California Law Review

Volume 3 | Issue 4 Article 1

May 1915

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Wm. E. Colby

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Recommended Citation

Wm. E. Colby, *New Public Land Policy with Special Reference to Oil Lands*, 3 Calif. L. Rev. 269 (1915).

Link to publisher version (DOI)
https://doi.org/10.15779/Z380V45

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California Law Review

Volume III. MAY, 1915 Number 4

The New Public Land Policy with Special Reference to Oil Lands

THE sentiment of the people of the United States, as reflected by the attitude of the President, of Congress and of the Supreme Court of the United States with regard to the disposal of certain of the lands of the public domain has in the past few years undergone a vital and radical change. This recent change is the outcome of a marked conflict of opinion as to the appropriate manner of disposing of the remainder of the public domain.[1]

The public lands acquired by the federal government during the past century by cession, purchase and conquest have amounted to over one and a half billion acres. This immense empire was, when acquired, an almost totally undeveloped wilderness and in order to encourage and foster its settlement and development, the government held out great inducements, not only to its own citizens, but to the citizens of other countries who were willing to transfer their allegiance and become pioneers. Agricultural lands were given away to those who became actual settlers and lands valuable for other purposes were sold at nominal prices. Mineral lands were "declared to be free and open to exploration and purchase."[2] This lavish policy, coupled

[1] This new policy does not materially affect the disposition of lands which are purely agricultural in character and which will continue to be disposed of in accordance with the provisions of the various existing acts of congress providing for such disposal. As George Otis Smith said before the Public Lands Committee of the senate at a hearing on the Oil Lands Leasing Bill, "in the case of agricultural lands there is the home on the land idea, which puts them in a class by themselves". Neither is there any pronounced attempt at present to materially change the policy of disposing of metalliferous lands.

[2] § 2319 U. S. Rev. Stats.

with the wonderful discoveries in these lands of wealth of mine, forest, water and water power available to all comers, has resulted in the disposition by the federal government and the passing into private ownership of by far the more fertile and valuable half of this vast acreage.

Awakened by this rapid shrinkage of the public domain and the realization that if prompt action were not taken all of the valuable public lands would pass into private ownership, certain leaders in the creation of public opinion started a new trend of thought, having for its basis certain fundamental ideas.[3] These were, briefly, the belief that the liberal policy of the government in holding out inducements to prospectors and pioneers had, in the main, accomplished its purpose, and in many instances the disposal of natural resources had far over-reached the point where the greatest public good would be subserved by a continuation of that policy; that there were certain of these resources so intimately associated with the future welfare of the nation that it was for the best interests of the public at large that these resources, viz: timber, coal, petroleum, water power, phosphates, potash, etc. should be retained in public ownership since their use could thus be best conserved and

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[3] Apropos of this subject, Secretary of the Interior, Franklin K. Lane has the following to say:

"... there exists a feeling in the West that its affairs and needs have not been given that consideration at the hands of the National Government which they merit..... they are unable to understand why ways have not been found by which the great bodies of coal and oil lands, of phosphate and potash lands, may be developed, and waters of the mountains made available for the generation of power and the redemption of the desert. There is one very simple explanation for the existence of this feeling. We have adventured upon a new policy of administering our affairs and have not developed adequate machinery. We have called a halt on methods of spoliation which existed, to the great benefit of many, but we have failed to substitute methods, sane, healthful, and progressive, by which the normal enterprise of an ambitious people can make full use of their own resources. We abruptly closed opportunities to the monopolist, but did not open them to the developer..... we had put into force a new land policy, which caused dismay and discontent..... Congress has always been most generous as to the disposition of the national lands. .... out of the abuse of the Nation's generosity there came a reaction against a policy that was so liberal as to be dangerous. .... So there has slowly evolved in the public mind the conception of a new policy—that land should be used for that purpose to which it is best fitted, and it should be disposed of by the Government with respect to that use. To this policy I believe the West is now reconciled....." Annual Report of the Secretary of Interior (1913), pp. 1-3.

controlled; and that there was also imminent danger that they might be monopolized to the detriment of the public.[4] The idea of a public revenue to be derived from the leasing and sale of these resources has also come into prominence. This is the modern idea of conservation of natural resources.[5]

One of the first of these resources to be conserved, as having a most vital effect upon the future welfare of the nation, were the forests. The assurance of a conserved supply of lumber and the regulation of stream flow and its natural benefit to the navigability of such streams were the controlling inducements which have resulted in the withdrawal from disposal and permanent reservation of millions of acres of timbered lands now embraced within the "national forests" in the western states.[6]

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[4] "The objects to be sought by amendment of the public land laws are, first, purposeful and economical development of resources for which there is present demand, with retention of such control as may insure against unnecessary waste or excessive charges to the consumer, and, second, the reservation of title in the people of all resources the utilization of which is conjectural or the need of which is not immediate." Geo. Otis Smith, Annual Report of the Director of the U. S. Geological Survey, (1911), p. 9. These annual reports, 1908 to date, contain much interesting information and forecast the change in public land policy.

[5] Of course, conservation in its broadest sense embraces a far greater field and is applicable to the use of private as well as of public resources. Conservation in this modern sense has been defined to be "the utilization of lands for their greatest value". The Classification of the Public Lands, by George Otis Smith, et al., Bulletin 537 U. S. Geological Survey, p. 1. Another definition, credited to Dr. C. W. Hayes, chief geologist of the U. S. Geological Survey, is "the utilization of natural resources with a maximum efficiency and a minimum of waste". Professor Van Hise has defined conservation of natural resources to mean "that they should remain as nearly undiminished as possible in order that this heritage of natural wealth may pass in full measure to succeeding generations". The Conservation of Natural Resources in the United States, by Chas. R. Van Hise (1910).

A more comprehensive definition, with special reference to public lands, is the following: "National conservation. . . . . is a policy of primarily placing the remnant of the public domain, other than that portion of it which is essentially agricultural in character, in a state of reservation and subsequently dealing with it or its natural resources in such a manner as will economically yield the best results to all the people. Its principal aim is to obtain a maximum economic production at a minimum of waste; to prevent individuals or aggregations of individuals from securing monopolies; and to exact some equivalent for the privileges granted". Lindley on Mines, 3d ed., § 200. Anyone interested in the subject will find an excellent presentation of "Conservation Measures and their Effect on the Mining Industry" in §§ 200-200c of this work.

[6] Acts of March 3, 1891, 26 Stats. at L. 1103; June 4, 1897, 30 Stats. at L. 1103; Feb. 1, 1905, 33 Stats. at L. 628; Mar. 4, 1907, 34 Stats. at L. 1256; etc.

Public sentiment rapidly crystallized so that coal lands were next deemed of such far reaching value to the public that their conservation by retention of federal control was urged upon congress[7] and in rapid succession followed similar proposals as to lands valuable for water power control[8], asphalt, petroleum oil and gas, nitrates, phosphates and potash.[9] Congress has either already enacted legislation providing for the federal control of lands of this character or is expected to act shortly on these subjects. The federal reclamation and irrigation of arid lands in the West is also a part of this modern conservation movement.[10]

This comparatively sudden reversal of policy on the part of the federal government and the termination of the opportunity for private interests to acquire these valuable lands very naturally met with determined opposition. The constitutionality of these conservation measures adopted by congress and the action of the President in anticipating such legislative action by withdrawing from private entry the lands in question pending the enactment of the desired statutes, has been seriously questioned on every conceivable ground.

Of greatest immediate interest to California, as far as the operation of the new public land policy is concerned, has been the withdrawal of oil lands situated on the public domain within the state. The California deposits of mineral oil are among the most extensive and important deposits in the world and the manner in which the federal government will administer these withdrawn lands and provide for the extraction and disposition

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[7] Until July, 1906, the government had followed the policy of disposing of coal lands at the minimum prices prescribed in the statutes, U. S. Rev. Stats. § 2347. Thereafter it classified these lands, and has disposed of them at appraised values, in many cases far in excess of the statutory minimum. The Public Lands Committee of the senate eliminated all reference to coal from the general leasing bill passed by the house at the last session of congress, for the reason that the need for new legislation for the mining of coal on the public lands is not so great as that for the other minerals specified. Senate Report, No. 947, 63rd congress, 3rd session.

[8] The executive withdrawal of lands valuable for water-power sites, irrigation, etc. was authorized by congress, June 25, 1910, 36 Stats. at L. § 847.

[9] These latter substances are considered of great general economic value because of their use in the manufacture of fertilizers to renew the productivity of worn-out agricultural lands.

[10] Act of June 17, 1902, 32 Stats. at L. 388, amended June 25, 1910, 36 Stats. at L. 836.

of this oil is of vital interest to the future of this state. Because of the arid character of the surface lands, vast areas of the territory overlying the oil strata had remained a part of the public domain. The discovery of the existence of this oil in commercial quantities and the creation of a market for the crude output resulted in a rush of locators to the oil fields commensurate with and in many respects similar to the congestion and conditions resulting from new "strikes" or discoveries of the gold fields.

The general placer law was the only operative mining law permitting of the acquisition of these deposits.[11] Immediately following the disclosure of the value of these public oil lands there were the usual attempts to acquire them by indirection and by distorting other land laws in the attempt to defeat the mineral claimant. "Scrippers", i. e. those who attempted to make selections of these oil lands in lieu of other lands under an exchange system provided for by law, homesteaders, desert entrymen, etc., all proceeding under laws providing for the acquisition of agricultural lands, which laws expressly exclude mineral lands from their operation, hastened to make filings, in most instances lacking in good faith. Locators under the mining laws even, claiming discoveries of gypsum cropping on the surface, were also subject to the valid criticism of attempting to gain by subterfuge the valuable oil deposits which they could not acquire directly without the expenditure of time and money. These attempts were rendered possible by the physical fact that the valuable oil-bearing sands lay at considerable depths below the surface and could be reached only after drilling to the depth of hundreds or even thousands of feet and at great cost. In some instances it has taken wells of 4000 or 5000 feet in depth and the expenditure of over $250,000.00 to reach the oil. The courts early held that only actual discoveries of oil by drilling would satisfy the statutory requirement of discovery essential to validate a mining claim and that mere oil seepages or stains or other surface indications were not sufficient.[12]

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[11] §§ 2329-2333 U. S. Rev. Stats., a codification of the Federal Placer Act of 1870. The act of Feb. 11, 1897, 29 Stats. at L. 526, provided that lands containing petroleum or other mineral oils could be acquired under the laws relating to placer mineral claims.

[12] Nevada Sierra Home Oil Co. v. Home Oil Co. (1899), 98 Fed. 673, at p. 675; Miller v. Chrisman (1903), 140 Cal. 440, 75 Pac. 1083. 74

While this holding gave the fictitious agricultural claimants a certain technical advantage over the bona fide mineral claimants, yet the courts made short work of these subterfuges and finally eliminated most of these pseudo filings from further serious consideration.[13] The land department also came to the rescue of the oil miners and withdrew from agricultural entry large areas of land adjacent to the proven territory pending classification by government geologists.[14] This peculiar situation forced on government officials an early realization of the fact that the placer mining laws with their rigid discovery requirement were a misfit when applied to the location of oil lands.[15] The courts of California and Wyoming aided the diligent oil locator in a measure, by a liberal interpretation of the inchoate right acquired by him in making his location prior to actual discovery and held that such a locator, who in good faith was prosecuting the drilling of his discovery well with reasonable diligence, would be protected to the full extent of his boundaries from clandestine or forcible invasion by others attempting to locate subsequently.[16] Thus many of the serious problems which confronted the oil locator in the early days of the field have since been removed, so that the amount of litigation arising from these original sources is becoming relatively unimportant.

Pac. 444, 98 Am. St. Rep. 63; s. c. (1905), 197 U. S. 313, 49 L. Ed. 770, 25 Sup. Ct. Rep. 468.

[13] Cosmos Exploration Co. v. Gray Eagle Oil Co. (1900), 104 Fed. 20, 112 Fed. 4, (1903), 190 U. S. 301, 47 L. Ed. 1064, 23 Sup. Ct. Rep. 692; Kern Oil Co. v. Clarke (1897), 30 L. D. 550, on review, 31 L. D. 288; State of California (1913), 41 L. D. 592; Hirshfeld v. Chrisman (1911), 40 L. D. 112; see also Diamond Coal Co. v. United States (1914), 233 U. S. 236, 58 L. Ed. 936, 34 Sup. Ct. Rep. 507; Washington Securities Co. v. United States (1914), 234 U. S. 76, 58 L. Ed. 1220, 34 Sup. Ct. Rep. 72; Leonard v. Lennox (1910), 181 Fed. 760.

[14] United States v. Midwest Oil Co. (1915), 35 Sup. Ct. Rep. 309, at p. 315. Similar withdrawals from non-mineral acquisition have been made as a measure of protection to surface locators under the mining laws, of lands overlying deep seated deposits of copper ore in Arizona. Report of Director of U. S. Geological Survey (1913), p. 154.

[15] Classification of the Public Lands, Bulletin 537 U. S. Geological Survey, p. 38; Report of Secretary of the Interior Lane (1913), p. 13.

[16] Weed v. Snook (1904), 144 Cal. 439, 77 Pac. 1023; Merced Oil Co. v. Patterson (1908), 153 Cal. 624, 96 Pac. 90; Miller v. Chrisman (1903), 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63; Borgwardt v. McKittrick Oil Co. (1913), 164 Cal. 650; Little Sespe Cons. Oil Co. v. Bacigalupi (1914), 167 Cal. 381, 139 Pac. 802; Smith v. Union Oil Co. (1913), 166 Cal. 217, 135 Pac. 966; Whiting v. Straup (1908), 17 Wyo. 1, 95 Pac. 849.

In addition to this conviction that the placer laws were a misfit, the land department was also influenced most forcibly by the conservation movement which has already been commented on and which is resulting in the establishment of the new public land policy. The appreciation of the importance of oil as a mineral fuel and source of heat and power, next to that of coal, was accentuated by the magnitude of the discoveries in the oil fields of California and Wyoming. Here was an asset of vital concern to the future welfare of the nation found in almost fabulous quantities on land which was in part still public domain. The rapidity with which these lands were being located and thus passing into private ownership, convinced the public officials and leaders in conservation ideas that if prompt action were not taken, most of the available territory would be privately absorbed and as far as petroleum was concerned, the new policy of government ownership and control would be impossible of accomplishment.[17]

The importance of conserving a supply of this new fuel for the requirements of the navy was also in the minds of the interested officials though it had not at that time assumed the importance which has since arisen through the more definite determination to use fuel oil in the navy.[18] Acting on the suggestion of his advisors in the land department,[19] President Taft caused an executive order or proclamation to be issued on September 27, 1909, withdrawing from all forms of disposal and "in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain", over three million acres of land in California and Wyoming which included most of the territory known or thought by the Geological Survey to be valuable for oil.[20] This sudden and sweeping

[17] See United States v. Midwest Oil Co. (1915), 35 Sup. Ct. Rep. 309, at p. 310; The Classification of Public Lands, Bulletin 537 U. S. Geological Survey, p. 38.

[18] At the request of the navy department, two naval petroleum reserves were created in the California oil fields on Sept. 2, 1912, and Dec. 13, 1912, estimated to contain 250,000,000 barrels of oil. Report of Director of U. S. Geological Survey (1913), pp. 151-152.

[19] The history of the origin and development of this proposal is outlined by its chief sponsor, George Otis Smith, before the Public Lands Committee of the senate at a hearing on the Oil Lands Leasing Bill, 63rd congress, 3rd session, pp. 208-210.

[20] Of course, much of the land withdrawn included private titles which had already vested and which were consequently not affected by the withdrawal. The net area of the public lands thus withdrawn could

action on the part of the executive in withdrawing practically all of the remaining public lands possessing probable oil values caused great consternation among the oil operators. It injected a tremendous element of uncertainty into the operations of many and resulted in a decided curtailment of expenditures looking toward the making of discoveries. Many bona fide operators were placed in the position of not knowing whether their expenditures already made would be forfeited or not, and yet they hesitated in the dubious experiment of continuing to "throw good money after bad". President Taft himself was not convinced of the unqualified legality of his act[21], and in order to place his power of withdrawal beyond question he urged congress to give him positive statutory authority, which resulted in the passage of the Act of June 25, 1910.[22] Immediately after its passage and acting under its authorization, he again caused these same lands and additional lands which had been withdrawn from time to time subsequent to the first withdrawal, to be withdrawn. The validity of this later withdrawal in pursuance of congressional sanction has not been seriously questioned. The Withdrawal Statute expressly provided:

> "That this act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas-bearing lands after any withdrawal of such lands made prior to the passage of this Act."

Thus all question as to the validity of the original Taft withdrawal of September 27, 1909, was left open for the determination of the courts.[23] The practically universal consensus of

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only be estimated in a very general way, for the included location titles were in all conditions varying from mere "paper locations" not accompanied by actual possession, nor followed by any attempt at discovery work, to locations where all the legal requirements had been strictly complied with and discovery actually made. Until "court has been held" and all of the underlying and essential facts disclosed, it will be impossible to determine whether many of these private claims are valid or not. The Government has instituted suits to test the validity of many of these private claims.

[21] This doubt was expressed by the President in his message to congress of January 14, 1910, and also in public speeches.

[22] 36 Stats. at L. 847. This act only provided for the withdrawal of mineral lands containing coal, oil, gas and phosphates, but was amended August 24, 1912, (37 Stats. at L. 497), in order to provide for the withdrawal of lands valuable for potash, and in anticipation of the fact that other minerals might later be found desirable to be included in such reservations, the act was made operative as to all non-metallic minerals.

[23] In the recent Midwest decision by the Supreme Court of the United States and hereinafter noted, the majority opinion states that

opinion among the oil operators and the lawyers of the West who examined into the question, was that the first or executive withdrawal was invalid. Acting on opinions of their legal advisors to this effect, many operators located withdrawn lands, or commenced diligent prosecution of work on lands already located.[24] As a consequence, cases involving lands affected by the first order of withdrawal began to arise, necessitating a determination of the validity of this executive action. The land department first passed on the question, deciding that the order of September 27, 1909, was valid.[25] Then Judge Riner, federal District Judge for Wyoming, in the now famous Midwest case, sustained a demurrer to the bill of complaint filed by the United States, holding that the withdrawal order was void.[26] This case was taken to the Supreme Court of the United States and became the test case on this question. Meanwhile on June 1, 1914, Judge Dooling, one of the federal District Judges in California, decided[27] that the promulgation of the order in question was "an encroachment upon the domain of Congress" and was therefore unlawful.

The Midwest case just referred to involved a tract of public land in Wyoming which was taken possession of by private individuals six months after its withdrawal under the order of September 27, 1909. A well was drilled, discovery of oil made and quantities of oil extracted. The federal government brought suit to recover the land and for an accounting. The government took an appeal from the District Court's ruling sustaining the demurrer and dismissing the bill. The Circuit Court of Appeals certified certain questions to the Supreme Court of the United States which latter court ordered the entire record sent up for consideration. The Supreme Court recently decided the case in favor of the government, reversing the ruling of the Wyoming federal District Court.[28]

"The Act left the rights of parties . . . . to be determined by the state of the law when the proclamation was issued".

[24] The withdrawal act of June 25, 1910, expressly protected bona fide claimants of oil lands who were, at the date of any order of withdrawal theretofore or thereafter made, diligently prosecuting work leading to a discovery.

[25] In re Lowell (1911), 40 L. D. 303.

[26] No written opinion was filed in this case.

[27] United States v. Midway Northern Oil Co. (May 29, 1914), 216 Fed. 802.

[28] United States v. The Midwest Oil Company (Feb. 23, 1915), 35 Sup. Ct. Rep. 309. Five justices joined in the prevailing opinion,

The case was twice argued orally and several briefs were filed by parties interested in other lands similarly affected. The importance of this decision to the oil industry, as well as the interesting character of some of the problems involved, will justify a brief analysis of the case.

The single and controlling question was the validity of the withdrawal order and the power of the President to make such an order in the absence of positive congressional authorization. Justice Lamar wrote the prevailing opinion and held that it was unnecessary to determine as an original question whether the President had this power because "of the legal consequences flowing from a long continued practice to make orders like the one here involved". He calls attention to the fact that such a practice dates from an early period in the history of our government and that during the past eighty years a multitude of executive orders have been made without express statutory authority, operating to withdraw every kind of land—mineral and non-mineral—that would otherwise have been open to private acquisition under existing acts of congress. Instances of at least 252 executive orders withdrawing public lands for military, Indian, and bird reservations were cited where there were no express statutes empowering the President to withdraw any of the lands affected. He said that it was natural that the government should retain for these purposes what it already owned, especially since no private right was, at the date of the withdrawal, in existence to be injured, for prior to the initiation of some right under public statute, no citizen had an enforceable interest; that the President was in a position to know when the public interest required such withdrawals and his action was subject to disaffirmance by congress which had repeatedly acquiesced in the practice; and that this was also the interpretation placed upon the existence of the power by the law officers of the government at various times.

In answer to the argument that while there might be this usage yet these instances of the exercise of this power did not establish its validity, Justice Lamar said:

> "But government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally

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Justice McReynolds not participating. Three justices dissented. A petition for rehearing was filed April 16, and denied April 19, 1915.

adjust themselves to any long continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be as often repeated as to crystallize into a regular practice".

Therefore, usage itself shall be given weight in determining the existence of a power.[29] Not that "the Executive can by his course of action create a power" but "the long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands." The United States, acting through congress, is the proprietor and owner of the public domain, and conditions may arise requiring that, in the public interest, the land be withheld from sale and this power may be granted by implication to the executive just as might be the case between a private owner and his agent. The attempted distinction between reservations and withdrawals was held unavailing. If permanent reservations made by the executive and already noted are valid, then the lesser exercise of similar power, involved in making a temporary withdrawal in aid of future

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[29] The best considered criticism of this doctrine is to be found in Cooley's Constitutional Limitations 7th ed., Chapter IV, pp. 102-107, from which the following extracts are taken:

"Where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. . . . . .

"Great deference has been paid in all cases to the action of the executive department, where its officers have been called upon, under the responsibilities of their official oaths, to inaugurate a new system, and where it is to be presumed they have carefully and conscientiously weighed all considerations, and endeavored to keep within the letter and the spirit of the Constitution. If the question involved is really one of doubt, the force of their judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind.

"Where, however, no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases, that the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmakers. 'Contemporary construction . . . . can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries.' While we conceive this to be the

legislation, is lawful and examples were cited where this power of withdrawal had also been exercised, and attention called to the fact that in 1902 the senate specifically requested information of the secretary of the interior as to the extent that public lands had been withdrawn and the authority for such action. Congress after receiving this information did not repudiate the practice and its silence was acquiescence, or equivalent to consent, until revoked by subsequent congressional action.

An unusually vigorous dissenting opinion was written by Justice Day and concurred in by Justices McKenna and Van Devanter.[30]

Justice Day quotes article four, section three, of the Constitution of the United States, which empowers congress

> ". . . to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . . "

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true and only safe rule, we shall be obliged to confess that some of the cases appear, on first reading, not to have observed these limitations. In the case of Stuart v. Laird, above referred to, the practical construction was regarded as conclusive. . . . .

"It is believed, however, that in each of these cases an examination of the Constitution left in the minds of the judges sufficient doubt upon the question of its violation to warrant their looking elsewhere for aids in interpretation, and that the cases are not in conflict with the general rule as above laid down. Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the Constitution. We think we allow to contemporary and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed."

It will be noted that the case of Stuart v. Laird (1803), 1 Cranch 299, 2 L. Ed. 115, adversely commented on by Cooley, is one of the leading authorities on which the prevailing opinion in the Midwest case is based. The authorities discussed in the note on p. 107 of Cooley are also of considerable interest in this connection as indicating that, after all, the question is fundamentally a matter of opinion as to whether it is best to "bend the Constitution to suit the law of the hour" and yield "to considerations of expediency in expounding it" or whether "the success of free institutions depends upon a rigid adherence to the fundamental law", whereas "by yielding to such influences constitutions are gradually undermined and finally overthrown."

[30] It is interesting to note that these latter two are western appointees and together with the two federal District Judges below

and cites a previous decision of the Supreme Court which holds that

> "this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise".[31]

He states that there is nothing in the Constitution suggesting or authorizing any augmentation of executive authority said to arise by implication from the tacit consent of congress in its long acquiescence in such executive action of making the specified withdrawals. Withdrawals have been made by the President in the past and have the sanction of judicial approval but only in cases (a) where congress has already declared its policy as being an appropriate one for the use of public lands such as military and Indian reservations, or (b) where grants of land by congress are so conflicting that the withdrawal of the lands affected is sustained until congress has had an opportunity to clear up the ambiguity.[32]

Taking up the Taft withdrawal, Justice Day calls attention to the fact that congress had by specific statute[33] authorized the location of lands valuable for oil under the placer mining laws. The sole purpose for making the withdrawal was in anticipation that congress might provide a better system for the disposition of such lands and to preserve some oil lands in California as a basis of naval supply in the future. It is not claimed that the President had express authority from congress. Such withdrawals must be limited to purposes which congress has itself recoguized by direct legislation or long continued acquiescence as public purposes. It is conceded that the President might reserve tracts for definitely fixed public purposes declared by congress, such as military or Indian reservations, but the action here taken in withdrawing a large part of the public domain from the operations of the public land laws is neither sanctioned by the Constitution, nor conferred by congressional legislation, nor by that

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who declared this order invalid, presumably reflect the western thought and attitude toward this question.

[31] Wisconsin etc. R. R. Co. v. Price County (1890), 133 U. S. 496, 504, 10 Sup. Ct. Rep. 341.

[32] Justice Day entered into a rather elaborate review of the specific withdrawals claimed to constitute the basis for the executive custom of withdrawal held in the prevailing opinion to have ripened into implied authority and classifies these withdrawals under either the one heading or the other.

[33] February 11, 1897, 29 Stats. at L. 526.

long acquiescence as to be the equivalent of a grant. The President's powers are defined by the Constitution which does not confer upon him any power to enact, suspend or repeal laws of congress, and the Supreme Court has refused to sustain withdrawals made by the executive in contravention of a policy for the disposition of lands expressly declared in acts of congress.[34] In order to be valid, an executive withdrawal must either be authorized by express congressional authority or clear implication of such authority. Justice Day calls attention to the limited powers of the United States government vested definitely by the Constitution in the three co-ordinate branches of the government and quotes from the famous case of Kilbourn v. Thompson, to the effect that it is essential to the successful working of this system that the respective functions of these branches shall be broadly and clearly defined and that they shall not be permitted to encroach upon the powers confided in the other branches, but each "be limited to the exercise of the powers appropriate to its own department and no other",[35] and concludes the dissenting opinion with the following language:

> "These principles ought not to be departed from in the judicial determinations of this court, and their enforcement is essential to the administration of the Government, as created and defined by the Constitution. The grant of authority to the Executive, as to other departments of the Government, ought not to be amplified by judicial decisions. The Constitution is the legitimate source of authority of all who exercise power under its sanction, and its provisions are equally binding upon every officer of the Government, from the highest to the lowest. It is one of the great functions of this court to keep, so far as judicial decisions can subserve that purpose, each branch of the Government within the sphere of its legitimate action, and to prevent encroachments of one branch upon the authority of another.
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> In our opinion, the action of the Executive Department in this case, originating in the expressed view of a subordinate official of the Interior Department as to the desirability of a different system of public land disposal than that contained in the lawful enactments of Congress, did not justify the President in withdrawing this large body of land from the operation of the law and virtually suspending, as he necessarily did, the operation of that law, at least until a

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[34] Cases are cited involving withdrawals in aid of railroad grants held to have been invalid for the foregoing reason.

[35] Kilbourn v. Thompson (1880), 103 U. S. 168, at p. 190.

different view expressed by him could be considered by the Congress. This conclusion is reinforced in this particular instance by the refusal of Congress to ratify the action of the President, and the enactment of a new statute authorizing the disposition of the public lands by a method essentially different from that proposed by the Executive."

The foregoing analysis of the two opinions will indicate that they are based respectively upon fundamentally different conceptions of governmental policy as embodied in the federal constitution.

The prevailing opinion rests upon the conception that "government is a practical affair intended for practical men" and that the federal Constitution should be construed accordingly. Instances where the executive branch of the government has withdrawn lands in aid of governmental functions, either expressly or impliedly sanctioned by congressional action, are held to constitute a precedent and to create a power by implication which the President admittedly did not possess originally under the terms of the Constitution, and which gives him the authority to withdraw immense tracts of public domain, in aid of contemplated legislation, from the operation of existing acts of congress specifically providing for the private acquisition of such lands. To reach so liberal a conclusion as to the existence of this executive power, the majority of the court were unquestionably influenced by the modern conservation policy and the pressing necessity for immediate action in the effort to retain under public control as large an area of valuable oil lands as possible. The fact that no private interest existing at the date of the withdrawal was affected, was also a potent consideration. Those who attempted to secure private rights thereafter did so with full knowledge of the executive withdrawal and acted at their peril.

On the other hand, the dissenting opinion is based on a strict conception of the distinct spheres of action of the three branches of the government and the danger of a centralization of power in the executive resulting from its invasion of the legitimate and exclusive functions exercised by the other branches. Irrespective of the beneficial results to be attained by the consummation of federal conservation policies, the minority members of the court were influenced by the bald proposition that the executive in withdrawing all of the lands of the public domain

known or thought to be valuable for oil[36] was virtually nullifying and suspending the operation of the last expressed will of congress contained in its positive declaration that all lands valuable for petroleum shall be free and open to exploration and purchase by citizens under the placer mining laws.

The fact that the executive assumed this power as a result of a conviction that new laws should be enacted is interesting to note. If the executive can suspend the operation of existing statutes on the theory that they are detrimental to the public interests and can substitute his views for those last expressed by congress, even if only temporarily, there may arise occasions where this power might be exercised in hostility to what may prove to be the public interest. It was to avoid just such contingencies that the strict division of power as between the various branches of the government was originally conceived by the framers of the Constitution. It would also be interesting to know how long the executive could lawfully suspend the operation of statutes and continue such suspension in force in the event that congress did not see fit to make the contemplated changes in the existing law. Of course, the answer can be made that congress has the power to nullify such executive action, since it retains the fundamental and exclusive power to legislate on such subjects, but it may be said with equal force that congress is in session during a large portion of each year and can act in the original instance on such contemplated proposals and, if deemed expedient, authorize the executive to make necessary withdrawals in the interim in order to preserve the *status quo*. This is really the fundamental difficulty. Logically, congress is the body contemplated by the Constitution to consider and originate legislation and make radical changes in existing legislation affecting the public lands, but as a matter of practical operation, congress has become to a greater and greater degree an unwieldy body, slow to consider and slower to act. From the very nature of its organization, representing as it does such radically different viewpoints on most of the problems presented for its consideration, it is prone to debate rather than to legislate. This has

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[36] The withdrawal of September 27, 1909, "included not only all known California oil lands . . . . but also the Wyoming lands." George Otis Smith, in Senate Public Lands Committee hearings on Oil Lands Leasing Bill, p. 209.

resulted in the executive stepping in and usurping, to a degree, certain of the functions unquestionably vested exclusively in congress by the federal Constitution if interpreted in the spirit which actuated its framers. This has become notably conspicuous in the case of the last few administrations where the executive branch of the government has formulated to a large degree the legislative program, prepared to the letter the actual bills proposed for passage, and employed all available political pressure to insure their passage in their original form.

We are, therefore, confronted with an actual condition which has by force of circumstances compelled a material deviation from the policy outlined by the framers of the federal Constitution and the decision in the Midwest case is but a recognition of this change and of the exercise of increased powers by the executive in the attempt to secure a greater flexibility of action and more expeditious results than it is at present possible to obtain from the ponderous and slow-acting legislative branch of the government.

The decision in the Midwest case is, therefore, of far reaching importance, since it sanctions a material enlargement of federal executive power and places a positive stamp of approval on the new public land policy. Of course, congress still has control over the ultimate disposition of these oil lands and may not accept the proposed executive policy as to future legislation, but the trend of recent events practically insures adoption of the new policy either in whole or in large part.

The upholding of the validity of the Taft oil withdrawal adds materially to the importance of the policy which will control the future disposition of public oil lands. As already pointed out, the conservation policy now generally accepted involves the idea of a permanent reservation of title in the federal government and the disposal of the oil under a leasing system on a royalty basis.[37] A bill having this object and fostered by the administration was before the last congress but in the press of other legislation failed of passage.[38] A similar bill is likely to be en-

[37] Legislation of this character has been urged for a number of years by the department of the interior. See the Annual Reports of the Secretary of the Interior, and of the Director of the U. S. Geological Survey for the past few years.

[38] The fact that these oil lands have been withdrawn for over five years and that congress has not acted yet as to their ultimate disposi-

acted during the sixty-fourth session of congress.[39] In his report to the Public Lands Committees of congress[40] Secretary Lane states that this bill does not propose any change in the laws governing the disposition of agricultural lands in general; that, instead of conducting a "gigantic land lottery under government auspices" as heretofore, in which a few individuals and corporations have acquired the best oil and coal lands for little or nothing and have then sold the product back to the public at arbitrary prices, the proposed leasing system is open to all comers who wish to prospect and develop these mineral resources on fair terms so as to afford a fair return to the lessee and eliminate to a degree the element of speculation.[41] He points out the fact that the oil lands in private ownership are now largely operated under the leasing system and that though the federal government early abandoned a system of leasing lead mines, the adverse conditions there encountered do not exist today in the case of oil and coal lands.[42]

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tion is evidence of the difficulty of securing prompt action from this body on most subjects.

> "The West no longer urges a return to the hazards of the 'land is land' policy. **But it does ask action.** It is reconciled to the Government making all proper safeguards against monopoly and against the subversion of the spirit of all our land laws, which is in essence that all suitable lands shall go into homes, and all other lands shall be developed for that purpose which shall make them of greatest service. But it asks that the machinery be promptly established in the law by which the lands may be used. And this demand is reasonable." Annual Report of Secretary of the Interior Lane for 1913, p. 3.

[39] H. R. 16136. An act providing for the leasing of coal lands in Alaska became a law Oct. 20, 1914. U. S. Stats. Ann., Jan. 1915 supp. p. 6. By private resolution, 37 Stats. at L. 1346, the secretary of the interior was authorized to continue the operations of the Owl Creek Coal Co. in Wyoming, which he did by formal lease. See Report of the Secretary of Interior (1912), pp. 10-11.

[40] 63rd congress, 3rd session.

[41] In a letter dated May 1, 1914, addressed to the chairman of the Public Lands Committee of the house, Secretary Lane writes: "The measure deals with the principal fuel and fertilizer minerals found in the public lands, classes of deposits in which the people generally are particularly interested, and which should be so handled as to insure general use at reasonable rates. It would be unwise to permit these resources to be monopolized or gathered into private ownership of a few for speculative purposes".

[42] "The leasing method of disposition is about as fair a disposition as we can expect to make of the publicly owned lands, not simply from the standpoint of economics, but especially from the standpoint of the public interests in the control of some of these minerals that must be considered as absolutely necessary to the industrial life of today."

The proposed law passed the House and as finally amended in the senate Committee on Public Lands, provided for a prospector's permit giving an exclusive right for a maximum period of two years to prospect for oil and gas upon a maximum of 640 acres of public land situated not less than two nor more than ten miles from any producing well, or a maximum of 2560 acres when situated over ten miles from such a well. Drilling operations were to be commenced within six months, 500 feet to be drilled in one year and 2000 feet in two years. The applicant must comply with certain formalities of marking the ground and posting notices, and the drilling operations must be carried on as prescribed. Upon establishing a discovery of valuable deposits of oil or gas the permittee becomes entitled to a patent for one-fourth of the area embraced within the permit.

All other deposits of oil and gas on the public domain are subject to lease by the secretary of the interior through competitive bidding, each tract not to exceed 640 acres and such leases to be conditioned upon the payment of a royalty of not more than one-eighth, payable in oil or gas, and a rental of not less than one dollar per acre per annum payable in advance to be credited against the royalties as they accrue for that year. The term of such leases is to be twenty years with preferential right of renewal for successive periods of ten years. The maximum leasehold or leaseholds that can be held by a single lessee in any area of fifty miles square is 640 acres.[43]

In order to protect those oil miners who were affected by the executive withdrawals, it is provided that claimants of land in which oil was discovered, or drilling operations were in actual progress, January 1, 1914, and the claim to which land was initiated prior to July 3, 1910, may, within six months after the passage of the act or within sixty days after the final determination of the right to a patent, relinquish the land to the government and receive a lease therefor upon substantially the same conditions as other lessees, except that no annual rental is prescribed aside from the royalties, and it is further provided that where claimants in good faith located lands prior to withdrawal thereof and continued to occupy the same, and since July 3, 1910, have

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Hearings on Oil Land Leasing Bill, Public Lands Committee of senate, 63rd congress, 3rd session, pp. 216-217. See also Classification of Public Lands, Bulletin 537 U. S. Geological Survey, pp. 47-50.

[43] There were many regulative provisions of lesser importance.

diligently prosecuted work looking toward a discovery and have discovered oil prior to the passage of the act, that such claim may pass to patent under the mining laws.[44]

The secretary is authorized to dispose of the surface of these lands insofar as the surface is not necessary for the use of the lessee.[45] One of the most important provisions of all, requires the payment to the respective states wherein the leased premises are situated of fifty per cent of all moneys received from royalties and

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[44] On March 2, 1911, congress passed an act to cure a questionable situation arising in numerous cases where an individual acquired more than 20-acres of located land prior to discovery of oil, (36 Stats. at L. 1015). This act was amended August 25, 1914, 38 Stats. at L. 708, to authorize the secretary of the interior to enter into agreements with claimants of producing oil land so as to provide for the disposition of the oil pending final determination of the title of the land where this was questioned by the government.

A curative act applicable to phosphate lands located prior to withdrawal was approved January 11, 1915, and provides for their patenting under the placer laws. Where a lode claim conflicts, no placer patent is to be issued until the adverse lode claim is abandoned, presumably to get rid of any possible claim of an extralateral right.

[45] This policy of severing the surface from the subsurface mineral deposits and disposing of each separately has already been provided for by congress. The importance of this step was recognized by the director of the U. S. Geological Survey, who in his annual report for 1911. p. 10, said: "The first step, both in principle and practice, in any amendment of the land laws, appears to be that of making possible by legislation the separation of surface and mineral rights whenever the two estates have values which can be separately utilized". See also Bulletin 537, U. S. Geological Survey, Classification of Public Lands, pp. 46-47. The Act of July 17, 1914, 38 Stats. at L. 509, provides for the issuance of patents under the non-mineral laws of the United States for the surface of withdrawn lands containing phosphate, nitrate, potash, oil, gas, or asphaltic deposits, with a reservation to the United States of such deposits, together with the right to prospect for, mine and remove the same under appropriate federal laws. The right to occupy the necessary surface for mining operations is also reserved and payment for any damages to crops and improvements incident to such operations provided for. Agricultural entries of surface lands overlying coal deposits are permitted in the Acts of March 3, 1909, 35 Stats. at L. 844, and June 22, 1910, 36 Stats. at L. 583, amended April 30, 1912, 37 Stats. at L. 105, and April 14 1914, 38 Stats. at L. 335. The Act of August 24, 1912, 37 Stats. at L. 497, provides for the agricultural entry of the surface of oil and gas lands in Utah. The Act of February 27, 1913, 37 Stats. at L. 687, provides for the selection by the state of Idaho of the surface of oil and phosphate lands. This policy of severing the surface from the mineral rights and treating each as distinct properties is unquestionably the ideal system of land and mining law, for the surface and the underlying minerals can in most cases be disassociated and the surface used for agricultural or other non-mineral pursuits with of course the reservation of the right to use enough of the surface as may be essential to mining operations and provision made for the payment of damage suffered by the surface

rentals,[46] the other half going into the reclamation fund. This provision is inserted in order to appease the strong western sentiment antagonistic to the permanent retention by the federal government of the proprietary control of these immense areas of land wealth.[47] That this sentiment has a valid basis is apparent from the mere statement of the fact that millions of acres of land containing fabulous values of timber, coal, oil, water-power etc. are to be administered by the federal government to the exclusion of the states within which these resources exist, whereas all of the eastern states and most of the states of the middle west do possess and exercise this exclusive sovereign control over all of the lands and resources within their respective borders, and enjoy the salutary results flowing from such complete exercise of sovereignty. These western states are facing a serious curtailment of sovereign power which places them on a distinct plane of inequality. Here again, if this federal policy is to become a permanent one, as there is every reason to believe, our primary conceptions of the status of the western states which were to be admitted to the Union upon terms of exact equality with all the other states and were to enjoy equal privileges must suffer a profound adjustment to harmonize with these new conceptions.

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claimant. This separation of these rights is in line with true conservation, since it permits of "the utilization of lands for their greatest value". Many of the continental systems of mining law provide for this severance and it is unfortunate that the United States should not have earlier recognized its ultimate importance.

[46] As to this proposal, Secretary Lane says: "Inasmuch as the title to these oil or other lands would remain in the Government and be excluded from State taxation, it would seem to be fair that a certain percentage of the royalties received should go to the States within which the revenues are raised". Report to Public Lands Committee of Congress.

The Senate Committee on Public Lands reports: "This is deemed a just recognition of the rights of the States in and about the public domain situated within their borders and the right of a State to receive therefrom some revenue and benefit to go toward maintenance of State Government". Report on H. R. 16136, p. 7.

[47] This western attitude is strongly voiced by Justice Henshaw who wrote the opinion in Deseret Water, Oil, etc. Co. v. State of California (1914), 167 Cal. 147, a case decided in bank and where the following language appears:

> "But here we desire to point out that while the state of California was admitted as a sovereign state of the Union upon equal terms with all the other states, and while it has been judicially declared that an essential part of that equality is the disposition of the public lands within the state, to the end that the revenues by taxation therefrom and the control over them may be vested in the state, we have in California a withdrawal by the United States from sale and a placing in reserves of one-third of the area of the

This is a question of the interpretation to be placed on the provisions of the federal Constitution which bear on the creation of new states, their status and relation to the other states. If we take the decision in the Midwest case as evidence of the recent trend of opinion entertained by a majority of the federal Supreme Court, we can almost certainly conclude that when this basic question of State v. Federal Rights is presented to that court for decision, it will not consider itself bound by strict letter, but will interpret the Constitution broadly and in the light of the recent public attitude toward conservation problems in general, and will again recognize the doctrine that "government is a practical affair intended for practical men".[48] The question is, after all, an eminently practical one, involving as it does profound economic and social problems, and not only a readjustment of the relations of the individual toward the resources of the public lands, but also a readjustment of the respective spheres within which the state and the federal governments shall operate.[49]

This new public land policy certainly marks a decided step in the direction of centralization of power in the federal govern-

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whole state—an area greater than the combined territory of New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New Jersey, and Maryland. Not this alone, but we have in these withdrawals a refusal upon the part of the United States to yield to the state of California control over its natural sources of wealth. Its forests, its mines, its oil-bearing lands, its power sites and possibilities, have been withheld by the United States, which proposes to exercise over them, and is exercising over them, the "municipal sovereignty" which the supreme court of the United States in Pollard's Lessee v. Hagan declared not to exist. If at the time of the proposed cession of its lands by Virginia, Congress had declared its intent to be that which it has actually executed in the state of California, little doubt can be entertained as to the answer which Virginia would have made. It is indeed a departure from the accepted construction of these constitutional provisions to have it said that the United States may, as here, withdraw from state use one-third of the area of a sovereign state, forever deny to the state the sovereign power of taxation and control over these lands, and develop and exploit them under its own rules and regulations for the enrichment of its own treasury."

[48] In fact the Supreme Court of the United States in the case of Light v. United States (1911), 220 U. S. 523, 31 Sup. Ct. Rep. 485, 55 L. Ed. 570, has already intimated that congress may, in the fullness of its power of disposal over the public lands, and acting for the nation as proprietor and owner, withhold from sale and settlement and place in a state of permanent reservation such lands as it may in the exercise of its discretion, deem necessary for national and public purposes.

[49] The fact that these problems are largely social and economic and are tendencies represented on the one hand by advocates of "collectivism" or "advanced socialism" as opposed to the more conservative

ment which was not within the contemplation of its framers, but which policy its proponents contend, with considerable reason, can be more satisfactorily and efficiently administered through national rather than state control.[50]

Wm. E. Colby.

Berkeley, California.

"individualists", was presented in a clear analysis of these opposing views by Judge Curtis H. Lindley in April, 1910, at a meeting of the San Francisco Bar Association in an address entitled "Conservation of Natural Resources and its possible Effect on Mining, Irrigation and Hydro-Electric Industries". He said:

> "It is manifest that we are on the eve of a new dispensation, a new order of things, and that it is time we should examine into the prospective operation of these 'policies' when crystallized into statutory enactments at the hands of the national legislative body. . . . . The subject is a monumental one; presenting, in my judgment, some of the greatest problems which are to be solved by the present generation of lawyers, judges and constructive statesmen."

[50] Hon. Walter L. Fisher, when secretary of the interior, had the following to say on this general subject:

> " . . . . the ordinary citizen of these [western] states—are not at all concerned over Federal usurpation or unjust treatment. They recognize that the Federal Government has full legal power to dispose of the public domain as wise policy may direct.
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> "They do not fear Federal usurpation, but seek Federal co-operation in supplementing State and local powers, so that the natural resources shall be utilized for the public benefit primarily of the locality in which these resources are situated, and thus ultimately for the benefit of the Nation as a whole. They suspect that the real purpose of those who urge the turning over of the Federal domain to the States is that they may escape the longer and the stronger arm of the Federal Government and may take advantage of the more limited resources and governmental facilities of the individual States. While some States have undoubtedly wisely conserved certain of the lands and natural resources turned over to them by the Nation, the story has too often been the acquisition of these lands and resources by special interests or individuals without adequate recognition of the public interest. There is no policy which it would be wise for any State to adopt with respect to these matters in the adoption and enforcement of which it can not be supplemented and assisted rather than retarded by the retention in Federal hands of the powers and the property now held by the Nation. It is precisely this policy of practical co-operation which should be put into effect.
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> "There is no real conflict between the Nation and the States upon this subject. In fact, there can be no real solution of these aspects of the problem until the interests and the functions of the Nation and the States are co-ordinated and they are working together for the same essential ends." Report of the Secretary of the Interior (1912), pp. 20-21.