

12-1-2009

A Bright Idea from the Black Canyon: Federal Judicial Review of Reserved Water Right Settlements

Reed D. Benson

University of New Mexico - School of Law

Follow this and additional works at: https://digitalrepository.unm.edu/law_facultyscholarship



Part of the [Environmental Law Commons](#), and the [Water Law Commons](#)

Recommended Citation

Reed D. Benson, *A Bright Idea from the Black Canyon: Federal Judicial Review of Reserved Water Right Settlements*, 13 *University of Denver Water Law Review* 229 (2009).

Available at: https://digitalrepository.unm.edu/law_facultyscholarship/341

This Article is brought to you for free and open access by the UNM School of Law at UNM Digital Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UNM Digital Repository. For more information, please contact amywinter@unm.edu, lsloane@salud.unm.edu, sarahrk@unm.edu.

UNIVERSITY OF DENVER
WATER LAW REVIEW

VOLUME 13

ISSUE 2

SPRING 2010

**A BRIGHT IDEA FROM THE BLACK CANYON:
FEDERAL JUDICIAL REVIEW OF RESERVED WATER
RIGHT SETTLEMENTS**

REED D. BENSON*

INTRODUCTION	230
I. <i>WINTERS</i> AND MCCARRAN: FEDERAL CLAIMS, STATE COURTS	232
A. Reserved Rights Jurisdiction	232
B. Reserved Right Litigation and Settlement in State Courts	234
II. THE BLACK CANYON RESERVED WATER RIGHTS CONTROVERSY	238
A. The Black Canyon and its Reserved Water Rights	238
B. Cutting The Claim: A Partial Federal-State Settlement	242
C. Staying The Water Court Litigation	247
D. Making A Federal Case of The 2003 Agreements	250
E. The Real Deal: The 2008 Settlement	255
III. FEDERAL JUDICIAL REVIEWABILITY OF RESERVED RIGHT SETTLEMENTS	257

* Professor, University of New Mexico School of Law. A portion of this article—the story of the Black Canyon settlement and resulting litigation—was originally written as a chapter for the book, *THE WINTERS CENTENNIAL: WILL ITS COMMITMENT TO JUSTICE ENDURE?* (Barbara Cosens and Judith Royster eds., University of New Mexico Press, forthcoming 2011). The author thanks UNM Press for giving permission to use the book chapter as the foundation for this article, and Professor Royster for her editorial assistance on the book chapter. The author also thanks Adell Amos (Oregon) and Barb Cosens (Idaho) for their very helpful comments on an earlier draft of this article. In addition, the author thanks UNM law librarian Theresa Strike for her research assistance on the reviewability issues. Finally, the author thanks the UNM School of Law for its financial support of the work that went into this article, and the UNM law faculty members who provided thoughtful comments on this topic at a colloquium in March 2009. Any errors or omissions which survived this outpouring of assistance are, of course, the author's sole responsibility.

A. APA Review Provisions	258
1. Action committed to agency discretion.....	258
2. Final agency action	262
B. Ripeness	263
C. Colorado River Abstention	265
IV. IMPLICATIONS OF FEDERAL JUDICIAL REVIEW OF RESERVED RIGHT SETTLEMENTS	271
A. Limited Effects on Litigation of Reserved Right Claims.....	271
B. Effects of Reviewability on Settlement Negotiations	275
CONCLUSION.....	279

INTRODUCTION

Under the reserved water rights doctrine, lands the federal government has designated for a particular purpose have rights to sufficient water to fulfill that purpose.¹ Reserved water rights are also known as *Winters* rights after the doctrine's foundational case,² in which the United States Supreme Court held that Congress must have intended to reserve sufficient water to irrigate an Indian reservation although the treaty establishing that reservation said nothing about water.³

The federal and state governments began clashing over the proper judicial forum for federal reserved right claims soon after the Supreme Court's 1963 decision in *Arizona v. California*,⁴ which extended the *Winters* doctrine to include federal lands such as national monuments, wildlife refuges, and national forests.⁵ In the ensuing jurisdictional battles, the United States argued in favor of federal courts because its claims were for federal lands and would be determined under federal law.⁶ The western states, eager to maintain their traditional control over water rights, argued that their own state courts were the appropriate forum for these controversial claims.⁷

A 1952 federal statute known as the McCarran Amendment waived federal sovereign immunity to state court jurisdiction in the context of general stream adjudications,⁸ but provided no clear answer on where reserved right claims should be decided. The Supreme Court

1. See *United States v. New Mexico*, 438 U.S. 696, 702 (1978); *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

2. *Winters v. United States*, 207 U.S. 564 (1908) (involving the Fort Belknap Reservation in Montana).

3. *Id.*

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

5. *Id.* at 601.

6. See, e.g., *Colo. River Conservation Dist. v. United States*, 424 U.S. 800, 812 (1976); see also Alexander Wood, Note, *Watering Down Federal Court Jurisdiction: What Role Do Federal Courts Play in Deciding Water Rights?*, 23 J. ENVTL. L. & LITIG. 241, 249-50 (2008).

7. See e.g., *Cappaert v. United States*, 426 U.S. 128, 145-46 (1976).

8. Suits for Adjudication of Water Rights (McCarran Amendment), ch. 651, § 208(a)-(c), 66 Stat. 560 (1952) (codified as amended at 43 U.S.C. § 666(a) (2006)).

interpreted McCarran very favorably for the states, however, holding that the policy of the statute favors state adjudications as the preferred forum for determining reserved water rights.⁹ For the past thirty years federal reserved right claims have been heard almost exclusively in state courts,¹⁰ with decidedly mixed results. (The same is true for tribal *Winters* claims,¹¹ but this article deals only with claims for non-Indian federal lands.)

In 2006, however, a federal court decided a case involving reserved water rights for Black Canyon of the Gunnison National Park—and even more remarkably, the Colorado Supreme Court earlier had essentially decided that the federal forum was appropriate.¹² While the most immediate result was settlement negotiations resulting in an agreement providing stronger protection of flows for the national park,¹³ the broader implication of the Black Canyon cases is the potential for federal court review of agency decisions affecting reserved right claims.

This article examines the issue of federal judicial review of reserved right settlements reached in the context of state adjudications. Part I briefly gives the reasons why state courts typically hear federal water right claims, and addresses some key aspects of how those courts handle such claims. Part II tells the story of the Black Canyon controversy, focusing on the issues surrounding federal judicial review of a partial settlement of the park's reserved right claim. Part III analyzes the issue of whether federal judicial review is appropriate for settlement of reserved right claims, and concludes that review should be available when an agency enters into a final settlement agreement. Part IV considers the implications of federal review of reserved right settlements, concluding that federal review would not significantly impact reserved rights litigation, but may have significant effects on future settlement efforts involving federal claims. The conclusion suggests that federal judicial review may help address a couple of

9. *Colo. River*, 424 U.S. at 806-08.

10. There have been only a few reserved right cases in the federal courts since the early 1980s, focusing on tribal claims. See John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II*, 9 U. DENV. WATER L. REV. 299, 362-63 (2006). Only in New Mexico and Nevada have several adjudications been allowed to proceed in federal court. *Id.* at 361. "New Mexico is unique among western states in that the majority of its adjudications are in federal court." *Id.* at 351. Nevada's federal court adjudications are old cases involving rivers which flow into the state from California. See *Nevada v. United States*, 463 U.S. 110, 113-118 (1983) (describing litigation begun in 1913 to determine water rights on the interstate Truckee River); *Mineral County v. State Dep't of Conservation and Natural Res.*, 20 P.3d 800, 801-805 (Nev. 2001) (describing litigation begun in 1924 to determine water rights on the interstate Walker River).

11. See *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).

12. *High Country Citizens' Alliance v. Norton*, 448 F. Supp. 2d 1235, 1241 (D. Colo. 2006); *United States v. Colo. State Eng'r*, 101 P.3d 1072, 1080 (Colo. 2004).

13. See generally Press Release, W. Res. Advocates, Water Court Finalizes Decree to Benefit Black Canyon of the Gunnison National Park (Jan. 7, 2009), available at <http://www.westernresourceadvocates.org/media/pdf/BlackCanyonDecree1-07-09.pdf> (last visited Feb. 20, 2010).

fundamental problems with the way that reserved right claims have been handled.

I. *WINTERS* AND MCCARRAN: FEDERAL CLAIMS, STATE COURTS

A. RESERVED RIGHTS JURISDICTION

For nearly half a century after its foundational case,¹⁴ the *Winters* doctrine was thought to apply only to Indian Country. The great water law scholar Frank Trelease wrote, "At no time prior to 1955 did I ever hear a suggestion that the reserved rights doctrine was anything but a special quirk of Indian water law."¹⁵ In that year, the Supreme Court decided *Federal Power Commission v. Oregon*, holding that the state did not control the waters on a piece of land previously designated for a particular purpose under federal law.¹⁶ The Court's opinion did not involve a reserved rights claim or even mention *Winters*—the context was hydropower dam licensing under the Federal Power Act¹⁷—but it clearly laid the foundation for reserved rights beyond Indian reservations. Following that case, western members of Congress began introducing bills to restrict the use of the reserved rights doctrine for federal lands, but no such bill ever passed.¹⁸

Three years before the *Federal Power Commission* case, however, Congress enacted a statute that profoundly affected all manner of reserved right claims. The McCarran Amendment gave consent to allow parties to join the United States as a defendant in a state court case "for the adjudication of rights to the use of water of a river system or other source . . . where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise . . ."¹⁹ Congress thus allowed state court adjudications to determine the water rights of federal entities along with those of all other users on a stream system. Given that seemingly no one as of 1952 expected *Winters* to apply to non-Indian federal lands, it is not surprising that McCarran's text is utterly unclear as to whether state courts could hear reserved right claims. But the Supreme Court held federal *Winters* claims were indeed subject to McCarran, finding its language "all-inclusive."²⁰

This initial decision interpreting McCarran held that reserved right claims could be heard in state courts, but did not indicate that they *should* be heard there; the statute had not eliminated federal court

14. *Winters v. United States*, 207 U.S. 564 (1908).

15. Frank J. Trelease, *Federal Reserved Water Rights Since PLLRC*, 54 DEN. L.J. 473, 475 (1977).

16. *Fed. Power Comm'n v. Oregon*, 349 U.S. 435, 448 (1955).

17. Federal Power Act, 16 U.S.C. §§ 791(a)-828(c) (2006); *Fed. Power Comm'n*, 349 U.S. at 437.

18. Eva H. Morreale, *Federal-State Conflicts Over Western Waters—A Decade of Attempted "Clarifying Legislation"*, 20 RUTGERS L. REV. 423, 446-512 (1966).

19. 43 U.S.C. § 666(a) (2006).

20. *United States v. Dist. Ct. of County of Eagle*, 401 U.S. 520, 524 (1971).

jurisdiction over these claims.²¹ In *Colorado River Water Conservation District v. United States*,²² however, the Court fashioned an entirely new doctrine of abstention applicable to water right adjudications where reserved right claims were being litigated in federal court, but a state court also had jurisdiction under McCarran.²³ Applying this new doctrine and weighing various factors, the Court ordered the federal court to dismiss the case in favor of a later-filed action in state court.²⁴ With no language in the statute to support this result, the Court relied on McCarran's underlying policy of avoiding "piecemeal adjudication" of water rights.²⁵ The Court did not say that federal courts must always step aside in favor of state adjudications, but hinted that they ordinarily should, stating that McCarran "bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving" the statute's goal of resolving competing claims to water in a single case.²⁶

Some might argue that the judicial forum is not crucial to the success of reserved right claims;²⁷ after all, the Supreme Court has insisted that state courts must apply federal law in determining such claims, and that it may review state court decisions to ensure that they do so properly.²⁸ But three factors suggest that the court that hears these claims may be at least as important as the law that that court applies. First, both the western states and the federal government regarded the jurisdictional issue as very important, and they took steps in the years after the McCarran Amendment to ensure that their preferred forum heard federal water right claims.²⁹ Second, this jurisdictional dispute repeatedly reached the United States Supreme Court, which decided at least four cases on reserved right jurisdiction from 1971 to 1983,³⁰ and only two cases on the substance of the *Winters*

21. *Id.* at 526.

22. *Colo. River Conservation Dist. v. United States*, 424 U.S. 800 (1976).

23. *Id.* at 809.

24. *Id.* at 818-21.

25. *Id.* at 819.

26. *Id.*

27. The Court suggested in *Colorado River* that the state forum should not be a major problem even for tribal reserved right claims, insisting that "Indian interests may be satisfactorily protected under regimes of state law," and that McCarran "in no way abridges any substantive claim on behalf of Indians under the doctrine of reserved rights." *Id.* at 812-13.

28. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983); *Colo. River*, 424 U.S. at 813.

29. See Thorson et al., *supra* note 10, at 331-33 (describing withdrawal of federal government from adjudications in state courts, and state efforts to ensure that their adjudications would satisfy McCarran Amendment requirements). "States feared that federal and tribal water rights would be determined in federal court. Conversely, federal and tribal attorneys feared state court determination." *Id.* at 333.

30. *San Carlos Apache Tribe*, 463 U.S. at 549; *Colo. River*, 424 U.S. at 803; *United States v. Dist. Ct. for Water Div. No. 5*, 401 U.S. 527, 528 (1971); *United States v. Dist. Ct. of County of Eagle*, 401 U.S. 520, 521-22 (1971).

doctrine in the same period.³¹ Third, some state adjudication decisions have applied *Winters* so narrowly as to raise questions of whether state courts always treat reserved rights claims fairly.³² Indeed, some commentators have stated that state courts are often “hostile” to the federal government’s reserved right claims.³³

B. RESERVED RIGHT LITIGATION AND SETTLEMENT IN STATE COURTS

Many western states are in the process of conducting water right adjudications,³⁴ and several of these cases have been ongoing since the 1970s.³⁵ The prospect of federal reserved water rights was a primary motivation for the states to launch these cases; the states sought to ensure that their courts would hear federal and tribal claims, and engaged in a “race to the courthouse” to achieve that goal.³⁶ After years of jurisdictional maneuvering and a series of victories in the Supreme Court, the states got their wish.³⁷ “States commenced their water adjudications with the grim conviction that federal reserved rights did in fact exist, a concern somewhat softened by the fact that most of these rights would be determined in a forum perceived to be more favorable: state court.”³⁸

Within those adjudications, the United States filed tens of thousands of water right claims for federal and tribal lands. In Idaho’s giant Snake River Basin Adjudication, for example, the government filed about 50,000 claims;³⁹ in the relatively small Klamath Basin Adjudication,⁴⁰ there were 377 federal and tribal claims.⁴¹ This volume

31. *United States v. New Mexico*, 438 U.S. 696, 698 (1978); *Cappaert v. United States*, 426 U.S. 128, 131 (1976).

32. See Michael C. Blumm, *Reversing the Winters Doctrine? Denying Reserved Water Rights for Idaho Wilderness and Its Implications*, 73 U. COLO. L. REV. 173, 173-75 (2002); Reed D. Benson, *Can’t Get No Satisfaction: Securing Water for Federal and Tribal Lands in the West*, 30 ENVTL. L. REP. 11056, 11056-59 (2000).

33. Blumm, *supra* note 32, at 178 (asserting that state courts “have proved largely hostile to reserved rights”); Eric T. Freyfogle, *Repairing the Waters of the National Parks: Notes on a Long-Term Strategy*, 74 DENV. U. L. REV. 815, 834 (1997) (recommending that the National Park Service pursue strategic litigation to protect its interests in water: “Given the hostility of many state courts to federal reserved rights, litigation should typically occur in federal courts, in districts where judges do not have known hostilities to either environmental protection or assertions of federal power.”).

34. Thorson et al., *supra* note 10, at 439-42 (table providing status of adjudications in seventeen western states).

35. *Id.* at 325-31 (describing commencement of adjudications in ten western states).

36. *Id.* at 324.

37. See *id.* at 331-37.

38. *Id.* at 337. Only New Mexico has allowed several adjudications to play out in federal court, based on a 1950s agreement between the federal and state governments. *Id.* at 351, 475.

39. According to the court conducting the adjudication, the United States filed approximately 50,000 claims for ten federal agencies and four tribes, although some of these claims involved rights under state law rather than reserved rights. Snake River Basin Adjudication Court Informational Brochure, available at <http://www.srba.state.id.us/DOC/BROCH1.HTM> (last visited Feb. 20, 2010).

40. See Thorson et al., *supra* note 10, at 339 (noting that the Klamath case involves “only” 730 claims, far fewer than major adjudications such as Idaho’s).

of claims is not surprising, considering that nearly half of the West's land area is in federal ownership,⁴² managed by agencies as diverse as the Forest Service, Department of Defense, Fish & Wildlife Service, and Bureau of Land Management. A 1978 federal study suggested that a staggering 187.2 million acres in eleven western states might carry federal or tribal reserved water rights.⁴³ Although many reserved right claims have already been resolved in the course of these adjudications,⁴⁴ untold thousands of claims await final disposition—some in old, but still uncompleted, proceedings such as Arizona's Gila River Adjudication,⁴⁵ some in newer adjudications such as North Idaho's,⁴⁶ and some in river systems where no adjudication has yet begun, such as New Mexico's Middle Rio Grande.

Although federal law governs reserved water rights,⁴⁷ claims heard in state courts are subject to the procedural rules of the state adjudication proceedings.⁴⁸ Water rights adjudications are large, complex cases, and each western state has its own approach for conducting them; even the most concise summary of the various

41. This number includes 313 federal reserved right claims and 64 tribal-related claims. Oregon Water Res. Dep't, Klamath Basin Adjudication Claim and Contest Information as of May 19, 2009, available at http://www1.wrd.state.or.us/files/Publications/klamath-adj/Status_of_the_Adjudication.pdf (last visited Feb. 20, 2010).

42. "The percentage of federally owned land (*excluding* Indian reservations and other trust properties) in the Western States ranges from 29.5% of the land in the State of Washington to 86.5% of the land in the State of Nevada, an average of about 46%." United States v. New Mexico, 438 U.S. 696, 699 n.3 (1978).

43. The eleven states were Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. According to the report, each of these states could have over 10 million acres of land carrying reserved water rights, ranging from 10.8 million acres in Washington to 28.2 million acres in California. Thorson, et al., *supra* note 10, at 310-11.

44. According to the State of Oregon, all 313 federal reserved right claims in the Klamath Adjudication have been resolved, although most of the tribal claims are still being contested. Oregon Water Res. Dep't, *supra* note 41.

45. See Michael K. Jeanes, *The Water Case Turns 30*, MARICOPA LAWYER, May 2009, at 3, available at http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/_pdfs/MLMay09.pdf (last visited Feb. 20, 2010) (describing the 30-year history of Gila River adjudication, and noting that several federal reserved right claims remain unresolved).

46. See Press Release, Idaho Dep't of Water Res., IDWR Commences Northern Idaho Adjudication (Jan. 8, 2009), available at http://www.idwr.idaho.gov/News/news_releases/rels2009/01jan/2009-02.pdf (last visited Feb. 20, 2010).

47. See *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) (holding that federal courts in Arizona and Montana should abstain from hearing tribal reserved right claims in favor of state adjudications, but stating "[w]e also emphasize, as we did in *Colorado River*, that our decision in no way changes the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law."). See also *Colo. River Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976); *United States v. Dist. Ct. of County of Eagle*, 401 U.S. 520, 526 (1971).

48. *United States v. Idaho ex rel. Dir., Idaho Dep't of Water Res.*, 508 U.S. 1, 8-9 (1993).

adjudication procedures would require many pages.⁴⁹ For purposes of this article, however, two aspects of state adjudications are relevant. First, once the government (or any other party) files a water right claim, other parties to the adjudication have the opportunity to object to that claim.⁵⁰ The objection may deny that the claimed right is valid at all, or may challenge the claimed priority date, purpose of use, quantity of water, or other aspects of the right as claimed.⁵¹ A single claim may generate a large number of objections,⁵² particularly if it is a reserved right claim.⁵³

Second, state adjudications commonly are not open to every citizen or group that would like to participate. Unless persons claim or assert water rights in the adjudication,⁵⁴ they become parties to the case by objecting to one or more rights claimed by others;⁵⁵ however, many state adjudication statutes allow only water users to file objections.⁵⁶ In other states, persons or groups without water rights may participate in the adjudication, but often find themselves effectively foreclosed from raising key issues of concern to them.⁵⁷ Thus, entities that are interested in the river but do not claim water rights—such as environmental, rafting, and angling groups—are typically either unable to participate in the adjudication, or foreclosed from raising key issues of concern to them.

In the end, reserved right claims are often resolved through negotiated agreements, and these settlements are regarded as a positive outcome of state water adjudications.⁵⁸ Nearly all of the focus on

49. Fortunately, an excellent summary of adjudication procedures exists in a lengthy article by four experts on western water adjudications. Thorson et al., *supra* note 10, at 356-432.

50. *Id.* at 393.

51. *Id.*

52. In Oregon's Klamath Basin Adjudication, for example, various parties filed a total of 5,664 contests (objections) to 730 claims. Oregon Water Res. Dep't, *supra* note 41.

53. In the Klamath Adjudication, 313 federal reserved right claims produced 4,355 contests. By contrast, 300 claims for private rights yielded 969 contests. *Id.*

54. For a general explanation of who may claim water rights and how claims are handled, see Thorson et al., *supra* note 10, at 384-86.

55. *Id.* at 392-396 (providing a general explanation of objections and how objectors become parties).

56. *Id.* at 393, nn.677-80 (citing sixteen state statutes).

57. In Colorado, for example, although "any person" may object to a filed claim, the Colorado Supreme Court has held that in the absence of statutory authority to do so, a water court may not deny an application based on environmental factors. COLO. REV. STAT. § 37-92-302(1)(b) (2005); *In re Bd. of County Comm'rs*, 891 P.2d 952, 971-73 (Colo. 1995) (rejecting appeal by environmental groups as contrary to Colorado water law, while acknowledging that "environmental factors might provide a reasonable and sound basis for altering existing law."). Similarly, in Washington, any interested party may file objections. WASH. REV. CODE § 90.03.200 (2009). However, according to the Washington Supreme Court, environmental and other public interest factors "cannot operate to impair existing water rights" being determined in an adjudication. *State Dep't of Ecology v. Grimes*, 852 P.2d 1044, 1053 (Wash. 1993).

58. "The successful completion of reserved water rights settlements is probably the

reserved right settlements, however, has involved tribal *Winters* claims. The western states, for example, have a longstanding policy resolution favoring settlement of tribal claims,⁵⁹ but no similar policy regarding settlement of non-tribal federal reserved rights. The literature on reserved right settlements is quite rich as to tribal rights,⁶⁰ and rather thin as to federal rights.⁶¹ Despite the relative lack of information, it seems clear that federal reserved right claims often settle,⁶² and those settlement agreements often protect existing users from any harm that could otherwise result from recognition of the reserved right.⁶³ Once

brightest achievement associated with western stream adjudications.” Thorson et al., *supra* note 10, at 444.

59. W. GOVERNORS’ ASS’N, POLICY RESOLUTION 07-3, NEGOTIATED INDIAN WATER RIGHTS SETTLEMENTS (2007), available at http://www.westgov.org/index.php?option=com_joomdoc&task=doc_download&gid=656&Itemid= (last visited Feb. 20, 2010) (indicating that the policy dates back to 1987 (Resolution 87-007), and has been readopted six times by the Western Governors Association).

60. See, e.g., JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 865 n2 (3rd ed. 2000) (listing numerous sources); BONNIE G. COLBY ET AL., NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST (2005) (providing a general overview of tribal water rights negotiation); *Nez Perce Water Rights Settlement Articles*, 42 IDAHO L. REV. 547, 547-794 (2006) (consisting of seven articles that present various perspectives on the Nez Perce tribal water rights settlement).

61. Perhaps the most detailed explanation of settlement of non-tribal federal *Winters* claims is all of eleven pages long. David Amman et al., *Negotiation of the Montana-National Park Service Compact*, 5 RIVERS 35, 35-45 (1995) (explaining the State of Montana’s successful negotiation with the National Park Service regarding reserved rights for Yellowstone and Glacier National Parks). A comprehensive review of western stream adjudications noted that “[s]ettlements have played a large role in determining federal reserved rights in the west,” but went on to discuss only tribal settlements. Thorson et al., *supra* note 10, at 407-09.

62. As stated in the 2000 edition of a leading water law text, “Although litigation goes forward on many fronts, a trend toward settlement of non-Indian federal reserved rights claims is emerging.” SAX, *supra* note 60, at 814. In Montana’s massive adjudication, for example, all but a few of the many non-tribal reserved right claims have been resolved through negotiations, and none of these claims have been litigated. E-mails from Susan Cottingham, Program Manager for the Montana Reserved Water Rights Compact Commission, to Reed D. Benson, Professor, University of New Mexico School of Law (Aug. 10-11, 2009) (on file with author). Montana’s numerous compacts involving water rights, including reserved rights, are codified at MONT. CODE ANN. §§ 85-20-101 to -1601 (2009).

63. Water users (and states) often oppose reserved rights because these rights may be legally senior to existing water uses established after the date of the federal reservation—meaning that in times of drought, these established uses may fail in favor of the federal right. To prevent this result, settlements may effectively subordinate the reserved water right to existing uses, perhaps by assigning it a priority date that junior to the date of the reservation. “The United States agrees to subordinate its federal reserved rights to at least some appropriations initiated after the federal reservation, in return for which the state agrees to cap further appropriations and to manage groundwater outside the boundaries of the federal reservation to protect wetlands and other water-dependent resources inside the reservation.” SAX, *supra* note 60, at 815. See also Press Release, Dep’t. of Justice, Historic Water Rights Settlement Reached in Colorado (Mar. 15, 2000) available at <http://www.justice.gov/opa/pr/2000/March/129enrd.htm> (describing a settlement of Forest Service reserved right claims in southern Colorado, whereby the Forest Service “relinquishes its claimed early priority dates to water and accepts a 1999 priority date”); W. WATER POLICY REVIEW ADVISORY COMM’N, WATER IN THE WEST: THE CHALLENGE FOR

the parties agree on settlement of a reserved right claim, the adjudicating court must still approve the agreement.⁶⁴

Reserved right settlements are often touted because they resolve water right controversies by mutual agreement and eliminate the need for years of expensive litigation.⁶⁵ This kind of praise was heaped on a 2003 agreement between the Interior Department and the State of Colorado regarding water rights for Black Canyon of the Gunnison National Park.⁶⁶ However, that agreement generated its own controversy and litigation, with remarkable results.

II. THE BLACK CANYON RESERVED WATER RIGHTS CONTROVERSY

A. THE BLACK CANYON AND ITS RESERVED WATER RIGHTS

The Black Canyon of the Gunnison is a spectacular gorge in central Colorado, carved deep into rugged hills and high desert by the Gunnison River. The gorge's dimensions are dramatic—it is up to 2722 feet deep, as little as 1100 feet wide at the rim, and as narrow as forty feet at the river⁶⁷—but those numbers only hint at the awesome grandeur of the Black Canyon.

Far below the gorge rim flows the Gunnison River, named for Captain John Williams Gunnison, whose 1853 expedition provided the first written description of the Black Canyon.⁶⁸ The river today, however, looks very different than the one Captain Gunnison saw, as described by the National Park Service: "The Gunnison River no longer flows freely through canyon. Three dams hold back its seasonal flood, reducing its former glory to a feeble shadow. Yet even in its diminished state, the Gunnison continues to add to the geologic story of Black Canyon . . . drop by precious drop."⁶⁹ Even in its diminished state, the

THE NEXT CENTURY 4-13 (1998) (describing a settlement of reserved water rights for Zion National Park in Utah, which "allows valid existing uses to continue"); *In re Water Rights for the United States of America*, No. 01CW05at 11 (Colo. Water Div. 4, Jan. 8, 2009) (outlining the final settlement for subordination to certain existing, junior uses); A. DAN TARLOCK ET AL., *WATER RESOURCE MANAGEMENT* 923-28 (2009) (illustrating that subordination provisions are fairly standard features of tribal reserved rights settlements. The authors noted that in settlements, tribes' "senior claims under *Winters* are commonly subordinated to existing (and sometimes future) non-Indian uses").

64. See Thorson *et al.*, *supra* note 10, at 408-11 (describing approval criteria and procedures employed by courts in Arizona, New Mexico, and Montana adjudications).

65. See, e.g., Press Release, *supra* note 63 (quoting a water user representative as being "pleased that this long controversy can have such a positive conclusion," and noting that the settlement will save all parties millions in litigation costs).

66. See *infra* notes 129-132 and accompanying text.

67. U.S. National Park Service, Black Canyon of the Gunnison National Park – Black Canyon Dimensions, [available at](http://www.nps.gov/blca/naturescience/dimension.htm) <http://www.nps.gov/blca/naturescience/dimension.htm> (last visited Feb. 20, 2010).

68. U.S. National Park Service, Black Canyon of the Gunnison National Park – Explorers: 1853 Gunnison Expedition, [available at](http://www.nps.gov/blca/historyculture/explorer_gunnison.htm) http://www.nps.gov/blca/historyculture/explorer_gunnison.htm (last visited Feb. 20, 2010).

69. U.S. National Park Service, Black Canyon of the Gunnison National Park – From

river has outstanding recreational values. The Gunnison through Black Canyon National Park is designated as a Gold-Medal Trout Stream by the State of Colorado, and the gorge section of the river offers expert kayakers Class V rapids and incredible scenery.⁷⁰

In 1933, President Hoover signed a proclamation establishing Black Canyon of the Gunnison National Monument.⁷¹ This brief proclamation noted that it would serve the public interest to preserve "the spectacular gorges and additional features of scenic, scientific, and educational interest."⁷² It directed the National Park Service to manage the Black Canyon under the National Park Service Organic Act of 1916, with its charge to preserve natural resources and provide public access in the parks "in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."⁷³

Congress upgraded the Black Canyon to a national park in 1999. In enacting the Black Canyon of the Gunnison National Park and Gunnison Gorge National Conservation Area Act, Congress made numerous findings regarding the many uses and values of the Black Canyon and surrounding lands, but said little about the Gunnison River.⁷⁴ The National Park Service retained authority to manage the new park under the 1999 statute and the 1916 Organic Act.⁷⁵ Regarding water rights, Congress declared that the statute did not affect any existing water rights (including those held by the United States) and did not constitute an express or implied reservation of water for the park, effectively preserving the status quo regarding Black Canyon water rights.⁷⁶

Long before Congress established the national park, however, the United States had secured a partially defined water right for the Black Canyon. In 1978, a Colorado water court entered a decree confirming the existence, priority date, and purposes of a reserved water right for the Black Canyon of the Gunnison National Monument.⁷⁷ As stated in the decree, the purpose of the monument "is to conserve and maintain in an unimpaired condition the scenic, aesthetic, natural, and historic

Past to Present, *available at* <http://www.nps.gov/blca/naturescience/pasttopresent.htm> (last visited Feb. 20, 2010).

70. U.S. National Park Service, Black Canyon of the Gunnison National Park – Fishing, *available at* <http://www.nps.gov/blca/planyourvisit/fishing.htm> (last visited Feb. 20, 2010); U.S. National Park Service, Black Canyon of the Gunnison National Park – Kayaking, *available at* <http://www.nps.gov/blca/planyourvisit/kayaking.htm> (last visited Feb. 20, 2010); *see* U.S. National Park Service, Black Canyon of the Gunnison National Park – Scenic Drives, *available at* <http://www.nps.gov/blca/planyourvisit/drives.htm> (last visited Feb. 20, 2010).

71. Proclamation No. 2032, 47 Stat. 2558 (Mar. 2, 1933).

72. *Id.*

73. *Id.*; 16 U.S.C. § 1 (2006).

74. *See* Black Canyon of the Gunnison National Park and Gunnison Gorge National Conservation Area Act, Pub. L. No. 106-76, 113 Stat. 1126 (1999).

75. *Id.*

76. *Id.*

77. *In re* The Application for Water Rights of the United States, No. W-437 at 2 (Colo. Water Div. 4) (2001).

objects of the monument, as well as the wildlife therein, in order that the monument might provide a source of recreation and enjoyment for all generations of citizens of the United States.”⁷⁸ Thus, the court decreed a water right for certain purposes, including both recreation and conservation as well as preservation of scenic and aesthetic values. The decree specifically authorized minimum stream flows in the Gunnison River for fish conservation and to “[a]ttain and preserve the recreational, scenic, and aesthetic conditions existing” as of the monument’s creation.⁷⁹ The priority date was March 2, 1933, the date President Hoover signed the proclamation designating the monument.⁸⁰

The 1978 decree thus recognized a Black Canyon reserved right, but explicitly did not quantify it. The court labeled the decree “interlocutory,” and addressed numerous federal water right claims in addition to the Black Canyon right.⁸¹ The decree stated, “The waters granted herein in fulfillment of the reserved rights of the United States shall be quantified pursuant to this decree,” and it did not award the government “exclusive title to any absolute or relative volume of water . . .”⁸² It did, however, “determine all of the reserved rights of the United States” for certain categories of federal lands in western Colorado, and “establish the priority of the United States’ right to use water” under its reserved water rights, including the one for Black Canyon National Monument.⁸³

The 1978 decree required the United States to file an application to quantify the Black Canyon reserved right, which would claim specific flows for each week of the year and explain why these flows were necessary to support the purposes of the national monument.⁸⁴ Once the court determined the amounts needed for the Black Canyon, they would “be the subject of an absolute water right with a priority date as of the reservation date” of the monument.⁸⁵ The decree required the government to apply for quantification within five years.⁸⁶

Nearly twenty-three years later, the United States finally sought to quantify the Black Canyon reserved right. On January 17, 2001—in the final week of the Clinton Administration—the Justice Department filed papers in the Colorado water court claiming certain flows in the river

78. *In re The Application for Water Rights of the United States*, No. W-437 at 2 (Colo. Water Div. 4) (Mar. 6, 1978 Interlocutory Decree Entered).

79. *Id.*

80. *Id.*

81. *In re The Application for Water Rights of the United States*, No. W-437 at 2, 4-5 (Colo. Water Div. 4) (June 17, 2008 Review Draft).

82. *In re The Application for Water Rights of the United States*, No. W-437 at 2 (Colo. Water Div. 4) (2001).

83. *Id.*

84. *See In re The Application for Water Rights of the United States*, No. W-437 at 1, Attachment B (Colo. Water Div. 4) (2001).

85. *In re The Application for Water Rights of the United States*, No. W-437 at 2 (Colo. Water Div. 4) (Mar. 6, 1978 Interlocutory Decree Entered).

86. *Id.*

through Black Canyon of the Gunnison National Park.⁸⁷ The application did not explain why it was filed nearly two decades late, but in later filings the government stated that the National Park Service performed extensive scientific studies and modeling to determine the necessary flow levels.⁸⁸

The federal application claimed instream flows of two primary types: “base flows” and “peak flows.”⁸⁹ The minimum claimed base flow, to be met throughout the year, was 300 cfs.⁹⁰ The application sought variable base flows for the May 1-July 25 period, to be determined by the amount of water predicted to flow into a specified reservoir above the Black Canyon; base flows for this period would be lower in drier years and higher in wetter ones, but would never exceed 3350 cfs.⁹¹ The claimed peak flow would be met one day per year during the May 1-June 30 period.⁹² Like the base flow claim, this one-day high flow would vary depending on the forecasted inflow for the year.⁹³ The application also claimed certain flow levels, known as “shoulder flows,” to be met as Gunnison River levels rose to and fell from the annual one-day peak.⁹⁴

By claiming flows for the protection of the park, however, the application threatened to constrain operation of the Aspinall Unit, a federal project operated by the Bureau of Reclamation (“USBR”) just upstream of the Black Canyon.⁹⁵ A major element of the Colorado River Storage Project, the Aspinall Unit comprises three dams with a combined storage capacity exceeding one million acre-feet; Blue Mesa dam, completed in 1966, forms the largest reservoir in Colorado.⁹⁶ In addition to storing water for irrigation and other purposes, these dams provide flood control and generate hydropower that is marketed through the Western Area Power Administration (“WAPA”).⁹⁷ Congress authorized the Aspinall (originally “Curecanti”) Unit of the Colorado River Storage Project in 1956 along with other major facilities such as Glen Canyon Dam on the Colorado, Navajo Dam on the San Juan, and Flaming Gorge Dam on the Green.⁹⁸ Water rights for the Aspinall Unit

87. *In re The Application for Water Rights of the United States*, No. W-437 at 1 (Colo. Water Div. 4) (2001).

88. Federal Defendants’ Opening Memorandum in Support of Federal Defendants’ Dispositive Motion at 20-21, *High Country Citizens’ Alliance v. Norton*, 448 F.Supp.2d 1235 (D. Colo. 2005) (Civ. No. 03-WY-1712).

89. *In re The Application for Water Rights of the United States*, No. W-437 at 2-3 (Colo. Water Div. 4) (June 17, 2008 Review Draft).

90. *Id.* at 3.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Federal Defendants’ Opening Memorandum, *supra* note 88, at 1.

96. *Id.* at 2, 7.

97. U.S. Bureau of Reclamation, Colorado River Storage Project: Aspinall Unit, available at <http://www.usbr.gov/uc/rm/crsp/aspinall/index.html> (last visited Feb. 20, 2010); see Colorado River Storage Project Management Center, available at <http://www.wapa.gov/crsp/aboutcrsp/default.htm> (last visited Feb. 20, 2010).

98. Act of Apr. 11, 1956, ch. 203, 70 Stat. 105 (1956); U.S. Bureau of Reclamation, Colorado River Storage Project Home Page, available at

have a priority date of November 13, 1957.⁹⁹

The application acknowledged that exercising the claimed rights to peak flows in the Black Canyon would "require careful consideration of numerous factors, including the structural capacity of upstream dams and potential downstream flooding, among other river management issues."¹⁰⁰ It concluded by stating that the Secretary of the Interior would "confer" with the State of Colorado, the National Park Service, the Bureau of Reclamation, the Western Area Power Administration, "and other affected interests in order to ensure that operational decisions to exercise this right are in accord with the best available information and with full consideration of the river management issues noted."¹⁰¹ USBR and WAPA thus got a voice in shaping peak flows for the park, but the application gave no indication that the Black Canyon's water rights could be effectively subordinated to upstream storage and hydropower generation at the Aspinall Unit. Controversy soon followed.

B. CUTTING THE CLAIM: A PARTIAL FEDERAL-STATE SETTLEMENT

This effort to quantify the Black Canyon instream flow claims predictably raised serious and widespread objections. More than 380 entities filed papers in Colorado water court opposing the federal claims; virtually all of these opposers claimed that the application sought more water than the park needed.¹⁰² Others argued that the claimed flows were inconsistent with federal duties to operate the Aspinall Unit under the 1956 Colorado River Storage Project Act, or even that the statute had implicitly modified the Black Canyon's reserved right.¹⁰³ The government later stated that these and other arguments showed the risk it faced in litigating the park's instream flow claim in the Colorado water court.¹⁰⁴

If Colorado state officials and water users were upset with the federal quantification filing in the final week of the Clinton Administration, they were surely cheered by President Bush's appointment of former Colorado Attorney General Gale Norton as Secretary of the Interior.¹⁰⁵ Bennett Raley, a prominent Colorado water lawyer, became the new Assistant Secretary for Water and Science (overseeing the Bureau of Reclamation and the U.S. Geological

<http://www.usbr.gov/uc/rm/crsp/index.html> (last visited Feb. 20, 2010); U.S. Bureau of Reclamation, *supra* note 97.

99. See *In re The Application for Water Rights of the United States*, No. W-437, at 4.

100. *Id.*

101. *Id.* at 3.

102. See Federal Defendants' Opening Memorandum, *supra* note 88, at 28.

103. See *id.* at 28-29.

104. *Id.* at 28.

105. David E. Sanger, *The 43rd President: The Transition; New Picks Firm up Conservative Cast of Bush's Cabinet*, N.Y. TIMES, Dec. 30, 2000, at A1, available at <http://www.nytimes.com/2000/12/30/43rd-president-transition-new-picks-firm-up-conservative-cast-bush-s-cabinet.html> (last visited Feb. 20, 2010).

Survey).¹⁰⁶ David Bernhardt was yet another high-level Interior Department official from Colorado¹⁰⁷ who would play a key role regarding Black Canyon water rights.¹⁰⁸

The 2001 quantification claim also raised concerns within the federal government; USBR and WAPA certainly stood to lose if Black Canyon instream flows were quantified at or near the levels claimed. Representatives of these two agencies, the National Park Service, and other units of the Interior Department began meeting to discuss a compromise that would protect both the park and the Aspinall Unit. An internal Park Service memo summarizing these discussions shows that the various agency negotiating positions were rather far apart, agreeing only on a minimum flow of 300 cfs.¹⁰⁹ The Park Service proposed peak flows of 10,000 to 16,000 cfs, “lower peak flows” of up to 10,000 cfs, and “shoulder flows” of up to 3,200 cfs.¹¹⁰ USBR offered peak flows of 10,000 cfs “infrequently,” “lower peak flows” of up to 5,500 cfs, and “shoulder flows” of up to 1,200 cfs.¹¹¹ The WAPA position allowed for peak flows of 10,000 to 13,000 cfs, but it called for faster ramping rates (river level increases or decreases) than the Park Service wanted, did not mention “lower peak flows,” and made no provision for “shoulder flows.”¹¹² Further negotiations within the Interior Department sought to close this gap, informed by USBR modeling runs of various operational scenarios for the Aspinall Unit.¹¹³

In April 2003, the Interior Department signed an agreement with the State of Colorado regarding Black Canyon instream flow rights.¹¹⁴ The agreement sharply reduced the reserved right claim, leaving only a 300 cfs minimum flow right with a 1933 priority date.¹¹⁵ Additional

106. Katherine Q. Seelye, *Bush is Choosing Industry Insiders to Fill Several Environmental Positions*, N.Y. TIMES, May 12, 2001, at A10, available at <http://www.nytimes.com/2001/05/12/us/bush-is-choosing-industry-insiders-to-fill-several-environmental-positions.html?pagewanted=all> (last visited Feb. 20, 2010).

107. See Office of the Solicitor Homepage, available at http://www.doi.gov/solicitor/bernhardt_bio.html (last visited Feb. 20, 2010) (noting that Bernhardt is a Rifle, Colorado native who has held various senior positions within the Department of the Interior).

108. See, e.g., Letter from Christopher J. Treese, External Affairs Manager, Colo. River Water Conservation Dist., to David Bernhardt, Dep’t of Interior (June 17, 2003) (Administrative Record at 6541, *High Country Citizens’ Alliance v. Norton*, 448 F. Supp. 2d 1235 (D. Colo. 2006)) (thanking Bernhardt for his “efforts ... to honor state water law and protect historical water users in the Gunnison basin”).

109. Memorandum (apparently from Nat’l Park Serv. staff to Nat’l Park Serv. Dir. Fran Mainella) on Black Canyon of the Gunnison National Park—Federal Reserved Water Right (Feb. 8, 2002) (Administrative Record at 12784, *High Country Citizens’ Alliance*, 448 F.Supp.2d at 1235).

110. *Id.*

111. *Id.*

112. *Id.*

113. See *id.*

114. Agreement, Black Canyon of the Gunnison National Park, Signed by Officials of the U.S. Dep’t of the Interior and the Colo. Water Conservation Bd. (Apr. 2, 2003) (Administrative Record at 6401, *High Country Citizens’ Alliance*, 448 F.Supp.2d at 1235).

115. *Id.*

flows for the park would rely upon a minimum flow right under Colorado state law, to be held by the Colorado Water Conservation Board (CWCB), with a 2003 priority date.¹¹⁶ The agreement did not define specific instream flows for the Black Canyon above 300 cfs; instead, it included a table of flows that “can be reasonably expected, based on historical averages of the last twenty-six years, to pass through the Aspinall Unit” for the benefit of the park.¹¹⁷ The table showed a 300 cfs base flow available every year, and “shoulder flows” of 300-1000 cfs available in twenty-two out of twenty-six years.¹¹⁸ Expected peak flows ranged from a low of 2000-5000 cfs available in eight out of twenty-six years, to a high of 10,000+ cfs available in three out of twenty-six years.¹¹⁹ The agreement clearly stated, however, that these flows were not guaranteed in the future, and that the quantity of water would depend on a range of factors.¹²⁰

Other than cutting the reserved right claim to 300 cfs, the agreement did not quantify water rights for the Black Canyon; instead, it described the operational priorities and procedures of the Aspinall Unit, which in turn would dictate the amount of water available for the park.¹²¹

Other than the 300 cfs minimum flow, nothing in the agreement imposed any substantive limits or requirements on Aspinall Unit operations; park flows were stated only as “reasonably expected” values with no guarantees, and there was no mention of ramping rates, which had been a key element of the 2001 claim and the subsequent

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. The agreement stated the following regarding Aspinall Unit operations and Black Canyon flows:

[T]he ultimate amount of water that will be available [for the park] in the future is dependent upon many factors, including where the water is removed from the system, the hydrology and the timing of the hydrology, future project demand, and reservoir elevation at the beginning of the run-off season. In light of these considerations, on an annual basis and prior to the spring run-off, the Bureau of Reclamation shall consult with the National Park Service, the Western Area Power Administration, the United States Fish and Wildlife Service, the CWCB, the Colorado Water River Water Conservation District, the Uncompahgre Valley Water Users Association, the Upper Gunnison Water Conservancy District, the City and County of Delta, and Redlands Water and Power Company, on Aspinall Unit project operations for the upcoming season regarding the delivery of the CWCB right. Nothing in the consultation process will divest the Bureau of Reclamation of its obligation to operate the Aspinall Unit in furtherance of its authorized purposes and obligations, and the Bureau of Reclamation shall operate the Aspinall Unit consistently with the terms of this agreement.... The Bureau of Reclamation will deliver the flows of the Gunnison River in accordance with the CWCB instream flow right with the 2003 priority date described [above], to the extent that such flows have not been appropriated by senior water right holders under Colorado law, to the extent that such flows are not subject to appropriation by the Aspinall Unit under the authorized purposes, and to the extent that such flows do not impair the structural integrity of the Aspinall Unit.

Id.

interagency negotiations.¹²² The mention of “future project demand” as a factor in determining flows for the park indicated that new offstream water uses could reduce the amount of water available, leaving the Black Canyon with even less protection than a 2003 water right might otherwise indicate.

The April 2003 agreement called for USBR, the National Park Service, and the State of Colorado to create “a binding Memorandum of Agreement (MOA) . . . regarding enforcement and protection of the instream flow right” to be held by the CWCB.¹²³ Under the ensuing MOA of July 31, 2003, the CWCB agreed to act under state law as needed to exercise and protect the instream flow right for the park.¹²⁴ The earlier agreement stated that the Park Service would be able to enforce the instream flow right if the CWCB failed to do so, but the MOA said only that the United States or the CWCB could sue (in an unspecified court) to enforce the MOA.¹²⁵ The agreement capped peak flows through the Black Canyon at 10,000 cfs, and specified that exercise of the instream flow right “shall not interfere with the operations or authorized purposes of the Aspinall Unit.”¹²⁶

Neither the federal government nor the State of Colorado has said much about the events leading up to the April 2003 agreement, so there is little public information on how it was developed or who participated in negotiating it. Notes of a November 2002 “Black Canyon mtg” show only that ten federal and seven state agency officials were in attendance.¹²⁷ A CWCB staff report in May 2003 said only that the staff “continues to serve as part of Colorado’s negotiating team working with other Colorado water users and a number of federal agencies towards the quantification” of the Black Canyon reserved right, without identifying these users or their role in the process.¹²⁸

Federal and state officials hailed the 2003 agreements as a breakthrough on the Gunnison dispute and a model for resolving conflicts over water rights for federal lands. Interior Secretary, Gale Norton, praised the deal as an innovative, collaborative solution to competing demands for water.¹²⁹ After saying that the 2001

122. *Id.*

123. *Id.* at 6402.

124. Memorandum of Agreement between the United States Department of the Interior National Park Service and Bureau of Reclamation and the Colorado Water Conservation Board Concerning the Enforcement and Protection of Water and Water Rights (July 31, 2003) (Administrative Record at 12666, *High Country Citizens’ Alliance*, 448 F.Supp.2d at 1235).

125. Agreement, *supra* note 114, at 6402; Memorandum of Agreement, *supra* note 123, at 12669.

126. *Id.* at 12669.

127. Attendance Sign-In Sheet, Black Canyon Meeting (Nov. 22, 2002) (Administrative Record at 11983, *High Country Citizens’ Alliance*, 448 F.Supp.2d at 1235).

128. Memorandum from Rod Kuharich and Dan McAuliffe to Colo. Water Conservation Bd. Members 17 (May 8, 2003) (on file with author).

129. Gale A. Norton, Op-Ed., *A New Path for Western Water Issues*, DENVER POST, Apr. 20, 2003, at E-04.

quantification application claimed “far more water than the park has received in recent memory or will ever need,” she stated that the Park Service and USBR first reached agreement among themselves, then found a way to protect park needs in cooperation with the state.

A key innovation is using a state “instream flow” right to protect the park, which avoids the turf battle that sometimes blocks settlements. The Park Service knows it will get the amount of water necessary to protect the park. Reclamation knows how to manage its water facilities. Local communities and citizens know their water rights are secure.

The certainty provided by this agreement will help both the local economy and natural resource conservation, since both function better when everyone understands exactly what their water rights are.¹³⁰

The director of Colorado’s Department of Natural Resources said the agreement would bring “a new era of cooperation with the federal government that results in real environmental benefits.”¹³¹ A State of Colorado press release said that the original federal claim “could have permanently imposed drought-like conditions in the Gunnison River Basin.”¹³² Similarly, a major water supplier on Colorado’s Western Slope said the agreement “is being welcomed as a major step forward.”¹³³

Environmental groups, however, blasted the agreement as a giveaway that would harm the Black Canyon and set a bad precedent. Trout Unlimited complained that trading a federal water right with a 1933 priority for a state right with a 2003 priority was a bad deal and would open the door to more water being diverted out of the Gunnison upstream of the park.¹³⁴ A Trout Unlimited staff attorney said that the deal “cuts the heart out of the park. Our concern is that the Interior Department will use this as a model to further dewater our National Parks, our National Forests, and our National Wildlife Refuges.”¹³⁵

The agreements of April and July 2003 reduced the Black Canyon claims but did not fully settle them. The Colorado water court in Montrose still needed to quantify the park water rights, so it scheduled an eight-week trial on the matter beginning September 2004.¹³⁶ The environmental groups had to know, however, that in the Colorado courts they had no real chance of getting a better result than these

130. *Id.*

131. Press Release, U.S. Dep’t of the Interior, Interior Department Announces Major Agreement for Gunnison River Water in Colo. (Apr. 2, 2003) *available at* http://www.interior.gov/news/03_News_Releases/030402.htm (last visited Feb. 20, 2010).

132. Press Release, State of Colo., State, Federal Officials to Announce Historic Settlement Agreement on Black Canyon of the Gunnison Water Rights (Apr. 1, 2003).

133. Letter from R. Eric Kuhn, General Manager, Colo. River Water Conservation Dist., to Greg Walcher, Executive Dir., Colo. Dep’t of Natural Res. (Apr. 10, 2003).

134. Press Release, Trout Unlimited, Trout Unlimited Condemns Bush Administration’s Decision to “Give Away” the Gunnison River (Apr. 2, 2003) (on file with author).

135. *Id.*

136. See Order on Motion for Stay at 1, Concerning the Application for Water Rights of the United States, No. 01CW05 (Colo. Water Div. 4, Oct. 7, 2003).

agreements would provide. For one thing, environmental groups had traditionally gotten little traction in the water courts, largely because Colorado water law does not allow water judges to consider environmental factors in determining water rights.¹³⁷ And while the Black Canyon rights would be determined under federal rather than state law, the environmental groups would be arguing for more water under the 1933 reserved right than the claimant federal government would be, placing them in a unique and nearly impossible position. Realistically, it could only get worse in the water court; if the environmental groups wanted a better deal for the Black Canyon, they needed a different forum. Thus, they sued to challenge the Interior Department's action in federal court¹³⁸ and sought to put the water court proceedings on hold.

C. STAYING THE WATER COURT LITIGATION

When the government reached the April 2003 agreement with the State of Colorado, it filed a motion in the Colorado water court to amend its quantification application,¹³⁹ cutting its claim to 300 cfs. But, the Black Canyon reserved right would not be final until the water court issued a decree following further proceedings. Environmental groups were pinning their hopes on the federal court to overturn the 2003 agreements, but they recognized that a final water court decree of the park reserved right would effectively moot their federal claims.¹⁴⁰ Thus, in September 2003, they moved to stay the water court proceedings (including consideration of the motion to amend) pending resolution of the issues raised in the newly filed federal case.¹⁴¹

The motion for stay placed the water court in an unfamiliar position. For nearly thirty years, since the Supreme Court's decision in *Colorado River Water Conservation District*,¹⁴² federal courts had generally abstained from cases involving reserved right claims in favor of state court adjudications. While a deferral by the water court certainly would not conflict with the *Colorado River* case, it would depart from the conventional wisdom that federal courts no longer have a role in reserved rights litigation.

Colorado agencies and water users opposed the motion for stay on that basis, arguing that the water court was the proper forum for quantification of the Black Canyon rights and that it would relinquish its authority by staying proceedings.¹⁴³ The United States did not raise

137. *In re Bd. of County Comm'rs*, 891 P.2d 952, 972 (Colo. 1995).

138. *See High Country Citizens' Alliance v. Norton*, 448 F. Supp. 2d 1235, 1242 (D. Colo. 2006).

139. *Id.*

140. *See Order on Motion*, *supra* note 136.

141. *See Id.*

142. *See generally* *Colo. River Conservation Dist. v. United States*, 424 U.S. 800, 819-20 (1976) (avoiding "piecemeal" adjudication favors deferring to state court proceedings).

143. *Order on Motion for Stay* at 1, *supra* note 136, at 1.

these arguments but did oppose the stay, contending that the environmental groups had not adequately shown a need for it and that delaying the state proceedings would harm other parties.¹⁴⁴ The environmental groups maintained that the stay was needed because a water court quantification decree would make the Black Canyon reserved rights final, thus preventing any effective relief on their federal claims; the Colorado agencies and water users countered that the only proper federal forum was United States Supreme Court review of a final quantification decree from the Colorado courts.¹⁴⁵

After weighing these arguments and others, the water court granted the motion for stay, exercising its discretion to hold the quantification proceedings, pending resolution of the federal litigation.¹⁴⁶ It concluded that refusing the stay would prejudice the environmental groups because a final reserved right decree would be *res judicata*, leaving them "without adequate recourse" if they were to win their federal case.¹⁴⁷ The water court seemed to discount any potential harm from delaying its proceedings, noting that the quantification application was filed in 2001 but that the reserved rights themselves were much older; it did not mention the twenty-three-year delay preceding that application. The court insisted that it was merely staying proceedings on the Black Canyon water rights, not deferring to the federal court on quantification.¹⁴⁸

The Colorado agencies and water users petitioned the Colorado Supreme Court to overturn the stay, arguing that the water court had abused its discretion.¹⁴⁹ The core of their arguments was that all issues relating to park water rights belonged in the water court under the McCarran Amendment as applied by *Colorado River*, and that the federal case would usurp the water court's role by effectively determining the minimum amount of the reserved right.¹⁵⁰ They contended that the stay had allowed the environmental groups "to effectively shift forums for certain key aspects of the quantification proceeding in contravention of . . . the clear federal policy of deference to state court adjudication of reserved rights claims," and resulted "in an effective abdication of [water court] jurisdiction over a critical component of the Black Canyon reserved right adjudication."¹⁵¹ The environmental groups maintained their position that the federal case was different from the quantification proceeding and therefore not an infringement on the water court's jurisdiction, and that the stay was

144. *Id.*

145. *Id.* at 2-4.

146. *Id.*

147. *Id.*

148. *Id.* at 6-7.

149. Reply to Petition Pursuant to C.A.R. 21 at 1, 7, 11-12, *In re Application for Water Rights of the U.S.*, 101 P.3d 1072 (Colo. 2004) (No. 03SA321).

150. *Id.* at 2-4, 7, 12.

151. *Id.* at 7.

needed to avoid prejudice from a final decree.¹⁵² For its part, the United States evidently dropped its opposition to the stay once the court issued it.¹⁵³

A divided Colorado Supreme Court upheld the stay in *In re The Application for Water Rights of the United States of America*, finding no abuse of the water court's discretion.¹⁵⁴ After examining the McCarran Amendment, the judicial review provisions of the Administrative Procedure Act, and cases applying these statutes, the court concluded that McCarran's waiver of sovereign immunity is "not so broad that it allows state courts to evaluate or adjudicate the federal agency decision making processes leading the United States to make a particular water application in a given case. The Environmental Opposers have brought claims in federal court that can only be decided by that court."¹⁵⁵

Because of the federal court's exclusive jurisdiction over these claims, the only question was whether the stay was an abuse of discretion.¹⁵⁶ The court found that the balance of hardships tipped in favor of the stay because the federal plaintiffs faced the threat of *res judicata* from a water court decree, whereas the other parties would suffer no great harm from further delay of a case that was already almost three decades old.¹⁵⁷

Most significantly, the Colorado Supreme Court flatly rejected the argument that the stay was improper in light of federal and state cases applying McCarran:

The water court explicitly retained its jurisdiction to quantify the United States' reserved water right. The fact that the federal case may decide that the United States violated federal law when it reduced its water right claim does not amount to a quantification of the water right. . . . Because of the exclusivity of the federal court's jurisdiction over the federal claims, dual proceedings are necessary and the McCarran Amendment's policy to avoid piecemeal litigation is inapplicable. As stated above, resolution of the federal case may influence the parameters of the water court's decision, but it will not quantify the United States' reserved water right.¹⁵⁸

Justice Hobbs dissented, joined by Justice Kourlis.¹⁵⁹ Taking a very expansive view of McCarran Amendment text and caselaw, the dissent took issue with both aspects of the majority opinion. First, Justice

152. Answer to Rule to Show Cause 1-2, *In re Application for Water Rights of the United States*, 101 P.3d 1072 (Colo. 2004).

153. See Reply to Petition Pursuant to C.A.R. 21, *supra* note 149, at 10 n.7 (stating that the U.S. initially opposed the stay but "now does not consider it to rise to the level of an abuse of discretion").

154. *In re Application for Water Rights of the United States*, 101 P.3d at 1075.

155. *Id.* at 1080.

156. *Id.*

157. *Id.* at 1083.

158. *Id.* at 1083-84.

159. *Id.* at 1084 (Hobbs, J., dissenting).

Hobbs rejected exclusive federal jurisdiction of the federal claims, arguing that McCarran "expressly provides for the state court to decide all factual and legal issues affecting the quantification and administration of the right, which the plaintiffs' claims in federal court surely do."¹⁶⁰ Second, he argued that the federal case would indeed infringe on water court jurisdiction, because deciding the legality of the 2003 agreements was not so different from quantifying the reserved right.¹⁶¹ "Such a neat distinction does not accord with the interrelated factual and legal issues in such a case as this, and, I conclude, derogates the long history of the Colorado courts' role in McCarran adjudications."¹⁶²

Thus, the stay remained, leaving the United States District Court to determine the environmental groups' federal claims. They would wait nearly two years for a decision on the merits, but they would find it worth the wait.

D. MAKING A FEDERAL CASE OF THE 2003 AGREEMENTS

In September 2003, a coalition of local and national environmental/conservation groups sued the Interior Department and Secretary Gale Norton in U.S. District Court in Denver, alleging that the agreements violated various federal laws by relinquishing the reserved right necessary to protect the park.¹⁶³ Under the Administrative Procedure Act (APA),¹⁶⁴ plaintiffs sought an order setting aside the 2003 agreements and remanding the matter of the Black Canyon water rights back to the Department of the Interior.¹⁶⁵ *High Country Citizens' Alliance v. Norton* was assigned to Judge Clarence Brimmer of the U.S. District Court for the District of Wyoming, sitting by designation.¹⁶⁶

The lawsuit framed the agreements as giving up a 1933 (unquantified) reserved right adequate to protect the park in favor of a junior water right held by the CWCB. Plaintiffs argued that this action violated the law by essentially delegating the federal government's duty to protect the park to a state agency, and by disposing of federal property (the reserved right) without Congressional authorization.¹⁶⁷ The plaintiffs contended that the agreements provided too little water to protect the Black Canyon environment, and therefore violated both the Park Service Organic Act¹⁶⁸ and the 1999 statute creating the

160. *Id.* at 1086.

161. *Id.* at 1088.

162. *Id.*

163. *See High Country Citizens' Alliance v. Norton*, 448 F. Supp. 2d 1235, 1242-43 (D. Colo. 2006).

164. 5 U.S.C. § 701-706 (2000).

165. *High Country Citizens' Alliance*, 448 F.Supp.2d at 1249.

166. *Id.* at 1235.

167. *Id.* at 1243.

168. 16 U.S.C. § 1 (2000).

national park.¹⁶⁹ In addition, the lawsuit claimed that the government failed to perform an environmental review before taking a major action that would have significant environmental effects, thereby violating the National Environmental Policy Act (NEPA).¹⁷⁰

The government moved to dismiss the case, arguing that the court lacked jurisdiction over some of the claims, and that others provided no grounds for the court to grant relief.¹⁷¹ Central to this motion was its characterization of the 2003 agreement as simply a change in the government's litigation position in the water court case over the Black Canyon water right.¹⁷² As such, the government's action was committed to the agency's discretion and unreviewable by the court: the brief stated that the Interior Secretary had broad discretion in deciding how to meet the water needs of both the park and the Aspinall Unit, and that "courts have long acknowledged that the Attorney General's litigation positions are presumptively immune from judicial review."¹⁷³ Similarly, the NEPA claim had to fail because a federal regulation excluded the Justice Department's litigation decisions from the scope of federal actions requiring environmental reviews.¹⁷⁴ As for the unlawful disposition claim, the government argued that the Black Canyon reserved right had never been quantified and thus was never federal property, despite the 1978 decree.¹⁷⁵

One of the government's primary arguments, however, was that the federal court should abstain in favor of the state water court case. The motion to dismiss stated that if the federal court were to determine whether the 2003 agreement violated federal agency duties to protect the park, it would "intrude into the reserved rights determination properly before the water court . . . How much water is necessary to fulfill the Park's purposes is the very question now pending before the state water court."¹⁷⁶ Citing federal and state cases applying the McCarran Amendment, the government argued that if the federal court were to inquire into the adequacy of the park's water rights, it would "frustrate Congress' intent to give primacy to state determinations of water rights and encroach upon the state courts' traditional role as arbiter of water rights disputes."¹⁷⁷ The motion to dismiss did not mention that McCarran had not stripped the federal courts of jurisdiction over reserved right claims, or that the Supreme Court had not required abstention in favor of state court adjudications under

169. 16 U.S.C. § 410fff-2 (2000).

170. 42 U.S.C. § 4332 (2)(C) (2000).

171. Defendants' Motion to Dismiss, *High Country Citizens' Alliance v. Norton*, 448 F.Supp.2d 1235 (Civ. No. 03-WY-1712) (D. Colo. Nov. 10, 2003).

172. *See id.* at 22-24.

173. Federal Defendants' Opening Memorandum, *supra* note 88, at 23 (citing 28 U.S.C. § 516).

174. *Id.* at 29 (citing 28 C.F.R. § 61.4).

175. *Id.*

176. *Id.* at 17.

177. *Id.* at 18.

McCarran.¹⁷⁸ The clear message was that the federal court should steer clear because the case involved a dispute over water rights that were the subject of ongoing litigation in state water court.

The district court would have none of it, rejecting the government's arguments and its framing of several issues.¹⁷⁹ In denying the motion to dismiss, the court wrote that it "fails to view the decision to relinquish the federal water rights in the state water court as a 'litigation strategy' of the Attorney General."¹⁸⁰ The real issue, said the court, was the April 2003 agreement between the Interior Department and the State, which was an agency action that may have violated an affirmative statutory duty to protect the park.¹⁸¹ Judge Brimmer also held the Black Canyon reserved right was indeed federal property, rejecting the argument that the government had disposed of nothing because the right had never been quantified.¹⁸²

Most significantly, the district court refused to view the federal challenge as improperly duplicative of the state court litigation. The water court case would address the exact quantity of water needed to meet the purposes of the Black Canyon reservation; the federal case, by contrast, would review agency decisions for compliance with federal law.¹⁸³ The court stated that it had exclusive jurisdiction over cases brought under the Administrative Procedure Act to challenge federal agency action, and that if plaintiffs prevailed, the remedy would be a remand to the agency rather than a quantification of park water rights.¹⁸⁴ Because the two cases were sufficiently different, the challenge to the 2003 agreements was not subject to the McCarran Amendment, and would therefore proceed in federal court.

The litigation proceeded to the merits, where in essence the key question was the adequacy of the 2003 agreements in protecting park resources: did the 300 cfs reserved right, coupled with the variable state-law instream flow right, provide enough water with enough certainty to meet the Black Canyon's needs?¹⁸⁵ The extensive administrative record (exceeding 13,000 pages) provided clear documentation that the park needed more water than a 300 cfs base flow.¹⁸⁶ The government argued not that 300 cfs was adequate, but that the Colorado instream flow right provided a sound alternative approach to meeting the park's water

178. *Id.*

179. *See generally* Order Denying Defendants' Motion to Dismiss, *High Country Citizens' Alliance v. Norton*, Civ. No. 03-WY-1712 (D. Colo. Apr. 19, 2004).

180. *Id.* at 16.

181. *Id.* at 16-17.

182. *Id.* at 20-21.

183. *Id.* at 15-16.

184. *Id.* at 15.

185. *See id.* at 21.

186. *See, e.g.,* Letter from Craig Manson, Assistant Secretary for Fish and Wildlife and Parks, U.S. Dep't of the Interior, to Greg Walcher, Executive Director, Colo. Dep't of Natural Res. (May 9, 2003) (Administrative Record at 5941, *High Country Citizens' Alliance v. Norton*, 448 F.Supp.2d 1235 (D. Colo. 2005) (Civ. No. 03-WY-1712) (explaining scientific basis for peak and shoulder flow claims for park)).

needs, and that the 2003 agreements were “intended” to provide a hydrograph with base, peak, and shoulder flows—the elements needed to protect the park.¹⁸⁷ Far less clear, however, was whether the park would actually receive such flows under these agreements. Assistant Interior Secretary Craig Manson’s qualified defense was not the type to inspire much confidence:

And is it an ironclad guarantee? No. We’ve said all along and been up-front about that. The April 2nd agreement said there is no guarantee that these same amounts can be available in the future. Is it illusory? No, it’s not illusory either. It’s clear there will be sufficient water available to the Park. And it’s clear that the chart in the April 2nd agreement, while neither an ironclad guarantee nor illusory, is the type of evidence that prudent people rely upon in making important decisions.¹⁸⁸

The United States did not suggest that a 2003 instream flow right would provide the necessary flows as reliably as a 1933 reserved right would. Instead, the government argued that its decision was appropriate because of the need to balance preserving the resources of the Black Canyon with protecting the functions of the Aspinall Unit: “Congress’ decision to build Aspinall effectively modified the Secretary’s obligations under the [Park Service] Organic Act with respect to this Park.”¹⁸⁹ The government did not specify the exact source or nature of this modification, but emphasized that the Colorado River Storage Project Act directed that the Aspinall Unit be built to store “no less than 940,000 acre-feet of water, an amount of water Congress had been informed would amount to all of the spring run-off from the basin in most years.”¹⁹⁰ Because a substantial reserved right might prevent storage of that amount, the Department of the Interior saw a conflict between its duty to protect the park under the general language of the Organic Act, and its obligations under the specific statutory language authorizing the Aspinall Unit.¹⁹¹ The 2001 quantification application had called for a larger reserved right, but also for consultation among federal agencies on how to exercise the right each year.¹⁹² The government contended that the 2003 agreements were “a different but eminently sensible way” for the Department of the Interior to resolve the apparent statutory conflict: “Rather than continue to insist on a massive reserved right with a necessary but amorphous ‘consultation’ component, the Secretary chose instead to have a concrete reserved right, a peak flow fully protected through state

187. Federal Defendants’ Opening Memorandum, *supra* note 88, at 56.

188. Transcript of Hearing at 167, Colorado Water Conservation Board Hearing on Staff Recommendation of the Gunnison River Instream Flow Appropriation, Nov. 19, 2003 (Administrative Record at 7932, *High Country Citizens’ Alliance*, Civ. No. 03-WY-1712).

189. Federal Defendants’ Opening Memorandum, *supra* note 88, at 60.

190. *Id.* at 61.

191. *Id.*

192. *Id.* at 23-24.

law, and to provide mid-range and shoulder flows through operation of the Aspinall Unit.”¹⁹³

The United States also maintained its position that the case was unreviewable in federal court. Its primary arguments were that the Administrative Procedure Act precluded review of the challenged decisions, either because the decisions did not constitute “agency actions” or because they were committed to the agency’s discretion under the relevant statutes.¹⁹⁴ In addition, the government resumed its argument that the federal court could not grant relief without improperly treading on the water court’s turf.¹⁹⁵ In maintaining that the 2003 agreements did not dispose of any federal property, the government contended that the court would intrude on the state court’s jurisdiction if it issued an order determining that the United States did not retain a reserved right sufficient to protect the park.¹⁹⁶ “[T]o accept Plaintiffs’ theory requires this court to determine that the federal reserved water right for the park exists in a quantity in excess of 300 cfs,” the government argued.¹⁹⁷ “Any order which would define the parameters of the water right must be left to the water court.”¹⁹⁸

In deciding *High Country Citizens’ Alliance v. Norton*, the court again brushed aside government arguments on reviewability.¹⁹⁹ The agreements were specific agency actions reviewable under the APA, said the court, unlike the agency failure to act which the Supreme Court found unreviewable in *Norton v. Southern Utah Wilderness Alliance*.²⁰⁰ And while the government did have some discretion in its duty to protect park resources, there was law to apply in measuring the exercise of that discretion, so the agreements fell outside the “committed to agency discretion by law” exception to judicial review.²⁰¹ This time, the court made no mention of the water court jurisdiction issue.

The court was equally unimpressed by the government’s position on the merits and held for the plaintiffs on all of their claims.²⁰² On the crucial question of whether the 2003 agreements adequately protected the park, the court stressed the importance of the reserved right’s 1933 priority date, and determined that the 2003 agreements reduced protection for the Black Canyon by permanently subordinating it to the Aspinall Unit.²⁰³ “Unlike forgoing a call on the river in dry years, as contemplated by the 2001 quantification application, the April and July agreements were a means to deprive the National Park Service of ever

193. *Id.* at 62.

194. *Id.* at 48-50.

195. *Id.* at 69.

196. *Id.*

197. *Id.*

198. *Id.*

199. *High Country Citizens’ Alliance v. Norton*, 448 F. Supp. 2d 1235, 1250 (D. Colo. 2006).

200. *Id.* at 1249 (distinguishing 542 U.S. 55 (2004)).

201. *Id.* at 1250.

202. *Id.* at 1253.

203. *Id.*

exercising a right to peak and shoulder flows of the Gunnison River.”²⁰⁴ The court also held that the government had unlawfully disposed of federal property, delegated its park protection duties to a state agency, and taken a major federal action without conducting the environmental review required by NEPA.²⁰⁵ On this latter point, the court stressed the importance of public participation in a decision with great long-term significance for a national park: “A decision to enter into agreements which permanently give up a priority to a resource which must be ‘saved for all generations’ must be made in public view and not behind closed doors.”²⁰⁶

The United States filed a notice of appeal but ultimately chose not to seek review in the Tenth Circuit Court of Appeals.²⁰⁷ The environmental plaintiffs had received their day in federal court and prevailed. Because the district court had simply remanded the matter to the agency,²⁰⁸ however, the final outcome for the Black Canyon was still far from certain.

E. THE REAL DEAL: THE 2008 SETTLEMENT

Rather than return to court, the parties chose mediation to resolve the Black Canyon water rights controversy.²⁰⁹ Thirty entities participated in the mediation, including not only the United States and the State of Colorado, but also five cities and towns, six environmental/conservation groups (three national and three local), five water districts, four counties, and three farm bureaus.²¹⁰ The talks produced an agreement that the parties announced in June 2008.²¹¹

Like the 2003 agreements, the settlement provides the park a range of instream flows that will vary depending on the forecasted inflow to Blue Mesa Reservoir, the Aspinall Unit’s major storage facility.²¹² But in other key respects, the settlement differs significantly from the earlier agreements. The reserved right now encompasses the full range of flows (not just a base flow) for the Black Canyon and does not rely on a Colorado instream flow right.²¹³ The settlement also specifies peak and shoulder flows for the park based on Blue Mesa inflows, rather than

204. *Id.* at 1252.

205. *Id.* at 1243, 1246, 1248.

206. *Id.* at 1245-46.

207. See Decree Quantifying the Federal Reserved Water Right for Black Canyon of the Gunnison National Park Attachment C at 2, *In re Water Rights for the United States of America*, No. 01CW05 (Colo. Water Div. 4 Jan. 8, 2009).

208. *High Country Citizens’ Alliance*, 448 F.Supp.2d at 1253.

209. Decree Quantifying the Federal Reserved Water Right for Black Canyon of the Gunnison National Park, *supra* note 207, at Attachment C.

210. *Id.*

211. *Black Canyon National Park Gets Its Water*, HIGH COUNTRY REP. (High Country Citizens’ Alliance, Crested Butte, Colo.), Summer 2008 at 1.

212. Decree Quantifying the Federal Reserved Water Right for Black Canyon of the Gunnison National Park, *supra* note 207, at Attachment C, at 7-9. Attachment B includes a different list of the thirty parties than Attachment C of the final decree, and Attachment C lists only one farm bureau.

213. *Id.* at 6-9.

simply providing a formula for determining the total volume of water available for such flows.²¹⁴ Perhaps most significantly, park water rights are no longer effectively subordinated to the Aspinall Unit²¹⁵, including potential future changes that could have reduced flows through the Black Canyon. Yet the agreement includes protection for various interests; for example, it preserves flood control operations,²¹⁶ subordinates the park reserved right to certain water uses (including all uses senior to the Aspinall Unit),²¹⁷ and allows the Aspinall Unit to release lesser peak flows if drought has reduced reservoir storage to specified low levels.²¹⁸

On January 8, 2009, the Colorado water court issued a final decree for the Black Canyon National Park reserved right based on the settlement reached in August.²¹⁹ In entering the decree the court noted that thirty parties, including all the parties to the mediation, had formally approved the decree, and another 157 parties had agreed to withdraw their opposition based on the settlement.²²⁰ The decree said a mouthful in a single sentence on the last page: "This Decree was entered pursuant to agreement of the parties to address their interests and concerns and resolves them finally in this matter."²²¹ So ended the quantification controversy that had spanned all eight years of the Bush Administration and delayed confirmation of a claim pending since the 1970s.

Four months after the decree, a story appeared in the *Denver Post* describing how the water right settlement would soon lead to higher flows in the Gunnison River for the benefit of the Black Canyon ecosystem.²²² The story explained that the Aspinall Unit had reduced average peak flows in the river to about 1700 cfs, but that the 2009 peak flow would be around 6,000 cfs²²³—similar to the average peak before

214. *Id.* at 3.

215. *Id.* at 11; Colo. Div. of Water Res., *Concerning the Tabulation of Water Rights in Water Division 4*, 90-91 tbl. 1 (2008), available at <http://water.state.co.us/pubs/tabulation/div1tabulation.pdf> (last visited Feb. 20, 2010).

216. Decree Quantifying the Federal Reserved Water Right for Black Canyon of the Gunnison National Park, *supra* note 207, at Attachment C, at 9 (noting that flood control remains the highest operational priority of the Aspinall Unit, and the decree does not affect flood control operations).

217. *Id.* at 4, 5, 11 (stating that the Black Canyon water right carries a 1933 priority; the Aspinall Unit water rights have a 1957 priority; and providing that the federal government "shall subordinate the Black Canyon Right to all water rights with adjudicated priorities that are senior to the Aspinall Unit Rights").

218. *Id.* at 10 (specifying when the United States may release lesser peak flows due to drought, and providing a formula for determining such flows).

219. *Id.* at 13.

220. *Id.* at 2, Attachments B and C.

221. *Id.* at 13.

222. Mark Jaffe, *Black Canyon River Flows Swell After 36-year Fight*, DENVER POST, May 8, 2009, at B1.

223. *Id.*; see also U.S. Geological Survey, National Water Information System: Daily Data for Gauge USGS 09128000 available at http://nwis.waterdata.usgs.gov/co/nwis/dvstat/?preferred_module=sw&site_no=09128000&por_09128000_4=345637,00060,4,1910-10-01,2009-10-26&start_dt=2009-05-

1937. The article quoted the park's chief of resource stewardship as saying, "This is the beginning of a return to a more natural river."²²⁴

III. FEDERAL JUDICIAL REVIEWABILITY OF RESERVED RIGHT SETTLEMENTS

The plaintiffs in *High Country Citizens' Alliance* sued to challenge a federal agency's effort to partially settle a reserved water right claim pending in state court.²²⁵ They convinced a federal court to do what few others have done since the *Colorado River* case: reach the merits of a federal lawsuit relating to reserved water rights. *High Country Citizens' Alliance* thus indicates that, contrary to conventional wisdom, federal courts may yet decide certain issues relating to federal water right claims, even where those claims are pending in a state court adjudication.

High Country Citizens' Alliance may prove to have somewhat limited value as precedent for two main reasons. First, and most obviously, it is a district court case; Judge Brimmer's decision never reached the Tenth Circuit after the United States chose not to appeal. Second, *High Country Citizens' Alliance* involves unusual facts: the challenged agency action was not the filing of a reserved right claim, the withdrawal of a claim, or even the final settlement of a claim, but rather a signed agreement to limit a claim that was still pending in state court.²²⁶ Such an agreement is certainly not necessary for resolving a reserved right claim, and in future cases, parties could easily skip that intermediate step and proceed directly to final settlement. The key question, then, is whether *final* settlement of a federal reserved right claim in a state proceeding is properly reviewable in federal court.²²⁷ This section addresses that question, and concludes that the answer is yes.

01&end_dt=2009-05-30&format=html_table&stat_cds=max_va&date_format=YYYY-MM-DD&rdb_compression=file&submitted_form=parameter_selection_list (last visited Feb. 20, 2010) (provisional data subject to revision) (In fact, the Gunnison through the Black Canyon actually peaked at about 6700 cfs on May 13, 2009.)

224. Mark Jaffe, *supra* note 222, at B1.

225. See *High Country Citizens' Alliance v. Norton*, 448 F. Supp. 2d 1235, 1242 (D. Colo. 2006).

226. See *id.*

227. See SAX, *supra* note 60, at 864 (As noted earlier, this article focuses on federal, non-Indian reserved right claims. Reviewability of tribal reserved right settlements may differ from settlement of federal claims, largely because they typically do not become effective until ratified by Congress, and sometimes by the legislature of the affected state and the government of the tribe whose rights are being determined.); Ann R. Klee & Duane Mecham, *The Nez Perce Indian Water Right Settlement—Federal Perspective*, 42 IDAHO L. REV. 595, 607 (2006) (noting that following agreement on the terms of settlement for the water right claims of the Nez Perce Tribe, "federal, state, and tribal legislative approvals[] had to be sought from the legislative branches of government"). The need for Congressional approval before a settlement takes effect may affect the finality of agency action regarding the settlement, and the shift of proceedings to the legislative forum may affect ripeness of the agreement for judicial review.

A. APA REVIEW PROVISIONS

The APA does not provide for judicial review in every instance where an agency has done something. Judicial review is precluded in some situations, including those where an agency has essentially complete discretion.²²⁸ Otherwise, the APA provides for judicial review of any "final agency action."²²⁹ This latter provision effectively imposes two requirements on suits brought under the APA: there must be agency action,²³⁰ and the action must be final.²³¹

1. Action committed to agency discretion

An agency action may be final but still unreviewable under the APA if it is "committed to agency discretion by law."²³² An agency may enjoy judicially unchecked discretion based on statutory text, either if the statute specifically confers total discretion on an agency in taking a certain kind of action,²³³ or if the language is so broad and general that a court believes it has "no law to apply" in measuring an agency's exercise of discretion.²³⁴ The nature of the agency's decision is also a relevant factor. For example, where an agency opted not to bring an enforcement action for a particular violation of law, the Supreme Court held that the decision was committed to agency discretion because it was analogous to a prosecutor's decision not to indict a potential criminal defendant, a choice that courts traditionally have not reviewed.²³⁵

In *High Country Citizens' Alliance*, the United States insisted that the court could not review the 2003 Black Canyon agreements because they were simply litigation decisions that were legally committed to the government's discretion.²³⁶ This argument against judicial reviewability had some force in that case, especially because the 2003 agreements did not settle the Black Canyon reserved right claim, but only reduced it.²³⁷ The government's motion to dismiss cited a statute that gives the Department of Justice control over the conduct of litigation involving

228. 5 U.S.C. § 701(a)(2) (2007). *But see* 5 U.S.C. § 701(a)(1) (stating that review may also be precluded by statute).

229. 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

230. *See* Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 62 (2004).

231. *See* Bennett v. Spear, 520 U.S. 154, 177-78 (1997).

232. 5 U.S.C. § 701(a)(2).

233. Webster v. Doe, 486 U.S. 592, 600-01 (1988).

234. Heckler v. Chaney, 470 U.S. 821, 830 (1985).

235. *Id.* at 831-32.

236. Federal Defendants' Opening Memorandum in Support of Federal Defendants' Dispositive Motion at 22-25, *High Country Citizens' Alliance v. Norton*, 448 F.Supp.2d 1235 (D. Colo. 2005) (Civ. No. 03-WY-1712).

237. *Id.*

federal agencies,²³⁸ along with Supreme Court cases denying review of certain litigation decisions by the Attorney General.²³⁹ It also relied on a case from the District of Columbia Circuit Court of Appeals, denying review of the government's decision not to file certain tribal reserved right claims in Idaho's Snake River Basin Adjudication.²⁴⁰

The court rejected this argument in *High Country Citizens' Alliance*. In denying the government's motion to dismiss, the court noted that the Interior Department made the 2003 agreements, and the Justice Department's subsequent motion to amend the claim in light of the agreements could not insulate those actions from review.²⁴¹ The court also noted that the law limits the Justice Department's discretion: "Notwithstanding the 'plenary authority' of the Attorney General to control litigation 'the Attorney General in representing a government agency is bound by the same laws that control the agency.'"²⁴² In its decision on the merits, the court brushed aside this argument in the context of the NEPA claim,²⁴³ concluding that the government was merely "labeling" the 2003 agreements as a litigation decision: "Defendants cannot shield their conduct from review or from the ambit of NEPA simply because [they] have advocated their position in water court."²⁴⁴

The "litigation decision" argument won the day, however, in a case involving the government's decision not to assert *Winters* claims on behalf of the Shoshone-Bannock Tribes in an Idaho adjudication.²⁴⁵ The District of Columbia Circuit relied not only on the statute (28 U.S.C. § 516) and cases giving the Justice Department general control of government litigation,²⁴⁶ but also on the leading Supreme Court case interpreting the "committed to agency discretion" provision of the APA.²⁴⁷ In *Heckler v. Chaney*, the Supreme Court held that an agency's refusal to take enforcement action was presumptively unreviewable

238. Federal Defendants' Opening Memorandum, *supra* note 88, at 23 (citing 28 U.S.C. § 516 (2007)) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

239. *Id.* (citing *Wayte v. United States*, 470 U.S. 598 (1985) (decision involving criminal proceedings) and *Morris v. Gressette*, 432 U.S. 491 (1977) (decision involving Voting Rights Act)).

240. *Id.* at 24 (citing *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476 (D.C. Cir. 1995)).

241. Order Denying Defendants' Motion to Dismiss, *supra* note 179, at 16.

242. *Id.* at 16-17 (quoting *Executive Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 761-62 (4th Cir. 1993)).

243. Order Denying Defendants' Motion to Dismiss, *supra* note 179, at 29 (citing 28 C.F.R. § 61.4 to support argument that its actions were not subject to NEPA because of a Justice Department regulation stating that Justice Department litigation actions were not "major federal actions" within the meaning of NEPA).

244. *High Country Citizens' Alliance v. Norton*, 448 F. Supp. 2d 1235, 1246 n.3 (D. Colo. 2006).

245. *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1481 (D.C. Cir. 1995).

246. *Id.* at 1480-81.

247. *Id.* at 1481 ("The circumstances [of this case] resemble, in many respects, those of *Heckler v. Chaney*. . . in which an agency refused to enforce its regulations.").

because such decisions are ordinarily committed to agency discretion.²⁴⁸ The District of Columbia Circuit stated that the *Heckler* Court's reasons for denying review "fully apply to this case"²⁴⁹ where the Justice Department had declined to file water right claims in a state proceeding. "Courts are ill-equipped to evaluate the factors that go into a decision not to bring suit or to enforce regulations."²⁵⁰ The court noted, however, that under *Heckler*, even a non-enforcement decision could be reviewable if Congress had "provided meaningful standards for defining the limits" of an agency's enforcement discretion.²⁵¹ The Shoshone-Bannock Tribe could point to no law limiting the exercise of the Attorney General's discretion in the context of that case, however, so it failed to rebut the presumption against review of the government's decision not to file water right claims.²⁵²

Shoshone-Bannock might appear to suggest that decisions regarding reserved right litigation are committed to agency discretion, but for purposes of reviewability there is a crucial difference between settling a claim, and declining to file a claim. The former involves a specific action by the agency—an agreement to resolve a claim on specific terms—whereas the latter is a refusal to act.²⁵³ Section 706(1) of the APA allows a court to "compel agency action unlawfully withheld,"²⁵⁴ but the plaintiff carries a heavy burden in such a case; the Supreme Court has stated that "a claim under § 706(1) can proceed only where a plaintiff asserts that a [federal] agency failed to take a discrete agency action that it is required to take."²⁵⁵ Thus, the *Shoshone-Bannock* court correctly evaluated the relevant treaty, statute, and other sources of law to determine if they required the government to file certain claims on the Tribes' behalf. A final settlement, however, would be reviewable under § 706(2) of the APA, allowing a court to "hold unlawful and set aside agency action"²⁵⁶ on any of several grounds.²⁵⁷ This distinction appears to be the pivotal difference between *Shoshone-Bannock*, in which the court denied judicial review of the Attorney General's decision,²⁵⁸ and *High Country Citizens' Alliance*, in which the court held that the 2003 Black Canyon

248. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

249. *Shoshone-Bannock Tribes*, 56 F.3d at 1481.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 1483-84.

254. A court may also compel action "unreasonably delayed." 5 U.S.C. § 706(1) (2006).

255. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

256. 5 U.S.C. § 706(2).

257. For example, a court may set aside agency action that it finds contrary to statute, 5 U.S.C. § 706(2)(C), or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

258. The court held that because no existing law required the government to file these particular claims on behalf of the Tribes, "judicial review of the Attorney General's decision is consequently unavailable" *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1484 (D.C. Cir. 1995).

agreements constituted reviewable agency actions.²⁵⁹

In a reserved rights adjudication, most of the government's actions—including the filing, defense, and proof of its claims—may appropriately be viewed as litigation decisions. For several reasons, however, final reserved rights settlements should generally be regarded as final agency actions subject to federal judicial review. First, the government's decision to settle a reserved right claim does not so much involve the *conduct* of litigation as the *conclusion* of it; even though every decision regarding the claim will involve the same complex judgment calls about the likelihood of success, a settlement represents a final resolution of a reserved right, and can therefore be evaluated on its substantive (not merely tactical) merits.

Second, while the Justice Department handles federal litigation, it is the management agencies (e.g. the National Park Service or the U.S. Forest Service) that are responsible for stewardship of the lands and waters within their jurisdiction.²⁶⁰ Under the "litigation decision" theory, however, the Justice Department would have absolute and unreviewable discretion over all reserved water rights that have not yet been quantified. Alone or in collusion with the management agencies, the Justice Department could either settle or dismiss all pending reserved right claims on any terms whatsoever, depriving federal lands of water rights, absolving management agencies of any duties regarding those water rights, and effectively abrogating the *Winters* doctrine. That kind of wholesale surrender of reserved rights is unlikely, to say the least—but if all final settlements were within the absolute discretion of the government, such an action would be entirely unreviewable in the federal courts²⁶¹, casting doubt on the validity of that position.

Third, a government decision to settle its reserved water right claims is very different from an agency decision not to bring an enforcement action, as in *Heckler*. If an agency refuses to bring an enforcement action in a particular situation, a violation may go unremedied and a violator may escape sanctions, but neither the law nor the agency's authority has changed: the agency may take action against the next similar violation, or the next transgression by the alleged violator.²⁶² A reserved right settlement, by contrast, means that the federal government's legal interest in water—its entitlement to obtain water in satisfaction of the specific purposes for which Congress or the President designated that land—are finally and permanently fixed.²⁶³ Even if the government made a mistake in pursuing its reserved water rights, it ordinarily cannot go back and obtain a reserved right to water for additional purposes, or additional water for the original purposes; the

259. *High Country Citizens' Alliance v. Norton*, 448 F. Supp. 2d 1235, 1249 (D. Colo. 2006).

260. *See S. Utah Wilderness Alliance*, 542 U.S. at 66-67.

261. *See High Country Citizens' Alliance*, 448 F. Supp. 2d at 1249-50.

262. *Heckler v. Chaney*, 470 U.S. 821, 837-38 (1985).

263. *See Shoshone-Bannock Tribes*, 56 F.3d at 1479.

decreed water rights are *res judicata*.²⁶⁴ Given that a reserved rights settlement carries serious consequences that are both legal and eternal, any uncertainty as to the reviewability of the government action should be resolved in favor of allowing review.

2. Final agency action

When a federal agency strikes a deal with adjudication parties regarding its reserved water rights, and agrees to settle its claims according to that deal, it has almost certainly taken an "action" for purposes of judicial reviewability. The APA defines "agency action" through a list, which "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act;"²⁶⁵ several of these terms are similarly "defined."²⁶⁶ Exactly how a particular water rights settlement would fit this definition may depend on the terms of the agreement.²⁶⁷

As the Supreme Court has stated, however, "The bite in the phrase 'final action' . . . is not in the word 'action,' which is meant to cover comprehensively every manner in which an agency may exercise its power. It is rather in the word 'final' . . ."²⁶⁸ In order to qualify as "final," agency action must "mark the consummation of the agency's decisionmaking process, and must either determine rights or obligations or occasion legal consequences."²⁶⁹

In most cases, a settlement of federal reserved water rights would clearly meet this standard for finality, even though the settlement would still require the approval of the state adjudication court. The agency completes its decisionmaking process—in this case, negotiations with other parties to the adjudication of the agency's claim—when the

264. *Nevada v. United States*, 463 U.S. 110, 135, 145 (1983). This same argument would apply equally to a decision not to assert reserved water right claims in a pending adjudication. In holding that the government's refusal to assert certain tribal reserved rights was unreviewable, the D.C. Circuit appears not to have considered this point. Instead, the Court's analysis focused on whether the Attorney General had a specific, nondiscretionary duty based on treaty or statute to assert certain claims requested by the Shoshone-Bannock Tribes. Based on its review of the relevant law, the court found none. *Shoshone-Bannock Tribes*, 56 F.3d at 1481-84.

265. 5 U.S.C. § 551(13) (2006).

266. For example, the definition of "sanction" has seven subparts, 5 U.S.C. § 551(10), and the definition of "relief" has three, 5 U.S.C. § 551(11), including agency "recognition of a claim, right, immunity, privilege, exemption, or exception." 5 U.S.C. § 551(11)(B).

267. Typically, these settlements will not only recognize and quantify a reserved water right, but will also subordinate that right to existing private water users, giving them greater security in times of shortage than the law would otherwise provide. See *infra* note 358 and accompanying text. By giving this kind of preferred position to other water users, the agreement evidently would fit the APA definition of "relief," which includes agency recognition of an "immunity, privilege, exemption, or exception." 5 U.S.C. § 551(11)(B). A reserved right settlement might also qualify as an order, which the APA defines in almost catchall terms as "a final disposition . . . of an agency in a matter other than rule making . . ." 5 U.S.C. § 551(6).

268. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001).

269. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 483 (2004) (internal quotations omitted).

agency signs an agreement specifying terms of the settlement. The agency certainly intends the agreement to determine rights and obligations of the parties—that, of course, is the whole point of the deal—although no rights will be final until the state adjudication court approves the settlement. Upon approval, however, the reserved rights as provided in the agreement would become *res judicata*, effectively mooting any challenge in federal court.²⁷⁰ A settlement pending judicial approval has legal consequences because it represents a conclusive, specific determination of the reserved rights from the standpoint of the adjudication parties, at the latest stage where a federal court could still review its legality and provide meaningful relief.²⁷¹

A reserved right settlement might not qualify as final agency action if Congress must approve it before it can take effect. Unlike tribal reserved right agreements, however, federal reserved right settlements do not typically require Congressional action to become effective.²⁷²

B. RIPENESS

Even if an agency action is final and the APA does not preclude review, a court may still deny review if it determines that the case is not ripe.²⁷³ In evaluating ripeness, a federal court must assess “both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.”²⁷⁴ Determining fitness of the issues for judicial review involves two questions: whether further factual development would assist the court in deciding the matter, and whether judicial review at this stage would “inappropriately interfere with further administrative action.”²⁷⁵

Once an agency has reached a final settlement of a reserved right claim, the matter would appear ripe. Regarding fitness, there is no obvious reason why the issues would not be ready for judicial review. Once all the parties have reached an agreement, there is neither the need, nor the opportunity, for further factual development: the agency has made a final decision regarding its reserved right claim, and the only question is whether that decision is legally sufficient.²⁷⁶ Nor is it

270. The Colorado water court and Supreme Court both emphasized this point in deciding that it was appropriate to stay the water court proceeding to quantify the Black Canyon reserved right, pending the outcome of the federal court challenge to the 2003 agreements. See *supra* notes 259, 264 and accompanying text.

271. *High Country Citizens' Alliance v. Norton*, 448 F. Supp. 2d 1235, 1249 (D. Colo. 2006).

272. See *supra* note 258 and accompanying text.

273. *E.g.*, *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 810-12 (2003) (denying review of the final Department of the Interior rule for lack of ripeness); *Whitman*, 531 U.S. at 478-80 (concluding that the final agency action was subject to and ripe for review).

274. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001) (internal citations and quotations omitted).

275. *Id.*

276. See *United States v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003). Ripeness seems much more doubtful at stages before final settlement, including the filing of reserved right claims by the government. If the United States were to file a claim that could be

likely that review would interfere with agency action, given that the agency has concluded negotiations and reached a final agreement regarding its claims. Finally, plaintiffs seeking federal judicial review of a reserved right settlement could argue persuasively that they would suffer irreparable harm if a court denied review, because if the state adjudication court approved the settlement and entered a final decree, the reserved right would be *res judicata* as decreed. The Colorado Supreme Court recognized this potential harm in upholding the water court's stay of proceedings on the Black Canyon reserved right, pending the outcome of the federal court case over the 2003 agreements.²⁷⁷

One might argue that federal judicial review of a final settlement might not inappropriately interfere with the agency's work, but that it would interfere with the ongoing state court adjudication. Although not based on the Supreme Court's factors for assessing ripeness, this argument finds some support in the Ninth Circuit's decision in *United States v. Braren*.²⁷⁸ In *Braren*, the government and the Klamath Tribes sought federal review of the State of Oregon's proposed standard for quantifying certain tribal reserved rights in the Klamath Adjudication, arguing that the standard was contrary to an earlier Ninth Circuit decision establishing the existence and purposes of those rights.²⁷⁹ Because the federal courts left the quantification of the tribal rights to the state adjudication, however, the Ninth Circuit held in *Braren* that the challenge to Oregon's proposed standard was not ripe for review, and would not be so until the adjudication was complete.²⁸⁰

Braren, however, does not resemble a case challenging a final settlement of a reserved water right. First, and crucially for purposes of judicial review under the APA, that case involved a statement by Oregon officials, not federal agency action.²⁸¹ Second, the standard at issue in *Braren* was preliminary; it had not yet been adopted within the adjudication, and the water rights that would be affected by it were still

challenged as substantively inadequate—if, for example, the government claimed an amount of water that was arguably insufficient to satisfy the purposes of the federal reservation—one could argue that a federal court should review the *claim*, because it would effectively put a ceiling on the amount of water that the reserved right would receive through the adjudication. At this early stage, however, a court certainly could conclude that further factual development (through the adjudication process) would aid its determination, and that review of the agency's decision in filing the claims could interfere with the agency's work, including negotiations that could lead to settlement. The filing of reserved right claims has practical consequences, but it seems likely that judicial review of the agency's actions at this stage would be available only upon final settlement. "A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704 (2007).

277. *In re Application for Water Rights of the United States*, 101 P.3d 1072, 1081 (Colo. 2004).

278. *Braren*, 338 F.3d at 972-73.

279. *Id.* at 975-76.

280. *Id.*

281. *Id.* at 973.

far from a final determination.²⁸² Finally, unlike a challenge to a federal agency decision settling a federal water claim, the issue in *Braren* was whether a federal court would order state officials to apply a certain standard in their adjudication.²⁸³ In short, neither *Braren* nor the Supreme Court's ripeness factors suggest that a final settlement of a federal reserved water right would be unripe for judicial review.²⁸⁴ The implications of federal review for the state proceeding are more appropriately considered in the context of abstention.²⁸⁵

C. COLORADO RIVER ABSTENTION

In its 1976 *Colorado River* decision,²⁸⁶ the Supreme Court fashioned a new doctrine of abstention to apply to a case involving a jurisdictional dispute over federal and tribal reserved right claims. The Court concluded that these claims fell within the jurisdiction of the Colorado water courts under the McCarran Amendment,²⁸⁷ as well as the United States district courts.²⁸⁸ In determining whether the district court properly dismissed the government's reserved right claims in favor of a water court proceeding,²⁸⁹ the Court noted the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them,"²⁹⁰ and stated that a federal court should defer to a concurrent state proceeding only in "limited" and "exceptional" circumstances.²⁹¹ The Court nonetheless held that dismissal of the federal case was appropriate based on several factors,²⁹² primarily what the Court called the McCarran Amendment's clear policy to avoid piecemeal litigation of water claims.²⁹³

In *Arizona v. San Carlos Apache Tribe*, a case involving solely tribal

282. *Id.* at 975-76.

283. *Id.* at 972.

284. *See id.* at 975-76. This conclusion may not hold for tribal reserved right settlements, given that they typically do not become effective until ratified by certain legislative bodies: Congress, the legislature of the affected state, and the government of the tribe whose rights are being determined. *See* Klee et al., *supra* note 227, at 607. Here again, the need for legislative approval does not fit cleanly within any of the ripeness factors as stated by the Supreme Court. But as the debate over the reserved right shifts from the courts to the legislatures, a court weighing a challenge to the settlement might believe that it should defer consideration of the matter to the various legislative bodies, and should direct opponents of the settlement to raise their concerns in the legislative process.

285. *See* *United States v. Adair*, 723 F.2d 1394, 1400, 1404 (1983).

286. *See* *Colo. River Conservation Dist. v. United States*, 424 U.S. 800, 805-06, 814-16 (1976).

287. *Id.* at 809-12.

288. *Id.* at 806-09 (stating that district courts have original jurisdiction of civil suits brought by the United States).

289. *Id.* at 803-06 (explaining the history of the case).

290. *Id.* at 817.

291. *Id.* at 818.

292. Most of these factors were specific to the *Colorado River* litigation, including the lack of activity in the federal case, the number of Colorado defendants involved, and the 300-mile distance between the federal and state courts. *Id.* at 820.

293. *See id.* at 819.

claims, the Supreme Court applied *Colorado River* and again found that dismissal of federal proceedings was appropriate.²⁹⁴ The Court held that McCarran (which says nothing about tribal water rights) had conferred jurisdiction on state courts to adjudicate reserved right claims asserted by tribes,²⁹⁵ even upon states whose Enabling Acts appeared to give them no authority regarding tribal property.²⁹⁶ Once again, the Court gave controlling weight to McCarran's underlying policy, both in determining the existence of state court jurisdiction,²⁹⁷ and in holding that the federal courts should step aside in favor of state adjudication of reserved right claims.²⁹⁸

These two Supreme Court cases strongly discourage concurrent federal and state proceedings to determine reserved water rights, but *Colorado River* abstention simply does not apply unless there is concurrent jurisdiction over the federal claims.²⁹⁹ The Supreme Court stated in *San Carlos Apache* that it was "clear in [this case], as it was in *Colorado River*, that a dismissal or stay of the federal suits would have been improper if there was no jurisdiction in the concurrent state actions to adjudicate the claims at issue in the federal suits."³⁰⁰ Federal courts clearly have jurisdiction over reserved right claims;³⁰¹ the major question is whether state courts can also assert jurisdiction. In these two cases, the Court read McCarran broadly to allow state courts to adjudicate the full range of federal and tribal claims.

McCarran's waiver of federal sovereign immunity, however, extends only to suits "for the adjudication of rights to the use of water of a river

294. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 545-547 (1983).

295. *Id.* at 561, 563-64.

296. In this case, the Enabling Acts of both Arizona and Montana seemed to limit state authority over tribal rights. *See id.* at 556-59. Rather than analyze the meaning of these specific provisions, the Court held that McCarran had conferred jurisdiction over tribal claims on state courts regardless of the language of a particular state's enabling act. *Id.* at 563-64.

297. The Court believed that the policy of McCarran (as explicated in *Colorado River*) would be undercut if certain states could adjudicate tribal water right claims and others couldn't, based purely on the language of their state enabling statutes. The Court believed this result would be contrary to Congress' intent in enacting McCarran:

The Amendment was designed to deal with a general problem arising out of the limitations that federal sovereign immunity placed on the ability of the States to adjudicate water rights, and nowhere in its text or legislative history do we find any indication that Congress intended the efficacy of the remedy to differ from one State to another.

Id. at 564.

298. After acknowledging the strength of the United States' and tribes' arguments against dismissal of the federal case, the Court responded that "the most important consideration in any federal water suit concurrent to a comprehensive state proceeding, must be the 'policy underlying the McCarran Amendment.'" *Id.* at 570 (quoting *Colo. River*, 424 U.S. at 820).

299. *See Colo. River*, 424 U.S. at 819.

300. *San Carlos Apache Tribe*, 463 U.S. at 559-60.

301. The Court held in *Colorado River* that McCarran had not stripped the federal courts of jurisdiction over reserved right claims. *Colo. River*, 424 U.S. at 807-09 (The federal statute providing jurisdiction in that case was 28 U.S.C. § 1345 (2006)). Other claims involving federal law may be heard under the general federal question jurisdiction statute. *See* 28 U.S.C. § 1331 (2006).

system or other source . . . or [] for the administration of such rights . . . ”³⁰² Under McCarran, as interpreted by the Supreme Court, an adjudication in state court can obtain jurisdiction over federal and tribal reserved right claims because those claims will determine “rights to the use of water.”³⁰³ However, a challenge to a federal agency’s decision to settle a reserved right claim would fall outside the McCarran Amendment; the case would determine the legality of the agency action, not the existence and terms of a water right, leaving a state court with no jurisdiction over the matter.

Federal courts have exclusive jurisdiction over challenges to agency action brought under the APA. Section 702 of the APA establishes a right to judicial review³⁰⁴ for certain kinds of cases against federal agencies and officials,³⁰⁵ and provides for such cases to be brought “in a court of the United States.”³⁰⁶ In rejecting state court jurisdiction over the United States Environmental Protection Agency, in a case challenging an order issued under the Clean Water Act, the Ninth Circuit Court of Appeals stated:

the waiver of sovereign immunity in section 702 is expressly limited to actions brought “in a court of the United States False” The legislative history demonstrates that section 702 was not intended to effect a waiver of sovereign immunity for suits against the United States or its officers in state courts. “The consent to suit is also limited to claims in the courts of the United States; hence, the United States remains immune from suit in state courts.”³⁰⁷

The Colorado Supreme Court acknowledged the exclusive jurisdiction of federal courts over APA claims in upholding the water court’s stay of proceedings to quantify the Black Canyon water rights following the 2003 agreements.³⁰⁸ The court rejected the argument that the water court was a proper forum for determining whether the government complied with federal law in reaching those agreements, stating that McCarran “is not so broad that it allows state courts to

302. 43 U.S.C. § 666(a)(1) (2006).

303. *San Carlos Apache Tribe*, 463 U.S. at 550-51.

304. 5 U.S.C. § 702 (2006). The section is headed “Right of Review,” and its first sentence reads, “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” *Id.*

305. Section 702 states that:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . .

5 U.S.C. § 702.

306. *Id.*

307. *Aminoil U.S.A., Inc. v. Cal. State Water Res. Control Bd.*, 674 F.2d 1227, 1233 (9th Cir. 1982); see also 91 C.J.S. *United States* § 235 (2009).

308. *In re Application for Water Rights of the United States*, 101 P.3d 1072, 1080 (Colo. 2004).

evaluate or adjudicate the federal agency decision making processes" relating to the disputed agreements.³⁰⁹ The court also noted that the federal challenge to the settlement would have a different focus and different outcome than the water court adjudication: "[t]he federal case will decide whether the United States' amended application complied with the applicable federal law, and the state case will quantify the reserved water right."³¹⁰

Dissenting from the Colorado Supreme Court's holding, Justice Hobbs admitted that challenges to agency action under the APA are "normally an area of exclusive federal jurisdiction."³¹¹ He laid out the best available argument for state court jurisdiction: that the challenge to the 2003 agreements was really a claim that the Black Canyon was entitled to more water than it would receive under those agreements, that the federal plaintiffs were thus effectively seeking partial quantification of the reserved right in federal court, and that the water court was the proper forum for quantification.³¹² "Although the claims in the federal suit are styled as [APA] claims," Justice Hobbs wrote, "in essence they challenge the exercise and scope of discretion in federal agencies administering their water rights under state and federal law."³¹³ Because the federal claims really concerned quantification and administration of the Black Canyon reserved right, in his dissenting view, McCarran brought them within the jurisdiction of the water court.³¹⁴

The dissent correctly observed that the federal APA claims related to the quantity, priority, and administration of the Black Canyon reserved right.³¹⁵ In essence, the plaintiffs argued, and the court later held, that the 2003 agreements violated federal law by protecting too little water under the park's decreed 1933 priority, leaving the necessary peak and shoulder flows to a vaguely defined 2003 water right held by the State of Colorado.³¹⁶ The question is, does an APA claim—otherwise exclusively federal—fall under state jurisdiction simply because it has implications for a reserved right claim? Justice Hobbs answered yes in the Black Canyon case based on his view that McCarran confers very broad jurisdiction on state courts.³¹⁷

For several reasons, however, APA claims should not be subject to state court jurisdiction even though they relate to a reserved right claim subject to a state adjudication. Neither the statutory text nor the Supreme Court caselaw supports the view that McCarran confers

309. *Id.*

310. *Id.*

311. *Id.* at 1072, 1086 (Hobbs, J., dissenting).

312. *Id.* at 1084-85.

313. *Id.* at 1086.

314. The dissent suggested that McCarran gave the water court authority "to decide all factual and legal issues involved" in the 2003 agreements, including "review of the decision making of those officers and agencies regarding" the agreements. *Id.*

315. *Id.*

316. *Id.* at 1083-84.

317. *Id.* at 1072, 1086 (Hobbs, J., dissenting).

jurisdiction over any issue relating to a reserved right. According to Justice Hobbs, "The McCarran Amendment expressly provides for the state court to decide all factual and legal issues affecting the quantification and administration" of a federal water right.³¹⁸ But the statute expresses no such thing, providing only that the United States may be joined in any suit for the adjudication of water rights from a particular source, or for the adjudication of such rights.³¹⁹ And although the Supreme Court has referred to McCarran as "all-inclusive,"³²⁰ that statement relates specifically to the various kinds of water rights subject to the statute.³²¹ For example, the Court has held that state courts have jurisdiction over the full range of federal and tribal water right claims,³²² not that a state proceeding has jurisdiction over any issue relating to a claimed right.

While it may be difficult to draw a precise line separating an exclusively federal APA claim from a reserved right claim subject to McCarran, that line surely exists. In other words, a federal claim cannot be subject to state jurisdiction merely because it has some connection—no matter how attenuated—to a reserved right. Consider another unlikely hypothetical: the government files federal bribery charges against a private water user because he allegedly offered to pay off a federal wildlife refuge manager if she would agree to settle for a smaller reserved right in an ongoing state adjudication.³²³ Few would suggest that the federal criminal charge would be subject to the adjudication, even though it involves an effort to influence a federal water claim. But the defendant would presumably like to have the local water court hear the case, and he would have a credible argument if McCarran actually did empower the state court "to decide all factual and legal issues affecting the quantification and administration of the right."³²⁴ Thus, at some point, a water-related claim must be so far removed from water right adjudication that it falls outside of McCarran and becomes an improper subject for the water court.

One final point is extremely important: a successful APA case against a federal agency's settlement of reserved rights would not result in the rights being determined or quantified in that case, as they would be in an adjudication. Both the federal and state courts involved in the Black Canyon dispute stressed this fact in rejecting the argument that

318. *Id.* at 1086.

319. 43 U.S.C. § 666(a) (2007).

320. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 810 (1976).

321. McCarran confers state court jurisdiction in water right adjudications "where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise." 43 U.S.C. § 666(a).

322. *E.g.*, *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 553, 563-64 (1983) (tribal reserved rights asserted by tribes on their own behalf); *Colo. River*, 424 U.S. at 805, 808-09 (tribal reserved rights asserted by the United States); *United States v. Dist. Ct. of County of Eagle*, 401 U.S. 520 (1971) (federal reserved rights).

323. *See* 18 U.S.C. § 201 (2006).

324. *See In re Application for Water Rights of the United States*, 101 P.3d 1072, 1086 (Colo. 2004) (Hobbs, J., dissenting).

the federal lawsuit improperly intruded on the water court's domain. In refusing to dismiss the APA action, the federal court wrote that the water court proceeding would determine the precise quantity of water needed to satisfy the purposes of the Black Canyon right under the 1978 decree, whereas the federal case

seeks review of federal administrative decisions for compliance with various provisions of federal law, including federal statutory mandates to preserve the environment of the Black Canyon. This Court has exclusive jurisdiction over claims which challenge federal administrative decisions and are brought pursuant to the judicial review provisions of the APA. Plaintiffs are not asking this court to determine the exact flow characteristics necessary to comply with the federal mandates. Instead, if this Court finds Defendants have violated the APA, this Court would order that Defendants' April Agreement and July MOA be remanded with instructions that they reformulate their management of the Black Canyon to comply with federal mandates. Therefore, this Court has exclusive jurisdiction since it is not holding parallel proceedings as the issues are not substantially the same and thus, do not fall under the McCarran Amendment.³²⁵

The Colorado Supreme Court concluded that because the federal case could not and would not quantify the water right, the water court did not abdicate its jurisdiction in staying its consideration of the Black Canyon claim.³²⁶ Further, the court emphasized that the results of the federal case would not be *res judicata* in the water court quantification proceeding, in which water users "may still argue that the purposes of the United States' reservation of the Black Canyon are narrow, and that a modest amount of water is adequate to satisfy those purposes."³²⁷

These courts were correct in finding exclusive federal jurisdiction over APA claims that would address the legality of federal agency action, but would not finally determine any aspect of a federal water right. This distinction provides a practical, objective, and legally sound basis for determining when a challenge to a reserved right settlement is within state court jurisdiction: if deciding a federal claim would conclusively establish the existence, priority, purposes, or quantity of a water right³²⁸ subject to a state adjudication under McCarran, the claim falls under state court jurisdiction. Otherwise, the claim must be heard in federal court in accordance with the usual rule of exclusive federal jurisdiction over APA claims.

In sum, a challenge to a federal agency's final settlement of its reserved right claims ordinarily should qualify for federal judicial review, consistent with the results in the Black Canyon cases. That legal conclusion, however, raises new questions about the practical and policy

325. Order Denying Defendants' Motion to Dismiss, *supra* note 179, at 16.

326. *In re The Application for Water Rights of the United States*, 101 P.3d at 1084.

327. *Id.*

328. The Black Canyon cases focused only on this last element, quantification, because the 1978 water court decree already established the existence, priority, and purposes of the park reserved right. See *supra* notes 308-24.

implications of federal judicial review of such settlements. The next section addresses these implications.

IV. IMPLICATIONS OF FEDERAL JUDICIAL REVIEW OF RESERVED RIGHT SETTLEMENTS

In *High Country Citizens' Alliance*, environmental plaintiffs obtained federal judicial review of a partial settlement of federal reserved water rights subject to a state adjudication, and they convinced the court to overturn the settlement and remand the matter to the Interior Department.³²⁹ The court's decision revealed that a federal judicial forum is potentially available for APA claims relating to agency decisions on reserved rights, and the previous section of this article concluded that final settlements of federal claims should indeed be reviewable in federal court.³³⁰ Assuming that conclusion is correct, what might this new opportunity for federal review mean for reserved water rights, which for three decades have been determined almost entirely in the context of state proceedings? This section contends that federal review of final settlements would have very limited impacts on reserved right litigation, but may have greater effects on efforts to resolve reserved right claims through negotiated settlements.

A. LIMITED EFFECTS ON LITIGATION OF RESERVED RIGHT CLAIMS

Given the long-running jurisdictional battles between western states and water users on one side, and the United States government and tribes on the other,³³¹ one might expect the prospect of a federal judicial forum for reserved right issues to provoke great concern and great excitement, respectively, in these two camps. Three years after the court's decision in *High Country Citizens' Alliance*, however, the issue has received little attention.³³² This absence of reaction suggests that federal APA review of settlements would have fairly minor implications for reserved right litigation, and a review of the relevant law brings up several reasons why that is almost certainly true.

First, and most obviously, McCarran and the applicable Supreme Court cases are still in effect. Reserved water right claims remain subject to state court jurisdiction, and federal courts are still encouraged to abstain from hearing such claims in favor of state adjudication proceedings. Thus, the federal government is no freer to pursue determination of its reserved right claims in federal court; to the contrary, the federal forum is available only to someone who sues the

329. See *supra* note 259 and accompanying text.

330. See *supra* notes 328-28 and accompanying text.

331. See *supra* notes 286-320 and accompanying text.

332. As of late March 2010, the *High Country Citizens' Alliance* decision had been cited in no cases—only a few treatises, three journal articles, and a handful of briefs and motions. Westlaw.com, Citing References for *High Country Citizens' Alliance*, 448 F. Supp. 2d, 1235 (D. Colo. 2006), <http://web2.westlaw.com/Find/default.wl?bhcp=1&cite=448+F%2ESupp%2E2d+1235&rs=LAWS2%2E0&strRecreate=no&sv=Split&vr=1%2E0> (last visited March 20, 2010).

government seeking APA review of a final agency action, i.e., a settlement agreement.

Second, federal review of settlements does not change the substantive law that determines federal water right claims. Reserved rights have always been a matter of federal law, even when they are adjudicated in state courts—a point made repeatedly by the Supreme Court.³³³ Moreover, federal judicial review of state court reserved right decrees has always been available in the U.S. Supreme Court. While such review has been quite rare in practice,³³⁴ the Court gave a stern reminder in *Arizona v. San Carlos Apache Tribe* that state courts do not have the last word in determining reserved water rights: “any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.”³³⁵ Given this established potential for Supreme Court review of final state decrees, federal district court review of final settlements is not such a dramatic development.

Third, federal APA review of settlements is likely to appeal primarily to a fairly narrow group of entities: those who are interested in water use, but do not hold or claim water rights. Water users claiming rights under state law may oppose settlement of the reserved rights, but because they likely are parties to the state adjudication, they already have a forum that is more familiar, and perhaps friendlier, than the federal district court.³³⁶ They may be able to object to settlement during the negotiation process, and if the reserved right is settled despite their concerns, they certainly can argue against approval in the water court.³³⁷ Federal APA review, however, may open the door to certain entities that

333. After holding that federal courts in Arizona and Montana should abstain from hearing tribal reserved right claims in favor of state adjudications, the Court stated: “We also emphasize, as we did in *Colorado River*, that our decision in no way changes the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law.” *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983); see also *Colo. River Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976); *United States v. Dist. Ct. of County of Eagle*, 401 U.S. 520, 526 (1971).

334. The last two Supreme Court cases deciding federal (non-tribal) reserved right claims on the merits were *United States v. New Mexico*, 438 U.S. 696 (1978) and *Cappaert v. United States*, 426 U.S. 128, 128-29 (1976). The last tribal reserved right decision was the Supreme Court’s 4-4 split in *Wyoming v. United States*, 492 U.S. 406, 406 (1989) (affirming the reserved right decree of *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988)).

335. *San Carlos Apache Tribe*, 463 U.S. at 571.

336. I do not mean to suggest that water users might not also sue in federal court to block a settlement. Irrigators have certainly sued under the federal environmental laws in other contexts, especially those involving project operations by the Bureau of Reclamation. See, e.g., *Westlands Water Dist. v. U.S. Dep’t of the Interior*, 376 F.3d 853, 855 (9th Cir. 2004); *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Or. 2001).

337. See Thorson et al., *supra* note 10, at 409-10 (describing adjudication courts’ criteria and procedures for evaluating settlements, and noting that Arizona and Montana courts both assess fairness and reasonableness of agreement).

have little or no opportunity to affect the adjudication.³³⁸ The most obvious beneficiaries are environmental groups (as in *High Country Citizens' Alliance*), but others may include river-dependent businesses (such as fishing lodges or commercial rafting companies), local governments, or others who have a stake in water, but no rights of their own.

Fourth, while opponents of reserved right settlements should be able to have their claims heard in federal court, they typically will find these cases hard to win. One problem is that the plaintiffs will be attacking a negotiated settlement, which the government will certainly argue is the best available compromise, one which provides adequate water for the purposes of the reserved right while also protecting existing water users and other interests.³³⁹ To the extent that a wide range of stakeholders had access to the negotiation process, and the resulting agreement demonstrably addresses a wide range of interests, this "great compromise" argument should be all the more persuasive.³⁴⁰ Moreover, a federal court reviewing an agency decision regarding the management and protection of resources overseen by that agency would appear to owe at least some deference to that decision.³⁴¹ It is hard to say which is the proper level of deference for an agency decision to settle a reserved right claim,³⁴² although sliding-

338. See *supra* notes 54-57 and accompanying text.

339. For example, in *High Country Citizens' Alliance*, the government argued strongly that the 2003 agreements were "a creative solution to meeting multiple needs," and represented the best approach to protect the Aspinall Unit as well as the Black Canyon, for water on the Gunnison River. *High Country Citizens' Alliance v. Norton*, 448 F. Supp. 2d 1235, 1243 (D. Colo. 2006).

340. The argument failed in *High Country Citizens' Alliance*, where the agreement was the product of closed-door negotiations between the federal and state governments. See *supra* notes 199-207 and accompanying text. The court stated that it was not clear who had participated in the settlement talks. *High Country Citizens' Alliance*, 448 F. Supp. 2d at 1241. However, the Colorado Supreme Court made a point of noting that the environmental plaintiffs in the federal case "were not invited to participate in any negotiations" leading up to the 2003 agreements. *In re Application for Water Rights of the United States*, 101 P.3d 1072, 1076 (Colo. 2004).

341. *United States v. Mead Corp.*, 533 U.S. 218, 227-35 (2001), explains the Supreme Court's approach to judicial deference to an agency's interpretation of its governing statute. In short, an agency's decision qualifies for strong judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), if it appears that that Congress gave the agency authority to make binding law through that type of decision, and that the agency exercised that authority on this occasion. *Mead*, 533 U.S. at 229, 234-35. An agency decision not qualifying for *Chevron* deference may still receive a weaker form of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), whereby the degree of a court's deference depends on the overall persuasiveness of the agency's decision in light of various factors. *Mead*, 533 U.S. at 227-28, 234-35.

342. A recent case involving a water allocation settlement decision by the Army Corps of Engineers illustrates the challenge of determining the right form of deference. See, e.g., *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008). The States of Florida and Alabama challenged a settlement whereby the Corps allocated to public water supply a certain percentage of the water stored in one of its reservoirs. *Id.* at 1318. In determining whether the settlement violated any of the Corps' governing statutes, the majority of the court of appeals stated that *Chevron* deference would apply, never explaining why it was appropriate. *Id.* at 1321. A concurring opinion by Judge

scale deference under *Skidmore v. Swift*³⁴³ seems most appropriate.³⁴⁴ One thing is clear however: no form of deference will save a settlement if the court believes that the agency has clearly violated its governing statutes,³⁴⁵ as in *High Country Citizens Alliance*.³⁴⁶

Finally, even if the plaintiffs succeed in their APA challenge to a reserved right settlement, they will have won an important battle, but not the war. The court will not issue an order definitively establishing the existence or elements of the reserved right; instead, the likely remedy is a remand to the agency.³⁴⁷ Nothing prevents the agency from reaching a new settlement agreement that is better supported than the original, but is not more palatable to the plaintiffs. In fact, a simple remand would leave the agency free to forsake the settlement process entirely, and pursue confirmation of its reserved right claims through the state adjudication—which may or may not be a good outcome for the federal plaintiffs, depending upon their goals regarding the

Silberman, however, denied any deference to the agency because the settlement was merely a litigating position. *Id.* at 1327. Judge Silberman also cited *United States v. Mead*, however, a case indicating that at least *Skidmore* deference would be appropriate. *Id.* The lack of clarity on this point in a decision by the D.C. Circuit—no stranger to review of all manner of agency actions—shows the difficulty in resolving this question of deference for litigation settlements.

343. See *Skidmore*, 323 U.S. at 140.

344. *Mead* supports this conclusion. See *supra* note 341. As the Court noted in that case, the great majority of its decisions giving *Chevron* deference involve agency decisions made through rulemaking or formal adjudication, *Mead*, 533 U.S. at 230, neither of which is involved in reserved right settlements. In fact, reserved right settlements do not arise from any federal administrative process, but from negotiations conducted in connection with a state adjudication; thus, there is no agency proceeding through which Congress intended the agency to have lawmaking authority. See *supra* notes 269-69 and accompanying text; see *Mead*, 533 U.S. at 229-30. Finally, like the Customs rulings at issue in *Mead*, a reserved right settlement does not establish precedent or apply beyond the right(s) involved that agreement, *id.* at 233, meaning that the agency's decision is not intended to make generally applicable law. Even if *Chevron* does not apply, however, *Mead* indicates that a reviewing court generally should consider whether to accord deference to the agency's decision under *Skidmore*. *Id.* at 234-235. Given the variable nature of *Skidmore* deference, it is difficult to say how much weight a court might give to any particular settlement decision.

345. *Southeastern Federal Power Customers, Inc.*, illustrates this point well. In that D.C. Circuit case involving a Corps of Engineers water allocation settlement, the majority and concurring opinions disagreed not only about the level of deference to give the settlement, see *supra* note 342, but also about the proper baseline for evaluating the effect of the proposed allocation. See *Fed. Power Customers, Inc.*, 514 F.3d at 1324, 1327. Despite these differences, all three judges had little trouble agreeing that the settlement violated the statute, 43 U.S.C. § 390b(d), prohibiting the Corps from making major operational changes at a project without first obtaining Congressional approval. *Id.* at 1324-25, 1327-28.

346. See *supra* notes 168-204 and accompanying text. The opinion in *High Country Citizens' Alliance v. Norton*, essentially gave *Skidmore* deference to the settlement decision, stating that in evaluating the agencies' "informal interpretation of the statutes governing the administration of the Black Canyon, this Court must consider the agency interpretation to the extent that the interpretation is well reasoned and has a power to persuade." *High Country Citizens' Alliance v. Norton*, 448 F. Supp. 2d 1235, 1251 (D. Colo. 2006).

347. See, e.g., *High Country Citizens' Alliance*, 448 F. Supp. 2d at 1253 (remanding the Black Canyon reserved right matter to the agency "for further proceedings consistent with this decision").

reserved right.

This last point raises the issue of the potential impacts of federal judicial review on future efforts to settle reserved water rights. These settlement implications are the subject of the next subsection.

B. EFFECTS OF REVIEWABILITY ON SETTLEMENT NEGOTIATIONS

Because negotiated settlement has become the preferred approach to resolving reserved right claims,³⁴⁸ federal judicial review of such settlements may have significant practical impacts on the future determination of federal claims. Given that every reserved right claim presents a unique situation, it is impossible to predict how the potential for federal review might affect any given one of them. Each claim has its own legal strengths and weaknesses, its own perceived costs and benefits for local and state residents, and its own array of opponents and supporters;³⁴⁹ these site-specific and right-specific circumstances will determine how the possibility of federal review might influence any particular settlement effort. That caveat will prove more universally true than any of the following general observations on the implications of reviewability for settlements.

The most immediate effect of potential federal review should be an infusion of influence for those entities that lack water rights, but are interested in the reserved water right at issue, such as environmental groups, water-dependent business owners such as rafting companies, and recreators such as anglers or birders. Despite their strong interest in maintaining adequate water for their preferred uses, such entities have typically been either foreclosed from participating in state adjudications or prevented from raising issues that could have helped their cause.³⁵⁰ Unlike the water right holders involved in the adjudication, many such entities may support the federal claim and seek to have it quantified at a relatively high level, although that is not necessarily true.³⁵¹ Because they have had little or no power to affect state adjudications, such entities may have held little or no sway over reserved right negotiations in the past. As potential plaintiffs in a federal court challenge to a settlement, however, they are far more likely to be taken seriously, and they may even gain a seat at the negotiating table.

348. See *supra* notes 58-63 and accompanying text.

349. See Amman et al., *supra* note 61, at 44 (describing successful settlement of various National Park Service reserved right claims in Montana, and explaining how settlement of a claim was affected by legal issues, local economic and political factors, and potential effects of the right on existing and future uses of water).

350. See *supra* notes 54-57 and accompanying text; see also *Idaho Conservation League v. Idaho*, 911 P.2d 748, 749-50 (Idaho 1995) (affirming that the public trust doctrine applies to Idaho water rights, but is not an issue to be considered in an adjudication).

351. It is not hard to imagine a group of citizens that would lack water rights but oppose a federal reserved right because of how it might affect them; for example, a group of landowners downstream of the federal reservation could be concerned that high flows might result in flooding of their property.

The prospect of federal judicial review may also strengthen the negotiating position of those who support recognition and adequate quantification of the subject reserved right. Opponents of the reserved right have always had an advantage in negotiations because if talks failed, the right would be adjudicated solely in state court,³⁵² where federal reserved right claims have often fared poorly.³⁵³ Given the choice between a weak settlement and a politically adverse state court,³⁵⁴ the federal negotiators may choose the settlement despite its terms; whatever else may be said about the settlement, it offers a predictable outcome and an ability to publically declare a positive result. If a federal court can review the settlement for its consistency with federal law, however, the government (and others who support the claim) should have a stronger basis for insisting that the settlement be demonstrably adequate for protecting the purposes of the federal reservation.

If these effects come to pass—that is, if the prospect of federal review of settlements increases the influence of those lacking water rights, and strengthens the negotiating position of those supporting the federal claim—the result should be better balanced and more durable settlements. A final resolution of water rights that is manifestly inequitable or that fails effectively to protect important public values in the water resource, will not necessarily provide long-term certainty and stability.³⁵⁵ An agreement that leaves a strongly interested group

352. A state court adjudication decision regarding a reserved right is subject to federal review only in the unlikely event that the Supreme Court agrees to take the case. See *supra* notes 333-34 and accompanying text.

353. See Janet C. Neuman & Michael C. Blumm, *Water for National Forests: The Bypass Flow Report and the Great Divide in Western Water Law*, 18 STAN. ENVTL. L.J. 3, 9-11 (1999) (describing Colorado courts' rejection of instream flow claims for national forest lands); see also Blumm, *supra* note 32, at 177 (explaining and analyzing the Idaho Supreme Court's rejection of reserved water rights for instream flows, especially for wilderness areas).

354. State water politics arguably resulted in an Idaho Supreme Court decision denying a federal reserved right claim, and in the re-election defeat of an Idaho Supreme Court justice who originally cast the deciding vote in favor of recognizing the federal right. See Blumm, *supra* note 32, at 178-210. Blumm concludes that the Idaho decision will be remembered for the point "that political expediency is always a factor in decisions of state court judges who are subject to reelection." *Id.* at 226. In another article, Colorado Supreme Court Justice (and water law expert) Gregory Hobbs draws parallels between the Idaho judicial election and an earlier one where a Colorado Supreme Court justice had been defeated for voting in favor of the federal government in a water rights case. Judge Gregory J. Hobbs, Jr., *State Water Politics Versus an Independent Judiciary: The Colorado and Idaho Experiences*, 5 U. DENV. WATER L. REV. 122, 123 (2001).

355. The Carson-Truckee basin of Nevada may provide the best example of a "final" water rights decision yielding ongoing controversy and instability. The U.S. Supreme Court decision in *Nevada v. United States*, 463 U.S. 110 (1983) barred the Pyramid Lake Paiute Tribe from obtaining reserved water rights to restore the Pyramid Lake fishery, seemingly blocking the Tribe from obtaining additional water for this purpose. Michael C. Blumm, David H. Becker, & Joshua D. Smith, *The Mirage of Indian Reserved Water Rights and Western Streamflow Restoration in the McCarran Amendment Era: A Promise Unfulfilled*, 36 ENVTL. L. 1157, 1191 (2006). "Despite this apparently crushing setback, over the past twenty years the tribe has successfully used Nevada state water law, water quality litigation, and pressure based on the [Endangered

unsatisfied and determined to undo the deal is likely to face ongoing turbulence.³⁵⁶ As Professor Cosens notes, "The fairness of the negotiation process requires attention to inclusion of a widening circle of interests. People with direct interests in water must be represented at the table Durability of the outcome requires that the process and solution be comprehensive by including all interests and all relevant issues."³⁵⁷

Obviously, not everyone would regard these potential developments as positive, and this fact raises one further possible effect of federal review: discouraging some parties from pursuing settlement at all. Western states and traditional water users, in particular, may decide that they would sooner litigate federal claims in state court than pursue multi-party negotiations that could result in a federal court case.³⁵⁸ The prospect of bigger, more complex negotiations that would presumably be longer, and more difficult, may also cause some parties to question the settlement path. Thus, subjecting settlements to federal judicial review seems likely to result in litigation of some federal claims that otherwise might have settled.³⁵⁹ Counterbalancing these concerns,

Species Act listings of Pyramid Lake fish species] to secure additional instream flows in the Truckee River and into Pyramid Lake." *Id.* Congress also passed a statute in 1990 that helped the Tribe make progress toward its restoration goals. *Id.* at 1192, (citing Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990, Pub. L. No. 101-618, tit. II, 104 Stat. 3289 (1990)).

356. For example, the Animas-La Plata Project, a proposed reservoir in southwestern Colorado, was included in a 1988 tribal water rights settlement. Thorson, *supra* note 10, at 461. "An excruciating five years followed, in which A-LP was downsized and reconfigured. Groups not involved in the original negotiations, environmentalists and the Navajo Nation, proved to be formidable opponents as their previously left out or discounted interests had to be taken into account by project developers." *Id.* at 462. According to the authors of a study on adjudications, the Animas-La Plata story shows that "if a settlement does not include all affected parties, there may be impacts on the non-represented parties. Unrepresented parties give rise to due process concerns, and those parties may challenge the legitimacy of such settlements." *Id.* at 479.

357. Barbara Cosens, *Water Dispute Resolution in the West: Process Elements for the Modern Era in Basin-Wide Problem Solving*, 33 ENVTL. L. 949, 1017-18 (2003). "People with an interest in the effect of water use on the basin community must also have an opportunity for comment at a time in the negotiation process when solutions are still in the design phase." *Id.* at 1017.

358. Even without the prospect of federal review, some opponents of reserved rights would rather take their chances in state court than agree to recognize federal claims. See Steven W. Strack, *Pandora's Box or Golden Opportunity? Using the Settlement of Indian Reserved Water Right Claims to Affirm State Sovereignty Over Idaho Water and Promote Intergovernmental Cooperation*, 42 IDAHO L. REV. 633, 636 (2006) (describing the State of Idaho's rationale for settling tribal reserved right claims after those claims had been rejected by the Idaho adjudication court). The court made its decision in response to "critics of the settlement [who] argue that the settlement agreement cedes too much to the Tribe." *Id.* at 650. The court also noted that some people "asserted that the State had snatched defeat from the jaws of victory." *Id.* at 670.

359. While it is reasonable to expect that some federal claims will not settle because of the prospect of federal court review, it is impossible to say whether litigating those claims would produce better or worse results (as compared to settlement) from the standpoint of the federal government and its allies. As noted earlier, settlements have routinely subordinated the reserved right to all established uses of water. See *supra* note 63 and accompanying text. Subordination is a major concession that protects existing water users at the expense of federal interests. Even a modern-day water right,

however, are powerful reasons why negotiation is superior to litigation as a means for resolving water disputes,³⁶⁰ including the uncertainty of litigation outcomes,³⁶¹ the high cost of litigation for all parties involved, and the flexibility of settlements in addressing each party's key concerns. Thus, while the prospect of federal review of settlements may make negotiations less attractive for some, and may well make agreements harder to reach, it seems likely that settlements will remain the preferred approach for resolving reserved right claims.³⁶²

The Black Canyon story, although unusual in one key respect,³⁶³ illustrates how federal judicial review might play out in future efforts to settle federal reserved rights. The 2003 agreements, produced through closed-door negotiations among government officials, were challenged in federal court;³⁶⁴ the plaintiffs were environmental groups who had not been included in the settlement process, and who saw the agreements as giving away water needed by the park.³⁶⁵ The federal court closely reviewed the government's decision for compliance with federal law, determined that the government violated the law, and invalidated a locally popular settlement—all without fear of political

however, ordinarily should provide better protection than no water right at all, which is what the United States might obtain if a state court litigates its claims. *See supra* notes 354-55 and accompanying text. The extent to which a subordinated right is actually better than nothing depends on various site-specific factors, including the practical likelihood of increasing water demands that would reduce flows to the federal lands, and the chances that such demands would actually obtain all state and federal approvals needed to allow for the new or increased water use. Thus, even assuming a worst-case legal scenario where a federal claim is forced into litigation and entirely denied by a state court, it is impossible to say whether the foregone settlement would be much of a loss in practical terms.

360. Cosens summarizes these reasons as "(1) the inadequacy of litigation for resolution of resource allocation problems, (2) ability to use the factual complexity of water supply and demand to expand availability and protection of the water resource, and (3) the need for participation by a broader range of interests." Cosens, *supra* note 357, at 962; *see generally* Barbara Cosens, *2005 Indian Water Rights Settlement Conference Keynote Address*, 9 U. DENV. WATER L. REV. 285, 286 (2006) (describing reasons why settlements are superior in tribal reserved rights context).

361. *See generally* Barbara Cosens, *Truth or Consequences: Settling Water Disputes in the Face of Uncertainty*, 42 IDAHO L. REV. 717 (2006) (providing a thorough examination of the effect of legal (and scientific) uncertainty on settlement of certain water right claims of the Nez Perce tribe).

362. After noting a trend toward settlement of reserved right claims for non-Indian federal lands, the authors of a water law text wrote:

As court decisions provide a better fix on the contours of these rights, federal agencies assemble the information necessary to quantify them, states discover what little threat many of these rights pose to state water right holders, and all continue to suffer from the expense and length of adjudications, the settlement fever is likely to spread. SAX, *supra* note 60 at 815.

363. That one respect is the 1978 partial decree that determined the existence, purposes, and priority date of the Black Canyon reserved right, leaving quantification as the only issue. *See supra* notes 77-84 and accompanying text. Without that earlier decree the parties would have had more issues to negotiate (or litigate), perhaps making settlement less likely.

364. *High Country Citizens' Alliance v. Norton*, 448 F. Supp. 2d 1235, 1241-43 (D. Colo. 2006).

365. *Id.* at 1235, 1242-43.

repercussions.³⁶⁶ The parties did not resort to litigation in response to this decision, but instead engaged in negotiations involving a wide range of groups interested in the Black Canyon water right.³⁶⁷ These talks produced a new settlement agreement that all parties could live with and that resulted in an uncontested decree, thus finalizing a reserved right that had been pending in the water court for more than three decades.³⁶⁸ Thus, in the Black Canyon context, federal judicial review of the original agreement led to a better process and a better result.

CONCLUSION

The Black Canyon experience suggests that federal review of settlements may offer real benefits for the successful negotiation and resolution of reserved water rights. While the Black Canyon provides a useful case study, however, the argument for federal judicial review of reserved right settlements ultimately comes down to good government. In other words, review of settlements can help address some fundamental design flaws in the way that the executive and judicial branches handle federal reserved water rights.

Federal judicial review provides the only real check on a federal agency's ability to essentially give up reserved rights through settlement, to the benefit of private water users and the detriment of the public. This kind of federal action has not traditionally been the greatest policy concern with respect to reserved rights; western states and water users have feared just the opposite, an imperious federal government that would attempt to nationalize water resources at the expense of state control.³⁶⁹ The Supreme Court's decisions in *Colorado River* and *United States v. New Mexico*, giving state courts control over reserved right litigation and prescribing a narrow legal standard for determining reserved rights,³⁷⁰ provided a powerful and demonstrably effective check against federal overreaching. Federal judicial review provides the only corresponding check on federal "underreaching," or giveaway of water associated with unquantified reserved rights—as the plaintiffs alleged (and the court effectively agreed) took place with the 2003 Black Canyon agreements.³⁷¹ One can argue that the 2003 agreements were not in fact a giveaway, or that federal agencies are very unlikely to "underreach" in settling their reserved rights, but it is difficult to

366. *Id.* at 1250-53. Judge Brimmer was uniquely unconcerned with Colorado water politics, unlike a state judge who might fear the electoral consequences of voting the wrong way in a major water case. *See supra* note 354. Not only was Judge Brimmer an Article III judge with a lifetime appointment, but he was also a District of Wyoming judge sitting by designation in Colorado. Judgepedia.org, Clarence Brimmer, *available at* http://judgepedia.org/index.php/Clarence_Brimmer (last visited Feb. 20, 2010).

367. Jaffe, *supra* note 222.

368. *See id.*

369. *See* Thorson, *supra* note 10, at 310, 323.

370. *See supra* notes 294-98 and accompanying text.

371. *See* High Country Citizens' Alliance v. Norton, 448 F. Supp. 2d 1235, 1252-53 (D. Colo. 2006).

maintain that anything would effectively prevent the government from doing so in the absence of federal judicial review of settlements.

A more basic problem, however, is reliance on courts as the exclusive forum for making long-term decisions about water issues of great public interest and importance. Water is a public resource, both by nature and, in the western states at least, by law.³⁷² Because the western states have established proprietary rights to use water, however, this public resource is largely viewed and managed as private property;³⁷³ this tendency is strongest in the context of state adjudications, where the courts have sometimes acknowledged the public aspects of water but held them to be irrelevant to the determination of previously established water rights.³⁷⁴ This exclusion of public interest factors is particularly inappropriate for federal *Winters* claims, which are about as public as water rights can get, in that they involve water for public lands designated by the government for public purposes such as national parks and forests.³⁷⁵ To the extent that state adjudications prevent effective participation by those who have an interest in water but no proprietary rights to it,³⁷⁶ they effectively discriminate in favor of established water users, as though the only important consideration for reserved right claims were their potential impacts on private rights. Closed-door negotiations involving only government actors may lack this members-only favoritism, but they too deny the interested public a meaningful opportunity to influence decisions on reserved rights that have major public importance.

Providing federal review of reserved right settlements obviously will not directly solve this "judicial forum" problem. If it merely shifts the action temporarily from state to federal court, it will perpetuate the problem; if it forces more reserved rights to be litigated in state adjudications rather than settled, it will exacerbate it. Federal judicial review can help move decision-making in the right direction, however, by encouraging a more accessible and inclusive process for resolving disputes over reserved rights. Specific recommendations for design and

372. This idea appears in some form in the constitutions and/or the water codes of the western states that allocate water based on prior appropriation. See, e.g., IDAHO CONST. art. XV, § 1; MONT. CONST. art. IX, § 3(3); N.M. STAT. ANN. § 72-1-1 (West 2009); OR. REV. STAT. ANN. § 537.110 (West 2009).

373. See, e.g., *People v. Emmert*, 597 P.2d 1025, 1028 (Colo. 1979) (reaffirming that Colorado constitutional provision declaring water to be property of the public, subject to appropriation, was primarily intended to establish appropriation doctrine and gave no right to public access on Colorado waters).

374. See, e.g., *Wash. Dep't of Ecology v. Grimes*, 852 P.2d 1044, 1053 (Wash. 1993) (holding that environmental factors cannot be considered in determining water rights in adjudication); *Idaho Conservation League v. Idaho*, 911 P.2d 748, 750 (Idaho 1995) (holding that the public trust doctrine applies in Idaho but cannot be considered in adjudication of water rights). But see *San Carlos Apache Tribe v. Arizona*, 972 P.2d 179, 199 (Ariz. 1999) (striking down statute attempting to prevent consideration of public trust doctrine in adjudication, and stating that courts would have to decide whether public trust doctrine was applicable on the facts).

375. *High Country Citizens' Alliance*, 448 F. Supp. 2d at 1237-39.

376. See *supra* notes 54-57 and accompanying text.

implementation are beyond the scope of this article,³⁷⁷ but at a minimum, the process must be open to the full range of stakeholders—those with water rights and those without—and their interests in the waters at issue. Providing an opportunity for public comment during the course of the negotiations would be one positive step.³⁷⁸ A further step would be to allow interested groups to participate directly in reserved right negotiations, such as the multi-party talks that ultimately settled the Black Canyon reserved right.³⁷⁹ In the end, a judicial decree will still be necessary to confirm the reserved water right; the question is whether the process leading up to that decree properly takes account of public interests and concerns relating to the right.

As the court stated in *High Country Citizens' Alliance*, "A decision to enter into agreements which permanently give up a priority to a resource which must be 'saved for all generations' must be made in public view and not behind closed doors with the public's interest in mind."³⁸⁰ The decision in that case led to a process in which more people had a say in determining the reserved right for Black Canyon National Park, resulting in a stronger agreement for the waters of the Gunnison River. By recognizing a right to judicial review of agency decisions to settle reserved rights, the federal courts may extend that opportunity to more people and more waters in the West.

377. A fairly detailed set of recommendations for resolving basin-wide water disputes (including but not limited to reserved rights) may be found in Cosens, *supra* note 357, at 1007-18.

378. The Montana Reserved Water Rights Compact Commission provides opportunities for public comment as it negotiates on federal and tribal claims, and may seek revisions to an agreement in response to public comment. See Amman et al., *supra* note 61, at 41. Of course, public comment may favor or oppose recognition of a particular reserved right. *Id.* (noting strong opposition to Yellowstone National Park reserved rights by a local chapter of People for the West!, but "generally positive" reaction to Glacier National Park reserved rights in the local area).

379. See *supra* notes 363-67 and accompanying text.

380. *High Country Citizens' Alliance*, 448 F. Supp. 2d at 1245-46.

