety of withdrawing selected lands covered by pending claims. *See* Memo. from Edward Finney, to Member of the Bd. of App. (Oct. 26, 1916) (on file with the Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under the Act of June 25, 1910, Arizona, Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP); Memo. from Seldon G. Hopkins, Asst. SOI, to Cotter, Admin. Asst., DOI (July 21, 1919) on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Idaho, Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[280] For a description of this form of "scrip," *see* ARGLO 1905, H.R. Doc. 60-5 (Dec. 31, 1905).

[281] ARGLO 1919, H.R. Doc. 66-409, at 257 (Sept. 6, 1919).

[282] ARGLO 1920, 39 (U.S. Govt. Printing Off. 1920).

[283] *Payne v. C. P. Ry. Co.*, 255 U.S. 228, 238 (1921); *Payne v. New Mexico*, 255 U.S. 367, 372–73 (1921); *Payne v. U.S.*, 255 U.S. 438 (1921); *Wyoming v. U.S.*, 255 U.S. 489, 508–09 (1921).

required of them, not when the application was approved by the DOI.[284] Following this ruling, the DOI approved a soldiers' additional homestead right selection for a spring made prior to a public water reserve withdrawal[285] and the 1914 administrative rule regarding selections was vacated by the Department.[286] The USGS regretted the policy change. It noted that many of the public water reserves made in recent years had been the result of field investigation of scrip and other locations.[287]

This change of policy prompted one scrip dealer to note an increase in inquires about scrip and to remark that the "paper" was becoming scarce. Stockmen and others who might want scrip were urged to buy scrip while the supply lasted.[288] This activity undoubtedly made it more difficult for DOI officials to prevent valuable public watering places from passing into private hands. With a noted increase of scrip activity in 1925,[289] the idea of a "blanket" withdrawal of public watering places would have appeared attractive to many in the DOI.

As for the authority for such a sweeping withdrawal, the First Assistant Secretary pointed to the provisions of the Stock Raising Homestead Act.[290] In Finney's mind Section 10 provided for the withdrawal of all water sources that the SOI deemed were "needed or used by the public for watering purposes."[291] This, in fact, had been the policy of the DOI since the passage of the Stock Raising Homestead Act. As noted by the Commissioner of the GLO in 1917, the DOI sought:

> [T]o withdraw all [the] smallest legal subdivisions upon which public springs or other water is found in portions of the country which may be classed as strictly desert in character, and where the acquisition of the land containing such springs or other water by individuals or

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[284] *Id.*

[285] *Donald C. Wheeler*, 48 Land Dec. 94, 96 (U.S. Govt. Printing Off. 1922).

[286] *Administrative Order Modifying the Administrative Ruling of July 15, 1914*, 48 Land Dec. 97 (U.S. Govt. Printing Off. 1922); *Instructions under Administrative Order of Apr. 23, 1921*, 48 Land Dec. 172 (U.S. Govt. Printing Off. 1921).

[287] Letter from George Otis Smith, Dir., USGS, to SOI (April 15, 1921) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Colo., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[288] Jeremiah Collins, *Departmental Service* 15, 29 (Collins Land Co. Fall 1925).

[289] ARGLO 1925, 11 (U.S. Govt. Printing Off. 1925).

[290] Letter from E.C. Finney, First Asst. SOI, to John B. Kendrick, Sen. (May 5, 1926) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-188: Streams, Springs and Water Holes, Pt. 1, RG 48, NACP); Letter from E.C. Finney, Acting SOI, to T.J. Walsh, Sen. (June 4, 1926) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-188: Streams, Springs and Water Holes, Pt. 1, RG 48, NACP); Letter from E.C. Finney, to SOI (Jan. 29, 1927) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act June 25, 1910, Cal., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[291] *Id.*

> corporations would create a monopoly of the waters of the range appurtenant thereto.[292]

Public Water Reserve No. 107, therefore, was simply another means of implementing that policy objective.

Why did the DOI wait nearly ten years after the passage of the Stock Raising Homestead Act of 1916 before making the blanket withdrawal order announced by Public Water Reserve No. 107? When asked that question, Finney responded that while he could not speak for those in charge of the DOI in 1916 and 1917:

> I can only surmise that it did not occur to them, or that possibly there was not sharply brought to their attention the fact that in some of the more arid regions of the west the control of watering places might effectually exclude others from grazing on the public domain. I rather think that if the matter had been sharply presented or thought of at that time, withdrawal would possibly have been recommended by the then officials.[293]

This, however, was not the real reason. As was pointed out earlier, the SOI at the of time of the Stock Raising Homestead Act's passage, Franklin K. Lane, believed that the new law would result in the settlement of most of the public rangelands, leaving the federal government "hardly enough grazing land to be worth consideration."[294] And as late as 1923, the current SOI Hubert Work, had been unwilling to admit the Stock Raising Homestead Act was a failure and that settlement under it be halted.[295] Such thinking mitigated against making a withdrawal like that done by Public Water Reserve No. 107.

Finney so much as admitted that, when in defending Public Water Reserve No. 107, he said:

> However, at the present time it is realized that the more desirable portions of the public domain, from an agricultural or grazing standpoint, have all been disposed of, and that as to the less valuable and more nearly arid areas remaining, the public control of water holes in the interest of the general public is even more desirable at the present

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[292] ARGLO 1917, 52–53 (U.S. Govt. Printing Off. 1917).

[293] Letter from E.C. Finney, First Asst. SOI, to John B. Kendrick, Sen. (June 11, 1926) (on file with Natl. Archives, DOI, CCF 1907–1936, File 2-188: Streams, Springs and Water Holes, Pt. 1, RG 48, NACP).

[294] Letter from Franklin K. Lane, SOI, to Carl Hayden, Rep. (May 2, 1918) (on file with Natl. Archives: GLO, CCF 1907–1936, File 2-147: Grazing on Public Lands, General, Pt. 4, RG 48, NACP).

[295] Letter from Hubert Work, SOI, to William Kent (Mar. 29, 1923) (on file with Natl. Archives, GLO, CCF 1907–1936, File 2-147: Grazing on Public Lands, General, Pt. 5, RG 48, NACP).

> time than it was in 1916; also should a grazing bill be enacted affecting all or part of the public domain, it will be desirable if the water holes can be retained under the same control and subject to the same use as may be provided in whatever sort of grazing law Congress may see fit to enact.[296]

This was, Finney commented, only his personal view of why there had not been a blanket withdrawal of public watering sources until 1926. It was, however, the thinking of the man who undoubtedly conceived Public Water Reserve No. 107.

Secretary Work also seems to have held a similar opinion. Soon after Public Water Reserve No. 107, Work initiated a national grazing land policy aimed at reclaiming the public range "through the drilling of wells and establishment of water holes."[297] He felt that large areas of the public domain could not be grazed efficiently because of inadequate water. Where water was available, the competition for the range had resulted in those places being "heavily overgrazed." He called for a policy that would protect the public range and provide for the development of its water supply, which he felt was essential for the effective administration of public rangelands if a leasing system was adopted by Congress. Secretary Work, recognizing the need to develop new water sources, clearly understood the need to protect and preserve those public watering places that remained.[298]

Public Water Reserve No. 107 certainly did that. The wording of the executive order was broad. It withdrew no specific tracts, but simply defined the water sources to be reserved. This did not, according to the GLO in 1928, "detract from its validity."[299] By its terms:

> [T]he order [was] effective in all instances whenever it appears that the land involved was public land at the date of the order, 'contains water holes or other bodies of water needed or used by the public for watering purposes,' and which water had not been appropriated and pursuant to the appropriation put to a beneficial use at the date of the executive order.[300]

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[296] Letter from Finney (June 11, 1926), *supra* n. 293, at 1.

[297] *National Grazing Land Policy*, 10 Land Serv. Bull. 285 (1926).

[298] *Id.* at 286. Even after Public Water Reserve No. 107 was ordered, Secretary Work felt that "watering places essential to grazing in semiarid or arid region [had] not been fully protected or developed." ARGLO 1927, 30 (U.S. Govt. Printing Off. 1927).

[299] Letter from Thos. Farrell, Acting Commr., GLO, to SOI (Feb. 7, 1928) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-188: Streams, Springs and Water Holes, Pt. 1, RG 48, NACP).

[300] *Id.*

In having Public Water Reserve No. 107 promulgated, the DOI was not inaugurating a new withdrawal policy. By 1926, the making of blanket withdrawals and designations had a long history. Both Congress and the executive branch resorted to the practice when they felt it necessary to further or to protect the public interest. The practice had been widely used by Congress. It employed this form of designation in a number of public land laws. The disposition of mineral, swamp, and timber and stone lands, for example, were handled by this method. Furthermore, the determination of whether or not public lands were subject to disposal under those and other public land laws was given to the DOI.[301]

The reason for making Public Water Reserve No. 107 a blanket withdrawal was, as in 1912,[302] that the USGS did not have the data to be more specific. This was acknowledged by the USGS in 1929 when it stated, "The location of the watering places intended to be included in [the] order, however, was not definitely defined because the information available was insufficient for that purpose."[303]

While a blanket withdrawal, Public Water Reserve No. 107 was not intended to withdraw large blocks of public land or bring an end to homesteading opportunities. First Assistant Secretary Alexander Vogelsang articulated this point in 1917 when he said, "good policy dictates that a minimum area of public lands should be withdrawn from disposition under applicable laws, the lands to be withdrawn to be of such character and situation as to be really necessary and valuable for the purpose indicated."[304] Public Water Reserve No. 107 continued that policy by providing that only forty acres of public land be set aside for each spring and water hole affected.[305] The reason for this, wrote First Assistant SOI Finney in 1926, was that the policy of the DOI was to "withdraw only such an area of land as may be necessary to protect the water supply. Ordinarily, this is accomplished by withdrawing the forty acre or larger subdivision, as the case may be, which surrounds the body of water to be protected."[306]

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[301] *Id.*; Op. M-27967 Off. Sol., 3–5 (Apr. 30, 1935) (on file with Natl. Archives: Unpublished Sol. Op. Collection, NA). This argument was made by Acting Sol. Charles Fahy in 1935 in defense of Exec. Order No. 5327, which withdrew all public lands in the United States containing oil shale deposits.

[302] Letter from Smith (Mar. 26, 1912), *supra* n. 85.

[303] Memo. from Herman Stabler, Chief, Conservation Branch, USGS, to Mr. Sawyer (Mar. 20, 1929) (on file with Natl. Archives: DOI, Legislation, 1905–1936, File 2-147: Grazing on Public Lands, 70th Congress, H.R. 16166, RG 48, NACP).

[304] Letter from Alexander T. Vogelsang, First Asst. SOI, to Dir., USGS (April 5, 1917) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, Mont., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[305] *Selections*, 51 Land Dec. 457.

[306] Letter from E.C. Finney, First Asst. SOI, to John B. Kendrick, Sen. (May 26, 1926) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-188: Streams, Springs and Water Holes, Pt. 1, RG 48, NACP).