

# The Interaction of U.S. Public Lands, Water, and State Sovereignty in the West: A Reassessment and Celebration

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**The Interaction of U.S. Public Lands, Water, and State Sovereignty  
in the West: A Reassessment and Celebration<sup>1</sup>**

**John D. Leshy\***

I.	INTRODUCTION.....	1
II.	ESTABLISHING THE NATIONAL FORESTS .....	4
III.	THE OTHER SIDE OF A GRAND BARGAIN: FEDERAL WATER PROJECTS .....	11
IV.	THE GRAND BARGAIN WAS THOROUGHLY BIPARTISAN .....	13
V.	STATE-FEDERAL AUTHORITY OVER WATER RIGHTS.....	15
VI.	INDIAN TRIBES AND THEIR WATER RIGHTS .....	18
VII.	RESOLVING STATE-FEDERAL TENSIONS OVER WATER RIGHTS ...	19
VIII.	MONTANA’S REMARKABLE SUCCESS STORY: SETTLING FEDERAL AND INDIAN WATER RIGHTS BY NEGOTIATION .....	21
IX.	CONCLUSION .....	23

**I. INTRODUCTION**

In the 2018 mid-term elections, the future of America’s public lands was again the subject of political discussion. It is easy to see why

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1. This is a lightly edited version of the Frank and Elvira Jestrab Water Lecture I delivered at the University of Montana Law School on September 26, 2018. A few of the themes sounded here are drawn from my *Debunking Creation Myths about America’s Public Lands* (U. Utah Press, 2018). I appreciate the help of U.C. Hastings student Ethan Pawson and the fine editorial staff at the *Public Land & Resources Law Review*, especially Publication Editors Lowell Chandler and Peter Taylor.

that is the case, considering they are a significant proportion of land in all of the western states, including almost one of every three acres in Montana, the same proportion as across the nation as a whole.<sup>2</sup>

By public lands, I mean those managed by all four of the major agencies, Park Service, Forest Service, Fish & Wildlife Service, and the Bureau of Land Management. While some are grazed and drilled and mined and logged, and carry a variety of different labels, for the most part they serve broad conservation purposes—furnishing and protecting water supplies, safeguarding wildlife habitat, and providing open spaces for recreation and inspiration. Indian lands are not considered public lands; while the U.S. holds bare legal title to most of them, the title is held in trust for the Indians.<sup>3</sup> But they are closely connected to public lands in certain respects, which I will discuss further below.

Many people love America's public lands. Some are indifferent. But some believe they are an affront to individual freedom and the institution of private property and threaten the rights of Montanans and residents of other western states to govern themselves.

U.S. Senator Mike Lee of Utah has become perhaps the most prominent spokesperson for this last point of view. In the summer of 2018 he gave a much-publicized speech in Salt Lake City comparing U.S. public lands to “royal forests” that are reserved “for the exclusive entertainment of the nobility,” as “playgrounds” for the “enjoyment of an economic and political elite with no real connection to the lands,” where local people are “denied access to even the modest resources on which they had long depended,” and where their communities “are being throttled by their federal landlord.” In short, Lee charged, the federal government has a “stranglehold on the west.”<sup>4</sup>

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2. *Federal Land Ownership: Overview and Data*, CONGRESSIONAL RESEARCH SERVICE R42346, (March 3, 2017), <https://www.everycrsreport.com/reports/R42346.html>.

3. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.03[1] (Neil Jessup Newton et al. eds. 2017).

4. Mike Lee, U.S. Sen., State of Utah, Federal Lands and Royal Forests at the Sutherland Institute (July 6, 2018), *remarks transcript available at* <https://sutherlandinstitute.org/public-lands-discussion-senator-mike-lee/>; Mike Lee, U.S. Sen. State of Utah, Honoring the Founders Promise on Federal Lands at the Sutherland Institute (Jun. 29, 2018), *remarks transcript available at* <https://www.lee.senate.gov/public/index.cfm/mobile/speeches?ID=2B16034F-BF02-422A-BECE-89AFD5EA773E>.

Strong words indeed. This attitude helped persuade President Trump in late 2017 to take the unprecedented step of drastically downsizing two large national monuments, the Grand Staircase-Escalante and the Bears Ears, that Presidents Clinton and Obama established on public lands in Utah.<sup>5</sup>

Now, to this topic of public lands, I want to add water; in particular, state-federal relations over water.

That, you might say, surely creates a toxic brew, for as Mark Twain famously said, “whiskey is for drinking, and water is for fighting over.”

There’s just one thing wrong: Although researchers have combed through the millions of words by and about Mark Twain, all now digitally retrievable, they have found absolutely no evidence that Twain ever said or wrote those words, or anything like them.<sup>6</sup>

Of course, fans of Mark Twain, including me, can agree it sounds like something he would have said. But the earliest known use of this quip dates from the early 1980s, and Twain died in 1910.

That bit of apparent fiction—fake news, if you will—about a well-known quotation brings me to a fundamental point I want to make today; namely, there is also a considerable amount of fake news over the years on the impact of U.S. public lands on water and on state sovereignty.

One thing I want to examine today is what Montanans themselves have believed about this since Montana was admitted to the Union in 1889. Perhaps the best barometer is how they have voted in elections at a time

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5. Establishment of the Grand Staircase-Escalante Nat’l Monument, 61 Fed. Reg. 50223 (Sept. 18, 1996); Establishment of the Bears Ears Nat’l Monument, 82 Fed. Reg. 1139 (Dec. 28, 2016);

Modifying the Bear Ears Nat’l Monument, 82 Fed. Reg. 58081 (Dec. 4, 2017); Modifying the Grand Staircase-Escalante Nat’l Monument, 82 Fed. Reg. 58089 (Dec. 4, 2017).

6. *Whiskey Is for Drinking; Water is for Fighting Over*, QUOTE INVESTIGATOR (Jun. 3, 2013), <https://quoteinvestigator.com/2013/06/03/whiskey-water/>; Doyle, Michael, *Twain’s whiskey/water quote appears greatly exaggerated*, MCCLATCHY DC BUREAU (Jul. 28, 2011), <https://www.mcclatchydc.com/news/politics-government/article24609343.html>; Twain Quotes Directory Entry for “Whiskey”, TWAIN \QUOTES, <http://www.twainquotes.com/WaterWhiskey.html>.

when those issues were prominent, and what their elected representatives have done on the subject.

Have they believed, with Senator Lee, that the national government has “dominated” the West and showed “contempt” for local attitudes, behaving like “feudal masters” administering “royal forests?”

Have they, with Senator Lee, believed that Montana would be better off if the U.S. government were not such a presence?

Or, contrary to Senator Lee, have they welcomed the idea that the U.S. should retain ownership of so much land and influence over so much water?

Montana is an especially appropriate place to explore these issues because life out here is inextricably linked to the public lands and—because much of the state is relatively arid—to water.<sup>7</sup>

It is also appropriate because Montana and some Montanans have played prominent roles in working out the policies concerning public lands and water that we see on the landscape today.

So, let’s saddle up for a quick historical tour.

## II. ESTABLISHING THE NATIONAL FORESTS

U.S.-owned public lands cover most of the higher elevation lands and headwaters areas in Montana.<sup>8</sup> This was no accident. Starting in the decades after the Civil War, a powerful political movement arose to have the U.S. government retain permanent ownership of large tracts of land it had come to own after acquiring title from foreign governments and from Native Americans.

By the time Montana was nearing statehood, it had become clear to most people that the classic vision of settling public lands with small family farms was simply not going to work very well in the arid and rugged terrain of the West. Relatively few of these lands had the potential to grow crops, and mostly only if they could be artificially irrigated with waters produced from the headwater areas.

This realization dawned on politicians at the same time several other political movements were coalescing. One sought to protect scenery

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7. *Montana Precipitation Map*, MONTANA NATURAL RESOURCE INFORMATION SYSTEM (2004), [http://ftp.geoinfo.msl.mt.gov/Documents/Maps/Individual/20060621\\_606\\_2000\\_AvgPrecip71to00.gif](http://ftp.geoinfo.msl.mt.gov/Documents/Maps/Individual/20060621_606_2000_AvgPrecip71to00.gif).

8. *Montana Public Lands Map*, WIKIMEDIA COMMONS (Oct. 29, 2009), [https://commons.wikimedia.org/wiki/File:Montana\\_public\\_lands\\_map.png](https://commons.wikimedia.org/wiki/File:Montana_public_lands_map.png).

and open spaces for inspiration and healing the wounds of the Civil War. Another sought to protect forests to protect watersheds that supplied users downstream, and to guard against timber shortages as forests in the eastern part of the country were being cut down. A third movement, and perhaps the most influential, sought to prevent monopolization of the remaining public lands by a relative few. It was largely a reaction to the excesses of the Gilded Age, where large corporate combinations, like railroads and mining companies, did what they pleased in pursuit of profit, largely overriding the interests of ordinary people and unchecked by government.<sup>9</sup>

The confluence of these interests led to demands that the government hold onto significant amounts of public lands, especially in the upper reaches of western watersheds, and manage them to serve broad public purposes. The biggest single step in this direction was Congress's enactment of the Forest Reserve Act in March 1891 that gave the president broad power to reserve in U.S. ownership any public lands that contained forests or other vegetation, whether of commercial value or not.<sup>10</sup>

Montana had joined the Union 16 months earlier. Its first elected member of the U.S. House of Representatives was Thomas Carter, a Republican and a seasoned politician. Right after the 1891 legislation was enacted, President Benjamin Harrison picked Carter to lead the General Land Office in the Interior Department.<sup>11</sup> The GLO, as it was known, oversaw all public lands at that time.<sup>12</sup>

Carter hit the ground running. Within two months he had directed his staff to take vigorous action to implement this new law. The top priority, he emphasized, was to “reserve *all* public lands in mountainous and other regions” where “timber or undergrowth is the means provided by nature to absorb and check” water flows in order to protect downstream

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9. The story is told in many places. *See e.g.* PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT, Ch. 19-20 (1970); ROY ROBBINS, OUR LANDED HERITAGE, Ch. 16-19 (1936); SAMUEL TRASK DANA & SALLY K. FAIRFAX, FOREST AND RANGE POLICY, Ch. 2 (2d ed. 1980).

10. Forest Reserve Act, Pub. L. No. 51-561, § 24, 26 Stat. 1095, 1103 (1891).

11. JOHN MORRISON & CATHERINE WRIGHT MORRISON, MAVERICKS: THE LIVES AND BATTLES OF MONTANA'S POLITICAL LEGENDS, 99 (Montana Historical Society Press, ed, 2003).

12. JAMES MUHN, *Early Administration of the Forest Reserve Act: Interior Department and General Land Office Policies, 1891-1897*, THE ORIGINS OF THE NATIONAL FORESTS 259-75 (Harold K. Steen, ed., 1992).

communities.<sup>13</sup> He instructed his employees to personally interview local officials and residents and formulate recommendations regarding what lands to preserve and publish them in local and state newspapers and invite feedback.<sup>14</sup> He also directed his staff to recommend “early action” if they thought any land was at risk of being “despoiled” while the review process was underway.<sup>15</sup>

People all around the West were already asking for such reservations, which came to be called forest reserves, the forerunner of what became the national forests. For example, Californians sought to reserve much of the upper reaches of the San Joaquin River in the southern Sierra Nevada Mountains. Before the end of 1891, Commissioner Carter issued an order withdrawing more than five million acres of public lands there from divestiture under the homesteading, mining and other laws.<sup>16</sup>

In the two years remaining in his term, President Benjamin Harrison, acting on Carter’s recommendations, established some fifteen forest reserves, covering nearly 15 million acres, including a four-plus-million-acre Sierra forest reserve in California that Carter had previously protected from divestiture.<sup>17</sup> (We Californians are very grateful for Carter and Harrison’s actions.)

Harrison’s successor, Democrat Grover Cleveland, set aside four million acres in Oregon’s Cascade Range not long after he took office in

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13. Annual Rep. of the Comm’r of the Gen. Land Office to the Sec’y of the Interior, DEP’T OF INTERIOR 331 (1891), <https://archive.org/details/annualreportofcg00unit> (last visited Feb. 28, 2019) (emphasis added).

14. *Id.*

15. *Id.* at 332.

16. Douglas H. Strong, *The Sierra Forest Reserve: The Movement to Preserve the San Joaquin Valley Watershed*, 46 CALIF HIST. Q J CALIF HIST. SOC., no. 1, 1967 at 9, DOI: 10.2307/25154181.

17. Proclamations are available at: UC Santa Barbara, *Proclamations Archive*, THE AMERICAN PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/presidential-documents-archive-guidebook/proclamations-washington-1789-trump-2018> (last visited Jan. 9, 2019); Harrison’s Proclamations 1891-93: 303 (Mar. 30, 1891); 310 (Sep. 10, 1891); 312 (Oct. 16, 1891); 316 (Jan. 11 1892); 319 (Feb. 11, 1892); 325 (Mar. 18, 1892); 332 (Jun 17, 1892); 333 (Jun. 23, 1892); 341 (Dec. 9, 1892); 342 (Dec. 20, 1892); 343 (Dec. 24, 1892); 344 (Dec. 24, 1892); 348 (Feb. 14, 1893); 349 (Feb. 20, 1893); 350 (Feb. 20, 1893); 353 (Feb. 25, 1893); 354 (Feb. 25, 1893).

1893.<sup>18</sup> Then he paused, waiting for Congress to finish work on legislation establishing how the forest reserves would be managed, to give guidance to livestock grazers, mineral prospectors, loggers and others who were using reserved lands without any official government permission.<sup>19</sup>

Congress had been working on legislation but was having difficulty pushing it across the finish line. In 1896, to try to speed things up, Congress and the President established a blue-ribbon commission of experts to make recommendations.<sup>20</sup> As petitions continued to come in from people all over the West asking for more forest reserves, the Commission recommended that the president establish many new ones.<sup>21</sup> Cleveland agreed and, on Washington's Birthday 1897, just a few days before he left office, he implemented its recommendation and put another 21 million acres in forest reserves, which included the first nine million acres of forest reserves in the State of Montana.<sup>22</sup>

Cleveland's strategy to spur Congress into action worked. Within three months it had enacted legislation that would guide management of the national forest system for the next eight decades. Among other things, this June 1897 legislation wrote into law that the principal purposes of these reservations of public lands were to "improve and protect the forest" within their boundaries, to "secur[e] favorable conditions of water flows," and to "furnish a continuous supply of timber for the use and necessities of citizens of the United States."<sup>23</sup>

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18. JOHN ISE, UNITED STATES FOREST POLICY, 120-22 (Yale U. Press 1920), <https://ir.library.oregonstate.edu/downloads/kd17cx78v>; FAIRFAX & DANA, *supra* note 9, at 57-59.

19. *Id.*

20. ISE, *supra* note 18, at 128-29.

21. *Id.*

22. *Id.* at 60, 129; GATES, *supra* note 9, at 568-69; Withdrawal of Lands for the Flathead Forest Reserve, Montana, Proclamation 395 (Feb. 22, 1897), <https://www.presidency.ucsb.edu/documents/proclamation-395-withdrawal-lands-for-the-flathead-forest-reserve-montana>; Withdrawal of Lands for the Lewis and Clark Forest Reserve, Montana, Proclamation 396 (Feb. 22, 1897), <https://www.presidency.ucsb.edu/documents/proclamation-396-withdrawal-lands-for-the-lewis-and-clark-forest-reserve-montana>; Withdrawal of Lands for the Bitter Root Reserve, Idaho and Montana, Proclamation 398 (Feb. 22, 1897), <https://www.presidency.ucsb.edu/documents/proclamation-398-withdrawal-lands-for-the-bitter-root-forest-reserve-idaho-and-montana>.

23. Agric. Dep't Appropriations Act, Pub. L. No. 59-242, 30 Stat. 11, 36 (1897) (codified as 16 U.S.C. § 475 (2018)).

Cleveland had left office three months earlier, unpopular because of an economic depression that gripped the nation's economy for much of his second term. In the June legislation, Congress included a slap at him, suspending the effectiveness of his Washington's Birthday proclamations for eight months in order to give the incoming president, Republican William McKinley, the opportunity to review them.<sup>24</sup> McKinley found no reason to disturb any of the Cleveland proclamations, and so they were automatically reinstated on March 1, 1898.

I recount these details to debunk the myth that these large national forest reserves were shoved down the throats of unwilling westerners by an elite cabal. While there was some grouching about Cleveland's decision-making process and exactly where the boundaries of his reserves were drawn, his Washington's Birthday proclamations were, on the whole, popular locally as well as nationally.

Thomas Carter's political career in Montana certainly did not suffer because of his early actions promoting forest reserves. The Montana legislature twice elected him to the U.S. Senate, and toward the end of his Senate career, he was the principal sponsor of legislation establishing Glacier National Park, most of which was overlaid on one of Cleveland's 1897 forest reserves.

President McKinley went on to establish other forest reserves, including another one in Montana in 1899, the year before he won a second term in office.<sup>25</sup>

When McKinley was assassinated in September 1901, the remainder of his term was filled out by Theodore Roosevelt, who established another 2.5 million acres of forest reserves in Montana, as well as many millions more in other states.<sup>26</sup>

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24. *Id.*

25. Setting Apart as Public Reservations Certain Public Lands in the State of Montana, Proclamation 430 (Feb. 10, 1899), <https://www.presidency.ucsb.edu/documents/proclamation-430-setting-apart-public-reservations-certain-public-lands-the-state-montana>.

26. A list of forest reserve proclamations, with references, can be found at: U.S. Dept. of Agric., *Establishment and Modification of Nat'l Forest Boundaries and Nat'l Grasslands: A Chronological Record 1891 – 2012*; FS-612, U.S. FOREST SERV. (2012), <https://www.fs.fed.us/land/staff/Documents/Establishment%20and%20Modifications%20of%20National%20Forest%20Boundaries%20and%20National%20Grasslands%201891%20to%202012.pdf>.

Then Roosevelt faced the voters in November 1904. If ever there was a time for voters to express anger at the millions of acres of forest reserves, this was it. But Roosevelt carried Montana by 20 percentage points over his Democratic opponent (with nearly one in ten of the state's voters favoring socialist Eugene Debs), on his way to a sweeping national victory, running up the biggest victory margin in the popular vote of any president since 1829.<sup>27</sup>

After the election, Roosevelt kept up the pace, creating many new forest reserves in 1905, including another 7.5 million acres in Montana.<sup>28</sup>

Then came a hiccup. In February 1907, Oregon Senator Charles Fulton persuaded his colleagues to include a rider on a bill funding the Department of Agriculture to prohibit the president henceforth from using the 1891 Act to create new forest reserves in six western states, including Montana.<sup>29</sup>

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27. *United States Presidential Election of 1904*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/United-States-presidential-election-of-1904> (last visited March 19, 2019).

28. Establishment of the Elkhorn Forest Reserve, Montana, Proclamation 552 (May 12, 1905), <https://www.presidency.ucsb.edu/documents/proclamation-552-establishment-the-elkhorn-forest-reserve-montana>; Modification of the Boundaries of the Bitter Root Forest Reserve, Idaho and Montana, Proclamation 558 (May 22, 1905), <https://www.presidency.ucsb.edu/documents/proclamation-558-modification-the-boundaries-the-bitter-root-forest-reserve-idaho-and>; Enlargement of the Yellowstone Forest Reserve, Wyoming, Montana, and Idaho, Proclamation 559 (May 22, 1905), <https://www.presidency.ucsb.edu/documents/proclamation-559-enlargement-the-yellowstone-forest-reserve-wyoming-montana-and-idaho>; Enlargement of the Madison Forest Reserve, Montana, Proclamation 594 (Oct. 03, 1905) <https://www.presidency.ucsb.edu/documents/proclamation-594-enlargement-the-madison-forest-reserve-montana>; Establishment of the Big Belt Forest Reserve, Montana, Proclamation 595 (Oct. 03, 1905), <https://www.presidency.ucsb.edu/documents/proclamation-595-establishment-the-big-belt-forest-reserve-montana>; Establishment of Hell Gate Forest Reserve, Montana, Proclamation 599 (Oct. 03, 1905), <https://www.presidency.ucsb.edu/documents/proclamation-599-establishment-the-hell-gate-forest-reserve-montana>; Enlargement of Little Belt Forest Reserve, Montana, Proclamation 602 (Oct. 03, 1905), <https://www.presidency.ucsb.edu/documents/proclamation-595-establishment-the-big-belt-forest-reserve-montana>.

29. Agric. Dep't Appropriations Act, 59 Pub. L. 242, 34 Stat. 1256, 1271 (1907).

Montana Senator Thomas Carter, now in his second term, supported Fulton's rider, but emphasized to his colleagues on the floor of the Senate that he and other westerners had strongly supported the 1891 and 1897 forest reserve legislation, and that people in those six states "want these forest reservations continued," but did not want the reservation policy to be extended "to vast areas of agricultural land."<sup>30</sup>

Montana's other senator at the time also supported Fulton's rider, and is worth a special mention. He was "Copper King" William Clark, one of the nation's wealthiest men, whose term was about to expire after having essentially bought a Senate seat from the Montana legislature six years earlier, ousting none other than Thomas Carter after one term. Mark Twain called him "as rotten a human being as can be found anywhere under the flag; he is a shame to the American nation, and no one has helped to send him to the Senate who did not know that his proper place was the penitentiary, with a ball and chain on his legs."<sup>31</sup>

Clark personified Gilded Age excess. Some years earlier, he had similarly bought his way into the presidency of the state's constitutional convention, where he promoted Butte to be the new state's capital and memorably defended its poor air quality, polluted by his company's mining activities, with the argument that "all the town's physicians consider the smoke" a "disinfectant," and ladies in particular were "very fond" of it because it had "just enough arsenic" to give them a "beautiful complexion."<sup>32</sup>

Clark also supported the Fulton amendment. He explained that while westerners "were all glad to have that bill passed in 1891" authorizing the president to establish forest reserves because it served "a great purpose," it had been carried "too far." The current generation of Americans, Clark said, is "obliged to avail ourselves of all the [natural] resources at our command," and those "who succeed us can well take care of themselves."<sup>33</sup> By that time, however, mainstream opinion in Montana

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30. 41 CONG. REC. 3722 (Feb. 23, 1907).

31. DUANE A. SMITH, *MINING AMERICA: THE INDUSTRY AND THE ENVIRONMENT, 1800-1980*, 45, 82 (1987); Michael P. Malone, *Midas of the West: The Incredible Career of William Andrews Clark*, MONTANA MAGAZINE 14 (Autumn 1983). Malone called Clark "an especially virulent example of the unrestrained capitalist on the frontier." *Id.* at 2.

32. SMITH, *supra* note 31, at 45.

33. 41 CONG. REC. 3725-26 (Feb. 23, 1907).

and the nation had rejected his philosophy of unrestrained greed with scant regard for others, including future generations, or for the environment.

Theodore Roosevelt signed the bill containing Fulton's rider into law, but before he did, he established dozens of new forest reserves and enlarged others in the six states to which the Fulton amendment applied. In Montana alone, Roosevelt added nearly five million more acres, bringing his Montana total to 15 million acres, and the state's total national forest acreage to 24 million.<sup>34</sup> Nationwide, by the time he left office in 1909, Roosevelt had added more than 100 million acres to the national forests.<sup>35</sup>

Congress did not consider reversing any of his proclamations. In the 1908 national elections, these massive reservations of public lands were simply not an issue, in Montana or anywhere else. William Howard Taft, Theodore Roosevelt's hand-picked successor, swept to victory, easily beating William Jennings Bryan in Montana even though in Bryan's two earlier runs for the Presidency in 1896 and 1900, he had handily carried Montana against William McKinley by margins of 80–20 and 58–40.<sup>36</sup> Taft's sweeping victory was another indication that the creation of the national forest system between 1891 and 1909 was strongly supported by people across the nation, including in Montana.

### III. THE OTHER SIDE OF A GRAND BARGAIN: FEDERAL WATER PROJECTS

As Thomas Carter (among others) had made clear, the political movement to reserve large amounts of public land in permanent U.S. ownership was closely connected to water. That connection was also underscored in 1902 when Congress, with Roosevelt's strong support, launched a federal program to build projects to capture and store water on or near public lands, and to deliver it to irrigate arid lands and establish

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34. GATES, *supra* note 9, at 580-81; *See generally* U.S. Dept. of Agric., *Establishment and Modification of Nat'l Forest Boundaries and Nat'l Grasslands: A Chronological Record 1891 – 2012*; FS-612, U.S. FOREST SERV. (2012), [https://www.fs.fed.us/land/staff/Documents/Establishment and Modifications of National Forest Boundaries and National Grasslands 1891 to 2012.pdf](https://www.fs.fed.us/land/staff/Documents/Establishment_and_Modifications_of_National_Forest_Boundaries_and_National_Grasslands_1891_to_2012.pdf).

35. GATES, *supra* note 9, at 580-81.

36. *1908 U.S. Presidential Election*, WIKIPEDIA (January 3, 2019), [https://en.wikipedia.org/wiki/1908\\_United\\_States\\_presidential\\_election](https://en.wikipedia.org/wiki/1908_United_States_presidential_election).

family farms.<sup>37</sup> In a brilliant stroke of political messaging, its proponents characterized their objective as “reclaiming” or restoring arid lands to productivity; hence, it was called the Reclamation Act.<sup>38</sup>

The Act operated only in the western states. It was a key part of a grand bargain involving the forest reserves, what historian Donald Pisani described as a “symbiotic relationship between forest preservation and reclamation.”<sup>39</sup>

In broad outlines, the deal was this: The U.S. would keep ownership of, and assume the responsibility for managing, the upper reaches of most western watersheds. This would safeguard the “favorable conditions of water flows” that could be used to irrigate flatter lands at lower elevations. Through the Reclamation Act, the U.S. would assume responsibility for building water projects to irrigate public lands that could be acquired under the Homestead Act, and also lands that had already passed into private ownership.

The timing was particularly good for Montana because silver and copper mining and processing, which had dominated the economy for decades, was declining. Agriculture was becoming the state’s dominant industry and artificial irrigation was desirable and even a necessity in some parts of the state.

After some maneuvering and compromise by members of Congress from Wyoming and Nevada and President Roosevelt, the Reclamation Act passed handily with strong western support.<sup>40</sup> The Interior Department promptly began authorizing and building reclamation projects in Montana and elsewhere around the West. One of the very first was the Milk River project in 1903. It was followed by the lower

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37. On his last day in the Senate in early 1901 before he gave way to new Senator William Clark, Thomas Carter had made a national splash by engaging in a fourteen-hour filibuster of a rivers and harbors appropriation bill, protesting the failure of Congress to offer federal aid for irrigation development in the west. See, Richard B. Roeder, *Thomas H. Carter, Spokesman for Western Development*, MONTANA: THE MAGAZINE OF WESTERN HISTORY 23, 25 (Spring 1989).

38. Bureau of Reclamation Appropriations Act, 57 Pub. L. 161, 32 Stat. 388 (1902); see MARC REISNER, *CADILLAC DESERT*, 115-20 (1st ed. 1987).

39. DONALD J. PISANI, *WATER, LAND, & LAW IN THE WEST*, 149 (1996).

40. REISNER, *supra* note 38, at 115-20; SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY*, 9-15 (Harv. U. Press 1959); PISANI, *supra* note 39, at 39-41.

Yellowstone Project in 1905 and the Sun River project near Great Falls in 1906. Many more would follow.<sup>41</sup>

By the end of 1906 the Reclamation Service had nearly two dozen projects underway across the West. Today, about ten million acres are irrigated with federal reclamation project water.<sup>42</sup>

The reclamation program quickly expanded beyond simply supplying water for farms. In 1906 Congress authorized the Interior Secretary to provide project water to “towns or cities on or in the immediate vicinity” of the irrigation projects, and to market electricity generated by project works that was surplus to irrigation needs.<sup>43</sup>

This opened the door for the reclamation program to evolve into a general public works program to serve the West. Today the Bureau of Reclamation supplies drinking water to more than 30 million people in the West and is the nation’s second largest producer of hydropower.<sup>44</sup>

#### IV. THE GRAND BARGAIN WAS THOROUGHLY BIPARTISAN

Now let me step back for a moment to draw your attention to a big difference in political culture between then and now. Today we more or less take for granted that public land policy is one of those partisan issues on which Republicans and Democrats tend to take sharply different positions. This is exemplified by Senator Lee’s remarks quoted earlier, and by President Trump’s dismembering of large national monuments that Presidents Clinton and Obama established in southern Utah.<sup>45</sup> This polarization, I cannot emphasize strongly enough, is a wholly modern development. The political movement that led to the U.S. public lands we see today was thoroughly bipartisan. Moreover, it was rarely marked by regional differences.

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41. *Projects & Facilities Montana*, U.S. BUREAU OF RECLAMATION, <https://www.usbr.gov/projects/facilities.php?state=Montana> (last visited Jan. 9, 2019) (containing histories of individual Montana reclamation projects).

42. *About Us-Fact Sheet*, U.S. BUREAU OF RECLAMATION (Jan. 31, 2019), <https://www.usbr.gov/main/about/fact.html> [hereinafter *Reclamation: About Us*].

43. Townsites Under Reclamation Act, Pub. L. 59-103, 34 Stat. 116 (1906).

44. *See Reclamation: About Us*, *supra* note 42.

45. *See text accompanying Lee*, *supra* note 4, and Donald Trump, President, Antiquities Act Designations (Dec. 4, 2017), *remarks transcript available at* <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-antiquities-act-designations/>.

The 1891 and 1897 forest reserve statutes were pushed through Congress by a coalition of Democrats and Republicans. Thomas Carter was a Republican, as were Presidents Harrison, McKinley and Roosevelt. Grover Cleveland and the principal congressional sponsor of the Reclamation Act, Francis Newlands of Nevada, were Democrats. Both major political parties took credit for the Reclamation Act in the 1904 election campaign.

Moving forward a couple of decades, another Montana Republican, Congressman Scott Leavitt, played a key role in the decision by Congress and the executive to hold in national ownership the largest remaining chunk of unreserved public lands, those now managed by the Bureau of Land Management (“BLM”). In the late 1920s, drought and overgrazing had led to badly deteriorating conditions on public rangelands. In addition, a severe agricultural depression had brought many ranchers to the brink of bankruptcy.<sup>46</sup>

Leavitt, who Montana voters had sent to Congress beginning in 1922, had from 1907 to 1917 been a Forest Service ranger, an experience that apparently added to his appeal to the Montana electorate. Leavitt worked closely with local ranchers to craft a bill to address the problems plaguing rangelands in one particular place in southeastern Montana. Enacted into law in March 1928, it established what became known as the Mizpah-Pumpkin Creek cooperative grazing unit. The core concept was that public lands in the 109,000-acre unit would be leased for up to ten years to ranchers who would work to restore the rangeland to health and graze it under Interior Department regulations.<sup>47</sup>

This experiment seemed to work to stabilize the local ranching industry and help restore the rangelands. Within a few years, after westerners firmly rejected a proposal advanced by President Hoover to turn over much of the remaining arid public lands deemed chiefly valuable for grazing to the states, Republican Congressmen Don Colson of Utah and Burton French of Idaho introduced legislation to apply the Mizpah-Pumpkin Creek idea west-wide.<sup>48</sup>

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46. E. LOUISE PEFFER, *THE CLOSING OF THE PUBLIC DOMAIN*, 187-89 (1951).

47. Public Lands, Grazing Ranges in Montana, Pub. L. 70-210, 45 Stat. 380 (1928); James A. Muhn, *The Mizpah-Pumpkin Creek Grazing District: Its History and Influence on the Enactment of a Public Lands Grazing Policy, 1926-1934* (Thesis, Mont. State Univ.); PEFFER, *supra* note 46, at 201-2.

48. PEFFER, *supra* note 46, at 215.

When Leavitt, Colson, and French were swept out of office in the 1932 election that saw Franklin Delano Roosevelt elected president, their initiative was taken over by Democratic Congressman Edward Taylor from western Colorado, who engineered passage of what came to be called the Taylor Grazing Act through the Congress in 1934. It quickly led to a combination of executive and further congressional action that kept most of the remaining unreserved arid lands of the intermountain West—including eight million acres in Montana—in national ownership under the supervision of what became the BLM.<sup>49</sup>

This effectively ended large-scale divestitures of public lands, outside the special case of Alaska. At the same time, the U.S. began to acquire failed homesteads under various New Deal programs to restore the grasslands. In Montana, about two million acres of these are managed by the BLM today.<sup>50</sup>

Over time, some of the public lands in Montana would be given new conservation designations, like the Charles M. Russell National Wildlife Refuge (first established as the Fort Peck Game Range by FDR in 1936)<sup>51</sup>, the Upper Missouri River Breaks National Monument (established by President Clinton in 2001), numerous other wildlife refuges, wild & scenic rivers and wilderness areas.<sup>52</sup>

## V. STATE-FEDERAL AUTHORITY OVER WATER RIGHTS

Now, let me again connect all this public land activity back to water; specifically, authority over water rights. While the national government was acting to keep ownership of many public lands, in part to

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49. Withdrawal of Public Lands for Conservation, Exec. Order No. 6910 (Nov. 26, 1934), <https://www.presidency.ucsb.edu/documents/executive-order-6910-withdrawal-public-lands-for-conservation>; Exec. Order No. 6964 (Feb. 5, 1935); Taylor Grazing Act, Pub. L. 73-482, 48 Stat. 1269-1275 (1934); Overgrazing and Soil Deterioration, Pub. L. 74-827, 49 Stat. 1976 (1936).

50. Wooten, H. H., *USDA Agriculture Economic Report No. 85: The Land Utilization Program 1934 to 1964 – Origin, Development, and Present Status*, U.S. DEP'T OF AGRIC. 33 (1965).

51. Exec. Order No. 7509 (Dec. 11, 1936).

52. See, e.g., Establishment of the Upper Missouri River Breaks Nat'l Monument, 3 C.F.R. 7398 (Jan. 17, 2001), <http://presidency.proxied.lsit.ucsb.edu/proclamations.php?year=2001&Submit=DISP LAY>.

protect their water supplies, Congress was mostly ducking the question of whether federal or state law would control the use of that water.

That might seem surprising, but it had political logic behind it. The truth was, there could be no simple answer to the question of state versus federal control. When confronted with situations like that, Congress often responds with silence or with ambiguity. It is a variation on the old political dodge, “some of my friends are for X and some of my friends are for Y and some for Z, and I’m for my friends.”

Let me give three examples of Congress’s evasiveness. The first was in the so-called Desert Land Act of 1877, which offered irrigable public lands for settlement to those who would irrigate them at their own expense. In that legislation, Congress made “the water of all lakes, rivers, and other sources of water supply upon the public lands” that were “not navigable” available “for the appropriation and use of the public for irrigation, mining, and manufacturing purposes.”<sup>53</sup> But Congress did not say whether that “appropriation and use” would happen under state or under federal law. And Congress was totally silent on what law would govern rights in navigable waters, in non-navigable tributaries of navigable waters, and in groundwater.

The second, the 1897 Forest Reserve Act I mentioned earlier, was even more ambiguous. It allowed “waters” on the forest reserves to be used for “domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, *or* under the laws of the United States and the rules and regulations established thereunder.”<sup>54</sup> By referring equally to state and to federal law, Congress provided no guidance whatsoever for managing conflicts between the two should such conflicts arise.<sup>55</sup>

The third was the 1902 Reclamation Act. On the one hand, it directed the Interior Secretary to “proceed in conformity with” state or territorial water laws “relating to the control, appropriation, use, or

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53. Desert Lands Act, 19 Stat. 377 (1877); 43 U.S.C. § 321 (2018).

54. 30 Stat. 11, 36 (emphasis added).

55. The reference to concurrent federal law was no accident, for earlier versions of what became the 1897 Act would have given states exclusive jurisdiction over the use of water on forest reserves. *See* Charles F. Wilkinson and H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OREGON L. REV. 1, 212 (1985), <https://scholar.law.colorado.edu/articles/1038>.

distribution of water used in irrigation. . . .”<sup>56</sup> On the other hand, it contained some federal law limitations on the use of reclamation project water and cautioned that nothing in it “shall in any way affect any right of . . . the Federal Government” regarding “water in, to, or from any interstate stream or the waters thereof.”<sup>57</sup> The ambiguity in this language has been addressed in several Supreme Court decisions, which have still left considerable uncertainty.<sup>58</sup>

The Reclamation Act’s disclaimer regarding the waters of interstate streams is particularly noteworthy, for it illustrates a key reason why there could be no simple answer to the question of state versus federal control of water. Water, unlike land, is fluid and can travel across state lines. Indeed, most of the waters in Montana and elsewhere in the West are part of interstate stream systems.

Under long-recognized principles of U.S. law, states downstream from Montana in the Columbia and Missouri River systems have a claim to some of these waters.<sup>59</sup> That means it can never be possible for the national government to step aside and simply allow a state like Montana to exercise full control over all water found within its boundaries.

Water also can traverse international boundaries. This means that under long-recognized principles of international law, Canada (which is both upstream and downstream of several Montana rivers) has something to say about Montana’s ability to control the use of waters inside its borders.<sup>60</sup>

Working things out with other states and Canada requires the involvement of the national government. It may require action by the U.S. Congress, the executive branch, and the federal courts (which can decide interstate water disputes).<sup>61</sup> It may also require international agreements, and even the involvement of international courts (which can decide disputes between nations).<sup>62</sup>

Individual states like Montana can influence, but cannot control, the ultimate content of such arrangements. This limitation on Montana’s

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56. Bureau of Reclamation Appropriations Act, 57 Pub. L. 161, 32 Stat. 388 (1902) (codified as 43 U.S.C. § 383 (2018)).

57. *Id.*

58. *See, e.g.*, *California v. United States*, 438 U.S. 645 (1978).

59. AMY K. KELLEY, 3 WATERS AND WATER RIGHTS §§ 43, 45–46 (3d ed., 2009).

60. *Id.* at §50.02.

61. *See, e.g.*, *Montana v. Wyoming*, 563 U.S. 368 (2018).

62. *See, e.g.*, KELLEY, *supra* note 59, at § 50.02.

sovereignty is an inescapable result of being just one state in a union of states, and part of one nation in a community of nations. This would be the case whether or not the U.S. owned any land in the state.

In Montana, this was made clear early on. One of the very first reclamation projects that the U.S. authorized early in the twentieth century was on the Milk River. But because the Milk River flows in and out of Canada, Congress would not spend federal dollars on the project until the U.S. and Canada reached an agreement that would allow the project to operate as designed. This led directly to the U.S. and Canada signing the landmark Boundary Water Treaty<sup>63</sup> in January 1909, which cleared the way for the project to be completed.<sup>64</sup>

## VI. INDIAN TRIBES AND THEIR WATER RIGHTS

At this point we need to bring Indian reservation lands into the picture, because they are another important limitation on a state's ability to govern waters within its boundaries. And here too events in Montana played an important role in the making of national policy.

There are seven federal Indian reservations in Montana. The treaties, laws and executive orders creating these reservations were all silent on water. In 1908, in a case styled *Winters v. United States*, the U.S. Supreme Court issued a landmark decision explaining the meaning of that silence.<sup>65</sup>

The case had its origins in 1888, when the Fort Belknap Indian Reservation was established along the Milk River to furnish a homeland for the Gros Ventre and Assiniboine tribes. A few years later, the U.S. filed suit challenging diversions made upstream from the reservation by non-Indians under state law. The U.S. argument was that these diversions interfered with the water the U.S. had earlier reserved for the Indians in connection with the land reservation downstream.

The Court in *Winters* held that when land was reserved for the Indian reservation, water needed to carry out the purposes of that

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63. Treaty Between the United States and Great Britain Relating to Boundary Waters between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448.

64. 3 WATERS AND WATER RIGHTS, *supra* note 59, at § 50.02.

65. 207 U.S. 564 (1908).

reservation was also implicitly reserved, and that reservation of water was superior to any water rights subsequently perfected under state law.<sup>66</sup>

Eventually, the U.S. Supreme Court would make clear that this principle of implied reservation of water, called the *Winters* doctrine, also applies to reservations of public land for non-Indian purposes, such as national forests, parks, and wildlife refuges.<sup>67</sup>

## VII. RESOLVING STATE-FEDERAL TENSIONS OVER WATER RIGHTS

Given all the uncertainties and potential state-federal conflicts described here, one might think that perfecting rights to use water for Reclamation Act projects would be very difficult to do. That turned out not to be the case. Many reclamation projects were built over the course of the twentieth century. This enterprise—lubricated by federal dollars and engineering expertise—was marked much more by cooperation than conflict among nearly all the affected interests.<sup>68</sup> But not all of them, for while this was happening, the water rights that attached to Indian reservations (and to reservations of public lands) under the *Winters* doctrine were almost always ignored.

A blue-ribbon national water commission established by Congress summed up the course of events this way in its landmark report, *Water Policies for the Future*, in 1973:

With the encouragement, or at least the cooperation, of the Secretary of the Interior—the very office entrusted with protection of all Indian rights—many large irrigation projects were constructed on streams that flowed through or bordered Indian Reservations [nearly all of which] were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the waters used for the projects. . . . In the history of the United States Government's treatment of Indian tribes, its failure to

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66. *Id.* at 577.

67. *Arizona v. California*, 373 U.S. 546, 601 (1963).

68. *See e.g.*, REISNER, *supra* note 38, *passim*.

protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters.<sup>69</sup>

There was no dissent from such a strong condemnation, and it is worth noting that every one of the Commission's seven members was from the West, and most of them, including the commissioner from Montana, had substantial experience in state-level water management.<sup>70</sup>

Another event important to this story needs to be noted. In 1952, Congress provided, in what came to be known as the McCarran Amendment, crucial *procedural* guidance for how state-federal disagreements over water rights might be resolved. It allowed state courts that were conducting so-called "general stream adjudications" of all the water rights of a particular stream system to join the U.S. as a party, to adjudicate water rights attaching to Indian reservations and public lands under the *Winters* doctrine, and to subject these rights, once quantified, to state administration.<sup>71</sup>

The Amendment, and its subsequent interpretation by the U.S. Supreme Court in several cases, expressed a general preference for state court adjudication and administration of all water rights, whether those rights were bottomed on state or federal law.<sup>72</sup> This has given states some control, if they choose to exercise it, over water rights connected with public lands and Indian reservations.

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69. *Water Policies for the Future*, NAT'L WATER COMMISSION 474-75 (1973), [https://www.epw.senate.gov/public/\\_cache/files/0/9/09fa2cfd-e480-40e6-bdf6-fc9fc8b5b0e3/6A20EC2999F0441563294B9DFFCFDD6E.water-policies-for-the-future-final-report-1973.pdf](https://www.epw.senate.gov/public/_cache/files/0/9/09fa2cfd-e480-40e6-bdf6-fc9fc8b5b0e3/6A20EC2999F0441563294B9DFFCFDD6E.water-policies-for-the-future-final-report-1973.pdf); see also DANIEL MCCOOL, *COMMAND OF THE WATERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT, AND INDIAN WATER*, 36-43 (1987).

70. John D. Leshy, *The Federal Role in Managing the Nation's Groundwater*, 11 HASTINGS W.-NW. J. OF ENVTL. L. & POL'Y 1, 12, n. 84 (2004).

71. 66 Stat. 560 (1952) (codified as 43 U.S.C. § 666 (1952)).

72. See, e.g., THOMPSON, LESHY, ABRAMS & ZELLMER, *LEGAL CONTROL OF WATER RESOURCES*, 1080-96 (6th ed. 2018). The Court has emphasized that the state courts have a "solemn obligation to follow federal law" in adjudicating federal reserved water rights. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571 (1983). Cf. Justin Huber & Sandra Zellmer, *The Shallows Where Federal Reserved Water Rights Founder: State Court Derogation of the Winters Doctrine*, 16 U. DENV. WATER L. REV. 261 (2013).

### VIII. MONTANA'S REMARKABLE SUCCESS STORY: SETTLING FEDERAL AND INDIAN WATER RIGHTS BY NEGOTIATION

Over the last few decades, more prominently in Montana than almost anywhere else, the U.S. government has worked to secure *Winters* water rights for Indian reservations (working closely with Tribes) as well as for reserved public lands like parks and forests and wildlife refuges.<sup>73</sup>

These *Winters* water right claims have created some tensions with states and with those claiming water rights under state law. This is because the federal claims are almost always legally superior to claims based on state law, which stems from the fact that most Indian and public reservations of land (and their water rights) predated, and therefore have priority over, most water rights established under state law. This can mean, as in the original *Winters* case, that those using water in compliance with state law may have to yield to senior, federal-law-based *Winters* water rights.<sup>74</sup>

Despite the potential for conflict, something truly remarkable has happened. Mark Twain's supposed maxim has not operated. In Montana, the story has a largely happy ending. The U.S., the state, the tribes, and other water users have, for the most part, managed to work through the issues and achieve mutually satisfactory solutions by negotiation rather than litigation.

The water rights of five national park service units in Montana, as well as the Upper Missouri River Breaks National Monument managed by BLM, two wild and scenic rivers, several national wildlife refuges, the National Bison Range, some national forests, and several other federal reservations, have all been settled by negotiation.<sup>75</sup> Even more noteworthy, the water rights of nearly all the Indian Tribes found in Montana, including the Blackfeet, the Crow, the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the Northern Cheyenne, and the Chippewa Cree Tribe of the

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73. *Id.*

74. David Getches, *The Unsettling of the West: How Indians Got the Best Water Rights*, 99 MICH. L. REV. 1473 (2001) (book review).

75. Approved compacts may be found at, <http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/approved-compacts>. See also THOMPSON, ET AL., *supra* note 72, at 1079-80, and Michelle Bryan, *At the End of the Day: Are the West's General Stream Adjudications Relevant to Modern Water Rights Administration?*, 15 WYO. L. REV. 461 (2015).

Rocky Boy's Reservation, have all been settled by negotiation, and the last two, at Fort Belknap and the Flathead Reservations, are nearing final approval.<sup>76</sup>

Several things help explain this success. The State of Montana, the United States, the Indian Tribes, the principal water users' associations, and other stakeholders have generally refrained from politicizing the matter and instead committed themselves to finding practical, win-win solutions. Like much of the history of the public lands, this has been a largely bipartisan exercise, with progress toward agreement maintained whether the national or state governments were controlled by Republicans or Democrats.

They have learned from some unhappy experiences elsewhere, especially in Wyoming, that the alternative of litigating these rights is lengthy and expensive, with results that are not easy to predict.<sup>77</sup> They also learned that *Winters* rights claims for national parks, forests, wildlife refuges and other public land reservations, being primarily designed to preserve flowing streams to protect habitat and other environmental amenities, are usually not in serious conflict with water rights obtained under state law for consumptive uses downstream.<sup>78</sup>

*Winters* rights for Indian reservations can involve significant diversions for irrigation and other consumptive uses, making the potential for serious conflict much greater. Still, negotiated settlements (especially those implemented through state and federal legislation, as most are) can accomplish things that litigation cannot, such as bringing more federal dollars to bear locally to help assist in sensible water management for the benefit of all stakeholders.<sup>79</sup>

Holders of state law water rights, recognizing that the Tribes can often establish senior claims, have been motivated to explore ways to maintain their water supplies while honoring those claims. Settlements offer Tribes a way to secure dollars to convert their paper claims into wet water, or to gain approval to lease their water for use off-reservation for cash and other considerations.<sup>80</sup>

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76. *Id.*

77. In re General Adjudication of Big Horn River System, 753 P. 2d 76 (1988), *aff'd by equally divided Court sub nom.* Wyoming v. United States, 492 U.S. 406 (1989).

78. See THOMPSON, ET AL, *supra* note 72, at 1079–80.

79. *Id.*, at 1136–40.

80. *Id.*

All these considerations have persuaded all sides that it was in their enlightened self-interest to resolve these matters by negotiated settlement.

Montanans should take great pride in what has been achieved here. Simply put, the challenge of dealing with water rights for Indian and public lands has been converted into an opportunity to advance sound water management, where the U.S. government, the state, and the tribes are partners much more often than they are foes, with wide public benefits.

This success story suggests that it is time to rewrite Mark Twain's fake news: Whiskey is for drinking, but water is too important for states and the U.S. government and the tribes and other stakeholders to fight about.

## IX. CONCLUSION

There is a larger lesson to take from all this, in my view. The settlement of federal water rights claims involving public and Indian lands in Montana is not only a major success story in and of itself, but it shows how the combination of public lands and enlightened leadership can, even on a subject as important as water, serve the general public interest both locally and nationally.

Indeed, considering what the public lands and the water flows they yield have meant to the quality of life in your great state, I am led to a fundamentally different conclusion from the one reached by Utah Senator Lee. I do not believe these public lands are, as Senator Lee suggested, akin to "royal forests" reserved "for the exclusive entertainment ... of an economic and political elite with no real connection to the lands." I do not believe the communities where public lands are found are "being throttled by their federal landlord." I do not believe the United States has a "stranglehold on the west."

I believe, instead, that public lands and their water supplies have generally been managed in a way that has reflected the general will of the people, both here in Montana and across the nation. We do not live in a monarchy. We do not have "royal forests." We live in a democracy. We are ruled by the outcome of elections like the ones we have recently had. How public lands are managed, what interests they serve, and indeed, whether they stay in public ownership, is subject to the will of the people, expressed however imperfectly, at the ballot box. That means, if and when

management of public lands and water no longer reflects what people want, it can be changed.

Let me underscore that point. Some libertarians call the public lands “political lands.” They use the term scornfully, but they are exactly right. Our public lands remain a creature of politics and our political system. This means their future is hardly guaranteed. Montanans have every right to elect public officials who agree with and will support Senator Lee’s vision. And if enough people are elected to office who agree with him, they can change things. Such changes can be dramatic. The public lands can be eliminated. Ownership can be transferred to the states or the private sector. No public land—not even iconic treasures like Glacier or Yellowstone—is immune. All it takes is simple, ordinary legislation. Congress could do it tomorrow.

Moreover, even if Congress does not act, existing law gives the executive branch considerable authority to transfer effective control over many of these lands to states or the private sector, through leases and other long-term legal arrangements. Congress and the president can also starve the managers of our public lands of funds, at a time when those lands are experiencing record numbers of recreational visits as well as facing numerous other challenges, including a changing climate. That makes it harder for those agencies to fulfill their stewardship mission, which in turn undermines public confidence and with it, public support for the public lands.

What it boils down to is this: Each new generation of Americans must effectively decide what it wants to do with these lands. Without political support, they and the values they bring to our way of life can be lost.

Now let me go further out on a limb. It seems to me that the public lands and the water supplies they produce have helped in significant ways to realize the promise of life in the great state of Montana for its citizens. The “favorable conditions of water flows” from the national forests that Congress sought to protect well over a century ago continue to make good quality waters available for conventional agricultural, municipal, and industrial uses downstream. Without these reserved public lands, I believe, disputes over water would almost certainly be more intense and harder to solve.

These public lands also serve larger public purposes. As Republican President Richard Nixon put it in his 1971 environmental

message, the public lands are the “breathing space” of the Nation.”<sup>81</sup> Without these lands being kept in national ownership and open to all, the quality of Montana life could be much different and, I believe, much poorer. As Montanans know well, these lands and waters protect fish and wildlife habitat and provide inspiration and wonderful recreational opportunities that are ever-more important not only to the quality of life, but to local economies. In these and many other ways, I believe, America’s public lands have brought us together, not driven us apart.

Considered broadly, America’s public lands seem to me to be a huge political success story, a credit to the workings of our political system and our government, particularly our national government, one of the finest examples of long-term thinking I know. Admittedly, it is not easy in today’s sour, polarized political climate to celebrate success stories, particularly those in which the national political system and bipartisan cooperation have played an instrumental role. That is exactly why it is particularly important to do so now.

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81. Special Message from Richard Nixon, President, to the U.S. Congress, *Special Message to the Congress Proposing the 1971 Environmental Program* (Feb. 8, 1971), <http://presidency.proxied.lsit.ucsb.edu/ws/index.php?pid=3294&st=&st1=>.