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Lloyd Burton, American Indian Water Rights and the Limits of Law

for the cliff dwellers is clear from the way he approaches and addresses the subject.

The chapter "The Role of Climate on Water Institutions in the Western Americas" discusses several interesting and important topics, including drought, paleohydrology, Machu Picchu, ice cap reconstruction data, and Powell's observations of Native American and Mormon water practices. Especially fascinating is the discussion of the "dust bowl years" and their impact on water use and conservation. The author states, "The Dust Bowl years motivated the Colorado Legislature to find better ways to manage water locally."

Another chapter worth noting, "Colorado's 1969 Adjudication and Administration Act: Settling In," is a true gem packed with many nuggets of valuable legislative history. The author discusses the Act of 1879; the 1881 Adjudication Act; the 1903 Adjudication Act; the Act of April 9, 1919; the Adjudication Act of 1943; the 1965 Ground Water Management Act; and the 1969 Adjudication and Administration Act. To grasp and master water law, one first must understand the legislative history and the issues and pressures that led to the legislation. This chapter provides that history.

The book includes a chapter entitled "A Decade of Colorado Supreme Court Water Decisions 1996–2006." This chapter addresses many very important water law doctrines, such as water as a public resource, beneficial use and anti-speculation, can and will, due diligence, change of water rights, invalid enlargement, augmentation plans, in-stream flows, and in-channel recreational rights. In this extremely valuable chapter, the author explains difficult and obscure doctrines and makes them understandable. It is to the reader's benefit that the author participated in many of the water law decisions from a position on the Colorado Supreme Court Bench.

Without a doubt, this book is fascinating and enlightening—a valuable and scholarly work that will be consulted for generations. I highly recommend it, and I plan to make it required reading for my water law students.

Lloyd Burton, *American Indian Water Rights and the Limits of Law*, University Press of Kansas (1991); 192 pp; \$16.95; ISBN 0-7006-0601-7; soft cover.

American Indian Water Rights and the Limits of Law is a thorough water policy study of the history of American Indian water rights and the methods of managing disputes over these rights. The author, Professor Lloyd Burton, teaches at the University of Colorado at Denver, where he coordinates the public law curriculum and directs the Environmental Policy, Management, and Law program.

The study traces the long and eventful history of American Indian water rights and the role of the law in adjudicating those rights. Bur-

ton analyzes numerous water disputes and negotiations following the Supreme Court's 1908 holding in *Winters v. United States*, which created reserved-water rights for tribal reservations. Furthermore, the book analyzes the state of American Indian water policy and law in the early 1990s, and the future direction of the negotiation and adjudication processes. Burton's solutions seek to achieve "socially just resource distribution without additional environmental despoliation." Burton argues that more effective and reliable dispute resolution alternatives will provide American Indian tribes, the federal government, and state and local governments with positive solutions to the ongoing water wars amongst these entities

Chapter 1, *Reflections in a Glass Bead*, lays out the history of American Indian water rights adjudications and its underlying themes. A major theme goes back to history's initial accounts of interactions between European settlers and American Indian tribes; namely, the settlers' acquisition of the future area of Manhattan for beads and trinkets worth twenty-four dollars. This idea of tribes trading rights to natural resources for symbolic wealth exists today in water rights litigation and negotiation. Additionally, Burton focuses on a metaphor from Herman Hesse's *Das Glasperlenspiel* (The Glass Bead Game) which describes the "intellectual elite who have taken it upon themselves to transmit the essence of high culture down through the ages by means of an elaborately structured transaction, or game." According to Burton, a small group of influential people conducted water resources management in a similar vein for much of the twentieth century. However, today new groups are joining this game. American Indian tribes constitute many of these groups.

Chapter 2, *The Development of American Indian Water Rights*, introduces the "ship with three rudders," an apt description of constitutional separation of powers' effects on historical developments in American Indian water law. The judiciary "rudder" views tribes as "nationlike entities," while the executive and legislative branches treat the tribes as ethnic minority groups. Given the importance of the tribes' federal-reserved water rights set forth in *Winters v. United States*, these distinct concepts of the tribes' autonomy create a veering water rights ship. *Winters* stands for the proposition that American Indian tribes impliedly retained water rights when land was set aside for their reservations. However, the tribes lacked the political power to enforce the *Winters* doctrine and therefore the executive and legislative branches did not account for these rights. Examples of this enforcement inability are evident in the Reclamation Act of 1902 and the Colorado River compact negotiations in 1922. The Reclamation Act of 1902 built huge irrigation systems; however, these systems served non-Indian entities despite the tribes' substantial water rights. Furthermore, the Colorado River compact negotiations did not include tribal representatives even though the tribes' reserved-rights claims constituted the largest claim

among the negotiating parties. Accordingly, *Winters* federally reserved water rights did not factor into the allocations in the compact.

The Supreme Court quantified these *Winters* rights in the landmark 1963 case *Arizona v. California*, determining that the rights reserved enough water for the “practicably irrigable acreage” on each reservation. However, despite the Court’s support of the *Winters* doctrine, Congress and the executive continued to “ignore the Indian right or to subvert it indirectly (by facilitating non-Indian water appropriation under state laws).”

While tribal sovereignty has increased in areas like criminal jurisdiction, child welfare, and energy resource development; American Indian tribes have less control over water resources. Chapter 3, *Legal Issues and Dispute-Managing Methods in Contemporary Water Rights Conflicts*, boils this lack of control down to uncertainty in areas such as jurisdiction of water rights’ adjudications, quantification of water rights, uses of reserved waters, authority over management of water resources, and legal representation. The resolution of these issues will determine the tribes’ economic and social futures.

Burton tackles each of these issues in Chapter 3. First, the Supreme Court’s changing composition from 1976 onwards made the Court’s rulings more deferential to the states. Burton outlines numerous cases delineating this emerging states’ rights mentality and state courts’ restrictive views of tribal water rights. Accordingly, this creates uncertainty for the tribes as to the jurisdiction in water cases. Second, tribes continue to disagree over whether the quantifying of *Winters* rights is in each tribe’s best interest. Burton believes “the weight of opinion is probably against quantification because the sense of indeterminacy created by a legitimate, unquantified reserved-rights claim is one of the Indians’ principal sources of bargaining power.” Third, despite the *Arizona v. California* “practicably irrigable acreage” quantification, *Winters* holds that the purposes for creating a reservation determine the amount of water reserved for that reservation. The *Arizona* quantification provides for agricultural uses; however, considerable uncertainty exists for the tribes concerning the amount of self-determination they have for other uses of water. Fourth, one of the most controversial issues in Indian water rights is the tribes’ ability to market and lease their water to non-Indian users. As water resources grow scarcer, this debate will continue flaring because the sale of water could provide the tribes with an enormous economic boon. Fifth, tribes are becoming more willing to take legal action against polluters of their water despite the uncertainty of their authority over water quality management. Finally, the federal government has historically represented the tribes as a trustee in court. However, some tribes see this as a conflict of interest for the government and seek to represent themselves at the bargaining table.

Having identified pertinent issues facing the tribes in Chapter 3, Burton explores negotiated settlements as a dispute resolution tool in Chapter 4, *The Peril and Promise of Negotiation: A Closer Look*. Negotiated settlements increased in popularity in the 1980s; however, they are not a novel concept. These settlements date back to the *Winters* doctrine, and feature “concerted efforts to get the tribes to relinquish a reserved-rights entitlement in return for the guaranteed provision of a lesser quantity of water.” Burton traces these settlements from the 1910 Kent Decree between the Salt River Pima-Maricopa Indians and non-Indian Arizona water users to the 1989 Utah Ute Water Rights Settlement Bill. While the distinctive features of these agreements change over time, Burton argues these negotiated settlements resemble the colonial trade of trinkets and beads for Manhattan because the tribes essentially trade reserved water rights for “token wealth.”

Early negotiations involved substantial pressure on the tribes and resulted in generally unfavorable settlement terms. However, this level of coercion caused a lack of durability and some of these settlements spawned significant water litigation. Moreover, the tribes entered settlements throughout the 1960s deferring or surrendering senior water rights in exchange for unfulfilled promises and “illusory” economic development. Burton believes these settlements “resemble delaying actions rather than just and durable solutions.” Contemporary settlements exhibit some of these qualities as well. However, some of these settlements use interest-bearing trust funds to cover the costs of keeping the settlements in effect. These trust funds “offset Congress’s historic inattention to promises made to the Indians” Additionally, two settlement acts contain damages clauses. Therefore, if the promised water is not delivered the federal government must pay damages to the tribes. These clauses are controversial because while they provide tribes with economic compensation for unfulfilled promises, they also effectively allow the federal government to condemn a tribal water right for simple monetary compensation. Despite these advantages to the tribes, these agreements still result in a net loss of water resources because the tribes forfeit their reserved rights in exchange for a lesser amount of wet water.

Chapter 5, *Groundwater Rights, Planning, and Bargaining in South-Central Arizona*, builds on this background of negotiated water settlements by focusing on the Ak Chin and Tohono O’Odham Settlement Acts of 1978, 1982, and 1984. In each of these settlements, the tribes chose the political process over the legal process due. The negotiated settlements featured the trading of theoretical paper water for wet water. Both tribes are located in south-central Arizona, and Burton lays out a history of the water issues confronting this area of the country. The O’Odham settlement began with the tribe filing a lawsuit against numerous defendants, including the city of Tucson, claiming reserved rights to the groundwater of the basin and an aquifer beneath the res-

ervation. The Supreme Court fortified the tribe's position with its decision in *Cappaert v. United States*, which extended the reserved-rights doctrine to groundwater. However, the mounting costs of litigation soon led the tribe to the bargaining table. The eventual settlement featured a \$15 million trust fund, \$10.5 million cooperative fund, marketing rights, and 37,800 acre-feet of water annually to two areas of the reservation. Additionally, if the promised water is not delivered, the settlement holds the government liable for damages.

The Ak Chin approached Congress amid sinking lands from massive groundwater removals and following the Supreme Court's decision in *Caepfert*. The tribe's proposal waived all of their claims to past, present, and future water rights claims in exchange for an adequate and quantified amount of water each year. This agreement, sponsored by Congressman Morris Udall, passed both houses of Congress and became law. However, the government began missing deadlines on its 85,000 acre-foot annual obligation, and in 1983 the parties revised the agreement. While the Ak Chin agreement does not have the appropriations insurance of the O'Odham agreement, the damages provision is superior because it bases damages on the replacement cost of the water. Accordingly, the market value of the water is the amount the government must pay the Ak Chin and, as water grows scarcer in the western United States, this could represent a significant expenditure for the government. Moreover, it makes the risk of an effective condemnation less likely because of this substantial cost.

Burton closes his study by looking at the future of negotiated settlements in Chapter 6, *Conclusion: Improving the Prospects for Negotiated Settlements*. He notes that tribes are now looking to "secure in fact the water resources they have previously held in theory." While negotiated settlements have common features such as using interest-bearing trust funds in financing implementation of agreements, many differences remain. Most importantly, marketing rights to non-Indian users and damages provisions are not a mainstay of all negotiated settlements. Burton chalks this up to a system that still crushes the weak and rewards the strong. The benefits of a negotiated settlement to a particular tribe remain tied to intangibles, such as having a champion in Congress and the abilities of legal counsel. Accordingly, efforts to streamline the process through comprehensive settlement legislation should be undertaken. Burton also proposes the formation of an American Indian Water Rights Commission to assist in intergovernmental water resource planning, the acquisition and analysis of data, the drafting and recording of model agreements, the standardization of procedural guidelines for negotiations, and providing facilitators and sponsorship for negotiations.

American Indian Water Rights and the Limits of Law is an exhaustive study of the history of American Indian water rights adjudications. While to a novice the study's detail can be confusing and difficult to

track, Burton ably aggregates these details into overarching themes and issues. This results in a fascinating overview of tribal water rights, the current state of negotiations, and the future issues facing the tribes, western states, and the federal government. As water resources become sparse in the western United States, Burton's study can serve as a thorough analysis of history's errors and successes in tribal water rights negotiations. Hopefully these errors will be accounted for in future adjudications and legislation, resulting in more thorough and fair settlements between tribes, states, and the federal government.

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Susan Hunter, Richard W. Waterman, *Enforcing the Law: The Case of the Clean Water Acts*, M.E. Sharpe, Inc., Armonk, NY (1996); 249 pp; \$43.95; ISBN 1-56324-682-1, soft cover.

Congress and President Clinton put forth a message that law enforcement must be strict and severe. With regard to the Federal Water Pollution Control Act of 1972, otherwise known as the Clean Water Act ("CWA"), this message is still not clear. There is unambiguous evidence that regulatory enforcement in the area of environmental protection has not been very effective. In *Enforcing the Law*, Hunter and Waterman evaluate the motivations of enforcement personnel, the constraints they face, and how they perceive the entities they regulate.

Hunter and Waterman argue that the level of the bureaucratic response directly correlates to the diversity of the regulatory environment. The authors conclude that the regulatory environment consists of the various actors that agency personnel deal with on a regular basis, the economic conditions relevant to the problem being regulated, the organizational structure employed by the various regulating agencies, the manner in which the agencies interact with each other, the way in which pertinent legislation is written, the demographic population for the regulatory action, and the nature of the externality being regulated. Each state and region deals with different geography, economic basis, population densities, and political pressures. Because the control of surface water pollution occurs in a large and diverse regulatory environment, the regulators operate flexibly in their approach, allowing for drastic variations by region.

The Environmental Protection Agency ("EPA") shapes the institutional setting with its largely discretionary role in both organization and rule making in the National Pollutant Discharge and Elimination System ("NPDES"). EPA functions with a centralized control by the Administrator and decentralized authority over its functional units. EPA's decentralizing tendency, its frequent delegation to the states, and the considerable discretion given to EPA officials accentuated the already apparent regional differences. EPA's dual contradictory objectives of national consistency and the accommodation of state and re-