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Neither Conservation Amendment Nor Police Power of State Justifies the Taking of Vested Riparian Rights without Compensation under Texas Water Rights Adjudicated Act of 1967.

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WATER LAW—Riparian Rights—Neither Conservation Amendment Nor Police Power Of State Justifies The Taking Of Vested Riparian Rights Without Compensation Under Texas Water Rights Adjudication Act of 1967

Schero v. Texas Department of Water Resources,
630 S.W.2d 516 (Tex. Ct. App.—Waco 1982, writ granted).

Joe E. Schero owns land abutting the Llano River. Eight of his tracts were patented from Texas before 1895. The Texas Water Rights Commission's final determination restricted and limited Schero's use of riparian water on all ten tracts[1] as authorized by the Texas Water Rights Adjudication Act of 1967.[2] Schero contended that he received no compensation for the infringement on his vested riparian right to unrestricted, reasonable use of water.[3] The district court affirmed the Commission's final determination.[4] Subsequently, Schero appealed to the Court of Appeals.[5] Held—*Affirmed in part and reversed in part.* Neither the conservation amendment[6] nor the police power of the state justifies the taking of vested riparian rights without compensation under the Texas Water Rights Adjudication Act of 1967.[7]

There are two main types of water rights systems in the United States,

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1. Schero v. Texas Dep't of Water Resources, 630 S.W.2d 516, 517 (Tex. Ct. App.—Waco 1982, writ granted).

2. TEX. WATER CODE ANN. §§ 11.301-.341 (Vernon Supp. 1982). This act recognized riparian water rights "only to the extent of maximum actual application of water to beneficial use without waste during any calendar year from 1963 to 1967, inclusive"; however, the period could be extended until 1970 if there were works currently under construction which were designed to increase the landowner's beneficial use of water. *See id.* § 11.303(b).

3. Schero v. Texas Dep't of Water Resources, 630 S.W.2d 516, 519 (Tex. Ct. App.—Waco 1982, writ granted).

4. *Id.* at 517.

5. *Id.* at 517.

6. TEX. CONST. art. XVI, § 59. "The conservation and development of all natural resources of this State . . . [are] . . . public rights and duties; and the legislature shall pass all such laws as may be appropriate thereto." *Id.* § 59(a). The Texas conservation amendment is an example of the current move in many semi-arid states to conserve water. *Cf.* Basin Elec. Power Coop. v. State Bd. of Control, 578 P.2d 557, 563 (Wyo. 1978) (even if appropriator uses less than adjudicated amount, he has no right to waste water).

7. Schero v. Texas Dep't of Water Resources, 630 S.W.2d 516, 518 (Tex. Ct. App.—Waco 1982, writ granted).

riparian and prior appropriation.[8] The riparian system had its origin in the English common law,[9] wherein ownership of land abutting a stream gave the landowner a vested property right in the use of the water.[10] A landowner's use, however, was required to be nondetrimental to other riparian landowners.[11] The mere use or non-use of water was insufficient for the riparian landowner either to create or lose his vested rights.[12] Thus, English common law required twenty years of continuous adverse use to divest one of his riparian rights.[13] Under the system of prior appropriation,[14] the second principal water system in the United States, water rights are created by diverting water and putting it to beneficial use.[15]

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8. *See* R. BOYER, SURVEY OF THE LAW OF PROPERTY 277 (1981); J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 370-72 (1975).

9. *See, e.g.*, Mason v. Hill, 110 Eng. Rep. 114, 117 (K.B. 1832)(owners of land abutting stream share equally in right to use water, but no use detrimental to other landowners allowed); Canham v. Fiske, 149 Eng. Rep. 53, 54 (Ex. 1831) (right to water passes with land if grant silent); Wright v. Howard, 57 Eng. Rep. 76, 82 (V.C. 1823) (landowner cannot divert water from downstream landowners). Each landowner had an equal right to use the water in the stream abutting his lands. *See* Haas v. Choussard, 17 Tex. 588, 589 (1856). This riparian right could only be lost by a specific grant of the right to use the water or by establishing a period of continuous adverse use; therefore, mere non-use of the water could not divest the landowner of his riparian rights. *See id.* at 589-90.

10. *See* Wright v. Howard, 57 Eng. Rep. 76, 82 (V.C. 1823). The riparian landowner's right to use the water was well settled, but he did not own the water itself. *See* Haas v. Choussard, 17 Tex. 588, 589 (1856); Mason v. Hill, 110 Eng. Rep. 114, 117 (K.B. 1832).

11. *See* Wright v. Howard, 57 Eng. Rep. 76, 82 (V.C. 1823). Unless a riparian landowner had the permission of the affected landowners, he could not decrease the flow of water to downstream landowners nor divert the water back onto the lands of upstream landowners. *See* Haas v. Choussard, 17 Tex. 588, 589-90 (1856); Wright v. Howard, 57 Eng. Rep. 76, 82 (V.C. 1823).

12. *See* Booth, *Adjudication of Water Rights—A General Discussion of Water Rights and Recent Legislation to Administer Water Rights in Texas*, in WATER . . . AND THE NEW TEXAS LAW 24 (1968); Marquis, Freeman, and Heath, *The Movement for New Water Rights Laws in the Tennessee Valley States*, 23 TENN. L. REV. 797, 826 (1955).

13. *See* Wright v. Howard, 57 Eng. Rep. 76, 82 (V.C. 1823). To uphold a claim to water use detrimental to riparian landowners, a claimant must either prove he received a specific grant of that right from the landowners concerned or prove his uninterrupted use of the water for twenty years. *See id.* at 82. In England, as a rule for the convenience of the court, the twenty-year period determined a "conclusive presumption of a grant." *See id.* at 82. In Texas, a ten-year period of uninterrupted enjoyment raised the same presumption. *See* Haas v. Choussard, 17 Tex. 588, 590 (1856).

14. *See generally* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 372 (1975). The basis of this system is the principle "first in time, first in right" under which a senior appropriator may use all his water before a junior appropriator is entitled to any water. *See* Marquis, Freeman, and Heath, *The Movement for New Water Rights in the Tennessee Valley States*, 23 TENN. L. REV. 797, 821 (1955).

15. *See* Hutchins, *Background and Modern Developments in Water Law in the United States*, 2 NAT. RESOURCES J. 416, 418-19 (1962). The goal of limiting the uses of water is to maximize the benefit from a given water supply; thus, non-beneficial uses are not allowed.

The rights obtained by prior appropriation are normally retained so long as the landowner properly exercises his rights.[16]

In 1840, Texas adopted the common law of England[17] and correspondingly adopted the riparian system of water rights.[18] Although the first judicial recognition of these riparian rights came in 1856,[19] it was not until 1905 that the courts detailed the riparian water rights that were to apply in Texas.[20] The first general statute that authorized appropriation of water for beneficial uses was passed in 1889.[21] Although its application was limited to the arid portions of the state,[22] the act set forth rules for the appropriation of water and for the operation of corporations formed to supply irrigation water.[23] The act was amended by a second act in 1895 to provide more comprehensive legislation.[24] Both acts permitted unappropriated waters to be appropriated under established guidelines;[25] how-

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See, e.g., Weaver v. Eureka Lake Co., 15 Cal. 271, 275 (1860) (claim based on pure speculation held non-beneficial); Maeris v. Bicknell, 7 Cal. 261, 262-63 (1857) (not beneficial use to divert water solely for drainage purposes); *In re* Water Rights of Deschutes River and Tributaries, 286 P. 563, 577 (Or. 1930) (using water to carry off debris not beneficial use). The concept of beneficial use, however, is not static; states have more recently begun to acknowledge recreational uses as being beneficial. *See* Hutchins, *Background and Modern Developments in Water Law in the United States*, 2 NAT. RESOURCES J. 416, 419 (1962).

16. *See* W. HUTCHINS, THE TEXAS LAW OF WATER RIGHTS 102 (1961).

17. *See* 1840 Tex. Gen. Laws, An Act To Adopt the Common Law of England, §§ 1-13, at 3-6, 2 H. GAMMEL, LAWS OF TEXAS 177-80 (1898); TEX. REV. CIV. STAT. ANN. art. 1 (Vernon 1969).

18. *See* Haas v. Choussard, 17 Tex. 588, 590-91 (1856) (riparian landowner may recover actual damages when dam built by another riparian landowner caused injuries).

19. *See id.* at 590-91. The court stated the rule that each "proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it is wont to run . . . without diminution or alteration." *Id.* at 589.

20. *See* Watkins Land Co. v. Clements, 98 Tex. 578, 585, 86 S.W. 733, 735 (1905). Riparian lands were restricted to those in the original grant with the added condition that riparian land must be within the stream's watershed. *See id.* at 585-86, 86 S.W. at 735. Each riparian landowner shares equally in the right to use the water; however, each use must be reasonable under the circumstances surrounding the use. *See id.* at 586, 86 S.W. at 736.

21. *See* 1889 Tex. Gen. Laws, ch. 88, §§ 1-17, at 100-03, 9 H. GAMMEL, LAWS OF TEXAS 1128-31 (1898). The act also provided for the termination of appropriative rights when the use ceased and for the filing of a statement of claims to appropriated waters. *See id.* §§ 3, 5, 6, at 100-01, 9 H. GAMMEL, LAWS OF TEXAS 1128-29 (1898).

22. *See id.* § 2, at 100, 9 H. GAMMEL, LAWS OF TEXAS 1128 (1898).

23. *See id.* §§ 5, 6, 9, 10, at 101, 9 H. GAMMEL, LAWS OF TEXAS 1128-29 (1898).

24. *See* 1895 Tex. Gen Laws, ch. 21, §§ 1-21, at 21-26, 10 H. GAMMEL, LAWS OF TEXAS 751-56 (1898). The 1895 act authorized appropriation for "mining, milling, the construction of waterworks for cities and towns, or stockraising" as well as for the irrigation and domestic uses provided for in the 1889 act. *See id.* § 2, at 21-22, 10 H. GAMMEL, LAWS OF TEXAS 751-52 (1898).

25. *See* 1889 Tex. Gen. Laws, ch. 88, §§ 5, 6, at 101, 9 H. GAMMEL, LAWS OF TEXAS 1129

ever, all water rights so acquired were subject to existing riparian rights, leaving Texas with a dual system of water law.[26]

In 1913, the legislature expanded the act of 1895 to apply to the entire state[27] and created the Board of Water Engineers[28] which was subsequently given authority by the legislature to adjudicate water rights and to supervise the distribution of water according to priorities the Board determined.[29] Eight years later, the courts declared unconstitutional this attempt to allow administrative agency determination of vested property rights,[30] and the water law of Texas remained in a state of confusion until

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(1898). This act provided for filing and recording in the county clerk's office statements detailing where the water was diverted, how it was diverted, and the name of the party who diverted it. *See id.* § 5, at 101, 9 H. GAMMEL, LAWS OF TEXAS 1129 (1898). The 1895 act contained these same provisions but also authorized the filing of an intent to irrigate with construction to begin in less than ninety days. *See* 1895 Tex. Gen. Laws, ch. 21, §§ 6, 8 at 22-23, 10 H. GAMMEL, LAWS OF TEXAS 752-53 (1898).

26. *See In re* Adjudication of the Upper Guadalupe River Segment of the Guadalupe River Basin, 625 S.W.2d 353, 364 (Tex. Civ. App.—San Antonio 1981, writ granted) (confused state of water law in Texas due to recognition of riparian rights as well as rights acquired by prior appropriation); *see also* 1889 Tex. Gen. Laws, ch. 88, § 1, 2, at 100, 9 H. GAMMEL, LAWS OF TEXAS 1128 (1898) (statute applies only to unappropriated waters in arid parts of state). The 1895 Act provided that:

> The ordinary flow or underflow of the running water of every natural river or stream within those portions of Texas described in section 1 of this act may be diverted from its natural channel . . . . [P]rovided, that such flow or underflow of water shall not be diverted to the prejudice of the rights of the riparian owner without his consent, except after condemnation thereof in the manner as hereinafter provided.

1895 Tex. Gen. Laws, ch. 21, § 3, at 22, 10 H. GAMMEL, LAWS OF TEXAS 752 (1898). Subsequently, the courts described riparian waters as those "waters of the ordinary flow and underflow of the stream." *See* Motl v. Boyd, 116 Tex. 82, 111, 286 S.W. 458, 468 (1926).

27. *See* 1913 Tex. Gen. Laws, ch. 171, § 1, at 358. Another modification provided that all unappropriated waters were the property of Texas. *Compare id.* § 1, at 358 (unappropriated waters property of state) *with* 1895 Tex. Gen. Laws, ch. 21, § 1, at 21, 10 H. GAMMEL, LAWS OF TEXAS 751 (1898) (unappropriated waters property of public).

28. *See* 1913 Tex. Gen. Laws, ch. 171, § 7, at 359-60. The duties of the Board were:

> to make or cause to be made measurements and calculations of the flow of streams . . . ; to collect data and make surveys; to determine the most suitable location for constructing works to utilize the waters of the State; to ascertain the location and area of the lands best suited for irrigation; to examine and survey reservoir sites; and wherever practicable, to make estimates of the cost of proposed irrigation works, and the improvements of reservoir sites.

Id. § 42, at 368.

29. *See* 1917 Tex. Gen. Laws, ch. 88, § 27, at 218 (board authorized to receive evidence, hear arguments, and either approve or reject applications).

30. *See* Board of Water Eng'rs v. McKnight, 111 Tex. 82, 97, 229 S.W. 301, 307 (1921). Many authorities believe that Corzelius v. Harrell, 143 Tex. 509, 186 S.W.2d 961 (1945), which upheld the constitutionality of allowing the Texas Railroad Commission to determine correlative rights of landowners of underground reservoirs of oil and gas, overruled *McKnight*. *See* W. HUTCHINS, THE TEXAS LAW OF WATER RIGHTS 480-84 (1961); Trelease, *Co-*

1967.[31]

The Water Rights Adjudication Act,[32] based on Oregon's statutes,[33] created the Texas Water Rights Commission which had authority similar to that of the Board of Water Engineers with one significant exception—the Act provided for judicial review before any final determination could be made.[34] This Act limited the rights of riparian landowners by mandating recognition of those rights to the extent of water beneficially used during a fixed period.[35] Moreover, failure by any riparian landowner to file his claim according to procedures set forth in the statute resulted in extinguishment of his rights to riparian waters; the statute made no provision for compensation.[36] The bases of the Water Rights Adjudication Act were the conservation amendment and the police power of the state.[37]

In *Schero v. Texas Department of Water Resources*,[38] the Waco Court of Appeals concluded that Texas' adoption of the English common law in 1840 created vested riparian rights in all pre-1895 patents from the state.[39] The court noted the long case history in Texas upholding vested riparian rights and viewed them as including a right to unlimited reasonable use which could not be lost through non-use, thus recognizing a right

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ordination of Riparian and Appropriative Rights to the Use of Water, 33 TEX. L. REV. 24, 60 (1954).

31. *See In re* Adjudication of the Upper Guadalupe River Segment of the Guadalupe River Basin, 625 S.W.2d 353, 364 (Tex. Civ. App.—San Antonio 1981, writ granted).

32. *See* TEX. WATER CODE ANN. §§ 11.301-.341 (Vernon Supp. 1982).

33. *See* Booth, *Adjudication of Water Rights—A General Discussion of Water Rights and Recent Legislation to Administer Water Rights in Texas*, in WATER . . . AND THE NEW TEXAS LAW 42 (1968).

34. *See* TEX. WATER CODE ANN. §§ 11.320-.322 (Vernon Supp. 1982). Section 11.320(a) provides that:

> In passing on exceptions, the court shall determine all issues of law and fact independently of the commission's determination. The substantial evidence rule shall not be used. The court shall not consider any exception which was not brought to the commission's attention by application for rehearing. The court shall not consider any issue of fact raised by an exception unless the record of evidence before the commission reveals that the question was genuinely in issue before the commission.

Id. § 11.320(a).

35. *See id.* § 11.303. The period covered the years from 1963 to 1967. *See id.* § 11.303(b). If a riparian landowner had begun construction designed to increase his beneficial use of water before August 28, 1967, however, the applicable period was from 1963 to 1970. *See id.* § 11.303(b).

36. *See id.* § 11.303(i). Note that domestic and livestock uses were excepted from this provision of the act. *See id.* § 11.303(*l*).

37. *See id.* § 11.302. The Water Rights Adjudication Act did not require the state to proceed under its power of eminent domain and thus to compensate damaged riparian landowners. *See id.* §§ 11.301-.341.

38. 630 S.W.2d 516 (Tex. Ct. App.—Waco 1982, writ granted).

39. *Id.* at 518.

of non-use.[40] Schero's vested riparian rights had been taken without compensation because the Texas Water Rights Adjudication Act limited Schero's use to the beneficial use during the 1963-1967 period regardless of whether future additional uses of the water were reasonable.[41] The court held such a taking could not be justified by either the police power of the state or by the conservation amendment.[42]

Schero is the latest attempt by the courts to resolve the dilemma created by the need to avoid destroying any vested riparian property rights while simultaneously avoiding water waste.[43] Increasingly, arid and semi-arid states hold that water not beneficially used is wasted.[44] The recent trend has, therefore, been to limit riparian rights.[45] Although the *Schero* court declared that riparian rights in Texas included unrestricted reasonable use not forfeited by non-use, the court failed to state the authorities upon which it relied.[46] Stating the opposing view, that riparian rights are vested only to the degree of actual beneficial use, another Texas court similarly omitted citations to specific cases.[47] The adoption of the conservation amendment, however, emphasizes the importance the state places on using natural resources wisely and may therefore alleviate the need for precedent.[48]

In a recent court of appeals opinion, a result directly opposite that in *Schero* was reached.[49] In *In re Adjudication of the Upper Guadalupe*

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40. *See id.* at 520.

41. *See id.* at 520-21.

42. *See id.* at 521. Two of Schero's tracts patented after 1895 did not include riparian rights and, therefore, were held to be subject to the Texas Water Rights Adjudication Act. *See id.* at 521-22.

43. *Cf.* Schero v. Texas Dep't of Water Resources, 630 S.W.2d 516, 520-21 (Tex. Ct. App.—Waco 1982, writ granted) (references to earlier cases attempting to resolve water law problems).

44. *See, e.g.*, Williams v. City of Wichita, 374 P.2d 578, 591 (Kan. 1962) (unused water flowing to ocean represents economic waste plus loss of valuable resource); Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642, 647 (Tex. 1971) (beneficial use represents conservation; non-use represents waste); Basin Elec. Power Coop. v. State Bd. of Control, 578 P.2d 557, 563 (Wyo. 1978) (appropriator's right to water does not exceed beneficial use even if use less than adjudicated amount). Many of these states have experienced water shortages and droughts. *See* U.S. NEWS & WORLD REP., July 21, 1980, at 31-32.

45. *See* Hutchins, *Background and Modern Developments in Water Law in the United States*, 2 NAT. RESOURCES J. 416, 438 (1962).

46. *See* Schero v. Texas Dep't of Water Resources, 630 S.W.2d 516, 520 (Tex. Ct. App.—Waco 1982, writ granted).

47. *See In re* Adjudication of the Upper Guadalupe River Segment of the Guadalupe River Basin, 625 S.W.2d 353, 359-60 (Tex. Civ. App.—San Antonio 1981, writ granted).

48. *Cf.* TEX. CONST. art. XVI, § 59. The conservation amendment was adopted in 1917. TEX. CONST. art. XVI, § 59 interpretive commentary (Vernon 1955).

49. *Compare* Schero v. Texas Dep't Water Resources, 630 S.W.2d 516, 520-21 (Tex. Ct. App.—Waco 1982, writ granted) (riparian rights include unlimited reasonable use and are

River Segment of the Guadalupe River Basin,[50] the San Antonio Court of Civil Appeals declared that the limitation on riparian rights was a mere refinement of earlier case law.[51] Viewed as a modification rather than a taking, the application of the legislation was within the power of the legislature.[52] Although a state cannot refuse to acknowledge any pre-existing vested rights,[53] the police power gives the state the authority to make reasonable regulations of both personal rights and property rights in the interest of the public's health or general welfare.[54] Additionally, the conservation amendment specifically authorizes all legislation necessary to conserve and preserve natural resources.[55] Instances sometimes arise, however, where these state powers are not sufficient to justify restrictions on property rights unless there is compensation for the infringement on those rights.[56] In these cases, the state must proceed under its power of

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not subject to legislative modification without compensation) *with In re* Adjudication of the Upper Guadalupe River Segment of the Guadalupe River Basin, 625 S.W.2d 353, 359-60 (Tex. Civ. App.—San Antonio 1981, writ granted) (riparian rights only vested to extent beneficially used and subject to legislative modification under police power or conservation amendment).

50. 625 S.W.2d 353 (Tex. Civ. App.—San Antonio 1981, writ granted).

51. *See id.* at 359. "There is no vested right in the decisions of a court and a change of decision does not deprive one of equal protection of the laws or property without due process of law." Baumann v. Smrha, 145 F. Supp. 617, 625 (D. Kan.), *aff'd*, 352 U.S. 863 (1956).

52. *In re* Adjudication of the Upper Guadalupe River Segment of the Guadalupe River Basin, 625 S.W.2d 353, 359 (Tex. Civ. App.—San Antonio 1981, writ granted); *see also* Baumann v. Smrha, 145 F. Supp. 617, 624 (D. Kan.), *aff'd*, 352 U.S. 863 (1956) (federal court upheld constitutionality of Kansas act limiting riparian rights even though act departed from rule established by prior court decisions).

53. *See* Baumann v. Smrha, 145 F. Supp. 617, 624-25 (D. Kan.), *aff'd*, 352 U.S. 863 (1956).

54. *See* Lombardo v. City of Dallas, 124 Tex. l, 10, 73 S.W.2d 475, 478 (1934). "All property is held subject to the valid exercise of the police power; nor are regulations unconstitutional merely because they operate as a restraint upon private rights of person or property or will result in loss to individuals." *Id.* at 10, 73 S.W.2d at 478. The police power thus justifies restricting the use of private property through zoning ordinances. *See id.* at 17-22, 73 S.W.2d at 481-83.

55. *See* TEX. CONST. art. XVI, § 59(a). This amendment has been used to uphold the Railroad Commission's adjustment of correlative rights of owners of gas in a common reservoir. *See* Corzelius v. Harrell, 143 Tex. 509, 513, 186 S.W.2d 961, 964 (1945).

56. *See* City of Austin v. Teague, 570 S.W.2d 389, 391 (Tex. 1978). Traditionally, the rule has been that there must be a physical taking before compensation can be awarded. *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 46-48 (1964). This test becomes unsatisfactory in light of article 1, section 17 of the Texas Constitution which provides compensation for "damaging or destroying" as well as "taking" property; accordingly, Texas has consistently held that an actual taking is not required. *See, e.g.*, DuPuy v. City of Waco, 396 S.W.2d 103, 110 (Tex. 1965) (compensation necessary when no reasonable access to property following city's construction of viaduct); State v. Hale, 136 Tex. 29, 40-43, 146 S.W.2d 731, 735-36 (1941) (compensation required when farm land damaged by silt deposits after state's

eminent domain.[57]

The distinctions between the police power and the power of eminent domain are anything but clear.[58] The Texas courts have recognized the judicial problems created by this lack of clarity[59] and have attempted to establish helpful guidelines,[60] but have also refused to attempt to "compartmentalize what is manifestly illusory."[61] It is arguable that the state should proceed under eminent domain rather than the police power and thus provide compensation to those whose rights are affected.[62] In past cases, the courts have required compensation where substantial property rights have been denied to an individual[63] and also where the loss did not affect the general population.[64] In *Schero* the court concluded that compensation was required because the general public was not similarly af-

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road construction altered drainage); Gulf, C. & S.F.R.R. v. Eddins, 60 Tex. 656, 667 (1884) (compensation allowed when railroad construction damaged land).

57. *See* City of Austin v. Teague, 570 S.W.2d 389, 391 (Tex. 1978). Eminent domain is the power of the state to take "private property for a public use" after compensating the property owner. *See* Friedman v. American Sur. Co. of N.Y., 137 Tex. 149, 160, 151 S.W.2d 570, 577 (1941).

58. *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964). The general confusion associated with these two aspects of a state's power traces back as far as the early seventeenth century. *See id.* at 54.

59. *See, e.g.*, DuPuy v. City of Waco, 396 S.W.2d 103, 107 (Tex. 1965) (pointing out "manifest illusoriness of distinctions" between police power and eminent domain); Brazos Basin Auth. v. City of Graham, 163 Tex. 167, 176, 354 S.W.2d 99, 105 (1961) (attempting distinctions between police power and eminent domain involves "sophistic Miltonian Serbonian bog"); San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266, 273 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (noting "crazyquilt pattern" of judicial decisions involving eminent domain and police power).

60. *Compare* DuPuy v. City of Waco, 396 S.W.2d 103, 110 (Tex. 1965) (recovery when all reasonable access to property denied) *with* Moorlane Co. v. Highway Dep't, 384 S.W.2d 415, 418-19 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e.) (no recovery when only incidental interference with access to property). Another useful test provides for compensation for damages when the government abandons its neutral position and acts for its own ultimate advantage. *See* San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266, 274 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (compensation allowed when plans for subdivision rejected because city had plans to build dam and wanted development halted to keep down costs of later condemnation). An additional test provides compensation when a loss to a party is not "common to the general public." DuPuy v. City of Waco, 396 S.W.2d 103, 107 (Tex. 1965).

61. *See* City of Austin v. Teague, 570 S.W.2d 389, 392 (Tex. 1978) (court rejected rigid guidelines for distinguishing between police power and eminent domain).

62. *Cf. id.* at 391-93 (distinctions between eminent domain and police power confusing and court proceeds on case-by-case factual determination).

63. *See* DuPuy v. City of Waco, 396 S.W.2d 103, 110 (Tex. 1965) (compensation required when landowner denied all reasonable access to property).

64. *See* State v. Hale, 136 Tex. 29, 40-43, 146 S.W.2d 731, 735-36 (1941) (compensation necessary when construction of road altered drainage and caused land to become unfit for farming).

fected;[65] therefore, any limitation of water rights beyond that of reasonable use violated vested riparian rights and could not be supported by either the police power of the state or the conservation amendment unless the riparian landowner was compensated.[66]

In considering the constitutionality of the Texas statute, one may look to other states which have reached varying results when considering the constitutionality of statutes or constitutional amendments which limit riparian rights.[67] Oregon's act of 1909[68] has withstood constitutional challenge on two occasions.[69] The act, however, represented only a slight modification of existing riparian rights, whereas the Texas statute envisioned a more significant curtailment of riparian rights.[70] An amendment to the California constitution restricting vested riparian rights to the amount of water beneficially used[71] was held constitutional, but the court simultaneously ruled that a riparian landowner was entitled to compensation for his loss of riparian rights; previously, Texas had not required similar compensation.[72] In Kansas, a 1945 act[73] limited vested riparian rights to those

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65. *See* Schero v. Texas Dep't of Water Resources, 630 S.W.2d 516, 521 (Tex. Ct. App.—Waco 1982, writ granted).

66. *See id.* at 521. The court, however, did not hold the 1967 act unconstitutional. *See id.* at 521.

67. *Compare* Baeth v. Hoisveen, 157 N.W.2d 728, 732-33 (N.D. 1968) (police power jusitifes regulation of water rights in semiarid state where regulation benefits general public) *with* Herminghaus v. Southern Cal. Edison Co., 252 P. 607, 622-23 (Cal. 1926) (police power does not justify taking riparian rights).

68. *See* OR. REV. STAT. § 539.010-.220 (Supp. 1981). This act limited riparian rights to the actual beneficial use established before February 24, 1909, and required the filing of a statement of use to maintain those rights. *See id.* §§ 539.010(1), 539.210 (Supp. 1981).

69. *See* California-Oregon Power Co. v. Beaver Portland Cement Co., 73 F.2d 555, 567 (9th Cir. 1934), *aff'd on other grounds*, 295 U.S. 142 (1935) (upheld modification of riparian rights because all existing riparian rights preserved); *In re* Hood River, 227 P. 1065, 1084-85 (Or. 1924) (since riparian rights may be defined by legislature, modification of common law rights permissible).

70. *Compare In re* Hood River, 227 P. 1065, 1085 (Or. 1924) (riparian rights previously vested only to extent beneficially used) *with* Board of Water Eng'rs v. McKnight, 111 Tex. 82, 92, 229 S.W. 301, 304 (1921) (riparian landowner's use must be reasonable).

71. *See* CAL. CONST. art. XIV, § 3.

72. *Compare* United States v. Gerlach Live Stock Co., 339 U.S. 725, 752 (1950) (public welfare requires riparian landowners to sacrifice benefits but loss must be compensated) *with In re* Adjudication of the Upper Guadalupe River Segment of the Guadalupe River Basin, 625 S.W.2d 353, 361 (Tex. Civ. App.—San Antonio 1981, writ granted) (police power justifies regulation of water rights without compensation). Prior to the adoption of the constitutional amendment, the California legislature made a similar attempt to restrict riparian rights without compensation. *See* 1913 CAL. STATS., ch. 586, § 11, *cited in* Herminghaus v. Southern Cal. Edison Co., 252 P. 607, 621 (Cal. 1926). The California courts found that act an invalid attempt to destroy vested riparian rights. *See* Herminghaus v. Southern Cal. Edison Co., 252 P. 607, 623 (Cal. 1926). The constitutional amendment was adopted after the attempt to limit riparian rights by statute failed. *See* United States v. Gerlach Live

currently being put to beneficial use and provided for the extinguishment of water rights whenever the water was not beneficially used for a three-year period.[74] While upholding the act as a valid exercise of the state's police power, the court noted that the Kansas act did provide for compensation to damaged riparian landowners.[75] The Texas Water Rights Adjudication Act does not provide for such compensation,[76] and at least two other states also do not require compensation.[77] South Dakota determined that the police power of the state justified limitation of riparian rights even without compensation.[78] Similarly, North Dakota courts held that the limitation imposed upon riparian rights were for the welfare of the general public and thus sustained their act as a valid exercise of the police power.[79] Although an examination of the rulings of other states' courts may be informative, one justice of the Supreme Court of Texas has publicly stated that Texas courts will not be bound by out-of-state court decisions.[80] Furthermore, each state has a different history of construing riparian rights and the ability of the police power to regulate them which makes out-of-state court decisions of questionable precedential value.[81]

Stock Co., 339 U.S. 725, 749-51 (1950).

73. *See* KAN. STAT. ANN. §§ 82a-701 to -728 (1977 & Supp. 1980).

74. *See id.* §§ 82a-701(d) & -718. Previously, riparian rights in Kansas had extended to any reasonable use of the water. *See* Clark v. Allaman, 80 P. 571, 585 (Kan. 1905).

75. *See* Williams v. City of Wichita, 374 P.2d 578, 592-94 (Kan. 1962). The statute provided that a riparian landowner could bring suit against an appropriator for the actual damage sustained by the riparian landowner as a result of the appropriator's use of the water. *See* KAN. STAT. ANN. § 82a-716 (1977).

76. *See* TEX. WATER CODE ANN. §§ 11.301-.341 (Vernon Supp. 1982).

77. *See* Baeth v. Hoisveen, 157 N.W.2d 728, 732-33 (N.D. 1968) (upheld regulation of riparian rights in North Dakota without compensation); Knight v. Grimes, 127 N.W.2d 708, 713-14 (S.D. 1964) (upheld South Dakota statute which did not provide compensation for riparian landowners).

78. *See* Knight v. Grimes, 127 N.W.2d 708, 711-14 (S.D. 1964); S.D. COMP. LAWS ANN. §§ 46-1-1 to -14 (Supp. 1981). The court found that the welfare of the general public required such regulation of water resources. *See* Knight v. Grimes, 127 N.W.2d 708, 714 (S.D. 1964).

79. *See* Baeth v. Hoisveen, 157 N.W.2d 728, 732-33 (N.D. 1968) (upheld statute under police power); N.D. CENT. CODE § 61-01-01 to -23 (1960). North Dakota had traditionally recognized riparian rights as vested property rights for all reasonable uses of the water. *See* Bigelow v. Draper, 69 N.W. 570, 573 (N.D. 1896).

80. Statements by Justice Pope, oral argument *In re* Adjudication of Water Rights in the Llano River Watershed of the Colorado River Basin in the Supreme Court of Texas (June 16, 1982).

81. *Cf.* Marquis, Freeman, and Heath, *The Movement for New Water Rights Laws in the Tennessee Valley States*, 23 TENN. L. REV. 797, 825-27 (1955) (discussing varied treatment of riparian rights in western states). *Compare* Schero v. Texas Dep't of Water Resources, 630 S.W.2d 516, 520 (Tex. Ct. App.—Waco 1982, writ granted) (riparian rights traditionally limited to reasonable use) *with In re* Hood River, 227 P. 1065, 1085 (Or. 1924) (riparian rights historically limited to actual beneficial use).

The Texas Water Rights Adjudication Act permits the taking of vested property rights without compensation. Neither the police power of the state nor the conservation amendment can be interpreted in such a way as to justify such a taking. Only a finding that riparian rights were never vested property rights will enable the Court to hold the Act constitutional in its current form. Alternatively, the Court could adopt a solution similar to that of the California courts and declare the Act constitutional while simultaneously mandating compensation for the damaged landowners.[82] Should the Court find that the issue of vested property rights poses a close constitutional problem, policy considerations will become the focal point.[83] Considering that approximately seventy-five percent of the streams in the state have now been adjudicated under this Act,[84] finding the Act unconstitutional would plunge Texas water law into a renewed state of confusion. Alternately, sustaining the 1967 Act would create stability and certainty in a field of law which has been unsettled for over a hundred years.

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82. *See* United States v. Gerlach Live Stock Co., 339 U.S. 725, 752 (1950) (state could pass constitutional amendment limiting riparian rights but landowners entitled to compensation).

83. On November 24, 1982, the Supreme Court of Texas handed down its decision in *Schero*. *See In re* Adjudication of the Upper Guadalupe River Segment of the Guadalupe River Basin, 26 Tex. Sup. Ct. J. 116 (Nov. 27, 1982). The court, in an opinion authored by Justice Pope, overruled *Schero* and affirmed *Guadalupe*. Riparian right owners were found to have only a vested usufructory use and that "after notice and upon reasonable terms, the termination of the riparian's continuous non-use of water is not a taking of their property." *Id.* at 120. The court spent considerable time discussing the need for water conservation in Texas, thereby evidencing the weight given to public policy in reaching their determination. *See id.* at 118.

84. Statement by Timothy Brown, Asst. Att'y Gen. of Tex., oral argument *In re* Adjudication of Water Rights in the Llano River Watershed of the Colorado River Basin in the Supreme Court of Texas (June 16, 1982).