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Review of "American Indian Water Rights and the Limits of Law" by Lloyd Burton

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American Indian Water Rights and the Limits of Law. Lloyd Burton. Lawrence, KS: University Press of Kansas, 1991. xiii + 174 pp. References. \$22.50 cloth (ISBN 0-7006-04812).

Professor Burton's work focuses on legal recognition and enforcement of Indian tribal water rights. He explains the uncertainty of tribal rights and the difficulties of perfecting rights in court. Lawsuits encounter jurisdictional disputes between state and federal courts, huge litigation costs, technical problems with engineering and hydrologic data, years of delay, and, in his view, hostile Republican judges on the federal bench. Given the difficulties with lawsuits, he examines in some detail tribes' efforts to pursue negotiations

and legislation as alternatives to litigation. He is quite critical of the alternatives and concludes that litigation is still the best choice for tribes. The shortcomings of even the best choice lead to his title's lament, the "limits of law."

The book's greatest strength is its longest chapter, a quarter of the book, which describes in detail attempts to resolve the water rights claims of the O'Odham Nation in southern Arizona by negotiation and federal legislation. This study is useful to those already knowledgeable in the field and to others interested in the policy choices confronting Indian nations. Burton's research is thorough and goes well beyond published sources to include interviews and unpublished studies. The chapter is readable and filled with facts. I learned from it, as would most readers.

The rest of the book is too general to be helpful to readers already familiar with Indian water rights. Whether it is a sound introduction to this subject is a harder question. It is marred by errors about the state of the law. Most are minor and do not sidetrack the narrative. But a few distort Burton's main theme, causing him to favor too much the choice of litigation over its alternatives. Readers do not get an accurate sense of the hard choices faced by tribal leaders who seek to enhance Indian rights.

The principal shortcoming arises from something that we constantly see out of the corner of Burton's eye but never look at directly. I refer to the consequences that flow from the fact that most Indian tribal water rights are entirely undeveloped. They are theoretically valuable but produce no present benefit to their owners.

This may sound odd. Normally, the means to enjoy an asset flow directly from one's ownership of it. But western water rights are different. They are not owned separately but in relation to other owners in a legal hierarchy. The highest ranking rights, known as senior rights, entitle their owners to use their full allocation ahead of all junior owners. But junior owners have the right to use any water that seniors do not actually use. Water rights owners cannot withhold water from use; they must use it or allow others to do so.

Tribal water rights are high in the theoretical legal hierarchy, they are senior rights. But they are also unused. Hence the water is available to junior users, and thousands of them have been using it for many years.

Professor Burton claims that Indian nations with senior rights can hold other water owners “in limbo,” and a perfected tribal right would leave “everybody else to pray for rain.” He quotes a claim that Indian rights are “massively destabilizing.” These assertions imply that tribes have enormous leverage over junior owners and lead readers to wonder why they have not used it.

This claim is essentially incorrect. Undeveloped Indian rights are of concern to large-scale investors in new projects. But the rights are unimportant to existing, developed users. By deterring some new investors, Indian claims tend to increase the stability of existing uses, and this suits many users just fine. When we identify the biggest existing users, such as the Southern California Metropolitan Water District, it is readily apparent that Indian nations do not have anything like the leverage that Burton suggests. To gain leverage, tribes must make common cause with those interested in new water developments that require greater certainty to attract investors. Many tribes are doing so, but this avenue favors negotiations and lobbying over lawsuits. Although Professor Burton underrates the significance of negotiations and legislation in the present legal landscape, he provides much information about them. Because they are more important than he says, his information is the more valuable. **Richard B. Collins**, *School of Law, University of Colorado at Boulder*.