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American Indian Culture and Research Journal

Title

Tribal Water Rights: Essays in Contemporary Law, Policy, and Economics. Edited by John Thorson, Sarah Britton, and Bonnie G. Colby.

Permalink

<https://escholarship.org/uc/item/6p87b6hj>

Journal

American Indian Culture and Research Journal , 31(1)

ISSN

0161-6463

Author

Anderson, Robert T.

Publication Date

2007

DOI

10.17953

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of why there is so much anxiety surrounding the ownership and commodification of Northwest Coast Native arts. As the author puts it, “identity and its material embodiment, the production and possession of objects, are not created on only one side of a boundary between ‘us’ and ‘them’; rather identity and ownership are constantly being fashioned and valued via the recognition on the part of outsiders that Nuxalk heritage is worth having an owning” (118).

Alexis Buntin

University of California, Berkeley

Tribal Water Rights: Essays in Contemporary Law, Policy, and Economics. Edited by John Thorson, Sarah Britton, and Bonnie G. Colby. Tucson: University of Arizona Press, 2006. 304 pages. \$50.00 cloth.

Indian water rights are in play throughout the West, and this collection of essays provides an examination of some of the issues encountered in litigating and negotiating Indian water rights. The introduction to the book describes *Tribal Water Rights* as a more detailed and in-depth sequel to issues dealt with in the soft-cover work, *Negotiating Tribal Water Rights*, also edited by Bonnie G. Colby, John E. Thorson, and Sarah Britton (2005). The fourteen chapters in *Tribal Water Rights* cover a wide range of matters—ranging from general principles of federal Indian law to highly specialized aspects of Indian water rights. As might be expected with multiple authors, the treatment of the various topics is mixed in terms of depth and quality, but in the end the book adds value to the body of literature dealing with Indian water rights. Unlike two other excellent treatments of legal history and the politics of settlement (respectively, John Shurts, *Indian Reserved Water Rights: The Winters Doctrine in its Social and Legal Context, 1880s–1930s* [2000] and Daniel C. McCool, *Native Waters* [2002]), this collection of essays serves as a solid practical guide for those who are actually engaged in litigation and/or negotiation of Indian water rights.

The doctrine is premised in part on aboriginal Indian ownership of what is now the United States, as well as on federal action setting aside lands as Indian reservations. In *Winters v. United States* (1907) the Supreme Court interpreted an agreement between the Indians of the Fort Belknap Reservation and the United States that was ratified by Congress. In the agreement, the Gros Ventre and Assiniboine Bands surrendered most of their aboriginal land and retained a much smaller reservation adjacent to the Milk River in Montana. Non-Indians who had settled upstream of the reservation claimed paramount rights to use water from the Milk River based on the prior appropriation doctrine, which is followed by all of the western states. The Indians would need water being used by the non-Indians if they were to grow crops contemplated by the agreement creating the reservation. The Supreme Court ruled that the United States and the Indians intended to reserve the waters of the Milk River to fulfill the purposes of the agreement between the Indians

and the United States. The Indian rights were superior notwithstanding the intervening use by the non-Indians.

Unfortunately for the tribes, the victory in the *Winters* case was not accompanied by federal action to protect tribal water rights. The federal government expended vast resources developing water projects for non-Indian use. The National Water Commission in 1973 concluded that “[i]n the history of the United States Government’s treatment of Indian tribes, its failure to protect Indian water rights for use on the reservations it set aside for them is one of the sorrier chapters.” The hard fact is that non-Indian development resulted in much of the water in the West being put to out-of-stream uses pursuant to state law, such that the assertion of senior Indian rights is fiercely resisted.

The book commences with Rebecca Tsosie’s chapter on tribal sovereignty and intergovernmental cooperation. It gives the uninitiated a nice introduction to the status of Indian tribes under federal law and different sorts of agreements negotiated among federal, state, and tribal governments. A chapter on tribal jurisdiction over water quality explains litigation upholding Environmental Protection Agency decisions recognizing tribes as states for purposes of administering the Clean Water Act and concludes with examples and recommendations for tribal-state cooperation in the water-quality arena.

Most non-Indian concern regarding Indian water rights is based on generally senior tribal priority dates and the potentially large claims that may arise using the so-called practicably irrigable acreage (PIA) standard. There is fear that courts might award large quantities of water for future use based on theoretical tribal farming operations and thereby disrupt current non-Indian use. Although this has not been the case, the fear has fueled judicial and academic criticism of uncritical reliance on the PIA standard. The US Supreme Court agreed to consider the PIA standard as applied by the Wyoming Supreme Court in 1989 but ended up affirming a rather large award based on PIA by a 4-4 vote. There was no opinion for the Court. Barbara Cosens distilled her excellent law review article on the Arizona Supreme Court’s use of the “tribal homeland” theory as an alternative to strict adherence to PIA. She notes the inequities experienced by Indian tribes without a land base sufficient to support large claims based on potential irrigation of those lands in an economic fashion. The Arizona Supreme Court’s call for a more flexible method based on “homeland purposes” for determining the quantity of water reserved for future Indian use has some appeal, yet tribes with large PIA claims might view it as a state-initiated device to limit claims endorsed by the Supreme Court in *Arizona v. California* (1963). Cosens addressed these issues in depth in an article first published in the *Natural Resources Journal* and excerpted in *Tribal Water Rights*. She supports the homeland approach and answers concerns with a suggested change to federal settlement funding criteria to encourage funding for water infrastructure and habitat improvements that ensure the viability of reservations as permanent homelands. This approach would presumably take into account the historic inequities suffered by tribes. Those inequities and the perhaps unintended consequences of the Endangered Species Act on the current exercise of tribal rights are detailed in a fine chapter on the effect of non-Indian development on Indian water rights.

The chapters dealing with settlement substance and process are easy to read, contain many useful insights, and are worth the cost of the book. Bonnie Colby's thirteen criteria for evaluating settlements provide an excellent framework for ensuring that any agreement has the substance and durability needed for success. She also does a wonderful job of explaining the use of economics to facilitate settlement. These sections will be of great use to anyone contemplating a negotiated settlement.

The book, however, is not without a few minor shortcomings. The introduction states that it supplements an earlier work, but the knowledgeable reader is struck by the fact that the introduction states that there have been only seventeen Indian water rights settlements since 1978. The table provided in the more general (and earlier) book by the same authors correctly lists twenty congressionally approved settlements. This is especially odd because the excellent groundwater chapter in *Tribal Water Rights* includes discussions of the eighteenth and nineteenth settlements—Zuni and Gila River—and the twentieth—Nez Perce—is mentioned in the final chapter. Also, sidebar 1.1 contains the erroneous statement that “the power to assert sovereign immunity belongs to the federal government, not to tribal governments.” Indian tribes have immunity from suit unless waived by Congress, and although it is true that tribal water rights may be determined in court without tribal participation, the overly broad statement in the sidebar could mislead one not familiar with the area. The groundwater chapter omits discussion of cases from the Montana Supreme Court and federal district in Washington that recognize application of the reserved rights doctrine to groundwater.

These oversights do not significantly detract from this compendium of essays. *Tribal Water Rights* is a book of great use to scholars, lawyers, and all parties affected by Indian reserved water right claims.

Robert T. Anderson

University of Washington School of Law

The Unquiet Grave: The FBI and the Struggle for the Soul of Indian Country. By Steve Hendricks. New York: Thunder's Mouth Press, 2006. 544 pages. \$27.95 cloth.

The major “unquiet grave” in this account belongs to Anna Mae Aquash, one of several dozen American Indian Movement (AIM) activists who were murdered at Pine Ridge during the years after the Wounded Knee occupation. *Unquiet Grave* is divided into two parts: “Then,” recounting events during the 1970s, and “Now.” Hendricks' style is exacting, and his narrative sometimes searing. He breaks the book open with this description of how Aquash's body was discovered:

On February 24 [1976], at a quarter to three in the afternoon, a rancher on that part of the South Dakota steppe that crumbles in to the badlands was looking for a place to run a fence when he turned a