An Overview of American Land Policy

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PAUL W. GATES

# AN OVERVIEW OF AMERICAN LAND POLICY

In attempting to present an overview of American land policy I propose to discuss in the most general terms the acquisition of the public domain, the fundamental constitutional questions relating to it, the divergent points of view of the older states and the newly developing west, the double effect of the various policies adopted, and the prevailing belief, at least until fairly recently, that the federal government should divest itself of the ownership of public land and get it into private hands. Finally I hope to show that many of the old disputes about our public land policies are still unresolved and that we are, in a sense, back to square one.

Philadelphia, the center of government in 1787, was host to the Constitutional Convention which met in Independence Hall while, simultaneously, the Congress of the Articles of Confederation was meeting in Carpenters' Hall writing the Northwest Ordinance to provide government for the territory north of the Ohio. After many disputes and petty jealousies had been composed, Virginia, Massachusetts, and Connecticut had surrendered to the national government all or parts of western land claims and the Congress had provided in the Land Ordinance of 1785 a plan for the management and sale of the land. Though the power to own, manage, grant, and otherwise dispose of the public lands was to be one of the most nationalizing factors in the life of the federal republic, that power received slight attention in the new constitution of 1787. It is confined to twenty-six words in Article IV, Section 3: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."[1] But more detailed powers

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[1] Merrill Jensen, *The New Nation: A History of the United States During the Confederation, 1781–1789* (New York: Alfred A. Knopf, 1965), 350–59; Henry Steele Commager, *Documents of American History* (New York: Appleton-Century-Crofts, 1962), 144, Article 4, Section 3 of the Constitution.



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and restrictions had previously been agreed to during the period of the Confederation.

Virginia had ceded her western land claims in order to secure Maryland's accession to the Articles of Confederation. But Virginia had imposed two restrictions. First, the lands were to be "considered as a *common* fund for the use and benefit of such of the United States as have become, or shall become members of the confederation or federal alliance of the said States, Virginia included, according to their usual respective proportions in the general charge and expenditure, and shall be . . . disposed of for that purpose, and for no other purpose whatsoever. . . ." Second, the ceded territory should be divided into states and admitted into the Union with "the same rights of sovereignty, freedom and independence as the other States. . . ." In accepting Virginia's act of cession, Congress resolved that it should be "recorded and enrolled among the acts of the United States in Congress assembled."[2] Thus it was established that the public lands were the sole property of the United States, that any income derived therefrom was to be shared by all the states in proportion to their representation in Congress, and that the new states were to have the same rights as the original states.

In the Northwest Ordinance of 1787 Congress declared: "The legislatures of these districts or new States, shall never interfere with the primary disposal of the soil by the United States . . . nor with any regulations Congress may find necessary, for securing the title in such soil, to the *bona fide* purchasers. No tax shall be imposed on lands . . . of the United States; and in no case shall non-resident proprietors be taxed higher than residents." Despite these limitations upon the sovereignty of the new states, and the greater one which barred slavery, Congress stated in that same ordinance that the new states should be admitted into the Union "on an equal footing with the original States, in all respects whatever. . . ."[3] These and other inconsistencies and ambivalent positions respecting the public lands were to have a major bearing on the question, "Whose public lands?"

The Congress of the Confederation had found it difficult to resolve questions relating to the public lands over which it had thus obtained jurisdiction because each of the thirteen original states had retained such ungranted or forfeited lands as remained within their boundaries as they exist today. In addition, Massachusetts had retained ownership of present-day Maine and still held a large portion of western New

[2] Thomas C. Donaldson, *The Public Domain: Its History, with Statistics* (Washington, 1883), 68–69.

[3] Donaldson, *Public Domain*, 155–56.

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York; Connecticut retained its western reserve in northeastern Ohio; New York still had many ungranted lands; Virginia retained, until 1792, public land in present-day Kentucky; and Georgia had the greatest amount of ungranted land within its present boundaries and did not cede its western land claims until 1802.[4] Sovereignty was associated with the ownership of ungranted lands within a state's boundaries, yet this right was to be denied to new states created out of the public lands. The public land states were never to forget this limitation upon their sovereignty and their representatives were to devote themselves to rectifying the situation while the original states continued to maneuver to induce Congress to carry out the pledge it had made to Virginia that the benefits arriving from the public domain should be shared by all the states in proportion to their federal ratio.

Notwithstanding the restrictions imposed by the Virginia Act of Cession, Congress had provided in the Land Ordinance of 1785 that section 16 in each township, or one thirty-sixth of the land, should be reserved for schools.[5] It thereby established a precedent for the continued violation of the principle that the public lands were being held for the benefit of all the states. When, subsequently, Congress made one grant after another to the western states, resentment in the older states intensified. The Virginia Act of Cession was not the only basis for their claim that the benefits of the public domain should be shared by all. Equally important was the fact that the Revolution had been won by all thirteen original states at much cost to them and that the cession of territory made by Great Britain had been made to the United States.

Thus there developed two major divisions of opinion on public land questions. The one concerned with the sharing of the land or its benefits among the states became essentially an East-West conflict between the thirteen original states, who were supported after a time by some of the older public land states. They were opposed by the newer public land states who felt that the land should be theirs and as their resources produced income it should be reinvested within their boundaries. The second division was similarly sectional, and even more political, with the more conservative eastern states wishing to prevent the public land states of the West from drawing population away from the East, thereby reducing its congressional representation, and also affecting land values and employment costs in the older area.

How was the public domain to be disposed of? In considering this

[4] Paul W. Gates, *History of Public Land Law Development* (Washington: GPO, 1968), 55–56.

[5] Commager, *Documents*, 123–24.

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question the Congress of the Confederation and later Congresses had the experience of the mother country and of the thirteen colonies to draw upon. During this long period of 180 years, great estates of millions of acres had been granted to the Penn, Calvert, Fairfax, and Granville families and smaller holdings, ranging in size from a few thousand to several hundred thousand, even a million, acres had been bestowed on many more influential persons. These estates were farmed by tenants who paid their landlords both rents and services. By the close of the Revolution the largest of these estates had been forfeited or confiscated and there had been a considerable division of properties into smaller holdings for sale, although these changes were far from revolutionary. Some proprietors who had either evaded taking a stand in the Revolution or who had wisely opted for rebellion, managed, like the Schuylers, Livingstons, and Van Rensselaers of New York to retain their holdings. Despite the radicalism of the Declaration of Independence, and the agrarian uprisings of the time, the period of the Confederation was marked by the establishment of additional large private holdings, by Massachusetts in its New York lands, by Virginia in Kentucky, and by Tennessee and Georgia, which all distributed their lands in the most profligate manner. However, estate making was paralleled in the southern colonies by the headright system and in New England the proprietors' grants were soon divided. Consequently freemen in good standing with the authorities were able to acquire small tracts of land, and, generally speaking, the larger holdings were interspersed with small farms. The very liberality of the various land systems had proved to be the principal attraction to settlers from the old world.[6] By 1790 the population of the United States was already 40 percent of that of Great Britain.[7]

After the Revolution neither of these colonial precedents was at first to be followed. The egalitarian ideas of the time, the growing hostility between the owners of large estates and their tenants, and the financial needs of the federal republic sufficiently account for the fact that the United States did not make extensive *grants* of land to influential people (it did make large sales to two influential groups), but neither did it adopt the headright system with its free grants to free men. The public domain was needed for other purposes.

[6] Significant works on colonial land policies are listed in Frank Friedel, *Harvard Guide to American History,* 2 vols. (Cambridge, Mass.: Harvard University Press, 1974), 2: 717.

[7] The population of Great Britain in 1791 was 9,747,000, that of the United States in 1790 was 3,929,214 (Phyllis Deane and W. A. Cole, *British Economic Growth* [New York and London: Cambridge University Press, 1962], 6, 8; *World Almanac,* 1975 [New York, 1975], 145).

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Alexander Hamilton was anxious that the public lands should provide revenues for the heavily indebted young nation. By an act of 1790 the income from land sales was pledged solely to payment of the nation's debts.[8] Hamilton expected that speculators and land companies would be the principal buyers and that they would then retail the land to actual settlers. At the outset, then, Congress created a wide-open land system with no limitation upon the amount of land individuals could buy. Not until the mid nineteenth century were any limitations to be placed on purchases and these proved quite ineffective.

Questions concerning the pricing of land, the speed at which it should be surveyed and opened for settlement, and the treatment to be meted out to squatters who had helped themselves to the public domain soon created that second fundamental division of opinion between East and West previously referred to. Hamilton had hoped for prompt sale of the public land in large blocks. Later, the conservative attitude toward the public lands, favored by Henry Clay and during his early career by Daniel Webster, was that the lands should be surveyed and opened to settlement only when older areas had been well taken up and improved and the land should be offered at prices that would not tend to draw farmers away from these older areas since their leaving might adversely affect land values and also the wages of labor. Moreover, slow extension of surveys and opening the land to settlement would facilitate compact growth, keep management costs down, and assure the early introduction of roads, schools, churches, and local government, and mean good order. But western pressure groups advocated the speedy opening of new land, the conservative policy was breached, the thinly maintained barriers were broken. The frontier of settlement advanced from Florida to Louisiana, and up the Mississippi to Arkansas and Missouri, and from Ohio to Illinois to Michigan, and new territories and states were created. Soon population reached Utah territory, the Oregon country, and California. Before long the Superintendent of the Census was deploring, with a little less than accuracy, that the frontier was gone. The Webster-Hayne argument about what section had done more for the West was futile, for it was the new West, with its vigorous restless representatives, that had demanded the reduction of all barriers and the elimination of the Indians from any area attractive to whites, and they had been successful in wresting from reluctant representatives of the older states concessions in the price of land and in the terms of purchase. They obtained a general prospective Preemption Law for the protection of squatters and a Homestead Law, subsequently supplemented by additional legislation that made free

[8] Act of 4 August 1790, 1 *Stat.*, 144.

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homesteads of various sizes available to settlers who complied with specific requirements.

The sales policies that were in force everywhere up to 1862 and in areas previously declared open to sale until 1889, plus the government's practice of rewarding veterans with bonuses of land, not cash, had the double effect of creating both small properties and numerous extensive speculator holdings, the latter often of choice land. The result was the development of a strong antimonopolist feeling in the West and a land reform movement in the East, initiated by men like George Henry Evans and Horace Greeley who saw in the public lands the means of alleviating the lot of eastern workingmen. But not until 1866 was the principal of land limitation adopted and then only for the five southern states of Arkansas, Alabama, Florida, Louisiana, and Mississippi. Some congressmen supported the act more as a punitive than a reform measure. George W. Julian, an Indiana congressman and the most realistic of the land reformers, hoped that by limiting the 46 million acres of public lands remaining in these states to homestead entries of no more than 80 acres it would be possible to provide farms for the freedmen and landless whites. Unfortunately the lands available for entry under the Southern Homestead Act were covered with long-leaf pine or were sandy barrens not well adapted to farming. The poorer class and the freedmen received little benefit from the Act. Upon the insistence of southern congressmen, who felt that the measure was a shameful discrimination, it was repealed in 1876.[9]

Although the Homestead Act of 1862 was for a time an outstanding success in enabling many thousands of settlers with little capital to become farm owners, the development of large properties continued even after this fundamental change in policy. Its effectiveness in contributing to the creation of farms was limited by the abuse of the settler laws, the use of dummy entrymen, the continuation of the cash-sale system and the extraordinarily generous sharing of the public lands with the railroads and the states which did not allow free homesteads on their part. Not until 1888–1891 did Congress get around to adopting a general limitation of 160 acres upon land entries, by which time 365,000,000 acres or an area ten times the size of Illinois were not open to homesteading and an additional 50,000,000 acres had passed into the

[9] For administrative restraint in not pressing lands into the market by President Pierce in the fifties and for the 80-acre limitation upon the alienation of southern lands between 1866 and 1876 see Paul W. Gates, *Fifty Million Acres: Conflicts over Kansas Land Policy, 1854–1890* (Ithaca, N.Y.: Cornell University Press, 1954), 76–77; and Gates, "Federal Land Policy in the South, 1866–1868," *Journal of Southern History* 6 (August 1940): 304–30.

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hands of speculators waiting for the rise in the value of their holdings.[10]

The federal government's control of the public domain has been a major factor in shaping federal-state relations. From the outset the new states learned to respect the powers of the national government and to look to it for assistance. When a new state was admitted into the Union it was required to write into its fundamental law the famous clause, irrevocable without the consent of the United States, disclaiming all right and title to the unappropriated lands, including the right to tax them, and declaring that the public lands "shall be and remain at the sole and entire disposition of the United States," that nonresident-owned land should never be taxed higher than resident-owned land, and that public land, when sold, should be exempt from taxation for five years. This practice was begun with the admission of Ohio in 1803, made more explicit with the admission of Louisiana in 1812, and somewhat modified by the omission of the tax exemption clause when Michigan was admitted in 1837.[11]

The western states detested these infringements on their sovereignty, which meant that they were not being admitted to the Union on the same basis as the original states but, anxious for statehood, they accepted them.[12] Besides, what the federal government took away with one hand it began returning with the other. New states received the sixteenth section in each township for schools, as the Land Ordinance had provided, and also land for seminaries and a university, the salt springs, and 5 percent of the net proceeds from the sale of public lands within their borders for construction of roads. As time went on, increasingly generous grants were made to states on their admission or, subsequently, for education, for the drainage of wet lands, and for the construction of roads, canals, or railroads. Few factors had a greater influence on breaking down states-rights' parochialism than the federal government's practice of sharing the public lands and the income derived from them with the states. The West learned to look to Washington for assistance with projects it could not yet afford. Constitutional

[10] Paul W. Gates, "Homestead Law in an Incongruous Land System," *American Historical Review* 41 (July 1936): 652–81; Gates, "The Homestead Act: Free Land Policy in Operation," in *Land Use Policy and Problems in the United States*, Howard W. Ottoson, ed. (Lincoln: University of Nebraska Press, 1963), 28–46; Gates, "The Homestead Law in Iowa," *Agricultural History* 38 (April 1964): 67–78.

[11] I have discussed the terms laid down in the admission acts and the grants to the states in *History of Public Land Law Development*, 285–318.

[12] Western feelings on the retention of the public lands by the United States, in the later years are best seen in E. Louise Peffer, *The Closing of the Public Domain: Disposal and Reservation Policies, 1900–1950* (Stanford, Calif.: Stanford University Press, 1951).

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limitations on the power of the federal government to undertake them were evaded with the argument that these gifts of public land to the states would increase the value and hasten the sale of the land that was retained. Yet, despite federal generosity, the attitude of the West on the public land question remained ambivalent. The western states benefited from federal policy and resented it, because public land within their borders was not all their own to manage as they saw fit.

By sharing portions of the public land with the states the federal government obliged them to create their own land-administering agencies. At the outset the public land states were under heavy pressure to make their lands available to settlers or other buyers as speedily as possible. They gave little attention to the possibility of withholding the lands for higher prices so that they would more adequately serve the purposes for which they had been granted. Later on, states were less prodigal in their management policies and were to obtain larger endowments for schools and universities. One could say that by the twentieth century most of the newer states were doing about as well with their lands as the federal government, some even better. Local control over portions of their resources did not always mean that the newer western states permitted self-seeking interest to dictate improvident management and sales policies. Indeed, in the twentieth century, the great giveaway has been more characteristic of federal than of state policies.

At the outset the grants for railroads were made to states which either undertook construction of the lines themselves or conveyed the land to private corporations. In either case, the state had prime jurisdiction over them. When interstate transcontinentals were planned in the eighteen-sixties, Congress granted the land directly to the corporation, which meant that the states could not regulate these railroads, could not tax their lands until they had been sold and the title conveyed to individuals, and could not compel forfeiture of unearned grants so as to open the land to homesteaders. The railroad mileage of the country increased from 9,021 in 1850 to 123,320 by 1895. I have not tried to determine what proportion of this mileage was built with the aid of land grants. It included most of the main lines of the Union Pacific, the Southern Pacific, the Santa Fe, the Burlington Northern, the Rock Island, the Northwestern, the Milwaukee, the Illinois Central, and the Missouri Pacific. Six new states were admitted into the Union between 1850 and 1885. All the rest of the West was divided into rapidly growing territories, from which seven states had been admitted to the Union by 1896. The construction of the railroads and the colonization work they carried on played a vital part in this rapid development.[13] Altogether an

13 The classic treatment of the land-grant railroad as a promoter of settlement is James B. Hedges, "The Colonization Work of the Northern Pacific Railroad," *Missis-*

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area about the size of Texas was granted for railroads. The Association of American Railroads has long devoted much time and energy to an attempt to convince the country that the grants were mostly of mediocre land.[14] They did include desert land, poor grazing land, and barren mountain tops. But they also included choice corn-belt land in Illinois, Missouri, Iowa, and Nebraska, and excellent wheat land in North Dakota, Montana, and Colorado. Some of the richest and most heavily timbered lands in Washington and Oregon passed to railroads, as did oil- and coal-bearing lands today worth billions of dollars. Much of the latter they still retain (or at least the subsurface rights to such land), although the public transportation services these railroads were supposed to supply have dwindled away.[15]

Representatives of the original thirteen states became resentful of the liberality with which Congress was sharing the public domain with the western states, building them up with grants for roads, canals, and railroads which the older states had had to provide for themselves, and drawing their farmers and their labor away to the cheaper and more fertile lands of the West. The older states recalled that it had been agreed the public domain should benefit all the states. It was theirs too, was it not? They were determined to get their share. In 1832 Henry Clay, a native Virginian, who regarded the terms of the Virginia cession as binding on the government, brought forth a bill to distribute the net proceeds from the sale of the public lands among the states in proportion to their federal ratio and with a special bonus allowed to the states in which the land was sold. Jackson vetoed it.[16] The older states then prepared an alternative to Clay's distribution plan. This was the act which directed that the federal surplus, largely derived from public land sales, be deposited with the states, strictly in proportion to their federal ratio. It became law and was in operation only a short time before it was suspended.

A third effort of the older states to share in the proceeds from western land sales reached enactment in the Distribution Act of 1841, but to win support for its adoption they had to accept features they detested: allowing general prospective preemption of settlers on public

*sippi Valley Historical Review* 13 (December 1926): 312–42. Also excellent is Richard C. Overton, *Burlington West: A Colonization History of the Burlington Railroad* (Cambridge, Mass.: Harvard University Press, 1941).

[14] The latest attempt of the AAR is a flyer entitled *Railroad Land Grants: A Sharp Deal for Uncle Sam.*

[15] The coal reserves in the alternate sections of the old Northern Pacific (now Burlington Northern) in North Dakota and Montana and the oil-bearing lands of the Southern Pacific in California have value almost beyond imagination.

[16] The story of the various efforts of the original thirteen states and other non–public land states to share in the proceeds from the sale or leasing of United States lands is given in greater detail in *History of Public Land Law Development,* 11–28.

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lands before the public sale and granting 500,000 acres of land to each public land state for the building of internal improvements. Distribution lasted for but a moment but the western gains were permanent.

In the eighteen-fifties, when Congress was granting lands lavishly to the western states for railroads and swampland drainage and was doubling its grants to new states for public schools, representatives from the non–public land states came forth with proposals that they should share directly in the public lands. One measure, which passed the House but not the Senate, would have given 29,250,000 acres to the non–public land states for public schools; the Dix bill, which easily passed Congress but was vetoed by President Pierce, would have given every state large grants in proportion to their size and population for the improvement in the case of indigent insane people; a third measure, the Morrill Land Grant College Act of 1862, gave 30,000 acres of land or scrip (land office money) for each senator and representative to which it was entitled for the establishment of colleges of agriculture and mechanic arts. This marked the high tide of the movement for the older states to share in the public lands. Since it could not be argued that grants for agricultural colleges would increase the sales value of the remaining public lands, as the railroad grants had been expected to do, it is obvious that the Land Grant College Act was a practical recognition and application of the principle of the Virginia cession and a strong step towards a more liberal interpretation of the constitutional powers of the federal government.

Unfortunately, many of the new colleges were to find they had not the resources to support research in the newer agricultural sciences. Farm leaders, realizing the inadequacies of the new institutions, moved on a broad front to secure more federal aid for them. The agricultural college scrip given to the landless states of the East had entitled them or their assignees to land in the public domain states of the West, which strongly resented that fact, particularly as the scrip had been sold chiefly to speculators who thus acquired large holdings cheaply. This time, therefore, it was proposed to ask not for land but for income from public land sales to subsidize research programs in the agricultural sciences. Since the revenues from public land sales ranged from $4 million to $11 million annually between 1886 and 1891 some of it could easily be spared. Accordingly the Hatch Act of 1887 authorized appropriations of $15,000 to support agricultural experiment stations in every state and the Second Morrill Act of 1890 authorized a similar annual sum for the support of the land-grant colleges. (The 1890 Act permitted the establishment of more than one college in each state.) The latter sum was to be increased each succeeding year until the annual grant amounted to $25,000.

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Westerners regarded as extremely dangerous to their interests an alternate proposal which Morrill of Vermont, Blaine of Maine, Hoar of Massachusetts, and other eastern senators had previously advanced. It would have required *all* the net proceeds from the public lands, after certain deductions, to be invested and the earnings to be distributed among all the states for education according to their federal ratio. In the end Morrill concluded that it was wiser to ask for half a loaf than to risk all. He therefore substituted for this proposal his second Morrill bill which Congress, in great relief, adopted. By 1890 Congress had moved far and broken down many barriers in supporting agricultural experiment stations and in instituting annual appropriations for state colleges. At the same time Congress had prevented the older states from tying up the entire revenue from public lands for which it was shortly to advocate a purely sectional use.

One of the aspects of past American land policies that is giving us trouble today is the manner in which land has been acquired from the Indians. Colonial and British governments were badgered by land promoters, with and without capital, and by frontier settlers to purchase additional land from Indian tribes. Often such persons, impatient for the land, induced the Indians to make private agreements with them and then tried to get their Indian deeds validated. The controversies that grew out of such negotiations, the terms of which were often unconscionable, and which often failed to recognize the claims of minor bands or other tribes to the territory in question, led the British government to insist that only properly accredited representatives of the government should have any part in negotiations with the Indians. Territory in which they were conceded to have rights was declared closed to white settlers, whose unauthorized intrusions had in the past led to Indian raids and warfare. The government of the United States adopted these same policies but did not succeed in preventing Indian wars. There was constant pressure from the South and West for the acquisition of reserves that had been solemnly guaranteed to the Indians. The fur trade brought white traders into the reservations. Soon the leading traders had the Indians, and particularly the chiefs, so indebted to them that they were able virtually to dominate the treaty negotiations and bring them to the conclusion desired by the whites. Lump-sum payments for the land surrendered by the Indians went to meet their obligations to the traders who could also look forward to profiting from the annuities agreed upon. Choice sites, often reserved for the chiefs at the instance of the traders, were soon acquired by them. It was the traders who were responsible for the introduction of the individual allotment system into the treaties with the Miami, Potawatomie, Choctaw, Creek, and Chickasaw Indians made during

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the first third of the nineteenth century. Doubtless the traders contributed also to the Dawes Severalty Act of 1887.[17] Despite the restrictions on alienability, the allotments soon passed into the possession of whites and those who were responsible for the Act ought to have been well aware what the results would be. Step by step the Indians were deprived of their land, forced or induced to sign treaties and accept terms of compensation which they now regard as unconscionable. By an Act of 1946 they have been permitted to reopen their claims on the United States Treasury, and have won $524,000,000 in awards, one tenth of which has gone to predominantly white lawyers. But the Indians, having gained a bagatelle, now want to recover possession of lands they were once cheated out of.[18]

Well before 1890 the best of America's arable lands had passed into private ownership. There remained large areas of dry land east of the Rockies in the intermountain country and in the Pacific Coast states. Irrigation had been practiced on a small scale by Indians in the Southwest, and at the missions in California, and the Mormons had resorted to it from their first settlement in Utah. By the end of the century much private capital had been invested, particularly in the San Joaquin valley of California, in reclaiming arid land. Overoptimistic estimates of the amount of water available and inadequate appreciation of the soil problems of irrigated areas had resulted in large losses but had shown the possibilities in semiarid areas if greater financial resources could be obtained for their development, and if more careful planning were done. In 1899 7,528,000 acres in the public land states were irrigated to some extent.[19] Officials of the western railroads, the real estate interests, and boomer people joined together to win government aid—that is federal aid for irrigation schemes. Three main proposals came under discussion. Outright cession of the remaining public lands to the states, which might then mortgage them to raise funds for irrigation projects accessible to water; grants to the states to enable them to experiment on a small scale, possibly on pilot projects that might lead to something bigger; finally, federal subvention of irrigation. Cession which had been raised over and over again by western states (and was to come up again in the twentieth century) seemed out in view of the West's continued failure to win sufficient eastern support

[17] Paul W. Gates, "Indian Allotments Preceding the Dawes Act," in *The Frontier Challenge: Responses to The Trans-Mississippi West,* John G. Clark, ed. (Lawrence: University of Kansas Press, 1971), 141–70.

[18] U.S., Indian Claims Commission, *Annual Report, 1974,* Appendix 1.

[19] Ray P. Teele, *The Economics of land Reclamation in the United States* (Chicago, Ill.: A. W. Shaw, 1927), 261.

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for this proposal. Small pilot plants were experimented with under the Carey Act of 1894, which promised as much as one million acres to any state containing desert lands that undertook irrigation projects. Little was accomplished. During the next eight years only 11,321 acres were patented and altogether less than a million acres of potentially irrigable land had been selected by the eleven eligible states.

Representative Francis G. Newlands, borrowing heavily from the past, including experience with Distribution and the two Morrill Acts, won enactment of a bill to create a revolving fund into which should pour all but 5 percent of the proceeds from public land sales in the sixteen western states and territories. The monies were to be used for the construction of irrigation works in the states from which they were derived.

Estimates of the amount of land that could produce crops if water could be provided ranged as high as 120 to 540 million acres, the former figure being that of Major John W. Powell, though all were extremely optimistic and based on no careful consideration. Newlands, at one point, estimated the possible irrigable area to be 70 million acres and later reduced the figure to 60 million. Actually, little more than 33 million acres are today irrigated, and this includes Texas which was not a public land state.[20] The number of farms into which the irrigable lands might be divided ranged as high as three to six hundred thousand. Planners and dreamers—and propagandists of the time—presented the scheme as one outranked in significance only by the Homestead Act of 1862 in its potential for strengthening rural America. The generating of hydroelectric power was not at that time contemplated. However, it was soon apparent that few or no reclamation projects could be financed without attaching them to hydroelectric plants and selling the water and the power, for which there was a ready demand for industrial and domestic use. Willy-nilly then, the Newlands Act, the increasing demands of the West for power, and the fact that irrigated land could repay only a small fraction of the cost of the great dams being planned, pushed the government into the development of public power on an immense scale. The planners and dreamers may have thought of establishing a rural Arcadia in the West but today their accomplishments are more commonly judged by the great industrial development and vast urban sprawl on the once desert lands of southern California, and parts of Arizona and New Mexico.

By the late twenties the West was dissatisfied with the slow progress

[20] U.S., *Congressional Record,* 57 Cong., 1 sess., 21 January 1902, p. 830, 13 June 1902, p. 6733; compiled from *Agricultural Census of 1964.*

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of water and power projects financed with the aid of the revolving fund of the Newlands Act.[21] Actually the fund failed to revolve, again because of poor planning of the projects. Soon western interests were urging that additional appropriations for reclamation and power projects be made out of general funds. The greater part of the more than seven billion dollars expended to date by the Bureau of Reclamation has been supplementary appropriations from general funds. Nothing comparable to this enormous expenditure of public funds, ostensibly for the irrigation of farmland but increasingly to provide at very low rates hydroelectric power and water for domestic and business uses in the West, has been made in any other section of the country. Even the subsidized Tennessee Valley Authority power development in the South is a small venture in comparison with public power in the West.

Despite the generous treatment the West received from the federal government, it remained dissatisfied. Western states continued to feel that the remaining public lands ought to be controlled and managed for their particular benefits. Limits on the alienation of the public domain should not be imposed, the public ranges should be thrown open to all users without limit, efforts to halt timber plundering from public lands should be resisted, and the growing conservationist sentiment of eastern men, whom the West at that time dubbed "sentimentalists," should be fought to the bitter end. What the West wanted was no restrictions on growth. Only western men familiar with the needs of that section of the country should have responsibility for it. Hence the Commissioners of the General Land Office, the registers and receivers of the local land offices, and the House and Senate Committees on the Public Lands, and later members of the Public Land Law Review Commissions should be from the West.[22]

With reluctance westerners had had to accept National Parks and National Forests and controlled Grazing Districts on the public range and administration by a bureaucracy centered in Washington, but they had the political clout to provide in legislation that the income of these

[21] Returns from the sale, leasing, rentals, and licensing of the public lands that flowed into the reclamation fund were small in the early years but with large increases in recent years have averaged over the entire period from 1901 to 1972 $19,124,000 or a total of $1,372,952,847 (U.S. Dept. of the Interior, Bureau of Reclamation, *Federal Reclamation Projects: Water and Land Resource Accomplishments* [Washington: GPO, 1972], Appendix 2, p. 25).

[22] A random sampling of the Senate and House Committees on public lands in 1910 and 1930 shows the following:

| | *1910* | | *1930* | |
|---|---|---|---|---|
| | House Com. | Sen. Com. | House Com. | Sen. Com. |
| From public land states | 17 | 15 | 18 | 12 |
| From 19 non–public land states | 3 | 0 | 4 | 2 |

The Public Land Law Review Commission was packed 14 to 5 with appointees from the public land states.

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agencies from the sale of products and services should be spent in the West. An Act of 1905 appropriated the revenues from the National Forests for "the protection, administration, improvement and extension" of the Forest Reserves but two years later it was provided that 10 percent of such revenues, later increased to 25 percent, should be returned to the states or territories in which they were collected for the support of schools and roads. Step by step other provisions for returning to the states portions of the revenue from the public lands were adopted: 37.5 percent of the income from sales and royalties for coal, oil, and gas taken from the public lands was allocated to the states of origin and 52.5 percent of these revenues to the Reclamation Fund. Approximately the same distribution was made of the income from the enormously rich lands once granted to the Oregon and California Railroad but revested in the United States. Of the income from grazing leases 12.5 percent was allotted to the states and most of the balance was to be spent in improving the range.[23] Despite these generous allocations of funds from the public lands the West was dissatisfied. In its report to the President in 1970, the western-dominated Public Land Law Review Commission urged that in addition the federal government should make payments to the states in lieu of taxes for public land it still holds in the West, the amount ranging from 60 to 90 percent of taxes on privately owned lands.[24]

Western parochialism appeared in a new guise in 1953 when, inspired by powerful oil interests which found state ownership of natural resources superior for them to federal, combined with a little revived government-type philosophy, it overwhelmed the past vigorous nationalism of the section and induced Congress to convey the tidelands to public land states and Texas.[25] Though this action greatly reduced the possible flow of money into the Reclamation Fund, that was not a serious matter for long, since Congress under western pressure had taken to voting it public funds from general revenue in great amounts.

The big questions about our national land policies raised at the outset and debated from that day to this are still unsettled. Whose public land is it? For whose benefit is it to be administered? How should it be managed and by whom?[26] Easterners thought the public domain

[23] I have given in more detail the revenue sharing features of federal policy in *History of Public Land Law Development*, 28–30, 582, 595, 603.

[24] U.S. Public Land Law Commission, *One Third of the Nation's Land: A Report to the President and the Congress* (Washington: GPO, 1970), 237.

[25] 67 *Stat.*, 29.

[26] An editorial in the *New York Times* (27 February 1975) entitled "Whose Public Lands?" scores the Secretary of the Interior for ordering the transfer of three wildlife refuges from the Fish and Wildlife Service to the Bureau of Land Management where they will presumably be subordinated to the welfare of livestock and mining interests.

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should benefit the entire Union with special regard to conservation, broadly speaking: westerners thought it should be administered for their benefit. Neither section won completely in the end. The West continues to resent the retention in federal ownership of any land within their boundaries. We seem to be back where we started.

The old debate continues but there is not the same division of opinion between East and West. There are still elements in the West who feel that the federal government should divest itself of the public lands, if not to individuals as in the old days, at least to the states who, they believe, can manage it best. But there are other elements, both East and West, who feel that the federal government should retain what remains of the public domain, husband it carefully, not primarily for revenue purposes as in the old days, but for careful conservation of our national resources—soil, subsoil, water, trees, and minerals. They feel that the federal government will take the larger view and not allow itself to be pressured by exploitative interests to the same extent it has in the past. Others think that the states are more alert to these dangers. The old debate is still going on but in a larger frame of reference. We now take a broader view of the value of our public domain and have a more acute realization of all the ecological and human interests that must be safeguarded.

It may seem futile to try to decide with the benefit of hindsight whether American land policies have been at all times wise. Not one of the policies adopted worked out in accordance with its advocates' objectives (or what they publicly stated as their objectives), speculator accumulations were rarely contained, whatever the intent of the legislation. Adequate classification of the lands was not made before legislation, sometimes unsuited to it, was applied. Administration was not always efficient or even honest. Endless disputes occurred in some areas. Revenues were wasted. Our national decisions about our public domain were taken originally when the new nation had certain needs and was under certain pressures. Her people had already a hundred and seventy years of frontier experience that had permanently marked their attitude toward the land. As a nation we had had our revolutionary experience, and our forefathers, some of them at least, had certain ideological hopes for the future as a nation. Newcomers arrived, drawn hither by various hopes and experience in societies dominated by landlords. The techniques of agriculture and transportation and industry were at any moment at a given stage of development. All these factors influenced our land policies.

In conclusion, may I suggest that while the management of our remaining public domain is still a most serious and important problem,

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the management of that portion of our territory that has become private property is a more serious problem. In fact, the old distinction between public and private property is losing its sharpness, or is being eroded away, and for the sake of later generations it should be. Has a man a right to destroy good, irreplaceable agricultural land by covering it up with cement or by stripmining it? Can a man do what is most profitable for him with his own? But is it his own in an unlimited sense? Rather has he not received from society in the ownership of land a bundle of rights which society protects but which society may also limit or modify or even take over? Is not the public land that has passed into private hands a trust? Older and more crowded societies than ours have long since been obliged to take this stand and we should come to this point of view also and soon.[27]

[27] In the extensive literature on this subject Joseph James Shomon, *Open Land for Urban America: Acquisition, Safekeeping, and Use* (Baltimore, Md.: Johns Hopkins University Press, 1971), well summarizes the issues.

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