Public Water Reserves: The Metamorphosis of a Public Land Policy

Part 2

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 Reserve No. 107 also did not withdraw all water sources. The circular instructions issued by the GLO relating to the withdrawal stated that the order:

> [W]as 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 not therefore to be 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. It withdraws those springs and water holes capable of providing enough water for general use for watering purposes.[307]

What is interesting about this "limitation" of what springs and water holes were affected by Public Water Reserve No. 107 is that the stipulation is not in the withdrawal order itself. It appears to be an afterthought on the part of First Assistant SOI Finney. When queried by Senator John B. Kendrick of Wyoming about the purpose of Public Water Reserve No. 107, Finney remarked that the order:

> [I]s 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.[308]

It was probably at this time that the thought must have come to Finney that the order should not completely impair homesteading efforts. If not, why did he write the commissioner of the GLO on the same day he sent his letter to Senator Kendrick with the suggestion that the GLO incorporate into the proposed regulations for Public Water Reserve No. 107 the following language:

> The order of April 17, 1926, 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 not, therefore, to be 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

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[307] *Selections*, 51 Land Dec. at 457.

[308] Letter from Finney (May 5, 1926), *supra* n. 290.

> animals. It withdraws those springs and water holes capable of providing enough water for general use for watering purposes.[309]

What constituted only enough water for one family and its domestic animals? The chief of the Division of Water Rights in California's Department of Public Works posed this question to the commissioner of the GLO soon after Public Water Reserve No. 107's issuance. In a response endorsed by First Assistant SOI Finney, Commissioner William Spry stated:

> As made clear by Circular 1066, the withdrawal is not intended to affect 'lands having small springs or water-holes affording only enough water for the use of one family and its domestic animals . . . .' It may be said, further, that the withdrawal is not intended to affect springs and water-holes which are manifestly not used or needed presently or in the future for public watering purposes. But as these questions are matters of fact, to be determined, each upon its own merits, it follows that no fixed rule may be set as to the minimum amount of water necessary to except them from the operation of the withdrawal order . . . . It is probable, however, that in most cases, the amount of water, in gallons, necessary for a family and its domestic animals, would be based largely, if not entirely upon the rules adopted by the various States within which the waters occur.[310]

There is no evidence that the DOI relied upon appropriate state water law to determine the amount of water needed by a family. Instead, the DOI appears to have adopted a policy to determine the withdrawal status of each water source upon the facts which existed at the time of investigation. The DOI also took a position of not including all water sources that clearly supplied more water than a family needed. In his letter to California's Division of Water Rights, Commissioner Spry noted that the Order of April 17, 1926, was "not intended to affect springs and water-holes which are manifestly not used or needed presently or in the future for public watering purposes."[311] He also excluded watering places which were inaccessible to the public.[312] There was one other significant limitation to the effect of Public Water Reserve No. 107: It was held

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[309] *Id.*

[310] Letter from William Spry, Commr., GLO, to Edward Hyatt, Jr., Chief of Cal. Div. Water Rights, 1–2 (Oct. 13, 1926) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, General, Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[311] *Id.* at 2.

[312] *Id.* at 4.

not to include perennial streams. This interpretation of the withdrawal order came from the DOI's solicitor.

In February 1927, the director of USGS sent the SOI a recommendation for the withdrawal of the only remaining public land on the Henry's Fork River in Wyoming because the land controlled grazing on thousands of public rangelands in the area.[313] The request for withdrawal was not asked for under Public Water Reserve No. 107, but instead was submitted as a new withdrawal order.[314] The GLO protested the proposed withdrawal order. Commissioner Spry stated that approval of the order would be "equivalent to a holding that lands crossed by a stream of water were not reserved under the withdrawal order of April 17, 1926."[315]

While Commissioner Spry did not provide an explanation of why he felt streams such as the Henry's Fork were subject to Public Water Reserve No. 107, it is not difficult to understand why he felt streams were withdrawn by the order. When the public water reserve policy was inaugurated, the reserves were often called "water hole" withdrawals.[316] The term seems to have been used at times in a generic sense, referring to the withdrawals of watering places, which could include springs, hollows, and accessible sites along streams. Many of the first withdrawals included not only springs and water holes but streams.[317] In some cases, the withdrawals covered the entire length of a stream,[318] and in one case in Wyoming, the withdrawal of one stream stretched for seventy miles.[319]

The GLO's contention that Public Water Reserve No. 107 was intended to embrace perennial streams probably came from a memorandum from First Assistant SOI Finney, in which he made a statement that alluded to the fact that the executive order included perennial streams. That letter said that 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

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[313] Memo. from George Otis Smith, Dir., USGS, to SOI (Feb. 19, 1927) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25 1910, Wyo., Public Water Reserves, Withdrawals, Pt. 2, RG 48, NACP).

[314] *Id.*

[315] Memo. from William Spry, Commr., GLO, to SOI (Mar. 3, 1927) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25 1910, Wyo., Public Water Reserves, Withdrawals, Pt. 2, RG 48, NACP).

[316] ARGLO 1917, 52–53 (U.S. Govt. Printing Off. 1917); *see e.g.* Letter from Fred Bennett, Commr., GLO, to SOI 1 (Aug. 19, 1912) (on file with Natl. Archives: GLO, 1910 Misc. LR, File 255821: RG 49, NA); Letter from George Otis Smith, Dir., USGS, to SOI 2 (Oct. 16, 1912) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act June 25, 1910, Wyo., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[317] *See e.g.* Letter from Bennett (Aug. 19, 1912), *supra* n. 316, at 1.

[318] *Id.*; Letter from Smith (Oct. 16, 1912), *supra* n. 316, at 2.

[319] Letter from Smith (Oct. 16, 1912), *supra* n. 316.

public for watering purposes."[320] That same wording was also incorporated into the GLO's circular for Public Water Reserve No. 107.[321]

The GLO's response prompted the SOI to question whether streams were embraced by Public Water Reserve No. 107 and submitted it to the DOI solicitor, F. O. Patterson. Patterson read the withdrawal order itself and noted the order called for the reservation of vacant, unappropriated, and unreserved public land that contained a "spring or water hole."[322] The term "water hole," the solicitor assumed, "was used . . . in the sense it is used generally and as defined in Webster's International Dictionary: 'A natural hole or hollow containing water.'"[323] Patterson was of the opinion that "a hole in the dry bed of an intermittent river could be described as a water hole but in [his] opinion the lands bordering on running streams are not affected by the order of April 17, 1926."[324] The opinion was approved by Assistant SOI John H. Edwards.[325]

The solicitor's opinion may have reflected First Assistant SOI Finney's thinking. While Finney made statements that could have led the GLO to think Public Water Reserve No. 107 included streams, he expressed the opinion in 1917 that Section 10 of the Stock Raising Homestead Act did not contemplate "that the banks of streams in the public land areas should be tied up by water-hole withdrawals."[326]

Although the solicitor's opinion held that tracts crossed by perennial streams were not covered by Public Water Reserve No. 107, that did not mean such sites, if valuable for public watering places, could not be withdrawn.[327] Such tracts simply had to have their own order of withdrawal drawn up, and a number of stream sites were reserved in the years that followed the issuance of Public Water Reserve No. 107.[328]

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[320] Letter from Finney (May 5, 1926), *supra* n. 290.

[321] *Selections*, 51 Land Dec. at 457.

[322] Op. M-21874, Off. Sol. 1 (Mar. 8, 1927) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, General, Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[323] *Id.*

[324] *Id.* at 2.

[325] *Id.*

[326] Memo. from E.C. Finney (April 9, 1917) (on file with Natl. Archives: GS-CCC, Stock Driveways, Maps, and Correspondence, 1917–1921, File SOI-Commr. of the GLO, RG 49, NA).

[327] *See* Memo. from Fred W. Johnson, Commr., GLO, to SOI (June 19, 1934) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act June 25, 1910, Mont., Public Water Reserves, Restorations, Pt. 2, RG 48, NACP).

[328] *See e.g.* Memo. from Julian D. Sears, Acting Dir., USGS, to SOI (Nov. 5, 1928) (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); Letter from C. Girard Davidson, Acting SOI, to Dir., Bureau of the Budget (Mar. 1, 1950) (on file with Natl. Archives: DOI, CCF 1937–1953, File 2-153: Withdrawals under Act of June 25, 1910, Idaho, Public Water Reserves, Withdrawals, Pt. 2, RG 48, NACP).

The DOI ruled that the withdrawal did not include "tracts containing mere dry depressions or draws which do not, in their natural condition, furnish or retain a supply of water available for public use."[329] The appropriation of any water from such tracts, however, did not give the user any exclusive possessory right or color of title to the tract.[330] At most, it gave an easement.[331] The DOI also found that Public Water Reserve No. 107 did not include man-made water sources.[332] Five years later, however, it was held that reservoir sites could be included if they had been abandoned by those who had originally developed the source and was used as a public watering place by ranchers.[333] Another exception to the rule seems to have been water sources constructed under the provisions of the Stock Watering Reservoir Act of 1897.[334]

The DOI, by its actions, construed Public Water Reserve No. 107 to include springs and water holes needed for purposes other than stock watering. This is reflected in the 1933 statement of the commissioner of the GLO which said that the executive order of April 17, 1926 withdrew "all springs and waterholes [sic] providing enough water for general use for watering purposes."[335] The order, for example, was used in 1928 to withdraw a springs needed by the town of Bozeman, Montana.[336] It was also used to preserve water needed by travelers in desert regions.[337] In fact, non-stock watering public water reserves constituted a significant proportion of the lands withdrawn. In 1929, the chief of the USGS's Conservation Branch noted that of the 412,000 acres withdrawn as public water reserves, about 134,000 acres were withdrawn for purposes other than stock watering.[338]

This policy of withdrawing lands for public water reserves for non-stock watering purposes was contrary to First Assistant SOI Finney's idea of the intent of Section 10 of the Stock Raising Homestead Act of 1916. In January 1927,

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[329] *Santa Fe P. R.R. Co.*, 53 Int. Dec. 210, 211 (U.S. Govt. Printing Off. 1933), *aff'd*, 56 Int. Dec. 387, 389 (U.S. Govt. Printing Off. 1939) (holding that a man-made watering hole dependent entirely on rainfall and snow was not withdrawn by Public Water Reserve No. 107).

[330] *Edwards v. Sawyer*, 54 Int. Dec. 144, 148-49 (U.S. Govt. Printing Off. 1935).

[331] *Id.* at 149.

[332] *Santa Fe P. R.R. Co.*, 53 Int. Dec. at 211.

[333] *Charles Lewis*, A-18474, (DOI July 29, 1935) (on file with Natl. Archives: DOI, CCF 1907–1936, File 10-6: Settlement Appeals, General, Pt. 1079, RG 48, NACP).

[334] Letter from Antoinette Funk, Acting Commr., GLO, to Register, Phoenix, Ariz. (Sept. 27, 1937) (on file with Natl. Archive: DOI, CCF 1936–1953, File 2-153: Withdrawals under the Act June 25, 1910, Ariz., Public Water Reserves, Withdrawals, Pt. 4, RG 48, NACP).

[335] ARGLO 1933, 98 (U.S. Govt. Printing Off. 1933).

[336] Memo. from Julian D. Sears, Acting Dir., USGS, to SOI (Mar. 17, 1927) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Mont., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[337] Memo. from George Otis Smith, Dir., USGS, to SOI (March 17, 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).

[338] Memo. from Stabler (Mar. 20, 1929), *supra* n. 303; Table, *see* appendix.

Finney opposed the designation of a spring under Public Water Reserve No. 107. He noted the spring was of little use for stock watering purposes, was used only occasionally by travelers, and that its main value was in connection with a mining operation. Finney argued that the Stock Raising Homestead Act provided the authority for making public water reserves and that Section 10 appeared "to indicate that the primary, if not only, purpose was to provide watering places for livestock."[339]

When making withdrawals under Public Water Reserve No. 107, it was no longer necessary to prepare individual orders of withdrawal for the president's signature. First Assistant SOI Finney instructed that the USGS prepare "orders of interpretation" with a definite location of lands involved, whenever they located a spring or water hole that was reserved by the blanket withdrawal.[340] These orders of interpretation,[341] which were deemed to be no more than an official finding that a particular tract was of the character contemplated by Public Water Reserve No. 107,[342] would then be noted by the GLO in their land records in the same manner as any withdrawal made under the Pickett or General Withdrawal Act.[343]

In rendering orders of interpretation under Public Water Reserve No. 107, the USGS at first followed a practice of including public lands that did not have springs or water holes but were needed to make the withdrawal of lands with water sources effective. The DOI stopped the practice when it became aware of it in 1929. If access needed to be assured, the DOI instructed the GLO to look into the advisability of making a stock driveway withdrawal for that purpose.[344]

The USGS faced a mammoth task in locating spring and water holes subject to Public Water Reserve No. 107. To help with the task, the USGS

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[339] 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).

[340] Letter from E.C. Finney, First Asst. SOI, to Commr., GLO & Dir., USGS (May 25, 1926) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-188: Streams, Springs and Water Holes, Pt. 1, RG 48, NACP).

[341] Prior to Public Water Reserve No. 107, the USGS had issued "orders of interpretation." They were used to adjust public water reserves made on unsurveyed lands to legal land descriptions after survey.

[342] The order of withdrawal attached at the date Public Water Reserve No. 107 was signed, April 17, 1926, not the date a spring or water hole was determined to come under the terms of the withdrawal order. *See e.g. State of New Mexico*, 55 Int. Dec. 466, 468 (U.S. Govt. Printing Off. 1938).

[343] Letter from Finney (May 25, 1926), *supra* n. 340; Memo. from Stabler (Mar. 20, 1929), *supra* n. 303; *Forty-Seventh Annual Report of the Director of the United States Geological Survey to the Secretary of the Interior* 82 (U.S. Govt. Printing Off. 1926); *Forty-Eighth Annual Report of the Director of the United States Geological Survey to the Secretary of the Interior* 61 (U.S. Govt. Printing Off. 1927).

[344] Memo. from Acting Dir., USGS, to the SOI (June 11, 1929) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-135: Withdrawals under Act of June 25, 1910, General, Public Water Reserves, Pt.1, RG48, NACP).

instructed all its field employees to report any springs, water holes, or other valuable sites.[345] In making Enlarged and Stock Raising Homestead Act classifications, watering places subject to the blanket withdrawal were looked for, and if none found, the orders of designation would state that none of the lands listed were affected by the blanket withdrawal.[346] They also received information from the GLO, the Forest Service, petitions for designation from individuals, and other sources.[347]

In addition, persons making entry under the homestead and other laws were required by affidavit to state that no spring or water hole existed on the land entered. If the land was unsurveyed, the affiant had to show that there was no spring or waterhole within a quarter mile of the claim. If there was a spring or water hole, the entryman or applicant was directed to give the exact location of the water source, an estimate of the quantity of water, its daily production, and any other information that might prove useful in determining whether or not the source was valuable or necessary as a public water reserve. The USGS would then review these affidavits, determining which entries could be clearlisted or needed field examination.[348]

All of these methods of locating water sources and determining whether they were subject to the terms of Public Water Reserve No. 107 did not result in a great increase in the number of acres withdrawn as public water reserves. Between 1926 and the passage of the Taylor Grazing Act in 1934,[349] the area withdrawn only increased from 358,956 acres to 480,058 acres. An increase of less than 125,000 acres.[350]

It was also found that there was little reason for Public Water Reserve No. 107 to apply to all of the public domain. As a consequence, the affidavit requirement was eliminated for entries and filings in Alabama, Mississippi, Louisiana, Michigan, Wisconsin, Minnesota, and other states where public water reserves obviously were not needed for stock watering purposes.[351] Where it was obvious there was no need for or insufficient public land remaining, the elimination of states from the effect of Public Water Reserve No. 107 was urged

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[345] Memo. from Stabler (Mar. 20, 1929), *supra* n. 343.; *Designation Lists Under the Enlarged and Stock-Raising Homestead Acts-Water Holes-Circular No. 1066, Modified: Order*, 51 Land. Dec. 597 (U.S. Govt. Printing Off. 1927).

[346] *Id.*

[347] Memo. from First Asst. SOI (May 25, 1926), *supra* n. 340.

[348] *Id.*; *Selections*, 51 Land. Dec. at 457–58.

[349] *Taylor Grazing Act*, ch. 865, 48 Stat. 1269 (1934) (codified at 43 U.S.C. §§ 315–315r).

[350] Table, *see* appendix.

[351] Memo. from Herman Stabler, Chief, Conservation Branch, USGS, to Mr. Mendenhall (Apr. 30, 1929); Memo. from Ernest Sawyer, to SOI (May 3, 1929) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, General, Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

by the USGS. This was done when the withdrawal order had first been requested by First Assistant SOI Finney because it was felt a "blanket order covering the entire public domain would serve no useful purpose."[352]

Even after the issuance of Public Water Reserve No. 107, the USGS recommended an interpretation of the order that would have excluded Alabama, Arkansas, Kansas, Florida, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, North Dakota, South Dakota, Oklahoma, and Wisconsin.[353] The DOI took no action but in 1929 when revocation was again recommended,[354] the DOI determined it was sufficient to exempt public land applicants in those states from having to file the springs and water holes affidavit.[355]

The DOI also revoked Public Water Reserve No. 107 as it applied to Alaska. In 1929, the GLO reported that, according to the territorial governor, there was an abundance of water in Alaska, and that Public Water Reserve No. 107 was "working a hardship" on settlers and others without providing "any benefit to the public generally."[356] Officials with the USGS agreed with the assessment.[357] As a consequence, Public Water Reserve No. 107, as it applied to Alaska, was revoked by executive order on May 4, 1929.[358] However, the DOI later found it necessary to make two public water reserve withdrawals in Alaska.[359]

A segregation under Public Water Reserve No. 107 worked like any other withdrawal made under the Act of June 25, 1910. The public land

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[352] Memo. from Acting Dir., USGS, to SOI (Apr. 16, 1926) (on file with Nat. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act June 25, 1910, General, Public Water Reserves, Pt.1, RG 48, NACP).

[353] Memo. from Dir., USGS, to SOI (Apr. 28, 1926) (on file with Nat. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under the Act of June 25 1910, Or., Public Water Reserves, Withdrawals, Pt.1 RG 48, NACP).

[354] Memos, *supra* n. 351.

[355] For elimination of the affidavit for eastern and southern public land states, *see Affidavits—Springs or Water Holes—Circular No. 1066, Modified*, 52 Land Dec. 559 (U.S. Govt. Printing Off. 1931). The affidavit requirement was eliminated for all entries in 1947 by GLO Circular No. 1661 and replaced by a requirement that an individual make only a statement as to the existence of springs and water holes. The rationale for this change was that an affidavit was unnecessary in view of a law which made it "a crime for any person [to] knowingly and wilfully . . . submit any false or fraudulent statement to any agency of the United States as to any matter within its jurisdiction." Memo. from Dir., BLM, to SOI (Oct. 1, 1941) (on file with Natl. Archives: DOI, CCF 1937–1953, File 2-214: Regulations, Pt. 7, RG 48, NACP; and Circular No. 1661, 12 FR 7141, 7142 (Oct. 29, 1947)).

[356] Letter from Commr., GLO, to SOI (Apr. 19, 1929) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153: Withdrawals under Act of June 25, 1910, General, Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP).

[357] *Id.*; Letter from Acting Chief, Alaskan Geologist, USGS, to Mr. Sawyer (Apr. 29, 1929); Memo. from Herman Stabler (Apr. 30, 1929), *supra* n. 351; Memo. from Acting Dir., USGS, (May 1, 1929).

[358] Exec. Or. 5106, *Proclamations and Executive Orders: Herbert Hoover* vol. I, 310 (U.S. Govt. Printing Off. 1974).

[359] Exec. Or. 5754, *id.* vol. II at 1040.

embraced by the order was withdrawn from settlement, location, sale, and entry under the various public land laws.[360] The withdrawal attached at the time of the order's issuance to all lands subject to it. Like other withdrawals, Public Water Reserve No. 107 was also considered to be a "continuing withdrawal," and it was held to attach to any lands that "subsequently become of the character and status defined in the order."[361] Even though an order of interpretation finding might be issued years after April 17, 1926, it was of no consequence to the finding that the tract was subject to the withdrawal because the withdrawal of a tract related back to the date of Public Water Reserve No. 107's promulgation.[362] The resulting confusion caused by interpretative orders as to when a spring or water hole was withdrawn led to the DOI discontinuing the issuance of interpretative orders in 1941.[363] The order of interpretation finding, however, was held to be ineffective in certain situations. If the use of a spring or water hole on a tract of public land had become vested in a party prior to the date of Public Water Reserve No. 107, and not abandoned, relinquished, or otherwise terminated in accord with local custom, law, or court decision, then the withdrawal was ruled inapplicable to that tract of land.[364]

After public lands were identified as being subject to Public Water Reserve No. 107 there was no active management of the tracts by the DOI. Secretary Hubert Work wanted to develop water sources on the public domain,[365] but Congress provided no monies for such work. However, private parties who had a permit to use or improve public water reserve tracts under the GLO regulations issued in 1925 could do such work.[366]

In January 1927, the GLO reported that the development of watering places for livestock was part of SOI Work's "new National policy for reclaiming the range on the public domain."[367] As part of that effort, it was noted that the

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[360] Letter from Spry (Oct. 13, 1926), *supra* n. 310; *Death Valley National Monument—Appropriation of Water*, 55 Int. Dec. 371, 377 (U.S. Govt. Printing Off. 1938).

[361] *State of New Mexico*, 55 Int. Dec. at 468.

[362] *Id.*; *Lee J. Esplin*, 56 Int. Dec. 325, 328 (U.S. Govt. Printing Off. 1939); *Jack A. Medd*, 60 Int. Dec. 83, 92 (U.S. Govt. Printing Off. 1954).

[363] From then on, the DOI directed, when any vacant and unappropriated public land or land embraced within any unpatented entry, selection, or filing was found to contain a spring or water hole, the matter was to be brought to the attention of the commissioner of the GLO. This was to be done by a letter, setting out all necessary facts. If determined to be subject to Public Water Reserve No. 107, the GLO would have the withdrawal noted in its tract books. Letter from First Asst. SOI, E. K. Burlew, to Heads of All Bureaus, Divisions, and Agencies of the DOI (Mar. 29, 1941) (on file with Natl. Archives: DOI, CCF 1937–1953, File 2-188, Streams, Springs and Water Holes, Pt. 3, RG 48, NACP).

[364] *Thomas Morgan*, 52 Land Dec. 735 (U.S. Govt. Printing Off. 1931).

[365] *National Grazing Land Policy*, *supra* n. 297 at 285–86.

[366] Memo. from Stabler (Mar. 20, 1929), *supra* n. 303; *Use of Lands Withdrawn as Public Water Reserves—Regulations*, 51 Land Dec. 186 (U.S. Govt. Printing Off. 1927).

[367] *National Grazing Land Policy—Private Cooperation*, 10 Land Serv. Bull. 377–78 (Jan. 1, 1927).

DOI had approved an application to construct a system of reservoirs and pipelines to provide water to stock at strategic points in a small area of southern New Mexico.[368] Aside from that activity, the only other thing the DOI could do was to assure that the public water reserves would remain open and free to all stockraisers using the public domain. Any unlawful use of the reserves, or attempts to monopolize them, were investigated by inspectors from the GLO. If circumstances warranted, civil or criminal suits would be filed in the courts.[369] Few investigations led to the institution of lawsuits, but one in Utah did result in a court action.

The Utah case, *United States v. Schmutz*[370] arose soon after Public Water Reserve No. 107 was promulgated. In early 1927, the GLO reported that citizens in the vicinity of Cedar City, Utah, were complaining about the recent appropriation of springs that had been used as public watering places for thirty to forty years. The springs had never been designated as public water reserves, so the people, mostly sheep outfits using the springs, had not been able to protect their right to utilize the water sources. The individuals appropriating the water had previously filed for water rights with the state engineer. A cursory look by GLO officials into the matter revealed that the water right filings were made after the date of Public Water Reserve No. 107. It was also brought out that the state engineer, who was responsible for water right filings in Utah, was of the opinion that he need not "pay any attention" to public water reserve withdrawals since "all public waters are the property of the state and are subject to appropriation under the laws of the state."[371]

After an investigation of the situation, it was discovered that brothers by the name of Schmutz had filed an application with the state of Utah to appropriate the water of several springs, none of which was tributary to any stream. This took place after Public Water Reserve No. 107 was made by the president. Protest against these filings had been made by other citizens in the area who claimed that the springs had been used by the public to water livestock for years. These protests, however, were to no avail because the state engineer had certified the water right filings made by the Schmutzs. The GLO officials in charge of the investigation recommended that the situation, and the attitude held by state officials, "amply warrant[s] taking of such steps in the courts, or

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[368] *Id.*

[369] Memo. from Stabler (Mar. 20, 1929), *supra* n. 303.

[370] 56 F.2d 269 (D. Utah 1932).

[371] Letter from Moore, GLO Div. Inspector, Salt Lake City, Utah, to Commr., GLO (Feb. 28, 1927) (on file with Natl. Archives: GLO, 1910 Misc. LR, File 1218080, RG 49, NA); *see* report and exhibits in Letter from F. J. Safley, GLO Inspector, to Commr., GLO (Nov.12, 1927) (on file with Natl. Archives: GLO, 1910 Misc. LR, File 1260243, RG 49, NA).

otherwise, as will serve to protect the public use of the waters of springs situated upon lands withdrawn by the President's proclamation" under Public Water Reserve No. 107.[372]

In February 1928, the commissioner of the GLO recommended to the DOI that a suit be filed regarding this matter.[373] First assistant SOI Finney concurred, telling the Department of Justice (DOJ) that the action was necessary to protect the springs as public water reserves.[374] The suit was also supported by sheep owners who were dependent upon public watering places.[375] The DOJ decided to argue the case upon the reserved water rights doctrine enunciated in the 1908 United States Supreme Court case *Winters v. United States*.[376] That ruling recognized the power of the federal government to reserve water and exempt it from appropriation under state laws, provided the reservation was made prior to the appropriation.[377]

On January 28, 1932, the *Salt Lake Tribune* announced "Court Ruling Opens Desert to All." The article stated that the ruling in *Schmutz*, upheld the DOI's right to preserve water holes for public use.[378] The decision, however, was not as definitive on the issue as DOI officials had hoped. The U.S. District Court for Utah held that the defendants had failed to bring themselves under any provision of the public land laws authorizing them to claim or take possession of the lands adjacent to the springs from which they had appropriated water. Therefore, the court ruled that the brothers were trespassers.[379] Thus, the court refused to rule on the validity of Public Water Reserve No. 107. It did state, however, that the federal government and the state of Utah should not be at odds over this issue. The United States was trying to preserve these springs and others across the West as public watering places. It seemed to the court that the state should pursue a like policy. So, rather than fight each other on the issue, the two entities might cooperate.[380]

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[372] Letter from Moore, GLO, Division Inspector, Salt Lake City, Utah, to Commr., GLO (Nov. 26, 1927) (on file with Natl. Archives: GLO, 1910 Misc. LR, File 1218080, RG 49, NA).

[373] Letter from Commr., GLO, to SOI (Feb. 24, 1928) (on file with Natl. Archives: GLO, 1910 Misc. LR, File 1218080, RG 49, NA).

[374] Letter from First Asst. SOI, to Atty. Gen. (Feb. 24, 1928) (on file with Natl. Archives: GLO, 1910 Misc. LR, File 1218080, RG 49, NA).

[375] Letter from Ashby D. Boyle, Atty., Salt Lake City, Utah, to SOI (Feb. 29, 1928) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-188, Streams, Springs and Water Holes, Pt. 1, RG 48, NACP).

[376] 207 U.S. 564 (1908).

[377] Letter from Atty. Gen., to Ray Lyman Wilbur, SOI (August 8, 1929) (on file with Natl. Archives: GLO, 1910 Misc. LR, File 1260243, RG 49, NA).

[378] *Court Ruling Opens Desert Water to All*, Salt Lake Trib. (Jan. 28, 1932).

[379] *Schmutz*, 56 F.2d at 270.

[380] *Id.* at 271.

The DOI was pleased with the decision of the court. Assistant SOI John Edwards agreed that the DOI and the state of Utah should cooperate in preserving public watering places. However, he was disappointed with the court's failure to give a "definite determination as to the validity of the appropriation [by the United States], under State law, of the water on these lands, as a failure to accomplish one of the principal purposes of the suit."[381]

Although not known at the time, this failure to address the main issue regarding public water reserve and the status of the waters embraced by those withdrawals would later frustrate DOI officials. The issue would come to particularly plague officials after the passage of the Taylor Grazing Act in 1934. As the public range came under Federal regulation, the need for a clear interpretation of the public water reserves became essential.

VI. THE TAYLOR GRAZING ACT AND PUBLIC WATER RESERVES

Passage of the Taylor Grazing Act in 1934 spelled the end to the chaos that had destroyed the public range. The purpose of the law was "to stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes."[382] This legislation would usher in a new era for the public domain that would significantly affect public water reserve policy.

Under the Taylor Grazing Act, the SOI was authorized to set aside eighty million acres of the remaining "vacant, unappropriated, and unreserved" public domain, exclusive of Alaska,[383] as grazing districts.[384] Under Section 3 of the law, the SOI was authorized to lease the public lands within the grazing districts to "such bona fide settlers, residents, and other stock owners" under such rules and regulations as he established.[385] Preference was to be given to those who lived in or adjacent to the districts who were "land owners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of the lands."[386]

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[381] Letter from John H. Edwards, Asst., SOI, to Atty. Gen., (Mar. 11, 1932) (on file with Natl. Archives: GLO, 1910 Misc. LR, File 1260243, RG 49, NA).

[382] *Id.*

[383] A regulated grazing law was enacted for Alaska in 1927, ch. 513, 44 Stat. 1452 (codified at 43 U.S.C. §§ 316–316o).

[384] 43 U.S.C. § 315.

[385] *Id.* § 315b.

[386] *Id.*

Public lands outside of grazing districts were also subject to lease. Under Section 15, these public lands could be leased to the owners of adjacent lands.[387] The lease of these lands, like those under Section 3, were to be made under the rules and regulations determined by the SOI.[388]

The SOI placed administrative responsibility for the grazing districts under a new organization called the Division of Grazing, which in 1939 was renamed the Grazing Service. The lease and regulation of Section 15 lands, the public lands for grazing outside the grazing district, was given to the GLO.[389]

The DOI recognized from the beginning that effective management of the Taylor Grazing Act would be, among other things, dependent upon water.[390] The axiom that water controlled the range did not change with passage of the law. This fact was recognized not only by the DOI, but by ranchers as well. Thus, after the passage of the Taylor Grazing Act, the policy of withdrawing public water reserves continued. The new law, however, brought about several changes. The first was the transfer of land classification and public water reserve responsibilities from the USGS[391] to the newly created Division of Grazing in March 1935.[392] The most important change, of course, was how public water reserves were viewed. One of the rationales for making the withdrawals, particularly Public Water Reserve No. 107, was in anticipation of grazing control legislation. This occurred with the Taylor Grazing Act's passage; now it had to be determined what role the public water reserves were to play in the administration of grazing under the provisions of that law.

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[387] *Id.* § 315m.

[388] *Id.*

[389] Muhn & Stuart, *supra* n. 23, at 1, 37–39.

[390] Letter from Asst. Dep. Dir. of Grazing, to ECW Camp Superintendents (Sept. 20 1935) (on file with Natl. Archives: GS-CCC, Range Files, L-Lands, File —Range Improvement—Water Development, RG 49, NA); Letter from Acting Dir. of Grazing, to Santiago Miranda, Cabello, N.M. (Oct. 31, 1936) (on file with Natl. Archives: GS-CCC, Range Files, Licenses & Permits, File—Appeals, RG 49, NA); Letter from Dep. Dir., Div. of Grazing, to Dir. of Grazing (July 27, 1937) (on file with Natl. Archives: DOI, CCF 1937–1953, File 2-147, Grazing on Pub. Lands, Administrative, Pt. 9, RG 48, NACP).

[391] In July 1933, Secretarial Order No. 659, directed that "all field examinations" pertaining to designations under the Enlarged and Stock Raising Homestead Acts and Public Water Reserve No. 107 be handled by the Division of Investigations. The Division of Investigations had been created in April 1933 and included the former field service of the GLO. The procedure regarding the filing and disposition of petitions for designation, as well reports regarding water sources remained the responsibility of the USGS. It is assumed this arrangement was continued after the Division of Grazing assumed the responsibility for land and public water reserve classifications. Memo. from Dir. Of Investigations, to the SOI (July 26, 1933); Secretarial Or. 659 (July 28, 1933); Letter from Acting Dir., USGS, to SOI (Aug. 1, 1933); Letter from Personal Asst. to the SOI, to Dir., USGS (Aug. 8, 1933) (on file with Natl. Archives: DOI, CCF 1907–1936, File 1-363: Division of Investigations, Administrative, Pt. 2, RG 48, NACP); James Muhn, *Brief History of the General Land Office's Special Agents, 1877–1946*, at 1 (unpublished paper, 1996, on file with author).

[392] ARDOI 1935 1, 17 (U.S. Govt. Printing Off. 1935); Ward L. Hopper, *The Land Classification Section—Its Activities and Functions*, 2 The Grazing Bull. 25 (June 29, 1939).

The answer to this question proved hard for DOI officials. Public water reserves would appear to have facilitated administration of the Taylor Grazing Act; however, this did not always prove to be the case and the first problem emerged early in 1935.

Section 8 of the Taylor Grazing Act provided for the exchange of federal, state, and private lands so that lands could be consolidated to facilitate the administration of grazing districts.[393] Regulations for the making of these exchanges were issued in February 1935 and parties filing applications were required to provide the spring and water hole affidavit required by the GLO.[394] This requirement bothered both state land commissioners and state land representatives who made this point in a meeting with DOI officials soon after the promulgation of the Section 8 regulations. Thomas Havell of the GLO pointed out that Public Water Reserve No. 107 had reserved all springs and water holes on public lands and so the regulations required applicants to file an affidavit as to the existence of springs or water holes on the public lands selected by them for exchange. This prompted a protest from Wyoming's commissioner of state lands. He claimed that Wyoming held title to "all running water and every body of still water."[395] Furthermore, another state land official remarked that the provision "damages the trading value in the exchange of lands."[396]

Rufus Poole, an attorney with the DOI's Office of the Solicitor, noted that public water reserves were made "to permit a more equitable use of these water holes."[397] He conceded that some modification of the order proclaiming Public Water Reserve No. 107 might be justified in view of the exchange provision of the Taylor Grazing Act. He also remarked that in making public water reserves, the DOI "did not attempt . . . to seek to withdraw the water. We withdrew the public domain upon which the water was located to which title was vested in the United States. That, of course, did not disturb the water."[398]

If that was the case, argued a state official, why should Public Water Reserve No. 107 be taken into consideration when making exchanges. Poole only responded that he "would not want to make a criticism of that order here, but I

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[393] 43 U.S.C. § 315g (repealed 1976).

[394] *Gifts of Lands and Filing of Applications for Exchanges of Privately Owned and State Lands under Section 8, Taylor Grazing Act*, 55 Int. Dec.192, 196, 200 (U.S. Govt. Printing Off. 1938).

[395] *Hearing Called by the Secretary of the Interior of the Land Boards of the Twelve Western So-Called Public Land States for the Purpose of Considering Matters of Common Interest to those Land Boards and the Federal Government in Connection with Their Respective Lands as Affected by the Taylor Act* (Feb. 11, 1935) (on file with Natl. Archives: GS-CCC, Grazing Service Miscellaneous Correspondence, 1934–1939, File-Denver Conference File-Feb. 11–16, 1935, NA).

[396] *Id.*

[397] *Id.*

[398] *Id.*

think we should seriously consider a modification of the order to carry out the spirit of the Taylor Grazing Law."[399]

The DOI did not appear to have made any "serious consideration" of modifying the terms of Public Water Reserve No. 107 after its meeting with the state land boards. The matter as it was reported by the Director of Grazing, Farrington Carpenter, could be worked out without any change to the order. He told SOI Harold Ickes that:

> Watering places needed in connection with the use of public range lands or for some community purpose are the only type that have in the past or are now being retained in public ownership. No state lieu or any other selection is denied solely for the reason that it contains a source of water unless the water is '*valuable or necessary*' for public use. State land units located in a compact body are not now and will not be denied the right to select land containing water supplies needed for proper use of such units.[400]

Following this policy, the DOI, upon the recommendation of the Division of Grazing, did have a number of public water reserve withdrawals revoked so that the lands could be transferred under Section 8 of the Taylor Grazing Act.[401]

It was not unusual to restore public water reserve withdrawals. The practice had originated early in public water reserve policy. It was often found that the lands withdrawn had been erroneously withdrawn, for no water source was found upon subsequent investigation of the tract or the water source had dried up.[402] Other lands were covered by land entries that had gone to patent,[403]

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[399] *Id*

[400] Memo. from Dir. of Grazing, to SOI (June 14, 1935) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-147, Grazing on Public Lands, Administrative, Pt. 2, RG 48, NACP).

[401] Letter from Acting Dir. of Grazing, to SOI (Oct. 18, 1938) (on file with Natl. Archives: DOI, CCF 1937–1953, File, 2-153, Withdrawals under Act of June 25, 1910, Ariz., Public Water Reserves, Withdrawals, Pt. 4, RG 48, NACP); Memo. from Acting Dir. of Grazing, to SOI (Oct. 21, 1940) (on file with Natl. Archives: DOI, CCF 1937–1953, File 2-153, Withdrawals under Act of June 25, 1910, General, Public Water Reserves, Restorations, Pt. 2, RG 48, NACP).

[402] Memo. from George Otis Smith, Dir., USGS, to Franklin K. Lane, SOI (May 29, 1915) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153, Withdrawals under Act June 25, 1910, Ariz., Public Water Reserves, Restorations, Pt. 1, RG 48, NACP); Letter from Dir., USGS, to Hubert Work, SOI (July 7, 1922) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153, Withdrawals under Act June 25, 1910, Cal., Public Water Reserves, Restorations, Pt. 1, RG 48, NACP); L. R. Brooks, *Minutes* (June 31, 1931) (on file with Natl. Archives: GLO, Records Relating to Withdrawals, Public Water Restorations, Restoration No. 70, RG 49, NA).

[403] Memo. from Acting Dir., USGS, to SOI (July 23, 1913) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153, Withdrawals under Act June 25, 1910, Wyo., Public Water Reserves, Withdrawals, Pt. 1, RG 48, NACP); Memo. from Dir. of Grazing, to SOI (January 22, 1938) (on file with Natl. Archives: DOI, CCF 1937–1953, File 2-153, Withdrawals under Act June 25, 1910, General, Public Water Reserves, Restorations, Pt. 2, RG 48, NACP).

the adjacent public range which the water served was largely settled,[404] or for other reasons.[405] To revoke a public water reserve withdrawal, an executive order restoring the land had to be signed by the president. This was even true for lands withdrawn by Public Water Reserve No. 107. The revocation of an interpretative order was insufficient to restore the land from withdrawal status. The interpretative order, as explained earlier, was no more than a finding of fact. If the tract was subject to Public Water Reserve No. 107, the revocation of an interpretative order could not change that fact. To restore the tract, an executive order had to be issued.[406]

While the Division of Grazing was willing to restore certain public water reserves to facilitate the consolidation of federal, state, and private lands, it was also intent on protecting government's interests in the public water reserves that remained withdrawn. In 1936 when ranchers and others attempted to appropriate water from lands withdrawn under Public Water Reserve No. 107 under state law, the DOI and Division of Grazing were adamant that the water on such land was "entitled to as much protection under the law as private lands of similar character."[407] Division of Grazing officials were instructed to protect the reserves by denying rights-of-way for purposes of diverting water and to protest applications to appropriate water where tracts were clearly subject to Public Water Reserve No. 107. No action, however, was to be taken in the federal courts unless a person took possession of the water source by trespass.[408]

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[404] Letter from Dir., USGS, to Franklin K. Lane, SOI (Aug. 15, 1918) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153, Withdrawals under Act June 25, 1910, Ariz., Public Water Reserves, Restorations, Pt. 1, RG 48, NACP); Letter from Dir., USGS, to Hubert Work, SOI (January 25, 1926) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153, Withdrawals under Act June 25, 1910, Wyo., Public Water Reserves, Restorations, Pt. 1, RG 48, NACP); R. E. Morgan, *Minutes*, (March 10, 1933) (on file with Natl. Archives: GLO, Records of Withdrawals, Public Water Restorations, Restoration No. 75, RG 49, NA).

[405] Letter from Dir., USGS, to Hubert Work, SOI (Sept. 26, 1925) (on file with Natl. Archives: DOI, CCF 1907–1036, File 2-153, Withdrawals under Act June 25, 1910, Wyo., Public Water Reserves, Restorations, Pt. 1, RG 48, NACP); Letter from Dir., USGS, to SOI (June 13, 1934) (on file with Natl. Archives: GLO Records of Withdrawals Public Water Restorations, Restoration No. 78, RG49, NA); Letter from Commr., GLO, to SOI (July 5, 1940) (on file with Natl. Archives: GLO, Records of Withdrawals, Public Water Restorations, Restoration No. 87, RG 49, NA).

[406] Letter from Commr., GLO, to SOI (June 19, 1934) (on file with Natl. Archives: DOI, CCF 1907–1936, File 2-153, Withdrawals under Act June 25, 1910, Mont., Public Water Reserves, Restorations, Pt. 2, RG 48, NACP); *Lee J. Esplin*, 56 Int. Dec. at 328; Letter from Under Sec., to Dir. of Grazing (Apr. 9, 1940) (on file with Natl. Archives: DOI, CCF 1937–1953, File 2-153, Withdrawals under Act June 25, 1910, General, Public Water Reserves, Withdrawals, Pt. 3, RG 48, NACP).

[407] Letter from Acting Dir. of Grazing, to Archie D. Ryan (Nov. 19, 1936) (on file with Natl. Archives: GS-CCC, Range Management Subject Files, 1930–1937, File-General, NA).

[408] Letter from Acting Sec., to Dir. of Grazing (Oct. 29, 1936) (on file with Natl. Archives: GS-CCC, Range Management Subject Files, 1930-1937, File—General, NA); Letter from Acting Dir. of Grazing, to Mr. G.M. Kerr (Nov. 3, 1936) (on file with Natl. Archives: GS-CCC, Range Management Subject Files, 1930-1937, File—General, NA); Letter from Acting Dir. of Grazing, to Chief of Range Operations, *Public Watering Places* (Nov. 6, 1936) (on file with Natl. Archives: GS-CCC, Range Management Subject Files, 1930–1937, File—General, NA); Letter from Acting Dir. of Grazing, to Archie D. Ryan (Nov. 19, 1936) (on file with Natl.

Protecting its interests in public water reserves did present the DOI with problems. By their nature these tracts were "public watering places." This was reiterated by the DOI's solicitor in 1935, when he noted that public lands withdrawn as public water reserves under Section 10 of the Stock Raising Homestead Act were "not subject to appropriation [under the water laws of the states], either by individuals or by any branch of the government, but 'shall, while so reserved, be kept and held open to the public for [watering] purposes.'"[409] As a consequence, no one could have exclusive use of the tract, and therefore, it could not be leased by anyone.[410] To include the land within a lease, a restoration had to be made of the public water reserve withdrawal,[411] but that was only done if the DOI felt it could be done "without injury to . . . public interests."[412]

As early as 1937, the Division of Grazing began to contend that public lands withdrawn as grazing districts reserved the water on those lands to the federal government. In a memorandum to Division of Grazing Director Farrington Carpenter, Deputy Director Archie Ryan argued that the Winters Doctrine (waters within Indian reservations were reserved for use of those reservations) applied to withdrawn public lands.[413] Not only was the water within tracts set aside by Public Water Reserve No. 107 reserved to the United States, but so was any water on public lands withdrawn as grazing districts.[414] The position was soon adopted, and it was further contended that it applied to the general withdrawals of public lands made by Executive Order No. 6910 and Executive Order No. 6964,[415] as well as the afforded "blanket protection of all public lands, including land containing springs and water holes." Therefore,

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Archives: GS-CCC, Range Management Subject Files, 1930–1937, File—General, NA).

[409] *Death Valley National Monument—Appropriation of Water*, 55 Int. Dec. at 373–74.

[410] Letter from Acting Chief, Field Operation, Div. of Grazing, to Roy Wood (June 21, 1935) (on file with Natl. Archives: GS-CCC, Range Management Subject Files, 1930–1937, Ariz., Range Management, General, RG 49, NA Denver DOI, CCF 1907–1936, File 10-6 Settlement Appeals, General, Pt. 1079, RG 48, NACP); Memo. from T.A. Walters, Acting SOI, to Congressman John Dempsey (Sept. 28, 1937) (on file with Natl. Archives: DOI, CCF 1937–1953, File 2-147, Grazing on Public Lands, N.M., Pt. 2, RG 48, NACP).

[411] Letter from Dep. Grazing Supervisor, Salt Lake City, Utah, to Dir. of Grazing (Dec. 3, 1935) (on file with Natl. Archives: GS-CCC, Range Files, L-Lands, Range Improvement—Water Development, RG 49, NA Denver); Memo. from Walters (Sept. 28, 1937), *supra* n. 410.

[412] Letter from Acting SOI, to Rhea Tillard, Pres., Thunder Basin Grazing Assn., Douglas, Wyo. (Mar. 27, 1940) (copy on file with Natl. Archives: DOI, CCF 1937–1953, File 2-207, Stock Driveways, Pt. 31, RG 48, NACP); Memo. from Walters (Sept. 28, 1937), *supra* n. 410.

[413] *Winters*, 207 U.S. 564.

[414] The question of whether water is reserved within grazing districts has been analyzed by Baldwin, *supra* n. 2, at 41–73.

[415] Exec. Or. 6910 (Cong. Info. Serv., Wash. D.C., Nov. 26, 1934); Exec. Or. 6964 (Cong. Info. Serv., Wash. D.C., Feb. 5, 1935); *Amendment of Executive Order No. 6910, of November 26, 1934, as Amended, Withdrawing Public Lands in Certain States*, 55 Int. Dec. 444 (Jan. 14, 1936); Muhn and Stuart, *supra* n. 23.

there was no longer any "administrative need for reserving land as public water reserves" with grazing districts.[416] With little need to locate springs and water holes under Public Water Reserve No. 107 within grazing districts, the DOI in 1941 transferred the responsibility for withdrawing public water reserves to the GLO.[417] The Grazing Service, however, retained jurisdiction over the public water reserves within grazing districts.[418]

Public Water Reserve No. 107 posed problems in regard to administration of the Section 15 grazing lands outside of grazing districts. Some ranchers wanted to secure grazing leases that embraced tracts withdrawn as public water reserves, but the GLO concluded that public water reserves could not be leased under Section 15.[419] The rationale being that "a watering place of public value within a grazing lease would prevent other parties from using the stock-watering place."[420] Public water reserves, therefore, were not properly subject to administration under Section 15 leases and the order of withdrawal had to be revoked to permit inclusion of the tract in such a grazing lease.[421]

Such thinking was reflective of the DOI's view of Section 15 leases. It was held that such a lease gave "the lessee the exclusive right and privilege of using the leased lands for grazing purposes. He may fence them and he should take such steps as may be necessary to protect them from grazing trespass."[422] Placing public water reserves, which were to be held open to use by the public, within Section 15 leases would, therefore, prevent public access and defeat one of the main purposes of public water reserves.[423]

Soon afterwards, under secretary A. J. Wirtz questioned the policy. In a recommendation by the Division of Grazing that an order of interpretation be

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[416] U.S. DOI, Grazing Service, Branch of Land Acquisition and Control, *Handbook* 67 (Mar. 1942) (on file with Natl. Archives: Grazing Service, Records of the Grazing Service, Central Files, 1934–1946, Box OP: L to MW General, RG 49, NA).

[417] Letter from E. K Burlew, First Asst. Sec., to Heads of All Bureaus, Divisions, and Agencies of the DOI (Mar.29, 1941) (on file with Natl. Archives: DOI, CCF 1937–1953, File 2-188, Streams, Springs and Water Holes, Pt. 3, RG 48, NACP); Letter from E. K. Burlew, First Asst. Sec., to Heads of All Bureaus, Divisions, and Agencies of the DOI (July 9, 1941) (on file with Natl. Archives: DOI, CCF 1937–1953, File 2-188, Streams, Springs and Water Holes, Pt. 3, RG 48, NACP); and Muhn, *supra* n. 262, at 2.

[418] U.S. DOI, Grazing Service, Branch of Land Acquisition and Control, *supra* n. 416.

[419] Memo. from Ward L. Hopper, to Mr. Falck (Jan. 4, 1939) (copy on file with Natl. Archives: GLO, Records Relating to Withdrawals, Restorations and Classifications of Public Lands, Records Relating to Public Water Restorations, 1914–1942, Folder, Public Water Restoration No. 82, RG 49, NA); Ward L. Hopper, *Minutes of Public Water Restoration No. 82* (Jan. 11, 1939) (copy on file with Natl. Archives: GLO, Records Relating to Withdrawals, Restorations and Classifications of Public Lands, Records Relating to Public Water Restorations, 1914–1942, Folder, Public Water Restoration No. 82, RG 49, NA).

[420] *Id.*

[421] *Id.*

[422] Letter from First Asst. Sec., to Martin Baskett, Casper, Wyo. (Mar. 4, 1937) (copy on file with Natl. Archives: DOI, CCF 1937–1953, 2-147, Grazing on Public Lands, Administrative, Pt. 9, RG 48, NACP).

[423] Memo. from Ward L. Hopper (Jan. 4, 1939), *supra* n. 419.

issued declaring a spring previously identified as being subject to Public Water Reserve No. 107, the under secretary first pointed out that the revocation of an order of interpretation "in no way affects the actual status of land. If the land contains a spring or water hole of the type contemplated by the executive order, then the land is withdrawn, regardless of the interpretation that the department may place on the order as to the land."[424] If a spring was, therefore, of the character contemplated by Public Water Reserve No. 107, an order of interpretation to the contrary was of no effect. An executive order revoking the withdrawal was the only action that would except the watering place from Public Water Reserve No. 107, for the DOI itself was without authority to eliminate land from a withdrawal created by presidential order.[425]

Furthermore, wrote the under secretary, revocation of the public water reserve withdrawal in question "may defeat its own purpose."[426] Once a tract was restored, it became subject to selection for exchange by the state under Section 8 of the Taylor Grazing Act. The state could then transfer its title to someone other than the person with the Section 15 grazing lease. Such action, therefore, had to be carefully considered.[427]

After 1940 it appears that public water reserves were restored for the purpose of inclusion in Section 15 leases only when it was determined that the water sources were not useful as stock watering places.[428] In 1944, however, the DOI, through the GLO, provided that public water reserves could be leased or used until such time as they were needed as public watering places.[429] The rule was adopted under the authority granted to the SOI to make all needful rules and regulations for implementation of the Stock Raising Homestead Act of 1916.[430] In 1948, this provision was also incorporated in the new regulations for Section 15 leases.[431]

Despite such changes in the regulations, it appears that the Grazing Service took the position that there was "no administrative need for reserving

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[424] Letter from A.J. Wirtz, Under SOI, to Dir. of Grazing 1, 2 (Apr. 9, 1940) (copy on file with Natl. Archives: DOI, CCF 1937–1953, File 2-153, Withdrawals under Act June 25, 1910, General, Public Water Reserves, Withdrawals, Pt. 3, RG 48, NACP).

[425] *Id.*

[426] *Id.*

[427] *Id.*

[428] Letter from Commr., GLO, to SOI (Aug. 1, 1944) (copy on file with Natl. Archives: DOI, CCF 1937–1953, File 2-153, Withdrawals under Act June 25, 1910, Or., Public Water Reserves, Restorations, Pt. 2, RG 48, NACP).

[429] Letter from First Asst. Sec., to Commr., GLO (Sept. 14, 1936) (copy on file with Natl. Archives: DOI, CCF 1937–1953, File 2-147, Grazing on Public Lands, Administrative, Pt. 7, RG 48, NACP).

[430] 9 Fed. Reg. 9793 (Aug. 11, 1944); *see also* 10 Fed. Reg. 3135 (Mar. 24, 1945).

[431] 13 Fed. Reg. 6660, 6660–6661 (Nov. 4, 1948); 43 C.F.R. § 295.7(c) (revised in 1970, 43 C.F.R. § 2013.2–6(c) (1970)).

land as public water reserves."[432] This position was apparently adopted by BLM, which was created in 1946 by the merger of the Grazing Service and GLO. From 1940 to 1975 fewer than 5,000 acres were withdrawn from the BLM as public water reserves.[433] In fact, there seems to have been a conscious effort to restore public land reserves, for during the same period about 137,000 acres were released from withdrawal.[434]

It was not until the 1980s that public water reserves took on renewed importance. One reason was the abandonment of the position that waters on public lands within grazing districts were protected. In 1979, the solicitor for the DOI, Leo Krulitz, issued an opinion in which he stated "the Taylor Grazing Act did not reserve any land from the public domain, but rather authorized the Secretary to manage the public lands for grazing . . . . Therefore, no reserved water rights were created by the Act."[435]

This opinion made Public Water Reserve No. 107 important again, for through it the BLM could reserve and protect federal water rights on the public lands. The importance of the measure became obvious in cases like Idaho's Snake River Basin adjudication, where 11,000 water right claims filed by the BLM relied upon Public Water Reserve No. 107.[436] However, despite the importance of public water reserves to the federal government, the BLM no longer has a section in its manual devoted to public water reserves.[437]

VII. PUBLIC WATER RESERVES AND THE RESERVED WATER RIGHTS DOCTRINE

Another problem the DOI faced was the attempt by private parties to appropriate the water within public water reserves. "The question of the control of water necessary for stock watering purposes in all the western public land states," wrote the deputy director of the Division of Grazing in July 1937, "is a question that is becoming more important all the time, and is one that vitally affects the administration of our grazing districts."[438] There were many

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[432] U.S. DOI Grazing Service, Branch of Land Acquisition and Control, *supra* n. 416.

[433] Table, *see* appendix.

[434] *Id.*

[435] *Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management*, 86 Int. Dec. 553, 592 (June 25, 1979).

[436] *U.S. v. State of Idaho*, 959 P.2d 449 (Idaho 1998), *cert. denied, Idaho v. U.S.*, 526 U.S. 1012 (1999).

[437] Public water reserves are briefly referenced in the BLM's Manual section relating to water rights, but the section on public water reserves last issued in 1974 was removed from the manual in 1984 has part of agency's "effort to revise and streamline the directives system." DOI, BLM, *BLM Manual*, § 7250.03.A.3, § 7250.12.A.2 (1984); Manual Transmittal Sheet, 2-192 (May 18, 1984).

[438] Memo. from Dep. Dir., Div. of Grazing, to Dir. of Grazing (July 27, 1937) (copy on file with Natl.

controversies involving the control of water. The deputy director believed that any spring or stream that surfaced and sank entirely on public lands was appurtenant to the land and not subject to appropriation under state law. He cited a number of court cases to support his contention and recommended that the DOI institute suit against a western state so the question could be finally determined.[439]

Public water reserves were at the heart of this question. The deputy director made this clear in an August 4, 1937 memorandum to the director of grazing.[440] The deputy director cited the situation surrounding W.W. Wilkey of Arizona. Wilkey applied for a grazing license within the grazing district. He used a spring on public land as commensurate property. The spring had been used by a number of stockraisers. Wilkey tried to secure control of the water sources by filing a mining claim, and then in 1927, a water right. The Division of Grazing, however, held that the spring was subject to Public Water Reserve No. 107. Wilkey, therefore, did not have an exclusive claim or right to the water and could not use the water as commensurate property.[441]

The spring in controversy was "similar to hundreds of others throughout the western range states."[442] Its entire flow was restricted to public lands and it had been used as a public watering place by ranchers for several decades. The deputy director noted that since the United States had the power to reserve and withdraw public lands, by the "same theory it should follow that [the federal government] has the right to reserve its waters and exempt them from appropriation under State law."[443] The doctrine announced by the United States Supreme Court in *Winters*, as well in cases like *Schmutz*, led the deputy director to contend that:

> [W]ater that rises and sinks wholly upon the land reserved and withdrawn from entry, [] should . . . have the same standing that the same class of springs would have on privately owned land, and that the waters of springs of this kind are not open to appropriation . . . . [T]hat on land withdrawn for stock watering purposes, it certainly was the intent to also withdraw the water [for] the land surrounding the waters

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Archives: DOI, CCF 1937–1953, File 2-147, Grazing on Public Lands, Administrative, Pt. 9, RG 48, NACP).

[439] *Id.*

[440] Letter from Dep. Dir. of Grazing, to Mr. Carpenter (Aug. 4, 1937) (copy on file with Natl. Archives: GS-CCC, Range Files, Legislation, Departmental and General, RG 49, NA Denver).

[441] *Id.*

[442] *Id.* at 3.

[443] *Id.*

> would certainly be of absolutely no use in a withdrawal if the water was not first made available for public purposes.[444]

He then argued that Public Water Reserve No. 107 was strengthened by the withdrawal of all public lands within grazing districts under the Taylor Grazing Act, "making a further bar toward [any] State asserting jurisdiction over waters and water holes already located on public land or water holes or wells developed on public domain within the boundaries of grazing districts."[445]

The DOI was not so anxious to institute the suit Deputy Director Ryan advocated. Talk of the United States instituting a suit to clarify water rights questions had already evoked some protest in the West. Apparently, the DOI did not want a confrontation with western states, and so, DOI officials told parties interested in the issue that they had not had time to study the matter. By 1940, the subject appears to have been forgotten altogether.[446]

The DOI's reluctance is not difficult to understand. Declaring that creation of a public water reserve withdrew not only the land but the water on a tract of public land would have been a bold step; one that the DOI had been unwilling to take for a long time.

In 1903, when making withdrawals under the provisions of the Reclamation Act of 1902, the USGS argued that water could be withdrawn along with public lands. The crux of the USGS's argument was:

> [T]hat whatever recognition and assent may have heretofore been given to the appropriation of the waters on the public lands, the United States may at any time resume the control of all unappropriated waters on such lands, and that 'as the Secretary of the Interior has full power to withdraw from entry any unappropriated lands which, in his opinion, may be necessary for public uses, there appears to be no reason why the Secretary may not, at the same time, withdraw both the land and the water from further appropriation, when the same are required for public uses.[447]

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[444] *Id.* at 7, 10.

[445] *Id.* at 10.

[446] Letter from Acting SOI, to Congressman J. G. Scrugham, (November 27,1937) (on file with Natl. Archives: DOI, CCF 1937–1953, File 1-188, Streams, Springs and Water Holes, General, Pt. 3, RG 48, NACP); Letter from Acting SOI, to Dir. of Grazing (June 8, 1939) (on file with Natl. Archives: DOI, CCF 1937–1953, File 1-188, Streams, Springs and Water Holes, General, Pt. 3, RG 48, NACP); Letter from Acting SOI, to Congressman J.G. Scrugham (June 8, 1939) (on file with Natl. Archives: DOI, CCF 1937–1953, File 1-188, Streams, Springs and Water Holes, General, Pt. 3, RG 48, NACP); Letter from Acting SOI, to Sen. Hayden (June 8, 1939) (on file with Natl. Archives: DOI, CCF 1937–1953, File 1-188, Streams, Springs and Water Holes, General, Pt. 3, RG 48, NACP).

[447] *Withdrawal of Public Lands for Irrigation Purposes—Act of June 17, 1902: Opinion*, 32 Land Dec. 254, 257 (U.S. Govt. Printing Off. 1904).

The Assistant Attorney General for the DOI did not concur in this rationale. He pointed out the executive department had no "such power or authority" to limit or suspend those laws that recognized and assented to the appropriation of waters upon public lands by the states and territories.[448] It was that thinking which apparently made DOI officials cautious in stating the effect public water reserves had on the status of the water located within the withdrawals. Even after the United States Supreme Court accepted the idea of reserved water rights for Indian reservations in *Winters*, the DOI was reluctant to apply the legal theory to withdrawn public lands.

While the justifications written by the USGS for the first public water reserves made in 1912 read that the withdrawals would preserve "the right to the use of the water,"[449] it is apparent that the statement was not meant to say that the DOI was also reserving the water. This contention is supported by the Director of the USGS, who noted in 1913 that "the effect of withdrawals of this character is to prevent alienation of the lands."[450] That was done so "use of the watering places by all is meantime possible under such conditions that no user can acquire the right of permanent exclusive occupation."[451]

In that same year, SOI Franklin Lane adopted that position when responding to a complaint by the state of Utah that public water reserves "encroach[ed] upon the laws enacted by the state for the [appropriation] and beneficial use of its public waters."[452] Lane contended that public water reserves did "nothing more than withdraw from all forms of disposition the lands containing and surrounding the watering places."[453] The SOI stated 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."[454]

In 1914, O.W. Lange, with the Assistant Attorney General's Office, wrote a memorandum about the legality of the public water reserves.[455] In the course of his discussion, Lange remarked that he was of the "opinion that a

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[448] *Id.* at 258.

[449] Letter from Smith (March 29, 1912), *supra* n. 98; Letter from Dir., USGS, to SOI (April 9, 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); Letter from Dir., USGS, to SOI (April 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).

[450] Smith, *supra* n. 81.

[451] *Id.*

[452] Letter from Lane (Apr. 12, 1913), *supra* n. 160, at 1, 4–5.

[453] *Id.* at 5

[454] *Id.*

[455] Letter from Lange (Dec. 26, 1914), *supra* n. 171.

withdrawal of lands containing springs in a grazing community to prevent the 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."[456] Lange's thinking that a public water reserve withdrawal reserved water as well as land, however, was not adopted by the DOI. In the DOI decision of *State of Utah*, rendered in 1916, it was stated that there was nothing in the withdrawal of public water reserves that prevented anyone from filing for the appropriation of the water found on the tract.[457] However, such a claimant could not prevent free access to the land withdrawn and no diversion of the water could be made without the consent of the DOI.[458]

Passage of the Stock Raising Homestead Act did not change the DOI's legal interpretation. When the GLO issued instructions in 1925 for the use and diversion of water within public water reserves, there was no assertion of federal title to or ownership of the water. On the contrary, the regulations required holders of a permit to obtain a certificate from the state as to their "right to appropriate the waters of the State."[459]

The DOJ did attempt to extend the reserved water rights doctrine to public water reserves when it argued the United States' position in the 1931 *Schmutz* case. The U.S. Attorney for Utah, in a brief submitted to the court, contended that as the United States had "the right to reserve its land from entry and sale, it also [had] the right to reserve the waters and exempt them from appropriation under state laws."[460] The court, however, sidestepped the idea and simply held the Schmutz brothers' attempt to divert water from a public water reserve as a trespass.[461]

For many years the DOI would follow the principle of *Schmutz*. As long as it denied third parties permission to enter upon public water reserves for the purpose of diverting the water to a place outside the withdrawal, they could prevent the appropriation of the waters with the public water reserves under state law.[462] It would not be until 1947 that the DOI would finally assert a reserved

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[456] *Id.* at 7

[457] *State of Utah*, 45 Land Dec. at 554.

[458] *Id.*

[459] *Use of Lands Withdrawn as Public Water Reserves: Regulations*, 51 Land. Dec. at 187.

[460] Brief of Complaint at 10, *Schmutz*, 56 F.2d 269 (on file with Natl. Archives: GLO, 1910 Misc. LR, File 1260243, RG 49, NA).

[461] *Schmutz*, 56 F.2d at 269.

[462] *Death Valley National Monument—Appropriation of Water*, 55 Int. Dec. at 372–73; Letter from Acting SOI, to Dir. of Grazing (Oct. 29, 1936) (copy on file with Natl. Archives: GS-CCC, Range Mgt. Subject Files, 1930–1937, File - General, NA); Letter from Acting Dir. of Grazing, to Mr. G. M. Kerr (Nov. 3, 1936) (copy on file with Natl. Archives: GS-CCC, Range Mgt. Subject Files, 1930–1937, File - General, NA); Letter from Acting Dir. of Grazing, to Chief of Range Operations, *Public Watering Places* (Nov. 6, 1936) (copy on file with Natl. Archives: GS-CCC, Range Mgt. Subject Files, 1930–1937, File-General, NA); Letter from Acting

water right for public water reserves. In the matter of *Jack A. Medd*,[463] Solicitor Mastin G. White held the legislative history for Section 10 of the Stock Raising Homestead Act of 1916 clearly showed that Congress "intended to authorize the reservation of waters as well as terra firma."[464] Furthermore, the DOI in this decision rejected any consideration that neither Congress nor the president could reserve unappropriated non-navigable water on the public domain.

The solicitor adopted the opinion taken by the United States Supreme Court in its 1945 decision *Nebraska v. Wyoming*,[465] on this point. In that case, the United Sates argued that in its acquisition of the public domain from France and Spain, it became owner of all the rights in the lands it obtained. This included all streams, lakes, and other water sources.[466] Congress, by various acts, allowed private entities to acquire the right, under local customs and law, to appropriate unappropriated non-navigable water on the public lands. Congress, however, had never made a general grant of such waters to the states, and therefore, the United States retained title to all the unappropriated non-navigable water on the public domain.[467]

In 1950, the solicitor, in an opinion regarding DOI compliance with state water laws, reiterated the position taken in *Jack A. Medd*. The United States was the owner of the unappropriated non-navigable waters on the public domain. It, therefore, had the right, which was also given by the Stock Rasing Homestead Act of 1916, to withdraw that water from private appropriation.[468]

It would take some time before the courts would also recognize the basic position of the DOI. Not until 1963, with the case of *Arizona v. California*,[469] did the United States Supreme Court unequivocally establish that a federal reserve water right could exist on withdrawn public lands.[470] The ruling held that, by implication, the reservation of public lands included water in the amount needed to realize the purpose of withdrawal and the courts would find a reservation of water if its absence would defeat the purpose of the withdrawal.[471] Since *Arizona*

Dir. of Grazing, to Archie D. Ryan (Nov. 19, 1936) (copy on file with Natl. Archives: GS-CCC, Range Mgt. Subject Files, 1930–1937, File-General, NA).

[463] *Jack A. Medd*, 60 Int. Dec. at 83.

[464] *Id.* at 99.

[465] 325 U.S. 589 (1945).

[466] *Id.* at 611.

[467] *Id.* at 612–16. In *Jack A. Medd*, the Sol. did not elaborate on what he felt the Supreme Court had held on this point in *Nebraska v. Wyoming*. He did do this in an opinion he rendered three years later. *Jack A. Medd*, 60 Int. Dec. at 100; Memo. from Sol., to Dir., BLM., *Compliance by the Department with State Laws Concerning Water Rights* (Nov. 7, 1950) (copy on file with Natl. Archives: M-33969, November 7, 1950, DOI, CCF 1937–1953, File, 2-188, Streams, Springs and Water Holes, Pt. 3, RG 48, NACP).

[468] Memo. from Sol. (Nov. 7, 1950), *supra* n. 467, at 9.

[469] 373 U.S. 546, 598 (1963).

[470] *Id.* at 600–01.

[471] Angela A. Liston, *Reevaluating the Applicability of the Reservation Doctrine to Public Water*

v. California, state courts have been willing to concede the United States has a reserved right to waters in tracts withdrawn under Public Water Reserve No. 107. In 1982, the Supreme Court of Colorado found that reserved rights to the waters of springs and water holes had been withdrawn by the 1926 blanket withdrawal.[472] More recently, the Supreme Court of Idaho in 1998 held that Public Water Reserve No. 107 gave the United States a reserved water right that no subsequent legislation has abridged.[473]

VIII. CONCLUSION

The history of public water reserves is reflective of public rangeland policy in the late nineteenth and early twentieth centuries. While part of the rationale for the establishment of the first reserves was in aid of legislation that would have regulated use of the public domain, the main purpose of the reserves was to prevent monopolization of the public range. This policy had been pursued by Congress, the courts, and the DOI since the early 1880s. Beginning with efforts to prevent illegal fencing of the public lands and fraudulent land entries, federal policy sought to maintain the status quo of free and open grazing, as well as encouraging settlement. Like the Stock Watering Reservoir Act of 1897, public water reserves helped further this status quo policy by preventing the monopolization of scarce water sources, and thereby the adjacent public range, by ensuring that those water sources would remain accessible to everyone. But by maintaining the status quo, public water reserves also allowed for the continued crowding of livestock onto public lands, and thereby exacerbated the deterioration of those rangelands through overgrazing.

Congressional recognition and sanction of public water reserve policy came with enactment of the Stock Raising Homestead Act of 1916, but the law did not change the primary purpose of the withdrawals. Interior Department officials continued to withdraw public water reserves to prevent monopolization of the public range and to assist homesteading. As a consequence, the reserves continued to do nothing to improve public range conditions resulting from overgrazing.

Not all public water reserve withdrawals were for stockraising purposes. Some withdrawals were made to protect drinking water for settlers and communities and for other purposes. These other reasons were not, however, as broad as DOI solicitor Leo Krulitz contended in a 1979 opinion. Krulitz correctly

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Reserve No. 107, 22 Pub. Land & Resources L. Dig. 113, 115–16 (1985).

[472] *U.S. v. City and County of Denver*, 656 P.2d 1, 31–32 (Colo. 1982).

[473] *Idaho*, 959 P.2d 449.

pointed out that the reserves were obviously set aside for purposes of "stockwatering and human consumption."[474] He also was of the opinion that other purposes included "water for growing crops and sustaining fish and wildlife" and to provide water for "flood, soil, fire and erosion control," contending that such control "was essential to protect the public and to allow new patentees and settlers on the public domain to make a viable living in this arid and semi-arid region of the Nation."[475]

Historical evidence fails to support Krulitz's contentions.[476] While it is true that many public water reserves were made to assist settlers, this was to provide them with water for domestic uses. Soon after the first public water reserves were set aside in 1912, the DOI took the position that lands that had agricultural value were not to be withdrawn. Furthermore, if water from public water reserves was to be for "watering crops," that implies diversion of water for irrigation. One of the intents of making the withdrawals was to prevent appropriation of water through diversion. It is known that in one case a withdrawal was made in conjunction with a federal reclamation project for associated works, but in a case where a private individual wished to divert water from a public water reserve, the DOI rejected the request. Even the exception made by the regulations governing Public Water Reserve No. 107 that eliminated springs and water holes which provided enough water for a family and its livestock undoubtedly meant water for human and animal consumption, and did not include the watering of crops.

Nor were any public water reserves set aside for wildlife purposes. In fact, when asked to cooperate in the improvement of springs on the public lands for wildlife purposes, the GLO contended it had no such authority and that any improvement had to be for stock watering purposes.[477] Since public water reserves were not developed prior to 1934, assuming they were set aside for flood control purposes is suspect. Considering the nature and extent of range fires, as well as the fire fighting techniques employed, the usefulness of the withdrawals for fire fighting purposes was minimal at best, and was never

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[474] *Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management*, 86 Int. Dec. 553, 581–82 (U.S. Govt. Printing Off. 1980).

[475] *Id.*

[476] Krulitz made another error in his analysis. He contends that the withdrawals, made separate and apart from Public Water Reserve No. 107, are of the same character. *See* Muhn, *supra* n. 11, at 580. As this study shows, the rationale and reasons for withdrawals made prior to April 17, 1926 and Public Water Reserve No. 107, were very different.

[477] Memo. from Chief, Range Dev. Serv., GLO, to Gordon H. True, Jr., Div. of Fish & Game, St. of Cal. (June 22, 1940) (on file with Natl. Archives: Records of the Range Dev. Serv., File—Misc. Correspondence, RG 49, NACP).

referenced by DOI officials as a reason for setting aside reserves.[478] Also, the very nature of public water reserves prior to enactment of the Taylor Grazing Act in 1934 left them open and free to all users. This resulted in serious erosion problems around some public water reserves.

The principal purpose of public water reserves, unless otherwise specified in the order making the withdrawal, was the protection of watering places for livestock. This point was made by First Assistant Secretary Edward Finney in 1927 in a memorandum to SOI Work. Finney, who probably understood public water reserve policy better than any individual in the DOI, noted that the basic authority for making public water reserves was Section 10 of the Stock Raising Homestead Act of 1916, and the wording seemed "to indicate that the primary, if not only, purpose [of public water reserves] was to provide watering places for livestock."[479]

The promulgation of Public Water Reserve No. 107 on April 17, 1926 significantly changed public water reserve policy. This blanket withdrawal transformed the policy from one of maintaining the status quo to a conservation measure intent on preserving water sources on the public range to aid the implementation of a regulated public land grazing policy.

Congress, however, failed to enact a regulated grazing policy until the Taylor Grazing Act in 1934. But rather than aiding implementation of the new national grazing law, public water reserves became an impediment. The DOI took the position that the water within public water reserves could not be appropriated by either private or federal parties. The reserves, by the wording of the Stock Raising Homestead Act and their withdrawal orders, had to be held open to public use. This prevented officials from including public water reserves within allotments or leases unless they revoked the withdrawals.

While the DOI would devise regulations that would overcome this problem in 1944, the frustrations resulting from the withdrawal of public water reserves would lead the Grazing Service, the agency administering grazing districts created under the Taylor Grazing Act, to severely curtail the setting aside of public water reserves. In doing so, however, the DOI was of the opinion that the inclusion of water sources within grazing districts, as well as the general withdrawals of public lands made by Executive Order No. 6910 and Executive

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[478] Stephen J. Pyne, *Fire in America: A Cultural History of Wildland and Rural Fire* 1, 91 (Princeton U. Press 1982).

[479] Letter from E.C. Finney, Asst. SOI, to SOI (Jan. 29, 1927) (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).

Order No. 6964, "afford[ed] blanket protection of all public land[s], including land containing springs or water holes."[480]

This change in policy had a profound effect on the administration of water sources on the public lands. From 1942 to 1975 only about 2,500 acres were withdrawn as public water reserves, while 135,000 acres were restored.[481] These figures clearly indicate a failure to properly identify and withdraw water sources affected by Public Water Reserve No. 107.[482]

Not until the DOI's solicitor in 1979 held that grazing districts were not withdrawals by which the federal government could claim reserved water rights did public water reserves assume the importance they had held prior to the passage of the Taylor Grazing Act. But while their importance has risen, the DOI and BLM failed to develop a comprehensive policy toward public water reserves.

There is little question that public water reserves, particularly Public Water Reserve No. 107, will be the subject of increasing litigation. There are many questions to still be resolved by the courts regarding the intent and purpose of these withdrawals and extent of federal reserved water rights in them.

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[480] U.S. DOI, Grazing Service, Branch of Land Acquisition and Control, *supra* n. 416.

[481] Table, *see* appendix.

[482] In 1956, the BLM noted that it was impossible to determine the exact number of acres withdrawn as public water reserves under Public Water Reserve No. 107 because "no effort" had been made to identify all the water sources affected by the executive order withdrawal "on the records of the Land Offices." DOI, BLM, *The Fundamental Authorities for Federal Land Ownership and Management—1956*, at 28 (DOI, BLM, 1956).

APPENDIX

PUBLIC WATER RESERVE ACREAGE WITHDRAWN AND RESTORED FISCAL YEARS 1912–1975[1]

FISCAL YEAR	ACREAGE WITHDRAWN	ACREAGE RESTORED	TOTAL ACRES WITHDRAWN AT FISCAL YEAR'S END
1912	86,122	0	86,122
1913	4,454	0	90,576
1914	74,814	1,628	163,762
1915	19,257	366	182,653
1916	11,327	708	193,272
1917	11,934	3,498	201,708
1918	4,128	1,830	204,006
1919	22,422	975	225,471
1920	14,367	85	239,753
1921	6,835	2,566	244,022
1922	13,827	3,210	254,639
1923	4,775	5,214	254,200
1924	107,205	6,783	354,622

[1] Acreage figures taken from annual reports of the USGS for fiscal years 1912–1916. For the years from 1917–1932, acreage figures are taken from annual reports of the GLO. Unpublished statistical reports for the GLO were then used for the years 1933–1946. The statistical appendix was used for the years 1947–1961, and then *Public Land Statistics* for the years 1962–1975. After 1976, BLM does not identify the authority for the acreage withdrawn or restored. Fiscal years for the period reported ran from July 1 to June 30. The total acreage withdrawn was calculated by the author.

1925	3,035	960	356,697
1926	5,850	3,591	358,956
1927	4,275	1,360	361,871
1928	31,153	798	392,226
1929	13,440	1,085	404,581
1930	16,513	2,405	418,689
1931	10,480	2,045	427,124
1932	9,855	400	436,579
1933	37,784	3,612	470,751
1934	11,027	1,720	480,058
1935	12,460	320	492,198
1936	2,180	0	494,378
1937	1,335	280	495,433
1938	1,600	570	496,463
1939	4,200	1,615	499,048
1940	1,920	240	500,728
1941	6,915	920	506,723
1942	1,240	160	507,803
1943	436	19,781	487,458
1944	0	0	487,458
1945	0	40	487,418
1946	360	0	487,778
1947	0	80	487,698
1948	0	320	487,378

1949	0	120	487,258
1950	335	0	487,593
1951	0	600	487,173
1952	86	457	486,802
1953	0	0	486,802
1954	40	800	486,042
1955	0	8,786	477,256
1956	0	45,117	432,139
1957	0	760	431,379
1958	0	699	430,680
1959	300	1,440	429,540
1960	0	1,754	427,786
1961	0	40	427,746
1962	0	520	427,226
1963	0	25,409	401,817
1964	0	1,533	400,284
1965	0	2,150	398,134
1966	0	668	397,466
1967	0	3,402	394,064
1968	0	1,481	392,583
1969	0	5,418	387,165
1970	0	931	386,234
1971	0	1,363	384,871
1972	0	2,512	382,359
1973	0	0	382,359

1974	0	9,377	372,982
1975	0	1,074	371,908