BLACK CANYON OF THE GUNNISON NATIONAL PARK WATER RIGHT

I. THE FEDERAL RESERVED WATER RIGHTS DOCTRINE

> *"The reserved rights doctrine is very like the Devil's Hole Pupfish in many ways. It too is an evolutionary sport. It too lives in Devil's Hole. It too has friends in high places within the federal bureaucracy and judicial system*."[1]

The federal reserved water rights doctrine is a judicially created concept. It provides that, when the federal government withdraws land from the public domain for particular purposes, it simultaneously acquires the right to sufficient water to effectuate those purposes. It is a significant exception to the federal government's traditional accession to the states' control over allocation of water within their boundaries.

In the mid-nineteenth century, the United States' public land policy in the Western territories was disposition. Large tracts of the public domain were given to private ownership under a variety of grants and laws without any provision for the allocation of water.[2] Miners and settlers took whatever water they needed and the territorial courts began applying the "first in time, first in right" rule that originated in the California gold camps. Congress recognized these rights, first in the Mining Act of 1866 (amended in 1870) and again in the Desert Land Act of 1877. The Mining Act sanctioned water rights acquired "by priority of possession . . . recognized by local customs, laws and decisions of courts . . .".[3] By 1877, when Congress enacted the Desert Land Act, most Western states had adopted what we now know as the prior appropriation doctrine. The Act provided that the use of water "shall depend upon bona fide prior appropriation" and that surplus waters "shall remain and be held free for appropriation and use of the public . . . subject to exiting rights."[4] Thus, federal patents conveyed no rights to water and allocation of water use was left to the states. Beginning in 1899, however, the United States Supreme Court carved out an exception to the Congress' deference to the states in matters of water allocation.

United States v. Rio Grande Dam & Irrigation Company[5] is generally recognized as providing the foundation for the federal reserved water rights doctrine. In that case, the question was whether the Territory of New Mexico could give an irrigation company the authority to divert water in a manner that would impair the navigability of the Rio Grande River. In addressing that issue, Justice Brewer pronounced the following dictum:[6]

> Although this power of changing the common law [riparian] rule as to streams within its dominion undoubtedly belongs to each State, yet . . . limitations must be recognized: . . . in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United

> States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property.[7]

Despite the fact that the decision in the *Rio Grande* case did not turn upon the territory's authority to control distribution of water, but instead was based upon an 1890 statute that prohibits interference with the navigable capacity of a river,[8] Justice Brewer's dictum was cited as authority for the court's later decision in the seminal case of *Winters v. United States*.[9]

The *Winters* case involved a dispute over the waters of the Milk River in Montana. The United States created the Fort Belknap Indian Reservation on May 1, 1888 for the purpose of transforming the Gros Ventre and Assiniboine tribes into "pastoral and civilized people."[10] To accomplish that purpose, in 1898 the Indian Service constructed a large diversion structure in the Milk River to enable the tribes to irrigate and farm the reservation lands. The structure was downstream from diversions by settlers who appropriated water prior to 1898 (but after 1888) according to the laws of Montana. During the drought of 1904-1905, the settlers depleted the river to the point that the reservation was completely deprived of the use of any water. The United States sought to permanently enjoin the settlers from diverting water, claiming that the reservation's right to the water was senior to that of the settlers. The settlers alleged that they had validly appropriated the water under state law and thus had the senior claim. They also argued that the water was "indispensable" to their continued existence, and that if they were to be deprived of it by granting the United States the senior claim "their lands will be ruined, it will be necessary to abandon their homes, and they will be greatly and irreparably damaged."[11] Citing *Rio Grande*, the court ruled:

> The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. (*Citations omitted.)* That the government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888 . . .[12]

Hence, the federal reserved water rights doctrine came into being, but for many years it was considered applicable only to Indian reservations.[13] That impression was dispelled in 1955 when the Supreme Court handed down its decision in *Federal Power Commission v. Oregon.*[14] In that case, the Court held that the severance of water rights from federal lands accomplished by the acts of 1866, 1870 and 1877 does not apply to land reserved by the United States for the purposes of generating power. Shortly thereafter, the Supreme Court recognized federal reserved water rights for two Indian reservations, the Lake Mead National Recreation Area, the Imperial National Wildlife Refuge and Havasu Lake National Wildlife Refuge, and the Gila National Forest in *Arizona v. California*.[15] Citing *Winters*, the Court ruled that "the United States did reserve the

water rights for the Indians effective as of the time the Indian Reservations were created" and that "enough water was reserved to irrigate all the practicably irrigable acreage on the reservations."[16] The Court also concluded that "the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests."[17]

In 1952, President Truman, by proclamation issued under the Antiquities Act of 1906, reserved as a national monument Devil's Hole, a deep cavern on federal land in Nevada containing an underground pool inhabited by a unique species of fish, the Devil's Hole Pupfish. In 1968, a nearby rancher, Francis Cappaert, began pumping from wells that were hydrologically connected to the pool, with the effect that the water levels began dropping in the pool and endangering the pupfish. Cappaert applied for well permits in 1970 in pursuant to Nevada law. After unsuccessfully seeking a denial of the well permits before the State Engineer, the National Park Service filed an action in federal court seeking to limit pumping from Cappaert's wells. That case ultimately reached the Supreme Court in *Cappaert v. United States*.[18] For a unanimous court, Chief Justice Burger wrote:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.
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> * * * * * * * *
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> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.
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> * * * * * * * *
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> The implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.[19]

Cappaert argued that the Antiquities Act did not authorize reservation of a pool. The court rejected the argument, noting that the presidential proclamation creating the monument made several references to the pool, specifically stating that it was of "such outstanding scientific importance that it should be given special protection".[20] The decision approved an injunction curtailing Cappaert's pumping, but only to the extent necessary to protect the water level in the Devil's Hole pool and the resident Pupfish.

In *United States v. New Mexico*,[21] the most recent Supreme Court case to analyze the reserved rights doctrine at length, the court adhered to the precedent described above, but clarified certain aspects of the doctrine. The case involved the application of the United States, in state water court, for reserved water rights from the Rio Mimbres in Gila National Forest. The New Mexico courts concluded that the United States, in setting aside the national forest in 1899, reserved the use of such water "as may be necessary for the purposes for which [the land was] withdrawn," but that these purposes did not include recreation, aesthetics, wildlife preservation, or cattle grazing.[22] The opinion reiterates the minimal need rule articulated in *Cappaert*, adding further definition and emphasis to the limits of an impliedly reserved water right.

> Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that *without the water the purposes of the reservation would be entirely defeated.*
>
> This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.[23]

The court concluded that, despite the additional purposes for national forests described in the Multiple Use Sustained Yield Act of 1960, the Organic Administration Act of 1897 demonstrates that Congress intended national forests to be reserved only to conserve the water flows and to furnish a continuous supply of timber for the people. Recreation, aesthetics, wildlife preservation, and cattle grazing, while authorized by the 1960 Act, were secondary purposes of national forests for which Congress did not intend to reserve water rights.

> Congress intended that water would be reserved only where necessary to preserve the timber or to secure favorable water flows for private and public uses under state law. This intent is revealed in the purposes for which the national forest system was created and Congress' principled deference to state water law in the Organic Administration Act of 1897 and other legislation.[24]

Because the court denied federal reserved water rights claims for minimum stream flows in national forests, *United States v. New Mexico* is considered by most commentators to be a major victory for Western water users with rights adjudicated under state law.

II. HISTORY OF THE CASE

Creation of the Reservation.

The initial reservation for the Black Canyon of the Gunnison National Monument was established by proclamation of President Herbert Hoover dated March 2, 1933, under the authority granted to the President by the Antiquities Act of 1906, which provides in pertinent part:

> The President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected . . .[25]

President Hoover's proclamation declared that "it appears that the public interest would be promoted by including the lands hereinafter described within a national monument for the preservation of the spectacular gorges and additional features of scenic, scientific and educational interest", and directs that the National Park Service have "supervision, management and control" over the monument.[26] Adjacent lands were added to the monument in 1938 and 1939 by President Roosevelt, and an exchange with private land owners, an exclusion, and Congressional wilderness designation and boundary adjustment configured the monument to its nearly to present form by 1984. In 1999, Congress redesignated the monument as the Black Canyon of the Gunnison National Park.[27]

The Original Water Court Application.

On December 23, 1971, the United States filed an application in Water Division 4, seeking "confirmation of its rights to the use of . . . water rights appurtenant to the Black Canyon of the Gunnison National Monument."[28] The application was filed as part of the United States' adjudication of a large number of appropriative water rights, together with federal reserved water rights for seven national forests, three national monuments, a national park, approximately 1,500 public springs or waterholes and two mineral hot springs. Originally filed in four District Courts and three Water Courts[29], the cases were consolidated and assigned to a Special Master-Referee, Michael D. "Sandy" White. The Master-Referee conducted nineteen evidentiary hearings, participated in by

72 attorneys and resulting in approximately 10,000 pages of transcript, and issued his 1,200-page *Partial Master-Referee Report Regarding the Claims of the United States of America* on August 6, 1976.

The Master-Referee concluded that the United States has the power in Colorado to reserve water appurtenant to the reservations identified in its application, that it had, in fact, intended to reserve water rights for those reservations, "but only to serve the *purposes* of each particular reservation *as they existed at the time that the reservation was created*."[30] With regard to national monuments, he opined that various uses may be made of reserved waters so long as those uses serve to fulfill the a valid purpose of the monument as determined from the proclamation creating the monument.[31]

To the Black Canyon of the Gunnison National Monument, the Master-Referee decreed absolute and conditional water rights. The absolute water rights were for small impoundments of rainfall runoff for stock and wildlife watering.[32] The conditional water right was decreed for thirteen "general" uses, such as domestic, fire fighting, forest improvement, commercial and sanitary uses for tourist-related activities. Among the general uses, the Master-Referee concluded that water could be used under the federal reservation doctrine for the following uses:

> Uses for fish culture, conservation, habitat protection and management, including, but not limited to, minimum stream flows and lake levels as are necessary to:
>
> > Insure the continued nutrition, growth, conservation.. and reproduction of those species of fish which inhabited such waters on the applicable reservation dates, or those species of fish which are thereafter introduced.
> >
> > Attain and preserve the recreational, scenic, and aesthetic conditions existing on the applicable reservation dates or to preserve those conditions which are thereafter caused to exist, provided that in the Black Canyon of the Gunnison National Monument no minimum stream flows shall be available except for the Gunnison River and not for any other streams in said national monument.[33]

The Black Canyon decree further provided that:

> In or before the month of December in the fifth calendar year following the year in which this decree is entered, the United States shall file with the Court a final and specific quantification of the amounts of water in each stream segment of the Gunnison River found in the lands described above necessary to fulfill the purposes for which land is reserved.

> Such quantification shall take the form of an application to make a conditional water right absolute. . . [34]

Objections to the Master-Referee's Report were filed by several parties and, after hearings on the objections, the Water Court issued its final Decree, consistent with the Report, on March 6, 1978. Motions to amend the decree or for a new trial were filed by several parties. Those motions were denied, and the water court adopted the Master-Referee's Report with modifications reflecting the court's rulings on the prior objections. After supplemental findings and conclusions and conforming changes were made in the decree on January 24, 1979, the Water Court entered an order allowing an immediate appeal to go forward. The United States and Denver appealed.

Appeal to Colorado Supreme Court
(United States v. City and County of Denver)[35]

On appeal, Denver challenged the very existence of federal reserved water rights in Colorado. In support of its contention that the United States had not reserved any Colorado waters from appropriation, Denver cited the 1866, 1870 and 1877 federal statutes by which Congress "abandoned" its interest in waters of the West, the "equal footing" doctrine, the United States' acquiescence in Colorado's constitutional provision that vests ownership of the waters of the state in the public, and the McCarran Amendment. Further, Denver asserted that the United States Supreme Court decisions creating the federal reserved rights doctrine as *dicta* or inapplicable and should be ignored. The United States' principal arguments on appeal related to its claim (addressed in *United States v. New Mexico*) that the Multiple-Use Sustained Yield Act of 1960 (MUSYA)[36] reserved additional water for recreation, fish and wildlife purposes in national forests and its objection to the water court's determination that the quantification of the instream flow right for Dinosaur National Monument had to be concluded within six months following a final decree in the case.

Writing for a unanimous court, Justice William H Erickson observed that:

> In seeking to invoke the reserved rights doctrine as a basis for its claimed water rights, the United States seeks to proceed outside Colorado's prior appropriation system for the adjudication of water rights. The integration of the competing legal theories into a common, rational, and comprehensive system of water distribution marks a reconciliation between two fundamental themes in the development of this State.[37]

The court ruled that, contrary to Denver's arguments, after *Cappaert* and *New Mexico* it is clear that the federal reserved rights doctrine applies in Colorado.

> Accordingly, we conclude that the United States possesses reserved rights

> for its federal reservations in Colorado in waters unappropriated upon the date of reservation of the federal lands from the public domain, and in the amount necessary to achieve the primary purposes of the reservations.

The court affirmed the water court's ruling that MUSYA does not reserve additional water in national forests for outdoor recreation, wildlife or fish purposes, concluding that for such purposes Congress intended that the United States proceed under state law to appropriate water. Also affirmed was the water court's requirement that quantification of the water right for Dinosaur National Monument proceed within six months, upon the reasoning that "We do not think that six months is an unreasonable period . . . The tremendous uncertainty that [federal reserved] minimum flow rights will inject into the existing state appropriation scheme makes any further delay unjustifiable."[38]

The court also determined a number of administrative aspects of federal reserved water rights in Colorado which govern the litigation of the Black Canyon water rights, to wit:

> The purposes for which water was reserved must be determined by reference to the various documents creating the reservation, statutes, and case law. . . . The only limitation properly placed upon use of reserved waters is that the water be used only for reservation purposes and in amounts necessary to fulfill those purposes. . . . Federal reserved water rights are immune from Colorado's non-use requirement to the extent necessary to fulfill the purposes of the reservation. . . . Once the federal right has been quantified, that amount is then outside the state appropriation system.[39]

As to the priority, the United States argued that federal reserved water rights are junior only to "prior properly *adjudicated* water rights". The court cited the *Cappaert* finding that the United States has a right only to *unappropriated* water at the time of reservation, and ruled that:

> State law determines what water is "unappropriated". At this time, however, there are no parties before this court who have claimed water rights in conflict with the federal government's priority. We will resolve such a conflict when it arises.[40]

The 2001 Application
(Case No. 01CW05, Water Division No. 4)

On January 17, 2001, the United States filed an Application in the water court seeking to quantify the reserved water right for the Black Canyon of the Gunnison National Park. As directed by the 1978 decree, the Application is in the form of an application to make a conditional water right absolute. The Application asserts a priority

date of March 2, 1933 for the following uses:

> As decreed in the Partial Master-Referee Report Covering All of the Claims of the United States of America (pages 311-314 and 647-648) adopted by the Court in the decree entered March 6, 1978 (pages 38 and 132), the uses include to "Insure the continued nutrition, growth, conservation, and reproduction of those species of fish which inhabited such waters on the applicable reservation dates, or those species of fish which are thereafter introduced" and to "Attain and preserve the recreational, scenic, and aesthetic conditions existing on the applicable reservation dates or to preserve those conditions which are thereafter caused to exist."[41]

The Application seeks adjudication of a base instream flow to be determined on a yearly basis according to formulae provided. Applying the formulae, the base instream flow varies from 300 c.f.s. to 3,350 c.f.s. depending upon the total forecasted unregulated inflow into Blue Mesa Reservoir as of May 1 for the period from April 1 through July 1.[42] In addition, the Application seeks a peak flow for one day each year between May 1 and June 30 in an amount also derived from a formula based on inflows to Blue Mesa Reservoir. The peak would be achieved by ramping the flow up at the rate of 500 c.f.s. per day to the peak and then ramping down to the base flow at the rate of 400 c.f.s. per day.[43] At those ramping rates it requires 85 days to move from base flow to peak flow and back to base flow. Applying the peak flow formula to historical inflow to Blue Mesa during the period 1976-1990, peak flows vary from approximately 2,250 c.f.s. in a dry year to approximately 14,500 c.f.s in a wet year. The Application concludes as follows:

> Specific numerical flow limits on peak flows have not been incorporated into this application. The United States recognizes that exercising the right to peak flows described in this claim will require careful consideration of numerous factors, including the structural capacity of upstream dams and potential downstream flooding, among other river management issues. Therefore, the Secretary of the Interior will confer with the State of Colorado, the National Park Service, the Bureau of Reclamation, the Western Areas Power Administration, the Fish and Wildlife Service 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 above.[44]

386 Statements of Opposition were filed in the water court during the permitted period following the Application. In the Spring of 2002, the United States initiated settlement discussions. As part of those discussions, the United States offered *pro se* opposers the opportunity to accept a subordination of the Black Canyon water right to the opposer's water rights and withdraw from the case, but retaining the right to approve the final decree. These Stipulations for Withdrawal were drafted and approved by counsel for the District, Gunnison County Stockgroers, Colorado River Water Conservation District,

Crystal Creek Homeowners Association, State and Division Engineers, CWCB and Colorado Division of Wildlife. On September 5, 2003, 22 Stipulations for Withdrawal, signed by opposers and the United States, were filed with the water court. The court approved the stipulations and made them the order of the court.

On April 3, 2003, the State of Colorado and the United States entered into an agreement intended to settle the Black Canyon water right case. The agreement provided that the United States amend its application in water court to seek adjudication of a reserved water right with a 1933 priority in the amount of 300 c.f.s., or natural inflow, whichever is less. Peak and shoulder flows to meet the needs of the Black Canyon were to be achieved by means of an instream flow water right to be obtained by the CWCB with a 2003 priority. Pursuant to the agreement, the United States amended its application and the CWCB proceeded to appropriate and initiate adjudication of an instream flow water right.[45]

The environmental groups that were opposers in the case were concerned that the 300 c.f.s. base flow reserved water right in combination with a 2003 instream flow water right would not adequately provide for the needs of the Black Canyon. In September, 2003, the environmental groups filed an action in the United States District Court seeking to overturn the 2003 agreement between the State and the United States.[46] Those groups also asked the water court to stay proceedings until the federal court case was resolved. The water court entered the stay. Concerned that the filing in the United States District Court would result in a federal judge quantifying the Black Canyon water right, several opposers petitioned the Colorado Supreme Court to lift the stay and allow the water court case to proceed.[47] In a 5-2 decision, the Supreme Court declined to lift the stay, and all activity in the water court ceased. At the time that the stay was imposed the United States had signed, but not filed in the court, 84 additional Stipulations for Withdrawal.

Federal Litigation
(Case No. 03-WY-1712, United States District Court for the District of Colorado)

Plaintiffs in the federal case were High Country Citizens' Alliance, The Wilderness Society, Trout Unlimited, Western Colorado Congress, Western Slope Environmental Resource Council, Environmental Defense, and National Parks Conservation Association. The action was filed pursuant to the Administrative Procedures Act (APA)[48], which provides that a court may review final agency action and set aside actions that are "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law". Review under the APA focuses on the reasonableness of the agency's decision-making *process*. To survive judicial review, the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.

Plaintiffs' First Claim for Relief alleged that, in entering into the 2003 Agreements, the government failed to act pursuant to the National Park Service Organic Act of 1916

(NPS Act)[49] and the Black Canyon Act[50]. Specifically, failing to secure the flows sought in the 2001 Application in the water court amounted to a failure to protect the water-related natural resources of the Black Canyon as required by the NPS Act and the Black Canyon Act, and was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

Plaintiffs' Second Claim for Relief alleged that the NPS' reliance on the CWCB instream flow water right to provide peak and shoulder flows to the Black Canyon violated the duties of NPS to protect the Black Canyon's natural resources in violation of the NPS Act and the Black Canyon Act, and was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

Plaintiffs' Third Claim for Relief alleged that, prior to entering into the 2003 Agreements, NPS failed to perform an environmental analysis as required by the National Environmental Policy Act (NEPA)[51], and that failure to comply with NEPA was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

Plaintiffs' Fourth Claim for Relief challenged NPS' decision (reflected in the 2003 Agreements) to "relinquish" much of the federal government's reserved water right without specific authorization from Congress, claiming that disclaiming a "significant portion" the unquantified water right awarded by the water court in 1978 without Congressional authorization was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

Plaintiffs' Fifth Claim for Relief challenged the NPS' decision (reflected in the 2003 Agreements) to delegate to the CWCB the authority and responsibility for protecting the water rights and other natural resources of the Black Canyon as unlawful under the provisions of the NPS Act and Black Canyon Act.

Judge Brimmer agreed with all of the Plaintiffs' allegations, concluding that the United States had "relinquished a water right with a 1933 priority date" in agreeing to amend the NPS application for a federal reserved water right to seek only a 300 c.f.s. base flow.[52]

In response to the third claim, the judge wrote that "A permanent relinquishment of a water right with a 1933 priority date for such a scientifically, ecologically, and historically important national park must be viewed as a major federal action requiring compliance with NEPA." The United States argued that the settlement with Colorado was a litigation decision within the discretion of the Department of Justice, but Judge Brimmer dismissed the argument, saying that "Defendants cannot shield their conduct from review or from the ambit of NEPA simply because [they] advocated their position on water court."

In response to the fifth claim, the Court agreed with Plaintiffs that delegation of authority and responsibility to Colorado, in the form of the CWCB instream flow water right, is prohibited. The United States argued that, since the reserved water right has not been quantified, it did not give up anything in reaching a compromise which satisfied a number of interests. The judge wrote "The Court does not judge the value of the compromise, but does judge the manner in which the compromise was reached . . . through delegating the determination and acquisition of the proper peak and shoulder flows to the state of Colorado."

In response to the fourth claim, the judge found that ". . . the decision to seek adjudication of a smaller amount than needed represents a disposition of federal property. Only Congress, and not an executive branch agency, can authorize the disposition ."

In response to the first and second claims, the court ruled that the Defendants' entry into the 2003 Agreements violated their nondiscretionary duties to protect the Black Canyon's resources. The United States argued that the 2003 Agreements are not reviewable under APA because they are not a "discreet agency action", and because decisions on how to protect the Canyon's resources are committed to agency discretion. The court rejected these arguments, concluded that Plaintiffs' claims are reviewable by the court, and found that " the effect of the [2003 Agreements] was actually to remove the administration of the Black Canyon resources from the National Park Service in direct contravention of the [NPS Act], the Black Canyon Act and the Wilderness Act", and that it was "arbitrary, capricious, and an abuse of discretion" to enter into the 2003 Agreements.

The Court ordered that the United States' "entry into the [2003 Agreements] is SET ASIDE. The matter is remanded to the National Park Service for further proceedings consistent with this decision."

At the March 1, 2007 status conference in water court, the United States formally withdrew its motion to amend its Application. Thereafter, the principal parties entered into mediation which resulted in a stipulated decree.

1. Trelease, *Federal Reserved Water Rights Since PLLRC*, 54 Den. L. J. 473 (1977).

2. RWR, p. 37-3.

3. Act of July 26, 1866, ch. 262, 14 Stat. 251.

4. 43 U.S.C. § 321.

5. 174 U. S. 690 (1899).

6. "Dictum" (technically *obiter dictum*) is a comment made in the course of delivering a judicial opinion that is unnecessary to the decision in the case, and therefore theoretically creates no legal precedent.

7. *Rio Grande Ditch & Irrigation Company*, 174 U.S. at 703.

8. 26 Stat. 454, § 10.

9. 207 U. S. 564 (1908).

10. *Id.* at 576.

11. *Id.* at 570.

12. *Id.* at 577. Ironically, Justice Brewer dissented. Also cited was *United States v. Winans*, 198 U. S. 371 (1905), a case involving Indian fishing rights.

13. "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." Trelease, *supra.*, at 475.

14. 349 U. S. 435 (1955).

15. 373 U. S. 546 (1963).

16. *Id. at* 600.

17. *Id. at* 601.

18. 426 U. S. 128 (1976).

19. *Id. at* 138-141. The final passage is commonly know as the "minimal need rule."

20. *Id. at* 132. The Antiquities Act is discussed in more detail at page 6 below.

21. 438 U. S. 696 (1978).

22. *Id. at* 698.

23. *Id. at* 701-702; *emphasis supplied*.

24. *Id. at* 718.

25. Act of June 8, 1906, 34 Stat. 225, 16 U.S.C. § 431; also referred to as "The Act for Preservation of American Antiquities".

26. Proclamation No. 2033, March 2, 1933, 17 Stat. 2558.

27. Black Canyon of the Gunnison National Park and Gunnison Gorge National Conservation Area Act of 1999, 106 P. L. 76; 113 Stat. 1126, 16 U.S.C. § 410fff. An additional boundary adjustment added 2,530 acres in 2003 (108 P. L. 128; 117 Stat. 1355).

28. Application of the United States of America, Case No. W-437, Water Division No. 4, State of Colorado.

29. Four of the claims were filed in the District Courts in former water districts 36, 37, 51 and 52 under the general adjudication provisions of the Adjudication Act of 1943, §§ 148-9-7 *et seq.*, C.R.S. (1963), and three were filed in the water courts for Divisions 4, 5 and 6 pursuant to the Water Right Determination and Administration Act of 1969, §§ 37-92-101 *et seq.*, C.R.S. (1973).

30. *Partial Master-Referee Report Regarding the Claims of the United States of America*, August 6, 1976, 6-7 (*emphasis in original*).

31. *Id. at* 311-312.

32. *Id. at* 643-644.

33. *Id. at* 643.

34. *Id. at* 646-647.

35. 656 P. 2d 1 (1982).

36. 16 U.S.C. §§ 528-31.

37. 656 p. 2d at 4.

38. *Id. at* 30. Inasmuch as the water right for the Black Canyon National Monument was likewise decreed as a conditional water right, the question arises whether the six-month limitation applies for quantification of that right. The United States asserts that a "final decree" was never entered in that case, and thus the six months did not commence.

39. *Id. at* 34-35.

40. *Id. at* 35. Under Colorado law, water is appropriated by diversion from the stream and application to a beneficial use. Many of the water rights adjudicated in the 1941 and 1943 decrees in the Gunnison Basin were appropriated prior to March 2, 1933. Thus the priority of the Black Canyon right as related to those rights

adjudicated in 1941 and 1943 could depend on the resolution of this issue.

41. *Application to Make Absolute a Conditional Water Right for the Black Canyon of the Gunnison National Park*, Case No. 01CW05, Water Division No. 4, at 2.

42. *Id. at* 3.

43. *Id. at* 3.

44. *Id. at* 4.

45. *See* Case No. 03CW265, Water Division No. 4.

46. Case No. 03-WY-1712, United States District Court for the District of Colorado.

47. *United States v. Colorado State Engineer*, 101 P.3d 1072 (2004).

48. 5 U.S.C. § 701 *et seq*.

49. 16 U.S.C. § 1 *et seq*.

50. 16 U.S.C. § 410fff.

51. 42 U.S.C. § 4331 *et seq*.

52. Since the water right has not been quantified, it is hard to understand what was "relinquished", and the ruling provides little guidance for understanding this conclusion.