



The Role of Water Rights and Georgia Law in Comprehensive Water Planning for Georgia

**A White Paper to the Joint Comprehensive Water Plan
Study Committee by the Georgia Chamber of Commerce**

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Executive Summary

The Georgia Chamber of Commerce has developed this white paper for the Water Rights Working Group to further explore the current legal status of water rights in Georgia. The paper examines the five primary sources where the law speaks to water rights in Georgia: the Official Code of Georgia, the US and Georgia Constitutions, case law, and administrative law, including the Rules of the Georgia Department of Natural Resources. The paper also examines the need for changes to the current system of water rights. The findings of the paper are as follows:

- I. The concept of water or riparian rights as private property is the common and essential element in water law.
- II. Georgia's regulation of surface and ground water is an adaptable system consistent with riparian rights.
- III. The current system of riparian rights in conjunction with state regulation (regulated riparianism) is well suited to handle the present and future challenges Georgia faces with respect to water supply and allocation.

IV. There are modifications to the current regulated riparian system that could be made to better position Georgia to manage its water. The five areas the Georgia Chamber has identified are:

- Consumptive vs. non-consumptive uses
- Transferability of water rights
- Involuntary reallocation during shortages
- Better assessment of existing water uses
- Public notice of permit actions

The white paper more fully explains each of the Georgia Chamber's findings and the five areas where Georgia's current water rights framework may need more work.

Senate Resolution 142 (2001) directs the Joint Comprehensive Water Plan Study Committee (“Study Committee”) and its working groups to “recommend a process and schedule to prepare the details of a comprehensive water plan, develop the principle for a comprehensive water plan, and recommend any other action or legislation the study committee deems appropriate.” Any recommendation concerning these three items requires a clear understanding of how Georgia law, as developed over hundreds of years, constrains and enables waters of the State of Georgia to be allocated and reallocated.

Georgia law on water is found from at least five primary sources: the Official Code of Georgia; the Constitutions of the United States and the State of Georgia; case law, including the Common Law as adopted from England; and Administrative Law, including the Rules of the Georgia Department of Natural Resources. The complex, and often confusing, interrelationship of these primary sources is explained within. The Study Committee should consider the existing mosaic of rights, responsibilities and legal precedent present in our current legal system before entertaining any wholesale or radical changes to the current system.

Of particular concern is any attempt to change the nature of the current system of water rights in Georgia. The claims and legal rights of Riparian owners must be honored, while protecting the public interest to a reliable water supply and sustainable environment as required under the inherent Police Powers of the State. Both of these obligations can be met under the current system of Georgia Water Law with minor changes as described in the following brief.

DISCUSSION OF LEGAL ISSUES REGARDING WATER RIGHTS

I. Water Rights are Private Property in Georgia

The United States Supreme Court has stated, "the quality of being riparian . . . may be the land's 'most valuable feature'".¹ Georgia courts have characterized water rights in Georgia as a system of riparian rights vested in landowners. The courts have characterized the Georgia concept as "natural flow subject to reasonable use."² The concept that running water belongs to the owner of the land on which it runs is also recognized in the Georgia Code.³ Similarly, groundwater belongs to the landowner in Georgia.⁴ The legislature has no power to compel or interfere with the owner's lawful use of water, except to restrain nuisances.⁵ Georgia's Code has merely followed and codified water law as developed by the courts.

Water is an attribute of private property, which the Georgia Courts have protected.⁶ In 1997, the Georgia Supreme Court stated,

Rivers are of three kinds: 1st. **Such as are wholly and absolutely private property.** 2d. Such as are private property subject to the servitude of the public interest, by a passage upon them. The distinguishing test between the two is, whether they are susceptible or not of use for a common passage. 3d. Rivers where the tide ebbs and flows, which are called arms of the sea.⁷

¹ Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977).

² Hendrick v. Cook, 4 Ga. 241 (1848); Pyle v. Gilbert, 245 Ga. 403 (1980).

³ O.C.G.A. § 44-8-1.

⁴ Stoner v. Patten, 132 Ga. 178 (1909). In Georgia, the owner of realty has title downwards and upwards indefinitely. O.C.G.A. § 51-9-9.

⁵ O.C.G.A. § 44-8-3.

⁶ Robertson v. Arnold, 182 Ga. 664 (1936) ("The right . . . is inseparably annexed to the soil, and is parcel of the land itself, and comes with the protection of the Constitutional provision which forbids the taking of private property for public purposes without just and adequate compensation being first paid.").

⁷ Givens v. Ichauway, Inc., 493 S.E.2d 148 (1997)(citing Young v. Harrison, 6 Ga. 130, 141 (1849))(emphasis added); See also, Price v. High Shoals Manufacturing Co., 132 Ga. 246 (1908) ("Flow and use [of water] belongs to the land through which [it] passes, as an incident, convenience, or easement which inseparably connects itself therewith as a part thereof, and frequently gives or adds value thereto, **and is a private property right to the proprietor thereof, within the protection of the Constitutional provision that private property shall be forever held inviolate, subject to the public welfare, and shall not be taken for public use without compensation being first made.**") (emphasis added).

While the right to water has sometime been described as a “usufruct,” usufructs are nonetheless protected property interests.⁸ Recently, the Georgia Court of Appeals stated:

This Court diligently protects the sacred right of property owners to just and adequate compensation before private property is taken or damaged for public purposes. And a leasehold interest, including a usufruct, is a property right that cannot be taken for public use without first paying just and adequate compensation. McGregor v. Board of Regents, 249 Ga. App. 612, 548 S.E. 2d 116 (2001).

Thus, water rights are property rights in the State of Georgia, protected by the Constitution, common law, and Georgia Code. It is imperative that this protection continue for legal as well as social and policy reasons. Georgia citizens have purchased land, constructed facilities and engaged in farming and industry, in reliance on the legal precedent that their water rights will be protected by law. Current and future land investments, and investment for agricultural, municipal and industrial purposes depend upon the ability of these land owners to utilize water. Any water allocation process undertaken in Georgia must take into account the nature of water rights as property. As explicitly recognized by the Model Water Code, any taking of these rights is subject to fair and just compensation under the Constitution.⁹

II. Georgia’s Regulation of Surface and Ground Waters Is an Adaptable System Consistent with Riparian Rights

The status of water rights as property rights in Georgia should not alarm those concerned with protection of the public interest. It is a tenet of Riparian common law and Georgia law that private use may not unreasonably interfere with riparian uses. The State may exercise its police powers, as it does with regard to many other private activities, in order to protect the public interest.

⁸ Franco’s Pizza & Delicatessen v. Dep’t of Transportation, 178 Ga. App. 331, 343 S.E. 2d 123 (1986).

⁹ The Regulated Riparian Model Water Code, at 29-30 (“Protection of Property Rights.”).

Georgia EPD is authorized, under the State's police powers, to regulate private and public use of surface and ground waters.¹⁰ Pursuant to the State's police power, the Georgia Code regulates the exercise of Riparian and groundwater rights, but does not presume to take ownership of the right to use water away from Riparian landowners. *Id.* The common law as developed in the courts remains intact.¹¹ Georgia is thus known as a "Regulated Riparian" state.¹²

The State's power to regulate uses of the waterways does not come from any ownership of the waters by the State itself. Moreover, it is not necessary for the State to own the waters in order to regulate them. In its role as a protector and manager of the resource, the State through its agencies is acting to protect the citizens. It is not acting as a property owner to enforce a property right. Therefore, changes in the way in which the State regulates withdrawers of water, dischargers of water and other users of the waterways must be based upon addressing a need to protect the health, safety or welfare of the citizens of Georgia.

Although some commentators have argued that the State of Georgia owns all waters and holds such waters of the state in "public trust," this approach applies at most to a very small portion of Georgia's tidewaters and marshlands.¹³ Public trust does not support declaring all waters in Georgia a public resource, because the public trust doctrine does not apply to nonnavigable waters. See David C. Slade, *Putting the Public Trust Doctrine to Work*, at 13-30. Thus, even if public trust concepts were applicable to water in Georgia, it certainly would not apply to the large number of Georgia waters that are non-navigable under O.C.G.A. § 44-8-5.¹⁴

¹⁰ O.C.G.A. §§ 12-5-31, 12-5-96.

¹¹ Pyle v. Gilbert, 245 Ga. 403 (1980).

¹² Joseph W. Dellapenna, *Regulated Riparianism*, in *WATERS AND WATER RIGHTS*.

¹³ Only the Protection of Tidewaters Act and the Marshlands Protection Act even allude to the "public trust" doctrine. O.C.G.A. § 12-5-281; O.C.G.A. § 52-1-2.

¹⁴ Givens v. Ichauway, 493 S.E.2d 148 (1997).

Again, a debate over water ownership does not advance the State's legitimate interest in protecting and preserving water for all citizens pursuant to its Police Powers.

Therefore, it is important to view any proposed changes in the Georgia Code addressing water issues as an exercise of the State's Police Power and judge such recommended changes on their efficacy in protecting the health, safety and welfare of the citizens of Georgia. This is not a contest between property rights of the citizens of Georgia and a property right of the State. No such property right of the State is involved. Existing statutes provide adequate authority for regulating water use in Georgia, and have the benefit of over 25 years of implementation.

The Chamber would not disagree with assertions that there may be need for more regulatory or policy refinements within the context of the current water withdrawal statutes. However, the Chamber submits that all of the problems, issues, and special interests raised by stakeholders regarding the committee's work can be addressed through the current water withdrawal statutory framework. Among the areas that the Chamber sees a need for possible regulatory or policy refinement are as follows:

(1) Consumptive and Non-Consumptive Uses. Currently, the Georgia statutes and regulations do not adequately distinguish between consumptive and non-consumptive uses, although in some circumstances EPD may take into account water consumption in the issuance of a water withdrawal permit.

(2) Transferability of Water Rights. Under Georgia common law, water rights are transferable.¹⁵ Georgia's water withdrawal statutes explicitly provide, however, for transferability of water rights only for permits for farm uses.¹⁶ An explicit provision authorizing the transfer of water withdrawal rights for non-farm uses would promote the highest and best

¹⁵ Pyle v. Gilbert, 245 Ga. 403 (1980).

¹⁶ O.C.G.A. § 12-5-31 (a)(3)

economic and social utility of water. Also, currently there are no restrictions regarding transfer of water by municipalities, counties, and other units of state government amongst different water purchasers from the public system. The Chamber submits that since water is transferable as a matter of Georgia law, that Georgia's water withdrawal statutes and regulations should reflect accurately this legal premise. In fact, the Model Code promotes voluntary transfer of permitted water uses as the most efficient means of responding to local needs and changing hydrologic and economic conditions.

(3) Involuntary Reallocation during Shortages. The current Georgia water statutes and regulations do not adequately specify the circumstances and conditions under which the EPD may reallocate limited waters during a period of shortage. While the regulations do recognize a priority of use, mirroring pre-established Riparian Common Law principles, regulations do not provide enough specificity to provide any reliable or certain basis on which a water user might expect or anticipate that this water use might be restricted due to shortage. In addressing this single issue which is of utmost importance to most stakeholders, the Study Committee could resolve a significant amount of comment and concern regarding the current water use statutory scheme.

(4) Better Assessment of Existing Water Uses. With increasing pressure on water resources, and water in short supply in many areas of the state, better data and information regarding all water uses is necessary for EPD to make sound water management decisions. All uses should be considered and assessed in making permitting decisions.

(5) Public Notice of Permit Actions. Due to the very serious implications of the loss of a water right, or a competing right encroaching on an existing water use, more comprehensive public notice procedures are necessary to ensure that all affected entities are apprised of

proposed water use permits. The Department of Natural Resources should be able to address this issue through its Public Participation Working Group that is currently meeting. In expanding public notice on permit actions, it is important that other interests not be adversely affected. For example, a strict application of the Model Code in Georgia may actually diminish the standing of some Riparian users in challenging other users.

CONCLUSION

In conclusion, Georgia's current water withdrawal statutes and regulations in conjunction with Georgia's longstanding Riparian Rights Common Law comprehensively deal with water resource issues. Any change in the statutory scheme that alters the nature of property ownership in Georgia will be met with costly litigation and may potentially constitute a taking of property without just compensation. In situations where modifications to Georgia's current regulated riparian system is needed, the Georgia Chamber encourages the Committee to first consider approaches that involve working within the current laws before proposing amendments to the current statutory scheme which has been designed in accordance with Riparian and property law.