

**Water Issues  
White Paper**

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Water Law Doctrines  
As Applied to Georgia Water Law

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Prepared for the Comprehensive State Water Plan  
Joint Study Committee

by  
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## Executive Summary

The foundation upon which Georgia's comprehensive water management is built must be based on an established framework, or doctrine, that guides all decisions in the formulation and implementation phase. This White Paper summarizes the water laws of Georgia and describes the water right doctrines upon which they are based.

### Georgia Water Law Summarized

Statewide comprehensive water policy is based on detailed and integrated analysis of water science, water engineering, water technology, water economics and water law. Water law is important since laws passed by the General Assembly implement water policy. These laws establish the foundation of water policy formulation and implementation. This foundation must be based on an established framework, or doctrine, that guides all decisions in the formulation and implementation phase.

As described by the Attorney General in his presentation<sup>1</sup> to the Joint Study Committee, water law in Georgia is bifurcated according to the amount of water withdrawn from the water source, whether it is a surface water source (river, stream, reservoir) or a groundwater source (aquifer). A summary of the fundamental principles and court rulings of Georgia's water laws have been well documented by Robert Bomar, Assistant Attorney General, State of Georgia.<sup>2</sup>

Georgia's water law for surface and ground water withdrawals greater than 100,000 gallons per day adheres to similar doctrines in as much as all both types of withdrawals are regulated by a comprehensive permit system. Georgia's surface water law can be classified as a form of the Regulated Riparian doctrine and Georgia's groundwater law can be classified as a form of the Regulated Reasonable Use doctrine for groundwater.

For withdrawals from surface sources that are less than 100,000 gallons per day (gpd), Georgia's water law closely adheres to the common law Riparian Rights doctrine, clarified by decisions of the Georgia Supreme Court in specific instances. For withdrawals from groundwater sources that are less than 100,000 gallons per day, Georgia's water law is ambiguous. Taken on its face, the water law arguably adheres to a modified Absolute Dominion doctrine. However, the case law is ambiguous and a strong case can be made that Georgia common law for groundwater rights has evolved to a form of the Reasonable Use doctrine for groundwater.

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<sup>1</sup> Remarks of the Honorable Thurbert Baker, Attorney General State of Georgia concerning the Legal Status of Water Rights in Georgia, Joint Meeting of the Comprehensive Water Plan Study Committee and the Water Plan Advisory Committee January 7, 2002 Atlanta, Georgia, found at [www.cviog.uga.edu/water](http://www.cviog.uga.edu/water).

<sup>2</sup> Robert S. Bomar, Deputy Attorney General, Georgia Water Law, A White Paper to the Joint Comprehensive Water Plan Study Committee, found at [www.cviog.uga.edu/water](http://www.cviog.uga.edu/water).

## Water Law Doctrines<sup>3</sup>

Traditionally, doctrines of law for surface water and groundwater were separate and distinct.

Rights to use surface water (rivers, streams and lakes) are generally provided under one of three water right doctrines.

- (1) One surface water rights doctrine, typified by common law Riparian Rights, treats *water as a common resource*. The doctrine, also referred to as a doctrine of “Reasonable Use,” permits anyone adjacent to a watercourse to withdraw and use the water as long as the use is “reasonable.” It is. The doctrine leaves the courts to resolve conflicting claims of right to use the common resource. Any shortfall in water availability is shared by all riparians, with courts deciding each user’s share according to its reasonableness at the time of the decision.
- (2) A second surface water rights doctrine, typified by the Appropriative Rights regime in many western states approaches a theory of *water as private property*. Water is appropriated according to “first in time, first in right.” The senior appropriator is one who first puts a specific amount of water to beneficial use. All others who put water to beneficial use later in time are junior appropriators. In cases of water scarcity, there is no sharing of the shortfall in water; the junior appropriator forfeits all water use until the senior appropriator has fully satisfied his appropriation, thus making the senior appropriators more secure by making increasing the insecurity of junior appropriators.
- (3) A third surface water rights doctrine, the Regulated Riparian Rights, has begun to supplant common law Riparian Rights as states have recognized the need for active public management of water as the needs of large water users (e.g., commerce, municipal, industrial, agriculture) increase and begin to compete for the available water supplies. Rather than treating water as a common resource as under common law Riparian Rights, or as a private resource as under Appropriative Rights, the Regulated Riparian doctrine treats *water as a public resource*. This is personified in the need for state permission (a permit) to use large amounts of water. The amounts exempted vary from state to state. In Georgia, the amount currently is any use in excess of 100,000 gallons per day. [Note that it is estimated that a family of four will use approximately 300 gallons per day for drinking, food preparation, bathing, washing, flushing toilets, car washing and lawn watering. Thus 100,000 gallons per day would be equivalent to the fresh water needs of over 330 families]

Five legal doctrines apply to-groundwater. The last two of the doctrines discussed below are applied variations of the first three and combine aspects of groundwater and surface water doctrines.

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<sup>3</sup> See generally Water and Water Rights (Robert E. Beck, Editor-in-Chief), Lexis-Nexis, 1991 Edition with 2001 Supplement.

- (1) The Absolute Dominion doctrine allows an overlying landowner to withdraw an unlimited amount of water, unconstrained (in its purest form) by injury to another landowner. This doctrine is a form of the “*water as private property*” model (somewhat similar in this respect to Appropriative Rights discussed above).
- (2) The Reasonable Use doctrine is similar to the absolute ownership doctrine, except that it requires the landowner to make “reasonable use” of withdrawn water; any unreasonable use of groundwater [uses that unreasonably injure adjacent landowners as determined in court] is actionable. Constraints on withdrawal are only that the use be reasonable. There is no sharing of a shortage in available water except as a court determines whether continuing a use is unreasonable. Implicit in the doctrine is that the “reasonable use” must take place on the land itself. This doctrine resembles the common law Riparian Rights model described above.
- (3) Under the Correlative Rights doctrine, landowners may withdraw only their “share” of water for “reasonable use.” If there is not sufficient water available, each landowner shares in the shortfall in proportion to the amounts allocated to that landowner’s use. This doctrine treats *water as a common resource* and resembles the common law Riparian Rights model described above. Defining and enforcing the shares is a complex and often unsatisfactory process.
- (4) Under the Appropriative Rights doctrine, groundwater is allocated according the temporal sequence of use, just with surface water. It treats *water as private property*. Few states with appropriative rights systems for both surface water and groundwater apply the same priority scheme to both types of water, creating serious coordination problems.
- (5) Under the Regulated Reasonable Use doctrine, groundwater is allocated by a statutory system creating a comprehensive permit system. This approach is the similar as the regulated riparian system for surface water and treats *water as public property*.

The introduction of water management through a regulatory permit system is increasingly common among states. At this time, 20 states have introduced some form of the Regulated Riparian Rights doctrine into state law.<sup>4</sup> In most states with regulated riparian systems, a single permit system applies to both surface and ground water. In a minority of regulated riparian states, surface and ground water are regulated under separate systems. In those states with separate systems the same sort of coordination problems exist that commonly arise in states where appropriative rights apply to both surface water and groundwater.

The Appropriative Rights doctrine prevails in 18 states.<sup>5</sup> Most of these states have also introduced the Regulated Reasonable Use doctrine for groundwater. Because of increasing demands during times of water scarcity, the need for regulatory systems to allocate efficiently and effectively water will most probably be introduced in all states.

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<sup>4</sup> Dellapenna, *op. cit.*

<sup>5</sup> Joseph W. Dellapenna, *Appropriative Rights Model Water Code (draft)*, ASCE 2002.