

Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West

by Bonnie G. Colby, John E. Thorson, and Sarah Britton. University of Arizona Press, 2005, \$35.

Reviewed by **Lawrence J. MacDonnell, J.D., Ph.D.** – Porzak Browning & Bushong, LLP

Negotiating Tribal Water Rights fills the need for a historical overview of the complex issue of tribal water rights in the West and provides a look at how future settlements might be successfully negotiated to benefit all parties.

The existence of “reserved” water rights for tribes and other federal reservations of land has been a continuing source of friction between states in the West and the federal government over the past 100 years. Such rights exist independently of state water law, arising from initial federal ownership of public lands and their water. That such reserved lands never passed into private ownership, and thus to state sovereign control, is one source of friction; worse is the assertion that federal rights to water exist outside of state-established water rights.

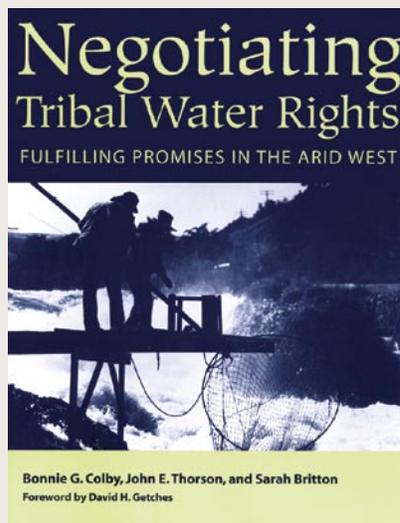
While legal foundations for the reserved rights doctrine are subject to dispute, the fundamental equities are plain. Under treaties, American Indians were induced or compelled to settle on comparatively small reservations of land and establish permanent homelands. In most cases it was anticipated the residents would become farmers. Since farming was generally impossible without water for irrigation, the provision of enough water to support it as a livelihood must have been implied, the U.S. Supreme Court decided in 1908.

As a result, tribes residing on reservations carved from federal lands have inchoate rights to some unspecified amount of water, with a priority based on the dates the reservations were established—usually in the 1800s. Unlike prior appropriation rights, reserved rights are not lost by nonuse. In those instances in which tribal reserved rights have been adjudicated,

they have most often been quantified as the amount of water needed to irrigate all arable lands on the reservation.

The potential for adjudicated tribal water rights to displace existing uses prompted negotiations to search for acceptable alternatives. A flurry of successful settlements were negotiated in the 1980s, based in significant part on congressional appropriations to tribes to support on-reservation economic development. Budget issues undermined political support for this approach in the 1990s. Subsequent negotiations lacked the promise of substantial federal funding and have struggled to find the ingredients necessary to produce agreement among the interested parties.

Negotiating Tribal Water Rights tells this story well, while providing an accessible



introduction to the larger context of law, economics, and politics in which it takes place. The authors give considerable attention to the nature of negotiations and to important elements of the settlement process. Case studies of settlements are provided, and some attempt is made to derive lessons learned from this experience. Materials are presented in a reader-friendly mix of text, sidebars, and interviews. Overall it makes for an unusual blend of practice and theory.

While acknowledging the inevitability of continued litigation over reserved rights, the authors remain optimistic that negotiations can best fulfill the promises that these rights represent for tribes. For those interested in this important dimension of western water issues, this is a book well worth reading.

Lawrence J. MacDonnell is former director of the Natural Resources Law Center at the University of Colorado, Boulder. Contact him at LMacDonnell@pbblaw.com.



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