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Cooperative Federalism in the Acquisition of Water Rights: A Federal Practitioner's Point of View

Sandra Dunn*

There is perhaps no topic in the field of state-federal relations which raises the hackles of westerners more than the issue of the federal government's acquisition of water rights. As a result of the size of the United States' landholdings,[1] in addition to its broad constitutional authority, the states fear that the federal government will disrupt their already over-appropriated systems for water allocation and usurp their scarce supply. With the memory of non-reserved water rights doctrine[2] recent in the minds of western policy makers there lingers a festering suspicion that the federal government will seek to displace the states in their role as the primary water resources manager. From the

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1. Based upon a comparison between federally and state owned lands, 31% of the land within the United States is owned by the federal government. Within California, 47% of the lands are federally owned, while 85% of the lands in Nevada are held by the United States. Public Land Stats. 1985 No. 170, U.S. Dep't of Interior, 5.

2. According to the opinion of the Solicitor of the Department of the Interior, federal agencies have the authority to use whatever unappropriated water is needed to fulfill the authorized purposes of the agency's program unless Congress has specifically acted to prevent such uses of water. Solicitor Krulitz stated: "[T]o the extent Congress has not clearly granted authority to the states over water which are in, on, under, or appurtenant to federal lands, the Federal Government maintains its sovereign rights in such waters and may put them to use irrespective of state law." *Remarks of the Honorable William French Smith Attorney General of the United States to the Chamber of Commerce and the Kiwanis Club of Cheyenne, Wyoming at 5 (June 17, 1982) (on file at the Pacific Law Journal)* [hereinafter *Remarks*].

perspective of a federal practitioner, the states' apprehension is largely without foundation.

The executive agencies of the federal government have had, for the most part, an amiable relationship with the states concerning the use, allocation and development of their water resources. For example, the United States, through the Bureau of Reclamation played a major role in the development of water conservation facilities at a time when the states lacked the financial capability to construct such major projects.

As the federal government's philosophy towards the public lands has changed from disposition and settlement to retention for development and protection, its need for water has increased. With the government's quest to meet its new demand, the conflict between the states and the federal government over the country's water resources has spiraled. During the Carter administration, in particular, the competition between the states and the federal government over water became increasingly bitter.

In 1982, however, the Department of Justice repudiated the previous administration's policy of federal non-reserved water rights and announced a renewed era of cooperative federalism. In re-establishing better governmental relations, the Attorney General declared that federal agencies[3] would obtain water rights pursuant to state water law, except under limited circumstances.

Despite this pronouncement, the cooperation between the states and the federal government has been one-sided. The states have greeted the federal government's requests for water with very little favor. Several states have demonstrated their distrust of the federal government by narrowly interpreting state law to deny legitimate acquisitions of water by certain federal land management agencies. Two cases, *In re Hallett Creek Stream System*[4] and *Nevada v. Peter Morros*[5] illustrate the lack of harmony which still exists. This article examines the wayward attempts by the States of California and Nevada to protect their systems of water allocation.

The Federal Government's Current Policy Regarding the Acquisition of Water Rights

In response to the enormous controversy over the non-reserved water rights doctrine, during the late seventies and early eighties, the

3. The primary land management agencies involved include the Forest Service, the National Park Service, the Bureau of Land Management and the Department of Defense.

4. 44 Cal. 3d 448, 749 P.2d 324, 243 Cal. Rptr. 887 (1988).

5. No.'s 19404, 19511, lip op. (Nev. Feb. 5, 1987) (on file at the *Pacific Law Journal*).

Department of Justice made a comprehensive analysis of the legal authority supporting the federal government's acquisition of water.[6] The Department's legal conclusions were summarized in a speech given by Attorney General William French Smith to the Chamber of Commerce and Kiwanis Club in Cheyenne, Wyoming on June 17, 1982.[7] In his presentation, the Attorney General expressly rejected the so-called theory of non-reserved water rights. Moreover, he voiced his opinion that the key to the proper analysis of the issues involved was to stop viewing them "as a struggle over ownership between the federal and state governments but as a question of competing regulatory jurisdiction."[8]

Premised upon the in-depth legal analysis done, the Attorney General disclosed three primary methods by which the federal government can acquire water rights.[9] First, the Attorney General recognized the federal government's legal authority to acquire water according to the reserved rights doctrine.[10] Pursuant to this theory, the government acquires the right to water when lands are withdrawn from the public domain for the creation of a federal reservation, i.e., national park, national forest, military enclave. By virtue of the authority granted the federal government under the United States Constitution,[11] when land is withdrawn, water is concomitantly reserved to fulfill the primary purposes of that reservation.[12]

The usefulness of the reserved rights doctrine as a comprehensive means of acquiring water even for federal reservations has been limited, however, by the Supreme Court's ruling in *United States v. New Mexico*.[13] Relying upon the history of congressional deference to state law with respect to the allocation of water, the Supreme Court

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6. The Department of Justice's analysis was released in a Legal Memorandum For Carol E. Dinkins, Assistant Attorney General, Land and Natural Resources Division, *Federal Nonreserved Water Rights*, prepared by the Office of Legal Counsel (June 16, 1982) (on file at the *Pacific Law Journal*) [hereinafter Legal Memorandum].

7. *Remarks*, *supra* note 2, at 8.

8. *Id.*

9. The three methods primarily concern the governments' legal authority to acquire water rights and they do not include the governments' ability to acquire water by purchase or by condemnation. *Id.* at 4.

10. *Id.*

11. Although there is no question about the authority of the government to acquire reserved water rights the debate over the scope of federal reserved water rights still continues to rage on. *See* United States v. Jesse, Case No. 855A347, slip op. at 15 (Colo. Sup. Ct.) (the Supreme Court for the State of Colorado recently held that the United States is not barred by doctrines of collateral estoppel and stare decisis from claiming instream flow rights to achieve the purposes of the Organic Act).

12. Winters v. United States, 207 U.S. 564, 577 (1908); Arizona v. California, 373 U.S. 546, 564-98 (1963); Cappaert v. United States, 426 U.S. 128, 143-46 (1976).

13. United States v. New Mexico, 438 U.S. 696, 702 (1978).

concluded that "[w]here water is only valuable for a secondary use of the reservation . . . there arises the . . . inference that Congress intended . . . that the United States would acquire water in the same manner as any other public or private appropriator."[14]

The second method by which the federal agencies may obtain water is premised on the same constitutional cornerstone as the reserved rights doctrine. The Attorney General revealed that the federal agencies could acquire, in addition to reserved water rights, the water needed to fulfill the specific directives given by Congress when authorizing a particular project.[15] As a matter of constitutional law, Congress has the authority to preempt state law governing the allocation of water resources.[16] Therefore, the Attorney General reasoned that Congress could expressly order the management of the federal lands in a way that would be totally frustrated by the application of state water law. Only under those limited conditions would the federal agencies be able to assert a right to the water necessary to fulfill the agency's specific regulatory goals.

The Attorney General inferred from the Supreme Court's emphasis on state water law in the decisions of *California v. United States*[17] and *United States v. New Mexico*[18] that congressional directives must be narrowly construed, if possible, so as to avoid a conflict.[19] Consequently, unless Congress clearly expresses an intention to displace state water law, the federal agencies are limited to that water which can be obtained in conformity therewith.

Thus, the third and perhaps most critical means of procuring water for the federal agencies is pursuant to state law. It is under state law that the Attorney General expected all of the federal agencies to meet the majority of their water needs.[20] The policy espoused by the Department of Justice emphasizes the acquisition of water by operation of state law. Rather than support this policy, the states have reacted

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14. *Id.*
15. *Remarks, supra* note 2, at 4. Although the Department recognized that this exact question has never been squarely before the Supreme Court, it noted that the following cases broadly support the constitutional basis upon which the federal government could act to preempt state laws concerning the allocation of water: Oklahoma v. Atkinson Co., 313 U.S. 508 (1941); First Iowa Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946); Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955); and United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950). *See* Legal Memorandum *supra* note 6, at 32.
16. *See* California v. United States, 438 U.S. 645, 674-75 (1978).
17. *Id.*
18. 438 U.S. 696, 702 (1978).
19. *Remarks, supra* note 2, at 10.
20. *Id.* at 9.

by attempting to restrict the availability of state water rights. By taking this position, the states risk the very thing which they seek to preserve: the sovereignty of the states to control and manage their water resources without interference or intrusion by the United States.

It is unrealistic to believe that by denying the federal government water rights, the states can effectively change the water demands of the various land management agencies. Thus, by their own actions, the states create a situation wherein state water laws will necessarily conflict directly with the express statutory duties of the land use agencies. Under such a scenario, the agencies are left with little choice but to assert a right to use water under federal law. By having placed themselves directly at odds with the federal government, the states will have lost their ability to regulate the government's use of water or to fit that use into their existing management schemes.

Two recent cases, *In re Hallett Creek Stream System*[21] and *Nevada v. Morros,*[22] exemplify the needless conflict between the states and the federal government. Both have resulted from the states' overly strict interpretations of their own laws. While the states vociferously argued before the courts that they were defending the very essence of their traditional water right laws, it became apparent that they were discriminating against the United States. As a result of their doctrinaire approach to the water requests of the federal government, the states jeopardized the integrity of the very system they seek to protect.

In re Hallett Creek

In 1976 the California State Water Resources Control Board (State Board) instituted[23] an adjudication to determine the rights of the various claimants to the use of the waters in the Hallett Creek stream system. Among the various claimants was the United States Forest Service who claimed 95,000 gallons annually under the reserved rights doctrine for firefighting and road watering during timber harvest in Plumas National Forest. The Forest Service claimed an additional 1,500 gallons per day at Spring No. 5 as a riparian right holder under state law for the enhancement of wildlife.[24]

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21. 44 Cal. 3d 448, 749 P.2d 324, 243 Cal. Rptr. 887 (1988).

22. No.'s 19404, 19511 slip op. (Nev. Sup. Ct. Feb. 5, 1987) (on file at the *Pacific Law Journal*).

23. *See* Cal. Water Code § 2525 (West 1971) (the authority of the State Board to institute the adjudication).

24. In the Multiple-Use Sustained-Yield Act, Congress expressly declared that it is the policy

The State Board recognized the federal government's reserved water rights but resoundingly rejected the Forest Service's claim of riparian rights.[25] The State Board concluded, as a matter of California water law, that the federal government is not entitled to riparian rights. The State Board went on to find, however, that the claim for 1,500 gallons per day was excessive even if the Board were so inclined to recognize the Forest Service's claim to riparian rights. The State Board determined that the Forest Service's hypothetical riparian water rights, if recognized, would be limited to 300 to 500 gallons per day.[26]

The United States took exception to the State Board's Findings and Order of Determination in the Superior Court for Lassen County. The Superior Court sustained the exceptions of the United States concluding that all property owners in California are entitled to riparian rights, including the United States.[27]

The State of California appealed the Superior Court's ruling to the Court of Appeal. The Court of Appeal agreed with the lower court that the United States did hold riparian water rights. It went on to find, however, that these riparian rights are subject to defeasance by subsequent appropriators.[28] Both the United States and the State of California appealed portions of that decision to the Supreme Court for the State of California.

On February 18, 1988, the Supreme Court affirmed the Court of Appeal's decision that the federal government can have riparian rights. However, the court reversed the lower courts' ruling that these rights were defeasible.[29] While this might have been the final chapter in the *Hallett Creek* litigation, California announced in its Petition For Rehearing[30] that it will seek a writ of certiorari to the United States Supreme Court.

In contesting the riparian status of the Forest Service, the State has offered novel legal theories having little relation to California water

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of Congress that national forests are established and shall be administered for, *inter alia* wildlife. Pub. L. No. 86-517, 74 Stat. 215 (1960) (codified as amended at 16 U.S.C. § 5228 (Supp. III 1985)).

25. Hallett Creek Adjudication, State Water Resources Control Board, at xiv (1983) (Findings and Order of Determination).

26. *Id.* at xvi.

27. *In re* Hallett Creek, No. 16921, at 11 (Super. Ct. 1984) (Tentative Decision and Proposed Statement of Decision).

28. *In re* Water of Hallett Creek Stream System, 187 Cal. App. 3d 863, 875, 232 Cal. Rptr. 208, 215 (1986).

29. *In re* Water of Hallett Creek Stream System, S.F. 25133, slip op. at 35 (1988) (on file at the *Pacific Law Journal*).

30. Petition for Rehearing, *In re* Water of Hallett Creek Stream System, S.F. 25133, at 3 (1988) (denied March 16, 1988).

law or with the nature or scope of the actual water claimed by the Forest Service. Given the State's adoption of a dual system of water rights (appropriative and riparian),[31] it logically follows that the United States may, when acquiring water rights pursuant to state law, either apply for appropriative rights or invoke its riparian rights. In the circumstances presented in the *Hallett Creek* adjudication, the State has departed from its existing system of water allocation by denying the riparian rights of the Forest Service. Because the State cannot develop a rule of law which specifically discriminates against the federal government,[32] it has been forced to create a legal distinction between the Forest Service's claim to riparian rights and that of a private riparian land owner.

The State's legal position is essentially two-fold. First, the State has argued that the federal government holds its land in a sovereign capacity rather than in a proprietary capacity. Therefore, according to the State, the federal reserved rights doctrine "fully protects any relevant federal interest in water."[33] To the extent that the federal government is unable to satisfy its water needs through these reserved water rights, the federal government can only acquire water by applying for an appropriative right to water. Second, the State contends that by virtue of the Mining Act of 1866 and 1870, and the 1877 Desert Land Act, Congress "severed" the water from the public lands, thereby also severing the government's riparian status.[34]

The State's legal explanation for its stance in this case is not intellectually honest. With regard to its first assumption that the federal government does not have a proprietary interest in the lands it owns, the State hypothesizes that the federal government's complete interest must be measured by the property clause of the United States Constitution.[35] Accordingly, the United States cannot also claim a property interest derived from the State's common law.[36] Put into the context of water rights, the federal government's property interest in water is totally defined by the reserved rights doctrine. Therefore, the United States cannot obtain water under state law if it is premised upon the common law, i.e. riparian water rights. It is the State's position that

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31. For a discussion of California's dual water rights system, see in this volume Markle, *Water Rights in California*, 19 PAC. L.J. (1988).

32. North Dakota v. United States, 460 U.S. 300, 317-20 (1983).

33. Opening Brief for Petitioners State of California, *In re* Water of Hallett Creek Stream System, S.F. 25133, at 5-6 (1988) (on file at the *Pacific Law Journal*) [hereinafter Opening Brief].

34. *Id.*

35. U.S. CONST. amend V.

36. Opening Brief, *supra* note 33, at 18.

the federal government's water rights are only derived from one source of authority,[37] and that is the United States Constitution.[38]

This proposition must be rejected when analyzed against the language of the Supreme Court in *United States v. New Mexico*.[39] In *New Mexico* the Court had to determine the quantity of water reserved by Congress in the withdrawl of public lands for the establishment of the Gila National Forest. Significantly, the Supreme Court recognized that Congress authorized the Forest Service under the Multiple Use Sustained - Yield Act of 1960[40] to manage the National Forest for a multitude of purposes. All of these purposes would likely require the use of water, such as outdoor recreation, range, timber, watershed, wildlife and for fish purposes. Yet, the Court concluded that Congress intended to actually reserve water only for the primary purposes of the forest: "to conserve water flows and to furnish a continuous supply of timber for the people."[41] Where water is needed to fulfill the enlarged purposes of the national forest, the Court expressly determined that the water would be acquired "in the same manner as any other public or private appropriator."[42]

It is evident from this discussion that the Supreme Court believed that the federal government was entitled to an interest in water as defined by the reserved rights doctrine. It is also evident that the Court expected the federal government to look to state law, whether common law or statutory, as an additional source to meet those water needs which remain unsatisfied after the application of its reserved rights.

The California Supreme Court joined the United States Supreme Court in its view that the State's legal position is "unmeritorious."[43] The court held that the federal government has in conjunction with its sovereign rights, the "common law rights of an ordinary proprietor under state law."[44] Reiterating the conclusion of the United States Supreme Court in *Kleppe v. New Mexico*, the court stated that

37. Were this the case, a logical extension of the State's argument is that the federal government can obtain no rights to water beyond those rights it has reserved. The State does not go that far since it is clearly in their best interest to require the government to seek appropriative water rights.

38. Opening Brief, *supra* note 33, at 24-25.

39. 438 U.S. 696 (1978).

40. 16 U.S.C. §§ 528-531 (West 1985).

41. United States v. New Mexico, 438 U.S. 696, 707 (1978).

42. *Id.* at 702.

43. *In re* Water of Hallett Creek Stream System, S.F. 25133, slip op. at 12 (1988) (on file at the *Pacific Law Journal*).

44. *Id.* at 14.

"Congress exercises the power both of a proprietor and of a legislature over the public domain."[45]

Moreover, the court rejected the State's assertion that only state *appropriative* laws could be used to acquire water for purposes other than the primary objectives of the reservation. An inference is properly drawn from the decision that the court viewed the state's statement as an unnecessarily strict construction of the Supreme Court's language in *U.S. v. New Mexico*. In contrast, the court concluded that "the underlying principle of deference to state law [as expressed by the Supreme Court] extends to any water right recognized under local law—including riparian rights."[46]

Not only did the court reject the first of the State's arguments it also declined to accept the State's argument regarding severance. According to the State, with the enactments of the Desert Land Act of 1877 and the Mining Acts of 1866 and 1870, Congress "severed" the water from the public lands. Relying primarily on the Supreme Court's holding in *California Oregon Power Co. v. Beaver Portland Cement Co.*,[47] the State contends that the effect of this severance was to terminate any federal riparian claims to such lands.[48]

According to the State, water rights cannot be obtained by virtue of any federal proprietary interest in the water. Rather, it must have been acquired by operation of state "appropriative" law.[49] When the federal government issues a patent and terminates its proprietary ownership in the land, the right to the riparian rights then attaches in favor of the patentee under state law.[50] Consequently, since the federal lands at issue in the *Hallett Creek* litigation remain under federal ownership, riparian rights may not annex.

The California Supreme Court rejected entirely the State's argument. Essentially, the court determined that the controversy between the State and the federal government in this particular instance was resolved in the 1886 landmark decision of *Lux v. Haggin*.[51] Summarizing the historical development of water rights in California, the court explained that upon being admitted to the Union in 1850 California specifically adopted the "dual" system of water rights by

45. *Id.* (citing Kleppe v. New Mexico, 426 U.S. 529, 540 (1976)).
46. *Id.* at 16.
47. 295 U.S. 142 (1935).
48. Opening Brief, *supra* note 33, at 30.
49. *Id.* at 27.
50. *Id.* at 34.
51. 69 Cal. 255, 10 P. 674 (1886).

recognizing both riparian water rights and appropriative rights.[52] Since the states were entitled to determine the rights that attached to the federal lands by virtue of the equal footing doctrine, it analytically followed that "the federal government held riparian rights under state law as owner of the public lands."[53]

The court went on to conclude that neither the Supreme Court's decision in *Oregon Power* nor the Desert Land Act undermined the holding in *Lux*. First, the court found that *Oregon Power* was not dispositive since the Supreme Court did not address the question of whether the federal government, itself, relinquished all water rights as a result of the Desert Land Act. Second, the court resolved that if Congress had intended to "relinquish" the water rights it had in the public lands "it is reasonable to assume that is precisely what Congress would have said."[54] Thus, the riparian rights which adhered to the federal lands by operation of state law were retained by the federal government.

The court went on to declare that while the Desert Land Act did not "terminate the interest of the federal government," it did subordinate the government's interest in the waters on the public domain to the rights of subsequent appropriators.[55] This conclusion does not affect the Forest Service's claims to riparian rights in Hallett Creek, however, since the court went on to reconfirm that the Desert Land Act applied only to the public domain lands, not to reserved lands.[56]

Despite the arguments discussed above, the genuine concern of the State is evident in the public policy considerations raised in response to the federal government's arguments. It is not the State's fundamental concern that riparian rights are in and of themselves inconsistent with California's system of water rights. Rather, according to the State, if the federal government is recognized to have riparian rights, it will enable federal agencies to avoid compliance with California's appropriative laws and thereby have a "calamitous effect on the State's management and planning authority."[57] Essentially, the State has taken a claim by the Forest Service to 300 to 500 gallons per day and translated it into the destruction of the State's entire system for water allocation. Such an abstraction is at best a gross exaggeration.

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52. *In re* Water of Hallett Creek System, S.F. 25133, slip op. at 22 (1988) (on file at the *Pacific Law Journal*).
53. *Id.*
54. *Id.* at 28.
55. *Id.* at 29.
56. *Id.* at 32 (citing Federal Power Comm'n v. Oregon, 349 U.S. 435, 448 (1954)).
57. Opening Brief, *supra* note 33, at 46.

The federal government has a selfish interest in seeing that the viability of the state's appropriative system is maintained. As owner and operator of the largest water resources development in California, the Central Valley Project, it is not in the federal government's best interest to erode away the system of water rights upon which that project has been constructed.

Moreover, the public policy concerns raised by California are not a consequence of the federal government's assertion of water rights. Rather, the concerns are inherent in a system which acknowledges water rights based upon both the doctrine of prior appropriation and the riparian status of a land owner. Having recognized the potential for conflict between riparians and appropriative rights holders, the State has long taken steps to provide a measure of regulation for riparians as well as appropriative rights.[58] Thus, having championed a system of water rights, the State cannot now seek to limit its application based merely upon the identity of the claimant.

STATE OF NEVADA V. PETER MORROS

The litigation currently pending between the State of Nevada, on behalf of the State Department of Agriculture, and the Nevada State Engineer is another example of the states' refusal to cooperate with the federal government in its attempt to acquire water under state law. This conflict had its beginnings when the Bureau of Land Management (BLM) and the Forest Service filed applications with the State Engineer of Nevada for the appropriation of water in accordance with state law. Although the Bureau of Land Management filed various applications, this litigation only involves fifteen requests for water rights for domestic stockwatering and wildlife.[59] In addition, the Bureau requested a water right for 66.5 acre-feet of water for recre-

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58. Article X, section 2 of the Constitution of the State of California provides in pertinent part:

> The right to water or to the use or flow of the water in and from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses.

Id.

59. BLM only sought to have small amounts of water approved, the largest quantity of any single application was only 0.03 cubic per second.

ational purposes, at Blue Lake, a natural alpine lake. The Forest Service's requests included fourteen water right applications for domestic stockwatering and wildlife purposes and for recreational purposes such as campgrounds and picnic areas.[60]

The State Engineer, after extensive hearings, filed rulings in 1985 regarding these applications. Three of the Bureau of Land Management applications were denied on the grounds that they conflicted with existing water rights. The remaining Bureau applications were granted. Two of the Forest Service's applications for recreational purposes were denied because the water sources were fully appropriated. Seven of the applications were approved for recreational purposes and five were approved for watering of livestock and wildlife.[61]

Subsequently, the State Attorney General, on behalf of the Nevada State Board of Agriculture, filed several civil actions challenging in part the State Engineer's decision.[62] These actions were consolidated in the Fourth Judicial District of the State of Nevada. On February 5, 1987, District Judge McDaniel issued an order reversing the State Engineer's rulings as to the stockwater rights, but affirming the Bureau's water rights at Blue Lake for recreational purposes.

In summary, the District Court determined that although stockwatering is a recognized beneficial use, it can only be granted to the person who is actually putting the water to such use.[63] Since neither the Bureau of Land Management nor the Forest Service owned the livestock or the wildlife for which the agencies planned on using the water, Nevada law prohibited the acquisition of a water right permit for that purpose.[64]

Judge McDaniel in affirming the Bureau's water right application for an *in situ* appropriation at Blue Lake stated that actual diversion of water was not a critical element of an appropriation of water under

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60. The largest quantity of water requested in the Forest Service's applications was 0.3 cubic feet per second.

61. *In re* Applications 36414, 36420, 36422, 36479, 44805, 44883, 44884, 44886, 44894, 44917, 44932, 44946, 44965 and 44979 Filed by the United States Department of the Interior, Bureau of Land Management to Appropriate the Public Waters of Underground Sources and Blue Lake in Elko and Humboldt Counties, Nevada (July 26, 1985) (on file at the *Pacific Law Journal*) [hereinafter Ruling I] and *In re* Applications 42920, 42922, 42923, 43156, 43157, 43392, 43393, 43394, 43395, 43740, 43741, 44398 and 46934 Filed by the United States Forest Service to Appropriate the Public Waters of Surface Water Sources in Humboldt, White Pine, and Elko Counties, Nevada (October 4, 1985) (on file at the *Pacific Law Journal*).

62. Nevada did not challenge the Forest Service's application for water for recreational purposes.

63. Nevada v. Morros, No.'s 19404, 19511, slip op. at 11 (Nev. Feb. 5, 1987) (on file at the *Pacific Law Journal*).

64. *Id.* at 10.

Nevada law. Actual beneficial use, he stated, was the critical factor in determining if appropriation of water should be granted.[65] Since Nevada law recognized that recreation is a beneficial use of water,[66] it was appropriate for the State Engineer to approve the Bureau's application for recreational purposes. This decision has been appealed to the Nevada Supreme Court by both the Attorney General and by the United States.

From the very beginning the State Engineer has, to his credit, considered the applications of the United States in an objective fashion. He has attempted to fulfill his statutory duty in conformity with state law and at the same time treat the federal agencies "with the same respect as all other prior appropriators."[67] On the other hand, the questions of state law raised by the Attorney General were only secondary to his efforts to fend off what he perceived to be a threat to the State's jurisdiction over its water resources.

Throughout the administrative and court proceedings, the Attorney General has never denied that the actual uses which the federal agencies seek to make of the water are beneficial. To the contrary, testimony was given by various officials of the state government as to the beneficial impact these water developments would have on the State. Particularly, the Director of Agriculture testified that the additional sources of water that the Bureau of Land Management and the Forest Service used for stockwatering and wildlife would certainly benefit the range by encouraging grazing in areas of less intensive use.[68] In addition, the Director of the Nevada Department of Wildlife testified that they had not been able to develop additional wildlife water sources due to lack of funds. Therefore, the wildlife water appropriations sought by the federal agencies would be beneficial for wildlife.[69]

Despite the positive aspects of the federal government's applications for appropriations they continued to be vehemently opposed by the Attorney General. The cornerstone of the Attorney General's argument is his belief that the State Engineer would violate his duty to protect the public interest if he gave water rights to the United States. The Attorney General lists the following parade of horribles which he contends would result directly from the approval of the agencies applications: (1) the state would lose its jurisdiction over the wildlife

65. *Id.* at 13.
66. *See* NEV. REV. STAT. § 533.030 (1985).
67. Ruling I, *supra* note 62, at 42.
68. Respondent's Answering Brief, Nevada v. Morros, No. 18105, at 17 (1987).
69. *Id.* at 32.

located within its boundaries; (2) the local governments and mining interest would lose their authority to access water by losing their powers of eminent domain; (3) the State would fail to protect the livestock industry; and (4) the State would fail to protect its revenues by indirectly discouraging the federal government from diverting itself of the public lands.[70]

Furthermore, when referring to the right acquired by the Bureau of Land Management at Blue Lake, the Attorney General asserted that the State Engineer "renunciated" the essence of the public trust by abdicating his duty to "maintain, protection [*sic*] and preserve" the lake.[71] The Attorney General cautioned that the ruling would establish a precedent for the State Engineer "to approve each and every application . . . on each and every natural lake in the State of Nevada" which the Attorney General claimed was targeted for federal take-over.[72]

Amidst such wild speculation there can be neither good law nor good public policy made. The State Engineer seemed to be keenly aware of this fact when he originally responded to the Attorney General's protest. In rejecting that protest the State Engineer declared: "The State Engineer may not fabricate a federal-state conflict and then resolve it under a state "public policy" or law to the practical disadvantage of the federal government."[73] The Attorney General continues to exert his view that it would be *per se* detrimental to the public interest to allow the United States to acquire a water right under the laws of Nevada. With this opposition, the Attorney General has created his own controversy and his own conflict. In a dual system of government where the Federal Constitution and the Acts of Congress are "the supreme law of the land,"[74] this point of view simply cannot prevail.

CONCLUSION

From the view point of a federal practitioner, *Hallett Creek* and *Nevada v. Morros* provide frustrating samples of misguided attempts

70. Appellants' Reply Brief, Nevada v. Morros, No. 18105, at 34 (1987) (on file at the *Pacific Law Journal*).
71. Appellants' Opening Brief, Nevada v. Morros, No. 18105, at 6 (1987).
72. *Id.* at 7.
73. Ruling I, *supra* note 62, at 29.
74. U.S. CONST. art. VI, cl. 2.

by the states to protect their system of water allocation. Rather than respond to the merits of the federal government's applications for water on a case by case basis, the states would rather react with wild accusations and allegations of a federal take-over. By their attitude the states have erected a barrier between the two levels of government where none needs to exist. By denying the federal agencies the rights to acquire water under state law, the states force the federal government into asserting a right under federal law. Thus, as a result of their efforts, the states have undercut the systems they so strongly want to protect.