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Renay W. Leone

George William Sherk

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THE STUMBLE OF STICKS: INSTREAM FLOW LEGISLATION AND RIGHTS TO PROPERTY
AFTER LUCAS v. SOUTH CAROLINA
COASTAL COUNCIL*

RENAY W. LEONE**
GEORGE WILLIAM SHERK***

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** J.D., William Mitchell College of Law; B.S., University of Minnesota. Attorney at Law, 6459 Smithtown Road, Excelsior, Minnesota.
*** J.D., University of Denver College of Law; B.A., M.A., Colorado State University. Of Counsel, Will & Muys, P.C., 1015 18th Street N.W., Suite 600, Washington, D.C., and Member of the Associate Faculty, Virginia Institute of Marine Science, College of William and Mary, Gloucester Point, Virginia.
I. Introduction

The concept of "instream flow" includes the use of water for a variety of purposes. Navigation, water supply and sanitation, as well as fish and wildlife purposes, have been recognized historically as requiring minimum stream flows. Recreational, aesthetic and ecological uses are now recognized as equally important water uses in a society whose perception of the value of the natural world is maturing.

In general, instream flows were not protected under the water law doctrines adopted in either the eastern or western states. The prior appropriations doctrine, the basic concept adopted in the western states for the management and allocation of state water resources, reflected the realities of the region. These realities in the western states produced a "drought-driven culture,"1 The prior appropriations doctrine works well in providing certainty in times of shortage.2 It does not work well in protecting instream flows because the prior appropriations doctrine historically has required water to be diverted from a watercourse before a right to the water could be established. There was little recognition or protection in prior appropriations doctrine states for nonconsumptive instream uses.

The riparian doctrine, the basic concept adopted in the eastern states, reflects the realities of a region blessed with abundant water resources. It does not provide a basis for the management and allocation of state water resources. In general, it requires water to be used "reasonably" and limits water use to lands adjoining or overlying the water resource. Instream flows receive even less recognition or protection in riparian doctrine states than is afforded in prior appropriations doctrine states. The common law of England utilized a "natural flow" theory under which riparian water users were prohibited from affecting adversely the natural flow of a watercourse. In the United States, however, the "natural flow" concept was replaced by a "reasonable use" con-

2. Certainty in times of shortage is predicated on the basic provision of the doctrine that "first-in-time" is "first-in-right." With limited exceptions, the temporal priority of the appropriation is controlling.
cept in order to encourage economic development in the eastern states. Absent state legislation, "reasonable use" does not include instream flows.

Both doctrines have been subject to substantial criticism. Strictly construed, the prior appropriations doctrine can be exceedingly harsh, especially with regard to new water uses having junior priorities. In addition, because the "beneficial use" test has historically been an economic test, the doctrine is not well suited to protect water uses (such as instream flows) that do not have easily quantifiable economic benefits.

The riparian doctrine can be exceedingly vague. With limited exceptions, it does not provide a means by which specific water uses may be either protected or regulated. It neither allows water to be moved to higher valued uses nor does it protect environmental amenities. In addition, the riparian doctrine is predicated on the assumption that there is an abundant supply of water. This may not be a valid assumption. Given instream flow requirements, gradual climatic change and the contamination of existing supplies, the eastern states may not have the abundant water resources that were assumed to be available. In fact, it has been argued that the eastern states have continued to adhere to the riparian doctrine precisely because those states have never faced a severe water shortage. Given the inevitability of such shortages in the future, the inescapable conclusion is that the riparian doctrine has outlived its usefulness as a means of managing and allocating state water resources.

In fact, most of the eastern states have enacted new laws that either amend or supersede the riparian doctrine. As the eastern states are moving away from the riparian doctrine, the western states are moving away from a strict doctrine of prior appropriations. The resulting conceptual confluence finds the eastern states adopting some aspects of the prior appropriations doctrine while the western states temper that doctrine by adopting certain


4. Abrams, Charting the Course, supra note 3, at 1383.

concepts that are historically riparian in origin.6

Protection of instream flows is one area in which the confluence may be seen. This Article reviews legislation enacted in the eastern and western states to protect instream flows in the context of the impacts of such legislation on existing rights to the use of water. In essence, when does such legislation (including implementing regulations) constitute a taking of property rights? The following section describes in general terms the instream flow legislation that has been enacted. The requirements of the Fifth Amendment to the U.S. Constitution are discussed in Section III as is the recent decision of the Supreme Court in Lucas v. South Carolina Coastal Council.7 Given that all takings claims are factually and case specific,8 Section IV examines five hypotheticals regarding the impacts of instream flow programs on existing water rights. Conclusions are presented in Section V.

II. INSTREAM FLOW LEGISLATION

Legislation to protect instream flows has been enacted in both the eastern and western states. In the prior appropriations doctrine states, for example, the diversion requirement has been eliminated in Colorado,9 Idaho,10 and Arizona.11 Legislation authorizing the reservation or withdrawal of water to protect instream flows has been enacted in Alaska,12 Oregon,13 Montana,14 and Utah.15 In addition, instream flows have been protected by case law or statute in Washington,16 Wyoming,17 North Dakota,18

8. As the Court noted in Lucas: "In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "'set formula'" for determining how far is too far, preferring to 'engage[e] in...essentially ad hoc, factual inquiries,' Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978) (quoting Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962))." Lucas, 112 S. Ct. at 2893.
17. WYO. STAT. §§ 41-3-1001 to -1014 (Supp. 1992).
and Nevada.\textsuperscript{19}

While the western states integrate protection of instream flows into the prior appropriations doctrine,\textsuperscript{20} at least sixteen eastern states have enacted legislation to protect such flows in the context of legislation amending (or superseding) the riparian doctrine. In fact, the protection of instream flows has been one of the driving forces behind legislative activity in the eastern states.\textsuperscript{21}

The preferred approach in the eastern states has been to authorize a branch of state government to establish minimum instream flows or water levels. Such legislation has been enacted in Florida,\textsuperscript{22} Indiana,\textsuperscript{23} Mississippi,\textsuperscript{24} Illinois,\textsuperscript{25} West Virginia,\textsuperscript{26} Connecticut,\textsuperscript{27} Tennessee,\textsuperscript{28} New Jersey,\textsuperscript{29} Wisconsin,\textsuperscript{30} and

\begin{itemize}
  \item \textsuperscript{19} State v. Morros, 766 P.2d 263 (Nev. 1988).
  \item \textsuperscript{22} The Water Management Districts are authorized to establish seasonal minimum levels and flows for both surface and ground water. FLA. STAT. ch. 373.042 (1988). The Districts are also authorized to develop criteria for the establishment of minimum surface and ground water levels. FLA. STAT. ch. 373.0395(4).
  \item \textsuperscript{23} The Natural Resources Commission and the Department of Natural Resources are authorized to protect "naturally occurring" stream flows. IND. CODE ANN. §§ 13-2-6.1-4(5), -6 (West 1987).
  \item \textsuperscript{24} The Commission on Natural Resources is authorized to establish both minimum instream flows and minimum lake levels. MISS. CODE ANN. §§ 51-3-7(2), -7(3) (1990).
  \item \textsuperscript{25} The Department of Transportation is authorized to establish minimum stream flows and lake levels. ILL. ANN. STAT. ch. 19, paras. 70, 70a (Smith-Hurd 1990).
  \item \textsuperscript{26} The Chief of the Division of Water Resources, Division of Natural Resources, and the State Water Resources Board are authorized to implement the Natural Streams Preservation Act. W. VA. CODE §§ 20-5B-2 to -17 (1989 & Supp. 1992).
  \item \textsuperscript{27} The Commissioner of Environmental Protection is authorized to establish stream levels in those streams that have been stocked by the state. CONN. GEN. STAT. ANN. §§ 26-141a, -141b (West 1990).
  \item \textsuperscript{28} The Director of the Water Resources Division is authorized to determine the waters of the state that are reserved for instream flow purposes. TENN. CODE ANN. § 69-8-103(5) (1987).
  \item \textsuperscript{29} The Commissioner of the Department of Environmental Protection is authorized to establish minimum water levels for both surface and ground water. N.J. STAT. ANN. § 58:1A-5(e) (West 1992).
  \item \textsuperscript{30} The Wisconsin Department of Natural Resources is authorized to establish minimum stream flows and lake levels. WIS. STAT. ANN. § 30.18(8) (West 1989).
\end{itemize}
Virginia.

The legislation enacted in Virginia in 1989 is illustrative.31 Use of the waters of the Commonwealth is restricted to beneficial uses, the definition of which includes instream uses.32 Flow conditions are to be maintained "to protect instream beneficial uses and public water supplies."33 Surface water management areas may be established by the State Water Control Board in order to protect instream beneficial uses.34 Permits for water use within a surface water management area must include provisions to ensure flow requirements as needed to protect instream uses.35 In addition, the Virginia legislation specifically authorized the Attorney General of the Commonwealth to intervene in order to represent the public interest in any litigation that concerned the use of surface water.36 Such representation would include the protection of instream beneficial uses.

A more limited approach was taken in South Carolina where legislation was enacted to protect instream flows by restricting the amount of water available for transbasin diversions.37 Such diversions must leave a reasonable instream flow in the river from which the diversion was taken. Similar restrictions were imposed in Massachusetts regarding the quantity of water available for withdrawal.38 Ohio has prohibited diversions that have significant adverse impacts on instream uses or existing water levels.39

At the present time, at least twenty-six eastern and western states have enacted legislation or have caselaw protecting instream flows. The need for such legislation is (or has been) the

31. The legislation was developed for the Virginia General Assembly by a task force on which a variety of water users and interest groups were represented. The process led to a consensus proposal which, in turn, led to the enactment of the proposed legislation. Both the legislation and the process that led to its enactment may become models for other states. See Richard C. Collins, Sharing the Pain: Mediating Instream Flow Legislation in Virginia, 1 RIVERS 126 (1990).
33. VA. CODE ANN. § 62.1-11.F.
35. VA. CODE ANN. § 62.1-248.A.
37. S.C. CODE ANN. § 49-21-30(C)(1) (Law. Co-op. 1987). Legislation has also been enacted in South Carolina that defines instream flow requirements as "essential water uses" to be protected during drought conditions. S.C. CODE ANN. § 49-23-70(c).
subject of study in virtually every state.40

III. THE STUMBLE OF STICKS

A. The First Principle: Takings Require Compensation

The first principle applicable to this discussion is that the taking of private property for a public purpose requires the payment of compensation under both the United States Constitution41 and the constitutions of the states.42

It is virtually certain that holders of water rights will seek compensation when their rights are impacted adversely by state programs to protect instream flows. What is uncertain is whether their claims will have merit.

B. The Second Principle: Water Rights Are Property

The second principle is that water rights are one form of property. This is true irrespective of whether the right arises under the prior appropriations doctrine43 or the riparian doctrine.44 Under either system, the right to use water is a usufructuary right in that the owner holds a right to the use of the water. The owner does not own the water.45

"Water rights are property, but they have no higher or more protected status than any other sort of property . . . . In fact water

40. The issue has also been the subject of study by the American Society of Civil Engineers (ASCE). At the present time, an ASCE task force is preparing a model state water allocation code. One of the provisions of that code will address instream flow requirements.

41. "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONSTAT. amend. V.


43. See generally A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5.18 (1992).

44. Riparian water rights are "one component of the property interests held by owners of land bordering or crossed by a natural body of water." Cox, supra note 21, at 113.

45. Water rights are defined as follows
[A] right in the water rather than as ownership of the water as such . . . .
[Such rights are] a kind of real property, termed an incorporeal hereditament rather than a corporeal right because the flow of water itself cannot be owned or possessed. One can own only a right to use water as it passes over, or lies upon, one's land.

rights have less protection than most other property rights." for at least three reasons. First, "because their exercise may intrude on a public common, they are subject to several original public prior claims, such as the navigation servitude and the public trust, and to laws protecting commons, such as water pollution laws." Second, "their original definition, limited to beneficial [or reasonable] and non-wasteful uses, imposes limits beyond those that constrain most property rights." Third, "insofar as water rights (unlike most other property rights) are granted by permit, they are subject to constraints articulated in the permits." In essence, riparian water rights are an "incomplete property right." The same can be said for water rights arising under the prior appropriations doctrine.

C. The Third Principle: Takings of Water Rights Require Compensation

Incorporating the Fifth Amendment into the discussion of water rights, therefore, is relatively simple. As with the taking of a corporeal property right, the taking of a water right may require the payment of compensation. This is the third principle applicable to the discussion.

The obligation to provide compensation arises when the exercise of a state's police power constitutes "a taking in the constitutional sense." As discussed in Lucas, there are two situations where this obligation arises: 1) in situations where regulations "compel the property owner to suffer a physical 'invasion' of his property. . . . ([A]t least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation,"

46. Sax, supra note 42, at 260.
47. Id.
48. Id.
49. Id. (footnote omitted).
50. Dellapenna, supra note 45, at 515 (citing A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 3.20[3], at 3-96 to 3-97 (1989)).
51. "[A] state cannot take vested property rights, whether corporeal or incorporeal, without paying 'just compensation' . . . ." Dellapenna, supra note 45, at 380 (footnote omitted).
52. Lucas, 112 S. Ct. at 2893 (citing Loretto v. Telepromoter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982) (permanent physical occupation authorized by government is taking without regard to public interests that it may serve); Kaiser Aetna v. United States, 444 U.S. 164, 178-80 (1979) (imposition of navigation servitude on privately owned marina will result in actual physical invasion of marina and requires Government to pay compensation); United States v. Causby, 328 U.S. 256, 264-65 & n.10 (1946) (physical invasion of airspace
and 2) compensation is also required when the effect of a governmental regulation "denies all economically beneficial or productive use of land."\(^{53}\)

In the second situation, diminution of value cases, the courts have been "extremely deferential" to state regulators in determining each case's merits. Diminution in value of up to ninety percent of the value of the property has been sustained as not requiring the payment of compensation.\(^{54}\) The percentage may now have increased to ninety-five percent of the value of the property.\(^{55}\) In essence, "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."\(^{56}\)

\(^{53}\) May constitute taking); see also Nollan v. California Coastal Comm'n, 483 U.S. 825, 831-32 (1987) (taking occurs to extent of occupation without regard to whether action achieves important public benefit or has only minimal impact on the owner); Sax, supra note 42, at 262.

\(^{54}\) Lucas, 112 S. Ct. at 2893 (citing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (sustaining local efforts to protect open space); Nollan, 483 U.S. at 831-92; Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987) (making its determination of whether compensation is required, Court will consider several factors including economic impact of regulation, extent to which regulation interferes with investment backed expectations, and character of government action); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295-96 (1981) (sustaining legislation requiring amelioration of impacts of strip mining)). The Court went on to conclude that "the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'" Lucas, 112 S. Ct. at 2894 (quoting Agins, 447 U.S. at 260).

\(^{55}\) Sax, supra note 42, at 262-63 & n.18 (citing United States v. Riverside Bayview Homes, 474 U.S. 121, 127 (1985) (sustaining provisions of Clean Water Act intended to protect wetlands, Court concluded that "the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking . . . . Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred.'"); Keystone, 480 U.S. at 513 (Rehnquist, C.J., dissenting) (suggesting that test should be whether regulation completely extinguishes value of property).

\(^{56}\) As the Court stated in Lucas:

It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these 'all-or-nothing' situations.

Lucas, 112 S. Ct. at 2895 n.8.

\(^{56}\) Id. at 2895 (footnote omitted).
D. The Fourth Principle: Water Rights May Be Regulated

Regulation of water rights can serve many purposes including protection of the environment and conservation of natural resources. To achieve these purposes, water rights may be regulated. This is the fourth principle.

Such regulation is consistent with the police power found in the Constitution. Several cases have upheld the constitutionality of legislation regulating water rights to protect natural resources. As one commentator has noted, "legislation that constrains uses of property to achieve environmental protection goals is firmly within the police power, as is legislation that constrains property use in order to conserve scarce natural resources by requiring more efficient use."58

E. The Fifth Principle: Regulation Does Not Require Compensation

The fifth principle is that governmental regulation of water rights does not in general require the payment of compensation. The claims of water rights owners for compensation have been routinely denied and the denials have been sustained upon appeal.59

Regulation may also be applied retroactively, unlike many laws. "It is not unconstitutional for regulation to constrain pre-

57. "[N]o property right can be exempted from the full exercise of the police power." Sax, supra note 42, at 261 & n.7 (citing Laurence H. Tribe, American Constitutional Law § 9-10, at 618 (1988)).
58. Sax, supra note 42, at 262 & n.12 (citing Riverside, 474 U.S. at 121; Hodel, 452 U.S. at 264; Agins, 447 U.S. at 255; State v. Dexter, 202 P.2d 906, 908 (Wash.), aff'd, 338 U.S. 863 (1949) (sustaining mandatory reforestation requirement, court concluded that state is not "required by the constitution of the United States to stand idly by while its natural resources are depleted . . . . [W]here natural resources can be utilized and at the same time perpetuated for future generations, what has been called 'constitutional morality' requires that we do so.").
59. "[T]he United States Supreme Court has been deferential toward state regulation that adversely impacts on property rights, routinely denying the owners compensation. . . . Every major change in western water law, despite adverse effects on existing claims of right, has been sustained as valid, non-compensable regulation." Sax, supra note 42, at 259 n.4 (citing Town of Chino Valley v. City of Prescott, 638 P.2d 1324, 1329-30 (Ariz. 1981), appeal dismissed, 457 U.S. 1101 (1982) (Arizona Groundwater Management Act of 1980 did not "deny appellants due process of law and does not require that they be paid compensation for any possible diminution of their rights which they may have had under the doctrine of reasonable use."); Baeth v. Hoisveen, 157 N.W.2d 728, 733 (N.D. 1968) (sustaining state statute that required permit for use of ground water); see also Joseph L. Sax, Property Rights in the U.S. Supreme Court: A Status Report, 7 UCLA J. ENVTL. L. & POL'y 199, 145-47 (1988).
existing uses or rights that were legal when initiated. Retroactivity is not the test of compensability."

F. The Sixth Principle: There Is No Clear Distinction Between Regulation and Taking of Property

The sixth principle is painfully obvious: the distinction between reasonable regulation of the use of property (not requiring compensation) and the taking of property (requiring compensation) is not readily discernible. "There is no set formula to determine where regulation ends and taking begins." \(^{61}\)

There had been speculation (including roughly equal measures of fear and hope) that the decision of the Supreme Court in \textit{Lucas v. South Carolina Coastal Council}\(^ {62}\) would more clearly define the distinction between the reasonable regulation of property rights and the taking of those rights. At issue in \textit{Lucas} was a state regulation prohibiting development of beachfront land that the plaintiff had owned before the regulation became effective. The landowner sought compensation, arguing that the regulation in fact constituted a taking of property. Despite a ripeness problem,\(^ {63}\) the Court found that deprivation of all economically beneficial use is a compensable taking unless the use is prohibited under state law.\(^ {64}\) The case was remanded both for a determination of the common law property and nuisance principles codified

\(^{60}\) Sax, \textit{supra} note 42, at 260. With regard to land use cases, for example, "[v]alid preexisting uses have been subject to rezoning and owners have been required to change their use to conform to the new law." \textit{Id.} at 265 (citing Goldblatt v. Town of Hempsted, 369 U.S. 590, 592 (1962) (sustaining ordinance regulating dredging and pit excavations, Court concluded that "every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional."); Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 83 (1946) ("[I]n no case does the owner of property acquire immunity against exercise of police power because he constructed it in full compliance with existing laws. . . . The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights."); Erie R.R. Co. v. Board of Pub. Util. Comm'n, 254 U.S. 394, 409-14 (1921) (Holmes, J.) (public and private rights should be balanced when regulations were challenged and public rights should prevail)).

\(^{61}\) Goldblatt, 369 U.S. at 594.


\(^{63}\) \textit{Id.} at 2890-92. The regulation at issue had been amended to allow the issuance of special permits to build in certain circumstances. The amendments were enacted after the case had been appealed to the Supreme Court. \textit{Id.}

\(^{64}\) \textit{Id.} at 2901-02. "[A] State, by \textit{ipse dixit}, may not transform private property into public property without compensation . . . ." \textit{Id.} (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980)). "Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuis-
in South Carolina statutes and for an application of those principles to the facts of the case.

The *Lucas* decision affected only a narrow ban of regulatory actions. It may be of little assistance in the majority of taking cases likely to arise. It can be argued, since the property rights at issue in *Lucas* were not water rights, that the decision will have only limited applicability to instream flow and other water use issues.

It is more likely that the decision will be directly applicable to instream flow and other water use issues because the Court recognized and reaffirmed in *Lucas* that property rights are defined both by state law and by underlying common law principles. "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."65

Given the limitations on water rights discussed herein, particularly the "incomplete" nature of such rights,66 it may be more difficult for a claimant to sustain a claim for the taking of a water right because of the "public servitudes" (such as navigation and the public trust) that existed prior to the initiation of the right.67

sance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found." *Id.*

65. *Id.* at 2899 (footnote omitted). The Court also concluded that the expectations of the owner of property should be "shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Id.* at 2894 n.7.

66. For a discussion of limitations on water rights, see supra notes 46-50 and accompanying text.

67. Application of the public trust doctrine to water resources derives from the decision of the Supreme Court in Illinois Cent. R.R. v. Illinios, 146 U.S. 387, 452-53 (1892), that concluded that "the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake . . . cannot be relinquished by a transfer of the property"; see also Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908). In *McCarter*, the Supreme Court stated:

[F]ew public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit. . . . This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of the opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation,
As one commentator has noted, "[t]here is a tradition that recognizes a pre-existing right of the State in the flow of its rivers. Private diversions, at least those in tidal or navigable waters and affected tributaries, have always been subject to a servitude and a trust in favor of the public." Specifically with regard to the regulation of riparian water rights, another commentator has concluded that "the public trust might itself be enough to uphold almost any conceivable regulated riparian statute." In essence, "[t]he state is not 'taking' something belonging to an owner, but is asserting a right it has always held as a servitude burdening owners of water rights."

IV. HYPOTHETICALS

Every case involving a taking claim is unique. Consequently, to understand the circumstances under which compensation may be required for a taking of water rights, it is necessary to consider a number of hypotheticals.

A. Reservation of Water

In order to protect instream flows, a state redefines the "waters of the state" that are subject to appropriation and use by reserving to the state that quantity of water needed to fulfill instream flow requirements. A riparian landowner asserts a taking claim.

In general, most challenges to instream reservations or appropriations as affecting existing rights have been unsuccessful.

in the exercise of the police power, of what otherwise would be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same. . . . The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health. 68

Id., at 356 (emphasis added).

68. Sax, supra note 42, at 269 (footnote omitted).

69. Dellapenna, supra note 45, at 517. At least nine eastern and western states have recognized some form of the public trust doctrine as one means of protecting the public interest in state water resources. In addition, definitions of navigability have been expanded to include public uses and recreational values in three other states. Sherk, Meetings, supra note 6, at 4.

70. Sax, supra note 42, at 280. This principle was reaffirmed in Lucas in the context of "confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." Lucas, 112 S.Ct. at 2900.

71. Sax, supra note 42, at 259 n.4 (citing Colorado River Water Conserva-
As discussed in the preceding section, the reservation could be sustained either as an expression by the state of the quantity of water required to protect the public trust or as the burden of the navigation servitude. Alternatively, in a riparian doctrine state the reservation could be viewed as a reasonable use of water by the state. Given that all riparian water uses are subject to the reasonable use of water by other riparian landowners, the reservation could be sustained.

Since the state is appropriating the water to itself, however, a taking claim might arise in a prior appropriations doctrine state if the claimant could demonstrate that the quantity of water reserved by the state included a quantity of water for which the claimant held a water right at the time of the reservation. In such litigation, the burden of proof would rest with the claimant.  

B. Registration of Water Uses

In a riparian state, the legislature enacts a bill that requires all existing water users to register their uses within two years of enactment. After the registration period has passed, new water uses may be initiated only upon issuance of a state permit. Water uses for which a permit was not obtained are presumed to have been abandoned. The legislation precludes the issuance of a permit if the proposed water use would have an adverse impact on instream flows. An owner of riparian land who was not using water when the statute was enacted brings a taking claim.

At least nineteen eastern states have enacted similar permit and registration requirements. The extinguishment of unused riparian rights has been upheld. For example, in Village of Tequesta v. Jupiter Inlet Corp., the Florida Supreme Court concluded that "the landowner does not have a constitutionally—protected property right in the water beneath the property, requiring compensation for the taking of the water when used for a public purpose." In comparison to zoning regulations, the court

72. Cox, supra note 21, at 115.
73. Sherk, Trends, supra note 5, at 294-98.
74. 371 So.2d 663 (Fla.), cert. denied, 444 U.S. 965 (1979).
75. Id. at 672.
stated that "the right to the use of water may also be limited or regulated."\(^{76}\)

The Wisconsin Supreme Court rendered a similar decision in \textit{Omernik v. Wisconsin},\(^ {77}\) a case in which a state statute prohibiting the diversion of water without a permit was challenged. In dismissing the plaintiff's challenge, the court concluded:

> We see sec. 30.18, Stats., as the state's exercise of its police power to protect public rights and to prevent harm to the public by uncontrolled diversion of water from lakes and streams. While the statute does not secure for the state a benefit not presently enjoyed by its citizens, it does seek to prevent the public harm of dry riverbeds replacing flowing streams. . . . [T]he statute " . . . does not create or improve the public condition but only preserves nature from the despoilage and harm resulting from the unrestricted activities of humans."\(^ {78}\)

As previously discussed, most western courts have held that water must be diverted and applied to a beneficial use to be a vested property right for compensation purposes. Consequently, changes in state water laws that resulted in the abolition of unused riparian rights have been upheld.\(^ {79}\) "[O]nly actual uses existing at the time of the transition will be protected from a taking without compensation."\(^ {80}\) The Supreme Court of the State of Washington addressed the issue of the abolition of unused riparian rights in \textit{In re Deadman Creek Drainage Basin},\(^ {81}\) and determined that there had been no unconstitutional taking of property.\(^ {82}\)

\(^{76}\) Id.

\(^{77}\) 218 N.W.2d 734 (Wis. 1974).

\(^{78}\) Id. at 743 (quoting Just v. Marinette County, 201 N.W.2d 761, 771 (Wis. 1972)).

\(^{79}\) Sax, \textit{supra} note 42, at 259 n.4.

\(^{80}\) Dellapenna, \textit{supra} note 45, at 516.

\(^{81}\) 694 P.2d 1071 (Wash. 1985).

\(^{82}\) Id. at 1077. In reaching this conclusion, the court in \textit{Deadman Creek} summarized the decisions of several western courts regarding this issue. \textit{Id}. Washington was not the only state which provided for forfeiting unused riparian rights. \textit{Id}. The state of Texas also allowed termination of riparian rights for nonuse through exercise of the police power. \textit{Id}. (citing \textit{In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin}, 642 S.W.2d 438, 444-46 (Tex. 1982)). Several states also allow for termination of groundwater rights for nonuse without providing compensation. \textit{Deadman Creek}, 694 P.2d at 1077 (citing Chino Valley v. Prescott, 638 P.2d 1324, 1330 (Ariz. 1981); Williams v. Wichita, 374 P.2d 578, 595-96 (Kan. 1962), \textit{appeal dismissed}, 375 U.S. 7 (1963); Baeth v. Hoisveen, 157 N.W.2d 728, 733 (N.D. 1968); Knight v. Grimes, 127 N.W.2d 708, 711-14 (S.D. 1964)). However, a contrary
The presumption of abandonment contained in many of the state statutes is supported by the decision of the Supreme Court in *Texaco v. Short*, a case involving a challenge to the Indiana Dormant Mineral Interests Act:

In ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law, this Court has never required the State to compensate the owner for the consequences of his own neglect. We have concluded that the State may treat a mineral interest that has not been used for 20 years and for which no statement of claim has been filed as abandoned; it follows that, after abandonment, the former owner retains no interest for which he may claim compensation. *It is the owner’s failure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no ‘taking’ that requires compensation.*

C. Drought Restrictions

Following the implementation of a state permit system, an ongoing drought forces a riparian doctrine state to implement mandatory water conservation measures. In order to protect instream flows, the state requires all permitted water uses to be reduced by ten percent. A group of water users challenges the requirement as constituting a taking of their water rights.

Initially, it must be noted that riparian water rights are limited generally to reasonable uses. It has oft been said in both riparian and prior appropriations doctrine states that “[t]here is no property right to waste water . . . .”

Even if all of the uses were reasonable and there was no waste of water by the claimants, the requirement would likely be sustained as a reasonable exercise of the state’s police powers. The situation is not unlike *Keystone Bituminous Coal Ass’n v.*


84. *Id.* at 530 (emphasis added).
85. Sax, *supra* note 42, at 264 (citing A-B Cattle Co. *v.* United States, 589 P.2d 57, 60 (Colo. 1978) (“[The] right to water does not give the right to waste it.”)).
DeBenedictis, in which the Court sustained a requirement that a portion of coal to be mined remain in place in order to provide support for overlying lands.

D. Clean Water Act Certification

State legislation is enacted under section 401 of the Clean Water Act precluding certification of any activity that would have an adverse impact on instream flows. Alleging a taking of the right to use water absent compensation, an applicant whose application was denied seeks judicial review.

It is unlikely that the disappointed claimant would prevail. The police power of the state should be adequate to sustain denial of the request for certification. The state, however, must be mindful of due process considerations.

E. Mandatory Releases from Storage

A power company obtains all needed state and federal permits to construct a reservoir. Water stored in the reservoir is used as cooling water for a coal-fired generating plant that the power company constructs at the site. Because of the growth of downstream diversions, a drought imperils the aquatic habitat existing in the river on which the power company's reservoir was constructed. In response to the drought, the legislature authorizes the governor to declare a "water supply emergency" and take whatever actions are needed. The governor then orders the power company to release water from the reservoir in such quantities as are needed to meet instream flow requirements. The power company challenges the governor's order as constituting an uncompensated taking.

This situation may present a valid taking claim. "The only new water law regulation that would prima facie raise a taking problem is a release requirement: requiring existing appropriators to make releases in order to augment instream flows for public purposes such as ecosystem protection and public

recreation.” 89 Nothing would prevent the state legislature, when it enacted the legislation authorizing the governor to declare a “water supply emergency” and to take needed actions, from providing for the payment of compensation in appropriate situations. Such an approach may be significantly less expensive than the subsequent litigation.

V. Conclusions

In Tyler v. Wilkinson, 90 the natural flow theory that had arisen in England and that had restricted the use of water gave way to a reasonable use theory. Under the new theory, “reasonable uses” of water resources by riparian landowners would be allowed subject to “reasonable uses” by other landowners similarly situated.

In the western states, riparian water rights gave way to the prior appropriations doctrine. The need to adapt water law to meet changing societal needs reflects a “tradition of change in water law.” 91 This tradition is ongoing. 92 It is being expressed at the present time in both eastern and western state efforts to protect instream flows.

In general, for the reasons discussed herein, these efforts will not result in a taking of private property for which the payment of compensation is required. Under certain circumstances, however, the payment of compensation may be mandated.

One final note. In City of Los Angeles v. Aitkin, 93 compensation was required when the aesthetic value of property was diminished as a result of the depletion of a water resource:

For the reason that the existence of Mono Lake in its natural condition, with all of its attractive surroundings, is the vital thing that furnishes to the respondents’ marginal land almost its entire value, and that the draining of the lake will nearly destroy the value of their properties and the incident littoral rights thereto, it seems clear that the lake is not being used by the respondents for an unreasonable or nonbeneficial purpose, but, upon the contrary, that their use of the lake in its natural condition is reasonably beneficial to their land, and the littoral

89. Sax, supra note 42, at 263.
90. 24 F. Cas. 472 (C.C.D.R.I. 1827) (No. 14,312).
91. Sax, supra note 42, at 267.
92. Id. at 267-69.
rights thereof may therefore not be appropriated, even for a higher or more beneficial use for public welfare, without just compensation therefor.\textsuperscript{94}

In essence, under other circumstances, a failure to protect in-stream flows may also result in a taking of property.

\textsuperscript{94} Id. at 592.