

**Water Issues  
White Paper**

**Rights in Groundwater at Common Law**

**Prepared for the Comprehensive State Water Plan  
Joint Study Committee**

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## **Introduction**

Several white papers on water rights have been submitted to the Joint Study Committee. There is no need to duplicate the thoughtful scholarship of others, but there is one point that warrants additional attention. There is general agreement that Georgia rejected appropriative rights and adopted riparian rights of reasonable use in the middle of the 19th century, that our common law applies riparian rights to surface waters, and that our permitting statutes embody riparian rights with respect to both surface and groundwaters. This paper will discuss a less settled issue: how our common law approaches groundwater.

The white paper of Robert Bomar, Assistant Attorney General, notes an ambiguity in the common law on groundwater and that a strong case can be made for “some form of reasonable use doctrine.” The white paper of Draper and Dellapenna concludes that our common law provides a right to extract groundwater “for any reasonable use.” This paper will look at the rationale behind the leading cases and conclude that Georgia’s aquifers, which flow over great distances and serve many communities, are plainly subject to riparian rights and the reasonable use doctrine under common law principles.

## **Summary of the Analysis**

No Georgia case has expressly addressed rights in aquifers, as modern science understands them. It is, therefore, fair to say that there is an ambiguity in the case law. The cases address a distinction between “underground streams” and “percolating” waters. Given the law of flowing waters, the rationale of the Georgia cases and current scientific knowledge, aquifers are analogous to underground streams, which are subject to riparian rights of reasonable use.

Any ambiguity in the cases, however, was clarified and resolved by our permitting statutes. They make both surface water and groundwater subject to riparian rights of reasonable use, which are usufructory rights. The nature of the usufructory rights in the water is the same, no matter how much is withdrawn. The threshold of 100,000 gallons per day for withdrawal permits is an administrative convenience and does not change the nature of the rights.

## **Discussion**

The nature of riparian rights and the reasonable use doctrine is described in the 1909 case of Price v. High Shoals Manufacturing, 132 Ga. 246, 64 S.E. 87 (1909):

Riparian proprietors have a common right in the waters of the stream, and the necessities of the business of one cannot be the standard of the rights of another ... Riparian proprietors have no title to the water which flows over their land, but are entitled to a reasonable use thereof ... The property, therefore, consists not in the water itself, but the added value which the stream gives to the land through which it flows.

Price made it clear that inartful language in the 1863 Georgia Code (which could be read to allow unlimited withdrawals from surface streams and which remains today) does not change riparian rights in surface water or the common law standard of reasonable use.

Two cases provide the framework for applying the rule in Price to aquifers.

The first case was Saddler v. Lee, 66 Ga. 45 (1880). Lee, a landowner in Lee County, had water that boiled up in a sink, and, after running a few steps, sank down again. Saddler, an owner down gradient, claimed that the same water emerged later as a stream and filled a pond to run his mill. The question was whether Saddler had any remedy if Lee diverted the water in the sink. The applicable statute (now O.C.G.A. Sec. 51-9-8) stated: “The course of a stream of water underground and its exact condition before its first use are so difficult of ascertainment that trespass may not be brought for any supposed interference with the rights of a proprietor.” Lee argued that, under this statute, the law provided no remedy if he diverted water that was almost entirely underground on his land.

This statute is grounded in a problem of proof resulting from the limited scientific knowledge regarding subsurface waters at the time. The reason for not interfering with a proprietor’s use of groundwater was that the course and condition of groundwater were “so difficult of ascertainment.” In applying the statute, the Court distinguished between groundwater, which “percolates” and “underground streams.” The Court held that, if Saddler could trace the course of the water and prove that it was the same water that flowed under Lee’s property, then he would be protected in the same manner as if a surface stream were involved.

In coming to this conclusion, the Court adopted the rationale of a sister state, as follows:

In limestone regions, streams of great volume and power pursue their subterranean courses for great distances, then emerge from their caverns furnishing power for machinery and supplying towns and settlements with water for all purposes of life; ... and to say that these streams might be obstructed, or diverted merely because they run through subterranean channels, is to forget the rights and duties of men in relation to flowing water. [Emphasis added.]

Thus, the Court recognized that water that flows from place to place and serves different communities “for all the purposes of life” is inherently a shared resource. Draper and Dellapenna point out that this idea goes back at least as far as the Justinian Code, which states: “By the laws of nature, flowing water is the common property of all men.”

The case of Stoner v. Patten, 132 Ga. 178 (1909), clarifies the distinction between “underground streams” and groundwater that “percolates.” The Court applied riparian rights of reasonable use to underground streams. As to water that percolates, the court stated: “... the owner has the same exclusive proprietorship in the water which seeps through his soil and collects in the substrate, as in that water which falls from the clouds upon the roof of his house and is collected in a cistern.” The distinction, then, between groundwater subject to exclusive proprietorship and

groundwater subject to riparian rights of reasonable use is really the distinction between a small, localized groundwater feature whose water originates from the surface in the immediate vicinity (such as perched subsurface water) and a groundwater feature whose flow can be shown to originate up gradient and pass beneath and through the property of an owner (such as an aquifer).

The common law develops case by case and by analogy. No Georgia case has addressed how the reasoning of Saddler and Stoner should apply to an aquifer as defined by modern science, such as the Floridan. Under the framework of these cases, the question is whether such an aquifer should be treated as an “underground stream” or “percolating” water. If an aquifer is analogous to an “underground stream,” then it is subject to riparian rights of reasonable use.

Under the reasoning of Georgia’s common law, an aquifer is plainly more akin to an “underground stream” than to water falling from the clouds onto an individual property and collecting on or beneath the property. Aquifers flow great distances and serve many communities with many uses. They are, therefore, subject to the “duties of men in relation to flowing waters,” recognized in Saddler. An aquifer is not a localized feature that can be analogized to “water which falls of the roof of the house and is collected in a cistern,” as described in Stoner, such that exclusive proprietorship would apply. The problem of proof with respect to the source and flow of groundwater, discussed in Saddler, has been largely solved. Modern science can trace real impacts on down-gradient communities to overconsumption by up-gradient uses. The reasonable use rule in Price applies to Georgia’s aquifers.

It bears repeating, however, that it is no longer necessary to argue about how a court would apply the common law to aquifers. In the Ground Water Use Act of 1972, the legislature resolved the question of whether groundwater is subject to riparian rights of reasonable use. Under that Act, the Environmental Protection Division manages our aquifers as a public resource based on our common law system of riparian rights. EPD issues permits for withdrawal that define reasonable use. Currently, the threshold for a permit is a withdrawal of 100,000 gallons per day. This threshold, however, is a matter of administrative convenience; and the Water Rights Structure Working Group has suggested that a lower threshold should be studied. The level of the threshold does not change the legislature’s determination that management of our groundwater should be based on the system of riparian rights to reasonable use found in our common law.