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**Bonnie G. Colby, John E. Thorson, Sarah Britton, Negotiating Tribal Water Rights:  
Fulfilling Promises in the Arid West**

Colorado law treats water right sales as it does land sales. However, while warranty deeds are the most common in real property sales, they are rare in the sale of water rights. Warranty deeds, the strongest guarantee, obligate the seller to defend title if any title issues arise. These are not popular in water right sales because water records can be difficult to trace. Special warranty deeds are more popular in water transactions: the seller promises that he has not done anything to the title, but makes no promises about his predecessors. A final deed is a deed without any promises, a quitclaim deed, which may be appropriate when both parties understand that the title is unclear or in the middle of a legal proceeding. Finally, the prospective buyer must perform the important step of due diligence to ensure delivery of water to the buyer's land both legally and physically.

In the final chapter, *Emerging Trends and Issues*, the book details three main issues likely to change future water law policy: (1) population growth, resulting in a decline in agriculture; (2) groundwater allocation; and (3) environmental concerns. The book cites studies projecting a sixty-five percent increase in population in Colorado by 2030. This population increase will demand more water diversions to Front Range municipalities. The authors argue that municipalities will need to convert irrigation water to municipal uses. Cessation of irrigation wells will have far reaching consequences beyond simply closing farms, including various social and environmental costs. Additionally, groundwater allocation will result in more wells shutting down as senior users with ineffective means of diversion put more calls on a river. Finally, the prior appropriation system does not take into account the environmental effect of water diversion. The authors argue that Colorado will have to change a strict reliance on prior appropriation to deal with these pressing issues.

*Colorado Water Law for Non-Lawyers* is a beneficial book for anyone seeking to obtain a general understanding of Colorado water law, whether non-lawyer, non-water lawyer, or law student. Additionally, water practitioners can recommend this book to their clients, who might have little knowledge of the water right they have or seek to have. The book succinctly lays out historic principles and explains current and future issues in Colorado water law.

*Shannon Carson*

**Bonnie G. Colby, John E. Thorson, Sarah Britton, *Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West*, The University of Arizona Press, Tucson, AZ (2005); 191 pp; \$35.00; ISBN 0-8165-2455-6; soft cover.**

*Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West* presents a thorough overview of Indian water issues in the Western United States. Water conflicts pose a problem in every river in the West, and these conflicts seem to worsen every year. At the heart of these troubles is the great uncertainty of ownership that pervades the water

rights system. Numerous Indian tribes have claims that they have not legally asserted over significant water resources, which other non-Indian communities infringe upon. Between the scarcity of water and the growing competition for those water resources, many Indian reservations have consequently found themselves in danger of suffering severe water shortages. These unasserted water claims remain mostly theoretical and only on paper, although a few of them have been resolved in court or through other means of resolution. As water becomes a more valuable commodity in the twenty-first century, many citizens, both Native American and not, have become alarmed about the general uncertainty of water right ownership. This book presents a summary of the numerous dilemmas that usually occur in every water basin with Indian reservations and reserved water rights, and provides practical guidance on how to negotiate western water issues and tribal water disputes.

The book consists of ten chapters divided into four parts, and includes an introduction, a foreword, numerous maps, illustrations, and photographs. Part One, *The Context for Indian Water Settlements*, is composed of the first three chapters and focuses on the legal background of Indian water rights throughout history. Part Two, *Stakeholders*, centers more on the perspectives and common goals that all potential stakeholders have when water rights are at issue. Chapters six through eight make up Part Three, *Making Settlements*, which concentrates on the aspects of the negotiations process. Finally, Part Four, *Hopes and Concerns*, consists of the ninth chapter, which studies past settlements over water rights and examines the many issues that can arise in these situations, and the tenth chapter, which provides a conclusion to the book and the authors' thoughts for the future.

The foreword, written by University of Colorado School of Law Dean David H. Getches, sets the background of the book by describing the large numbers of Indian tribes that hold significant and expansive water rights. Many of these tribes have not had the means to legally assert their water rights and, consequently, continue to suffer in poverty. Because Indian tribes now have more legal advocacy for their rights than they have had in the past, the declared purpose of the book is to "inform and incite dialogue on Indian water rights, leading to their settlement."

The introduction follows where the foreword leaves off, explaining that negotiations over Indian water rights will substantially shape the future of both Indian and non-Indian communities in the western United States. In light of this noteworthy crisis, the authors' intent of publication is to "provide information and ideas to fuel productive and well-informed dialogue among the many tribal and non-tribal stakeholders who rely upon the waters of the western United States."

The first chapter, titled *Historical Background*, reviews the history of the Indian peoples from the time the first Europeans came to the western lands in the sixteenth century. The Indians experienced persecution and generally suffered unfair treatment at the hands of the new European settlers. As the United States eventually assumed control

of most of the western lands, the government implemented policies involving relocation of Indian tribes to reservations. While the last thirty years have shown an unprecedented development in tribal economies, leadership, and general self-sufficiency, the authors explain that major problems involving water rights still exist for the Indian peoples.

The second chapter, *Legal Background*, describes the legal setting that most Indian tribes have experienced in regards to their water rights. The doctrine of prior appropriation, which generally states that the first person using water should have right to the water, has governed Indian water rights for over a century. In 1908, the Supreme Court of the United States expanded this concept in *Winters v. United States*, where the Court prohibited any non-Indian use of water that interfered with the tribes' use of their reserved water. Through tribal sovereignty, federal funding, and obligations to the tribes, the authors show that the Indian tribes today have a unique legal setting in which to negotiate for their water rights.

In the third chapter, *Indian Water Rights and the New West*, the authors review how the demographic changes and the new economy of the western United States have significantly formed the water rights system today. The West's massive population boom of the 1990's, coupled with the significant role that agriculture plays in the West, have quickly created an environment where water shortages are frequent and expected. Other factors including climate change, cyclical drought, changes in the administrative agencies of the United States, and national economic trends that cause reductions in federal funding have also lent a hand in creating this dire situation. The authors warn that Indian tribes, while often poverty-stricken, must remain aware of their own water rights and legal issues.

The fourth chapter, entitled *Hopes and Concerns*, explores the mutual goals and separate motivations of all the stakeholders in western waters. Some of these mutual or collective goals include reliable access to water, effective management of water resources, improved community and intergovernmental relations, economic development, conflict resolution, and the ability to anticipate and plan for the future. Individually, Indian tribes often strive to increase development of water resources for use on reservations, exercise their sovereign authority to manage their natural resources, and generally accommodate the diverse interests of the tribe concerning the use of the water rights. In like manner, non-Indian water users often have their own private motivations, including reducing uncertainty where water is concerned, accommodating competing water interests, and protecting their own current water use. Then, to complicate matters further, environmental agencies proclaim province concerning ecological management and preventing environmental damage. State and federal governments promulgate interests, such as protection of state and federal water-management authority, and achieving consistency with state and federal laws. It is through this complicated maze of stakeholders, that the parties must attempt to reach a settlement.

The fifth chapter, *Perspectives*, further discusses the hopes and concerns of stakeholders by presenting interviews with four active participants in the litigation and negotiation of Indian water rights. These interviews consist of a series of questions that thoroughly explain the interviewees' outlook towards the negotiation of water rights. The authors' first interview is John Echohawk, a Pawnee Indian lawyer who is executive director of the Native American Rights Fund ("NARF"). Echohawk shares his unique viewpoint by explaining NARF's essential role in the Indian water rights settlement movement. Second, the authors interview Nelson J. Cordova, former governor of Taos Pueblo. Cordova has had extensive experience and education involving tribal administration, and is currently a member of the tribal council. Next, the authors interview George Britton, former Phoenix Deputy City Manager. Britton was responsible for both water and wastewater management activities of the city, and has had broad experience in the politics of water. Finally, the authors conclude by questioning David J. Hayes, who was Deputy Secretary of the Department of the Interior during President Clinton's administration.

The sixth chapter, *Settlement Processes*, takes the reader stage by stage through the entire negotiation and settlement process. This lengthy and complex process usually starts with preparation for negotiation, which involves finding the right stakeholders to first approach, identifying the spokespersons to speak at the negotiations, and taking into account the role of the state and federal administrations. The process then progresses to coordinating litigation with negotiations and developing information and positions. These processes involve identifying major goals and issues, establishing general protocols for the settlement process, and detailed gathering of information and data relevant to the negotiation. Funding settlement agreements is the next stage and always presents a challenge for parties, especially for Indian tribes who usually are lacking in resources to subsidize litigation. Additionally, all parties involved are enjoined and must obtain any proper authorization or approval by the federal government, state government, or the courts regarding the negotiations. Finally, the authors explain the concluding stage of the settlement process, the implementation of the negotiated agreement.

The seventh chapter, *Settlement Components*, delves deeper into the settlement process by explaining the different factors that shape the final negotiations. The authors explain common strategies for obtaining water for tribal settlements, the process of acquisition of water rights through water markets and transfers, and the financial components of settlements such as federal contributions and cost sharing.

The eighth chapter, *Making Water Available for Indian Water Rights Settlements*, discusses how Indian tribes specifically attain available water in accordance with their water rights. While past Indian water rights settlements have principally led to reducing competition for the local water, tribes often employ other methods to realize adequate water, such as importing water supplies from outside the local area, purchasing off-reservation water rights, developing new local water

resources, and various water conservation techniques.

The ninth chapter, *Representative Settlements and Settlement Efforts*, focuses on "a series of settlements and settlement efforts... that represent various conditions and solutions." Essentially, the authors utilize the information presented in the preceding eight chapters and explain it in a sequence of examples involving water rights litigation. For example, the Wind River Litigation (1992) is a decades-long litigation involving Wind River and the Shoshone Indian tribe in Wyoming. In addition, the Ak-Chin Water Settlement (1978) concerned the water rights of the Pima and Papago Indians of Arizona, and involved strong Congressional help and leadership from Arizona representative John Rhodes.

Finally, the tenth chapter, *Conclusion*, ends the book by re-examining the plight of American Indians and their water rights. The authors offer a series of suggestions on how we can achieve a quicker progress regarding the settlement of Indian water rights claims. For example, Congress can do more to promote progress and equity, tribes and states can aspire to more consistent leadership, and parties should more frequently use mediation techniques in lieu of expensive and time-consuming litigation.

*Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West* is an extremely useful study of the current status of water rights negotiations in the western United States. The book reads with sufficient narrative, flavor, and personality to keep most legal readers interested and informed. The analyses of the legal history as well as the manifold aspects of the negotiation and settlement processes would be of particular interest to anyone involved in water rights litigation in the western United States.

Ethan Ice

**Robin Kundis Craig, *The Clean Water Act and the Constitution: Legal Structure and the Public's Right to a Clean and Healthy Environment*,** ELI Press (2d Ed. 2009); 308 pp; \$50.00; ISBN 978-1-58576-138-8; soft cover.

Professor Robin Kundis Craig excellently describes the development of the Clean Water Act ("CWA"), the CWA's constitutional implications, and whether the right to clean water is a constitutional right. Professor Craig is the Attorney's Title Insurance Fund Professor of Law and Co-Director of the Environmental and Land Use Law Program at the Florida State University College of Law. She specializes in the CWA, coastal water pollution, the intersection of water and land issues, marine biodiversity and protected areas, water law, and climate change.

In the Second Edition of this book, Professor Craig addresses the CWA and the Constitution in three parts. First, she describes the development of federal regulation and enforcement of water quality. This includes implications on the Supremacy Clause, federalism and comity among states, sovereign immunity, commerce, and takings.