

Water Issues
White Paper

Exercising Riparian Rights and Non-Riparian Land

Prepared for the Comprehensive State Water Plan
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by
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Executive Summary

Under the common law of riparian rights, only owners of riparian lands had any legal right to use water from a surface waterbody, such as a river or lake. Any water use by a non-riparian was held to be unreasonable *per se* and therefore enjoined by any objecting riparian regardless of which use was more reasonable—whether compared economically, socially, or otherwise. Even riparians were held not entitled to use the water if the use fell outside the watershed of origin. Some states, including Georgia, have modified these rules to allow the use of water on non-riparian land and outside the watershed of origin, either by a riparian owner or by someone who has bought the right to use water from a riparian owner. Just how far grantees of a riparian right can go in attempting to realize on such grants, however, remains far from clear, making the marketing of water rights under either Georgia’s common law or the present governing statutes highly problematic.

Exercising Riparian Rights on Non-Riparian Land Generally

Under the common law of riparian rights, the right to make a reasonable use of water derived from the ownership of riparian land—land that touched a defined surface waterbody such a river or lake.² This limitation was implicit in the very name “riparian rights.” The word “riparian” derives from the Latin *ripa*, meaning the bank of a stream.³ Because of this, no one, not even a riparian owner, had a right to use water from a surface water source on non-riparian land. This outcome was explained under the reasonable use theory by the rule that any non-riparian use was “unreasonable *per se*”—inherently unreasonable.⁴ Any riparian owner could obtain an injunction against a non-riparian use even if the riparian owner had suffered no injury from the non-riparian use, though, of course, riparian owners rarely if ever went to the bother and expense of going to court if they had not suffered a substantial injury.⁵

Determining whether land was riparian thus became a critical question in litigation over riparian rights. Courts were quite strict about what qualified as riparian land. Separation from the

² See, e.g., *City of Logansport v. Uhl*, 99 Ind. 531, 537 (1885); *Davis v. Getchell*, 50 Me. 602, 604-05 (1862); *Hall v. City of Iona*, 38 Mich. 493, 498-99 (1878); *Crawford v. Rambo*, 7 N.E. 429, 431 (Ohio 1886); *Chatfield v. Wilson*, 31 Vt. 358, 361 (1858). See generally Joseph W. Dellapenna, *The Right to Consume Water under “Pure” Riparian Rights*, in *WATERS AND WATER RIGHTS* § 7.02 (Robert E. Beck ed., 2001 replacement vol.).

³ At one time, the rights pertaining to owners along the shore of a lake or the sea were treated differently from riparian owners, with the rights of owners along a shore being termed “littoral rights”—from the Latin *litus*, meaning shore. Today, in most contexts the two sets of rights are the same and the term “riparian rights” is applied to both. See Joseph W. Dellapenna, *Introduction to Riparian Rights*, in *WATERS AND WATER RIGHTS*, *supra* note 1, § 6.02(b).

⁴ The leading case is *Stratton v. Mount Hermon Boys’ School*, 216 Mass. 83, 85-87, 103 N.E. 87, 88 (1913). See also *Ulbright v. Eufalia Water Co.*, 6 So. 78 (Ala. 1887); *Harrell v. City of Conway*, 271 S.W.2d 924 (Ark. 1954); *Anaheim Union Water Co. v. Fuller*, 88 P. 978 (Cal. 1907); *Adams v. Greenwich Water Co.*, 83 A.2d 177 (Conn. 1951); *Anderson v. Bell*, 433 So. 2d 1202 (Fla. 1983); *Canal Trustees v. Haven*, 10 Ill. 548 (1849); *Kennebunk, Kennebunkport & Wells Water Dist. v. Maine Turnpike Auth.*, 71 A.2d 520 (Me. 1950); *Sturtevant v. Ford*, 182 N.E. 360 (Mass. 1932); *McCord v. Big Bros. Movement*, 185 A.2d 480 (N.J. 1936); *Hopkins v. Kent*, 9 Ohio 13 (1839); *Jones v. Conn.*, 64 P. 855 (Or. 1901); *Redwater Land Co. v. Jones*, 130 N.W. 85 (S.D. 1911); *Texas Co. v. Burkett*, 296 S.W. 273 (Tex. 1927); *Humphreys-Mexia Oil Co. v. Arseneaux*, 297 S.W. 225 (Tex. 1927); *Virginia Hot Springs Co. v. Hoover*, 130 S.E. 408 (Va. 1925); *Brown v. Chase*, 217 P. 23 (Wash. 1923); *Roberts v. Martin*, 77 S.E. 535 (W. Va. 1913). Courts in two old states have held that proof of injury is required, at least where the non-riparian use has continued long enough to ripen into title by adverse possession. *Gillis v. Chase*, 67 N.H. 161, 162, 31 A. 18, 19 (1892); *Lawrie v. Silsby*, 76 Vt. 240, 252-53, 56 A. 1106, 1108-09 (1904).

⁵ Courts in several old cases have held non-riparian use to be enjoined by a riparian owner without mentioning any actual injury. *Hendrick v. Cook*, 4 Ga. 241 (1827); *Clinton v. Myers*, 46 N.Y. 511, 520 (1871); *Mackleton Hotel Co. v. Connellsville & S.L. Ry.*, 89 A. 703 (Pa. 1914); *Pastorius v. Fisher*, 1 Rawle 27 (Pa. 1828).

water by land belonging to another, no matter how narrow the separation, prevents the separated land from being riparian.⁶ Thus, in *Stratbucker v. Junge*,⁷ a strip only 37.5 feet wide between the claimant's land and the Missouri River was enough to prevent the land from being riparian. An easement in another owner, rather than ownership, however, does not prevent the servient tenement from being riparian.⁸ Nor does an easement by itself confer riparian status on the owner of the easement, as opposed to the owner of the land subject to the easement.⁹ Thus it made all the difference whether ownership of the land on which a public road is built, for example, passed to the public authority responsible for the road or remained with the owner of the adjacent land.¹⁰

Various commentators have argued that as between a use on riparian land and a use on non-riparian land, there is in fact no inherent reason why the use on riparian land should prove to be the better use, regardless of whether one measures the superior use purely in economic terms or in social or ecological terms.¹¹ This is especially true with the extreme cases where the separation of the land from the watersource is extremely narrow. Reflecting this argument, the *Restatement (Second) of Torts*, in summarizing its view of the common law of riparian rights, rejected the rule that uses on non-riparian land are unreasonable *per se*.¹² This view, however, neglects that use on non-riparian (particularly non-riparian land that is significantly removed from the watersource) reduces or precludes the possibility of a return flow to the watersource of origin. For riparian rights, based upon the premise that the right to use water is common property held equally by all riparian owners, for a riparian owner to destroy the possibility of a return flow is to take the entire value of the common resource leaving nothing for the other riparian owners. This concern is even more pronounced if the user appropriating the entire value of the resource is not even a riparian owner.

Courts in the east generally have not followed the *Restatement Second's* lead.¹³ Instead, they have dealt with the concerns about artificially restricting the possibility of the water being put to better use and cutting off the possibility of return flows through two different rules.¹⁴ First, eastern courts have followed the "unity of title" theory regarding the riparian nature of land. The unity of title theory treats all lands in a contiguous tract under a single ownership (unity of title)

⁶ See, e.g., *Caples v. Taliafero*, 197 So. 861 (Fla. 1940); *Smith v. City of Greenville*, 450 N.E.2d 389 (Ill. App. 1983); *Maxwell v. Hahn*, 508 N.E.2d 555 (Ind. App. 1987), *transfer denied*; *Thies v. Howland*, 380 N.W.2d 463 (Mich. 1985); *Schmidt v. Warner*, 955 S.W.2d 577 (Mo. App. 1997); *State v. Johnson*, 179 S.E.2d 371 (N.C. 1971); *City of Stillwater v. Oklahoma Water Resource Bd.*, 524 P.2d 938 (Okla. App. 1974).

⁷ 46 N.W.2d 486, 488 (Neb. 1951). See also *Canadian Nat'l Ry. v. Sprague*, 609 A.2d 1175 (Me. 1992) (land separated from water by the width of a railway right-of-way is not riparian).

⁸ *Burkart v. City of Fort Lauderdale*, 168 So. 2d 65 (Fla. 1964); *Veach v. Culp*, 599 P.2d 526 (Wash. 1979).

⁹ *Klotz v. Horn*, 558 N.E.2d 1096 (Ind. 1990); *Thies v. Howland*, 380 N.W.2d 463 (Mich. 1985); *Farnes v. Lane*, 161 N.W.2d 297 (Minn. 1968); *Hanigan v. State*, 629 N.Y.S.2d 509 (N.Y. App. Div. 1995); *Ellingsworth v. Swiggum*, 536 N.W.2d 112 (Wis. App.), *rev. denied*, 537 N.W.2d 572 (Wis. 1995).

¹⁰ *Pleasant Valley Canal Co. v. Borrer*, 72 Cal. Rptr. 2d 1, 26-27 (Cal. App. 1998); *City of Daytona Beach v. Tuttle*, 630 So. 2d 586 (Fla. App. 1993), *rev. denied*, 634 So. 2d 629 (Fla. 1994); *Abbs v. Town of Syracuse*, 686 N.E.2d 928 (Ind. App. 1997), *transfer denied*, 698 N.E.2d 1189 (Ind. 1998); *Ballard v. Mook*, 550 So. 2d 1208 (La. App. 1989), *writ denied*, 556 So. 2d 1283 (La. 1990); *Dobie v. Morrison*, 575 N.W.2d 817 (Mich. App. 1998); *Reads Landing Campers Ass'n v. Pepin Twp.*, 546 N.W.2d 10 (Minn. 1996); *Heise v. Village of Pewaukee*, 92 Wis. 2d 333, 285 N.W.2d 859, *cert. denied*, 449 U.S. 992 (1979).

¹¹ See, e.g., Eric T. Freyfogle, *Water Justice*, 1986 ILL. L. REV. 481, 489-92; Jean Toal Hill, *Limitation on Diversion from the Watershed: Riparian Roadblock to Beneficial Use*, 23 S.C. L. REV. 43 (1971); Donald R. Levi & Kenneth C. Schneeberger, *The Chain and Unity of Title Theories for Delineating Riparian Land: Economic Analysis as an Alternative to Case Precedent*, 21 BUFF. L. REV. 439 (1972).

¹² RESTATEMENT (SECOND) OF TORTS §§ 855-857 (1977).

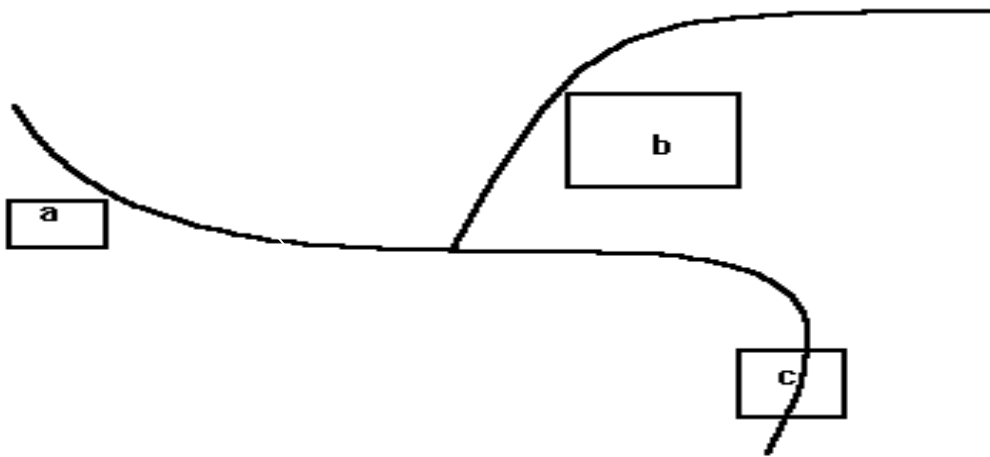
¹³ The only exception is *Pyle v. Gilbert*, 245 Ga. 403, 405-08, 265 S.E.2d 584, 586-87 (1980). One court expressly rejected the *Restatement (Second)*'s approach. *Baumler v. Town of Newstead*, 247 A.D.2d 861, 862, 668 N.Y.S.2d 814, 815-16 (1998).

¹⁴ See generally Dellapenna, *supra* note 1, § 7.02(a)(2).

as riparian so long as any part of the tract touches the waterbody—regardless of the history of prior ownership of the land.¹⁵ In other words, land held by a single owner in a contiguous tract is riparian regardless of whether parts of the tract might temporarily not have been riparian because of a prior division of ownership. The unity of title test eliminates artificial barriers to the most efficient use of water, leaving each landowner to determine whether and how to irrigate or otherwise use water. On the other hand, the unity of title test could be distributively unjust, concentrating water usage in the hands of a few holders of ever larger tracts of land. Courts can only counter the negative aspects of the unity of title test either through recourse to the watershed rule or by being willing to incorporate the negatives into an evaluation of whether competing uses are reasonable.

The idea of a watershed is relatively simple to state. A watershed is that area of land off which precipitation runs into a particular waterbody. Thus two sides of a particular hill or land showing even slight changes in the slope of the land can lie in different watersheds because the water will drain in different directions. What constitutes a watershed depends upon the geography of the drainage basin, the scale of one’s inquiry, and the purposes for which one seeks to determine the limits of the watershed. What constitutes a “watershed” for purposes of the watershed limitation has proven to be, however, somewhat elusive. One’s conclusion changes with the scale of one’s analysis. While the malleability of the concept is easily shown by considering large river basins, the concept’s malleability is equally applicable to the smallest creek or pond system.¹⁶ Do the Colorado and Gila Rivers in the southwest form a single watershed, or two watersheds? Are the Chattahoochee and Flint Rivers (which join to form the Apalachicola) a single watershed or several? The following diagram will help in understanding the problem.

DIAGRAM OF A WATERSHED



In disputes over consumptive uses of water, whether water is taken in violation of the watershed rule turns on whether the dispute involves two landowners both of whose land lies on the different watercourses above their confluence, or between landowners one of whose land lies below the confluence and the other, while on a “different watercourse” by name at least, lies

¹⁵ Clark v. Allaman, 80 P. 571 (Kan. 1905); Jones v. Conn, 64 P. 855 (Or. 1901); Slack v. Marsh, 11 Phila. 543 (C.P. 1875); Town of Gordonsville v. Zinn, 106 S.E. 508, 511 (Va. 1921).

¹⁶ See, e.g., Little Blue Nat. Resources Dist. v. Lower Platte North Nat. Resources Dist., 294 N.W.2d 598 (Neb. 1980); Alburger v. Philadelphia Elec. Co., 535 A.2d 729 (Pa. Commw. 1988).

above the confluence.¹⁷ In the diagram above, assume that the water is flowing in both upper streams from right to left and that all three tracts of land are in fact riparian—they touch the watercourses even if only in small ways. If the owner of tract c were to take water from the watercourse above tract b and return any unused portions to the watercourse on tract c, that would violate the watershed rule in regard to the owner of tract b, but would not violate the watershed rule in regard to the owner of tract a.

While *Restatement (Second)* rejects the rule that the land on which water is used must be within the watershed of the watercourse as inconsistent with the reasonable use rule,¹⁸ a number of eastern courts have embraced the watershed rule.¹⁹ They apparently did so because, although the watershed rule does not by itself guarantee maintenance of return flows to a particular waterbody, it does tend in that direction. Scholars have championed the watershed rule as protective of the ecological interest in streamflow maintenance as well as being supportive of the rights of other riparians to have a reasonable opportunity to use the water.²⁰

The Law in Georgia

Georgia courts embraced the usual view that the use of water was limited to uses on riparian land, and continued to apply this rule well into the twentieth century.²¹ Municipalities were treated just like private riparians—meaning that their sale of water to users within the city who are not themselves riparian are considered to be non-riparian uses that are unreasonable *per se* should a riparian owner challenge the municipality's uses.²² This approach was moderated in a case in which the Georgia Supreme Court chose to follow part of the approach of the *Restatement (Second)* without analyzing whether that approach really “restates” the law rather than breaking new ground,²³ and without analyzing whether that approach actually is suitable to the circumstances in Georgia.

The case in question is *Pyle v. Gilbert*.²⁴ *Pyle* involved a dispute between the owners of a 140 year-old gristmill and five irrigating farmers, with at least one farmer having begun to divert water barely three years before the suit began. The Georgia Supreme Court posed the problem before it as a choosing “between the past and the present.”²⁵ Justice Harold Hill, jr., indicated in the majority opinion in *Pyle* that a statutory ban on the diversion of water applied only to the diversion of water into another watershed, and not to the withdrawal of water for a reasonable

¹⁷ See *Rancho Santa Margarita v. Vail*, 81 P.2d 533 (Cal. 1938); *Anaheim Union Water Co. v. Fuller*, 88 P. 978 (Cal. 1907); *Dimmock v. City of New London*, 245 A.2d 569 (Conn. 1968); *Little Blue Nat. Resources Dist. v. Lower Platte North Nat. Resources Dist.*, 294 N.W.2d 598 (Neb. 1980); *Alburger v. Philadelphia Elec. Co.*, 535 A.2d 729 (Pa. Commw. 1988); *Town of Gordonsville v. Zinn*, 106 S.E.2d 508 (Va. 1921).

¹⁸ RESTATEMENT (SECOND) OF TORTS § 843 comment d (rejecting the watershed rule) (1977).

¹⁹ *Harrell v. City of Conway*, 271 S.W.2d 924 (Ark. 1954); *Dimmock v. City of New London*, 245 A.2d 569 (Conn. 1968); *Hendrix v. Roberts Marble Co.*, 175 Ga. 389, 165 S.E. 223 (1932); *Stanton v. Trustees of St. Joseph's College*, 254 A.2d 597 (Me. 1969); *Stratton v. Mount Hermon Boys' School*, 103 N.E. 87 (Mass. 1913); *Scranton Gas Co. v. Delaware, L. & W. Ry.*, 88 A. 24 (Pa. 1913); *Virginia Hot Springs Co. v. Hoover*, 130 S.E. 408 (Va. 1925); *Town of Gordonsville v. Zinn*, 106 S.E. 508 (1921). See generally Hill, *supra* note 10.

²⁰ Lynda L. Butler, *Allocating Consumptive Water Rights in a Riparian Jurisdiction: Defining the Relationship between Public and Private Interests*, 47 U. PITT. L. REV. 95, 111-17, 156-181 (1985); Peter N. Davis, *The Riparian Right of Streamflow Protection in the Eastern States*, 36 ARK. L. REV. 47 (1982).

²¹ *Moulton v. Bunting McWilliams Post No. 658*, 213 Ga. 859, 102 S.E.2d 593 (1958); *Hendrix v. Roberts Marble Co.*, 175 Ga. 389, 165 S.E. 223 (1932).

²² *City of Elberton v. Pearle Cotton Mills*, 123 Ga. 1, 50 S.E. 977 (1905).

²³ On the reliability of the *Restatement (Second)* as a guide to common law riparian rights, see Dellapenna, *supra* note 2, § 6.01(c).

²⁴ 245 Ga. 403, 265 S.E.2d 584 (1980).

²⁵ *Id.*, at 403, 265 S.E.2d at 585.

use within the basin of origin.²⁶ The Court accepted, virtually without discussion, that the water in question could be used on non-riparian land, at least so long as the use was within the watershed.²⁷ The Court expressly refused to adopt a rule protecting some judicially prescribed minimum level for the stream or lake and remanded both cases for a full trial on whether one use was “more reasonable” than the other.²⁸

How Does This Affect the Possibility of Water Markets?

In most states, whether a riparian owner can convey all or part of the owner’s riparian right to a non-riparian is doubtful.²⁹ Since 1994, Wisconsin even expressly prohibits the conveyance of riparian rights.³⁰ Many states have now come to accept that such conveyances are effective to some extent,³¹ with the effect varying, depending on whether the rights sought to be conveyed relate to consumptive or non-consumptive uses. Possibly, all that a grant of a riparian right in order to make a consumptive use amounts to is a contract by the grantor, binding only the grantor and successors-in-interest personally, not to contest the grantee’s right to use water from the common source.³² Such a rule at least eliminates the problems of evaluating the effects of a transfer on return flows coming down to other riparians.³³

If all a grantee of riparian rights acquires is the right to bar the grantor from interfering thereafter in the exercise of those rights, the non-riparian grantee would have gained very little. If any other riparian challenges the transfer, the usual rule that the water must be used on riparian land and within the watershed would effectively bar an attempt to transfer non-appurtenant riparian rights.³⁴ In a number of early cases, however, courts held that a grantee of such a right has the right to make a reasonable use along with riparian landowners.³⁵ This decision overruled

²⁶ *Id.*, at 405-08, 265 S.E.2d at 586-87. *But see* McNabb v. Houser, 174 Ga. 744, 156 S.E. 595 (Ga. 1931) (applying the ban on diversion to a gold mine, apparently in violation of the watershed rule). The statute is OCGA § 51-9-7:

The owner of the land through which nonnavigable watercourses flow is entitled to have the water in such streams come to his land in its natural and usual flow, subject only to such detention or diminution as may be caused by a reasonable use of it by other riparian proprietors. The *diverting of the stream in whole or in part from its natural and usual flow, or the obstructing thereof so as to impede its course or cause it to overflow or injure the land through which it flows or any right appurtenant thereto, or the polluting thereof so as to lessen its value to the owner of such land shall constitute a trespass upon the property.* (emphasis added)

²⁷ *Pyle*, 245 Ga. at 409-11; 265 S.E.2d at 588-89.

²⁸ *Id.*, at 408-11, 265 S.E.2d at 587-89.

²⁹ *See generally* Dellapenna, *supra* note 1, § 7.04(a)(3)(B).

³⁰ WIS. STAT. § 30.133 (West 1998).

³¹ *Mianus Realty Co. v. Greenway*, 193 A.2d 713 (Conn. 1963); *Belvedere Dev. Corp. v. Department of Transp.*, 476 So. 2d 649 (Fla. 1985); *Mid-America Terminal, Inc. v. Owensboro River Sand Co.*, 532 S.W.2d 437 (Ky. 1976); *Williams v. Skyline Dev. Corp.*, 288 A.2d 333 (Md. 1972); *Sundell v. Town of New London*, 409 A.2d 1315 (N.H. 1979); *Borough of Media v. Edgmont Golf Club, Inc.*, 288 A.2d 803 (Pa. 1972); *Commonwealth v. Forbes*, 197 S.E.2d 333 (Va. 1972); *Thomas v. Clark*, 346 A.2d 189 (Vt. 1975).

³² *Gould v. Eaton*, 49 P. 577 (Cal. 1897); *Hendrix v. Roberts Marble Co.*, 165 S.E. 223 (Ga. 1932); *Stratton v. Mount Hermon Boys School*, 103 N.E. 87, 89 (Mass. 1913); *Phillips v. Altman*, 412 P.2d 199 (Okla. 1966); *Tipperman v. Tsiatsos*, 915 P.2d 446, *aff’d on other grounds*, 327 Or. 539, 964 P.2d 1015 (1997); *Roberts v. Martin*, 77 S.E. 535 (W. Va. 1913).

³³ *See generally* Joseph W. Dellapenna, *The Importance of Getting Names Right: The Myth of Markets for Water*, 25 WM. & MARY ENVTL. L. & POL’Y REV. 317 (2000).

³⁴ *Harvey Realty Co. v. Borough of Wallingford*, 150 A. 60 (Conn. 1930); *Pleasant Lake Hills Corp. v. Eppinger*, 209 N.W. 152 (Mich. 1926); *Town of Purcellville v. Potts*, 19 S.E.2d 700 (Va. 1942); *Roberts v. Martin*, 77 S.E. 535 (W. Va. 1913).

³⁵ *Elliot v. Fitchburg R. Co.*, 64 Mass. (10 Cush.) 191 (1852); *St. Anthony Water Power Co. v. City of Minneapolis*, 43 N.W. 56 (Minn. 1889); *Gillis v. Chase*, 31 A. 18 (N.H. 1892); *Doremus v. Paterson*, 52 A. 1107 (N.J. 1902),

the decision in *Hendrix v. Roberts Marble Co.*,³⁶ in which the Court had held riparian rights could not be conveyed separately from the land. Even accepting that the right to make consumptive uses of water is transferable to a non-riparian, the cases have left unsettled whether the transferred right is to be measured by the reasonable needs of the grantor (therefore avoiding possible prejudice to other riparians)³⁷ or of the grantee (thus treating the grantee as a full, equal riparian).³⁸ These uncertainties are significant enough to make the purchase of a non-appurtenant riparian right little more than a hunting license that might or might not yield water. There certainly must be many instances in which water could have been put to better use on non-riparian land than on riparian land, and yet conveyances to non-riparian users remain rare. The uncertainty surrounding what a grantee acquires probably accounts for the rarity of such conveyances except ancillary to condemnation proceedings on behalf of public water systems.³⁹

In *Pyle v. Gilbert*,⁴⁰ the Georgia Supreme Court made an effort to accommodate the idea of markets to Georgian riparian rights. The Court accepted the right of a non-riparian who had bought part of a riparian right to use the water to which the right attached. The Court did so on the questionable authority of the *Restatement (Second) of Torts*.⁴¹ Apparently the buyer in *Pyle* acquired the right to claim a reasonable use of the common pool resource. *Pyle* left unsettled whether the transferred right is to be measured by the reasonable needs of the grantor or of the grantee. These uncertainties are significant enough that, unsurprisingly, markets do not appear yet to have become a major activity in Georgia.

An Aside on Groundwater in Georgia

If Georgia truly still adheres to the “absolute dominion” rule to groundwater,⁴² then the anyone whose land overlies an aquifer presumably can convey the right to withdraw the groundwater to anyone for any purpose, except for the malicious waste of the water⁴³ or the creation of a private nuisance.⁴⁴ If, however, Georgia courts have tacitly embraced the “Reasonable Use” rule regarding groundwater,⁴⁵ then problems similar to those under riparian rights arise regarding whether one who owns land overlying an aquifer can effectively convey water in the aquifer to someone whose land does not overlie the aquifer. Groundwater, after all, is a shared or common resource just like surface water, only it usually moves more slowly.

rev'd on other grounds, 55 A. 304 (N.J. 1903); *Smith v. Stanolind Oil Co.*, 172 P.2d 1002 (Okla. 1946); *Consolidated Water Supply Co. v. State Hospital for Criminal Insane*, 66 Pa. Super. 610 (1917); *Texas Co. v. Burkett*, 296 S.W.2d 273 (Tex. 1927); *Hite v. Town of Luray*, 8 S.E.2d 369 (Va. 1940); *Lawrie v. Silsby*, 56 A. 1106 (Vt. 1904); *State v. Apfelbacher*, 167 N.W. 244 (Wis. 1918).

³⁶ 175 Ga. 389, 165 S.E. 223 (1932).

³⁷ *State v. Apfelbacher*, 167 Wis. 233, 167 N.W. 244 (1918).

³⁸ RESTATEMENT (SECOND) OF TORTS §§ 856(2), 857(2) (1977).

³⁹ See Dellapenna, *supra* note 1, § 7.04(b).

⁴⁰ *Pyle*, 245 Ga. 403, 409-11, 265 S.E.2d 584, 588-89 (1980).

⁴¹ *Id.*, at 409-11, 265 S.E.2d at 588-89 (1980), citing RESTATEMENT (SECOND) OF TORTS § 856 (1977). *But see Bisson v. Laconia Inv. Properties, Inc.*, 559 A.2d 1338, 1341 (N.H. 1989) (declining to decide the question).

⁴² *City of Atlanta v. Hodgins*, 19 S.E.2d 508 (Ga. 1942); *Saddler v. Lee*, 66 Ga. 45 (1879).

⁴³ *St. Armand v. Lehman*, 47 S.E. 949 (Ga. 1904).

⁴⁴ *Tri-County Investment Group, Ltd. v. Southern States, Inc.*, 500 S.E.2d 22 (Ga. 1998); *Hoffman v. Atlanta Gas Light Co.*, 426 S.E.2d 387 (Ga. App. 1992).

⁴⁵ Joseph W. Dellapenna & Stephen E. Draper, *Property in Water*, A White Paper to the Joint Comprehensive Water Plan Study Committee, found at www.cviog.uga.edu/water.

Georgia's Water Allocation Legislation

Georgia's enactment of a regulated riparian/regulated reasonable use system for large, non-agricultural users of surface water or groundwater in the state⁴⁶ raises the question of the extent to which the foregoing analysis has been displaced legislatively. The answer appears to be not very much. To understand why, one must begin by recognizing that the surface-water statute expressly preserves common law rights (and—implicitly—their limits).⁴⁷ There is no comparable provision in the groundwater act, leaving open the possibility that that statute implicitly repeals whatever is left of the “Absolute Dominion” rule in Georgia. What goes in its place, however, remains entirely unclear.

The two Georgia statutes make no express provision either for use on non-riparian or on non-overlying land or for market transfers of a water use permit apart from the transfer of the title to the land on which the water is used. The two statutes create a possibility for such a transfer by provisions authorizing the EPD to approve a modification of a permit at the request of a permittee.⁴⁸ Apart from farm uses,⁴⁹ this power is limited to situations where a change of circumstances requiring more water than has hitherto been used or where the modification will allow for a more efficient use of the water. The provision on modifications thus seems to contemplate a change in the pattern of use, but not a change in the type of use. Furthermore, the application of the common law limitations on the transferability of water rights appear to survive and thus to continue to inhibit the use of water on non-riparian/non-overlying land as well as of market transfers. If so, a market for water permits is likely to be extremely circumscribed.

The two statutes do create a possibility if the EPD decided to transfer the right to use some or all water when a permit expires⁵⁰—a provision that does not apply to farm uses.⁵¹ Furthermore, the EPD can revoke a permit for surface water because of non-use of the water the use of which is authorized by the permit for two consecutive years without proper excuse.⁵² This provision, however, is more likely to prompt a permit holder to continue to waste water rather than to risk forfeiture. These risks, however, are somewhat ameliorated by a provision that allows the Director of the EPD to revoke, suspend, or modify a permit for the use of surface water “for other good cause consistent with ... health and safety ... and with this article.”⁵³ Even these limited possibilities of forfeiture do not exist in the Ground Water Use Act.

⁴⁶ OCGA §§ 12-5-31 (surface water), 12-5-90 to 12-5-107 (groundwater).

⁴⁷ *Id.*, § 12-5-46.

⁴⁸ *Id.*, §§ 12-5-31(i), 12-5-97(a).

⁴⁹ *Id.*, §§ 12-5-31((a)(3), 12-5-105(a).

⁵⁰ The EPD is to set the duration of the permits, generally within a range of 10 to 50 years. *Id.*, §§ 12-5-31(h), 12-5-97(a).

⁵¹ *Id.*, §§ 12-5-31(a)(3), 12-5-105(b)(1), (2).

⁵² *Id.*, § 12-5-31(k)(4).

⁵³ *Id.*, § 12-5-31(k)(7).