Water Issues
White Paper

Implications for Water Rights Transfers

Prepared for the Joint Comprehensive State Water Plan Study Committee

by

Stephen E. Draper
The Draper Group

Executive Summary

A legal status of the transferability of water withdrawal rights in Georgia derives from two sources; the Georgia Code and the common law as interpreted by the Supreme Court. O.C.G.A. §§12-5-31(a)(3) and §§12-5-105(b)(1) clearly limit private water rights transfers to only withdrawal right for farm use, and then, only when the land itself is transferred. Georgia common law, on the other hand, authorizes transfer of riparian rights by private grant to non-riparians. An analysis of these sources reveals that the common law prevails over the Code provisions for surface water withdrawal rights while the Georgia Code prevails over the common law for groundwater withdrawal rights. Since the decision leading to this common law rule is at best vague and indistinct, this difference places a significant obstacle for effective water management in Georgia.

Georgia Water Law Summarized

As described by the Attorney General in his presentation to the Joint Comprehensive Water Plan Study Committee,[1] water law in Georgia is divided according to the amount of water withdrawn from the water source and whether it is a surface water source (river, lake, stream, reservoir) or a groundwater source (aquifer).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.[2] The summary of Georgia law does not discuss, however, a significant issue involved in comprehensive water planning in Georgia. That issue concerns the ability to transfer of riparian rights to a non-riparian owner.

It has been noted that "(u)nder Georgia common law, water rights are transferable (citing Pyle v. Gilbert, 245 Ga. 403 (1980))"[3] and that "Georgia's water withdrawal statutes explicitly provide, however, for transferability of water rights only for permits for farm uses. (citing O.C.G.A. § 12-5-31 (a)(3))"[4] Consequently. It has been proposed that

[1] 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.

[2] 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.

[3] See Georgia Chamber of Commerce, *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, prepared by Gregory W. Blount, Harvey A. Rosenzweig and David M. Moore,Troutman Sanders LLP; James F. Renner, Golder Associates Inc.; James R. Wallace, Law Engineering and Environmental Services, Inc.; Stephen Loftin, Georgia Chamber of Commerce; Carol R. Geiger, Kilpatrick Stockton, LLP; Randall D. Quintrell, Sutherland, Asbill, Brennan, LLP; and Charles H. Hood, Georgia-Pacific, Corp,, March 2002, found at www.cviog.uga.edu/water.

[4] *Id.* Note, however, that the Georgia Code ties the water rights to the land and this transferability can occur only on the transfer of the title to the land.

> An explicit provision authorizing the transfer of water withdrawal rights for non-farm uses would promote the highest and best 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. [5]

This paper discusses the legal status of the transferability of water withdrawal rights and the implications of the proposal should it be adopted. Although the discussion is directed at transferability, it must be understood that transferability is inextricably tied to how far the receiving party (the grantee) is from the donor party (the grantor) and whether the grant involves interbasin transfer.[6]

Legal Status of the Transferability of Water Withdrawal Rights

The legal status of the transferability of water withdrawal rights derives from two sources; the Georgia Code, and the common law as interpreted by the Supreme Court, as well as an analysis of the existing practices of the sale of treated water.

The Georgia Code

The Georgia Code has two provisions that allow the transfer of water rights, §12-5-31(a)(3), and §12-5-105(b)(1). These provisions authorize permits for farm use to be "transferred or assigned to subsequent owners of the lands which are the subject of such permit." In essence, the Code has recognized that water withdrawal rights for farm use are tied to the land and, therefore, pass with the land upon sale. However, the water rights are related only to farm use. Should the owner of the land change to another use, say municipal or industrial, the owner must apply for a new permit. [7] Although the explicit provisions are restricted to water withdrawals above 100,000 gallons per day (gpd), Draper and Dellapenna have shown that such provisions apply to those withdrawals under 100,000 gpd as well.

Only one other Code provision for the transfer of water rights is found in the Georgia Code. §§12-5-97(c) prohibits groundwater permit transfers, except farm use permits, without approval of the Environmental Protection Division (EPD), the state agency managing the permit system in Georgia. This provision explicitly limits private transfer of groundwater rights to §§12-5-105(b)(1), as described above, without state approval.

---

[5] *Id.*

[6] §§12-5-105(b)(1).

[7] §§12-5-31(a)(1); §§12-5-96(a)(1) and §§12-5-97(c).

Common Law as Interpreted by the Supreme Court

Until 1980, the common law in Georgia restricted water withdrawal rights to the owners of riparian lands with reasonable use only on riparian lands.[8] In 1980, the Court expanded these rights considerably through their decision in *Pyle v. Gilbert.*[9] This case involved a dispute between the owners of a 140 year-old gristmill and five irrigating farmers. The mill owner claimed that the irrigation use that limited his ability to operate the mill was unreasonable and requested that the irrigation be stopped. The first question for the Court was "whether the use of water for irrigation is a diversion under our laws and thus is prohibited."[10] The Court found that "irrigation is not a prohibited "diversion" but is rather a permitted use where it is reasonable."[11] The case also presented the question whether the irrigation in this case was reasonable. The trial court had ruled that it was not reasonable as a matter of law. The Supreme Court reversed, holding that a determination of reasonableness was a matter for the jury.[12]

Having disposed of the question whether the use of water for irrigation purposes was a "prohibited diversion," the Court then posed the question whether the water for irrigation purposes could be used on non-riparian lands, in contradiction to the finding in *Hendrix v. Roberts Marble Co.* [13] In its analysis, the Court relied on two sources; a 1955 study by the Institute of Law and Government, University of Georgia Law School [14] and the American Law Institute's *Restatement (Second) of Torts*. [15] Based on these two sources, the Court went beyond the question whether water for irrigation purposes could be used on non-riparian land and found that "the right to the reasonable use of water in a nonnavigable watercourse on non-riparian <u>land can be acquired by grant from a riparian owner</u> (emphasis added)."[16]

This decision posed several interesting questions. The first question arises from the fact that, the decision conflicts with the Georgia Code. The full impact of the decision rests on a determination of which source of law prevails, the Georgia Code or the common law of water rights.

Analysis of the Code develops a curious result. The Code specifically preserves common law for surface water rights,[17] meaning the *Pyle* decision does apply to surface water rights and prevails over any conflicting provisions of the Code. However, the Code does not specify that common law rights be preserved for groundwater rights. In fact,

---

[8] City of Elberton v. Pearle Cotton Mills, 123 Ga. 1 (1905).
[9] 245 Ga. 403, 265 S.E.2d 584 (1980).
[10] *Id.*, at 407.
[11] *Id.*
[12] *Id*., at 409.
[13] 175 Ga. 389, 394 (1932) ["a riparian owner or proprietor can not himself lawfully use or convey to another the right to use water flowing along or through his property . . ."
[14] Kates, Robert Clark, *A Study of the Riparian and Prior Appropriation Doctrines of Water Law,* Institute of Law and Government, University of Georgia Law School,1955, p. 104.
[15] Rest. Torts 2d § 855, § 856(2).
[16] 245 Ga.at 411.
[17] §12-5-46.

within the Groundwater article is a provision that again states, "[n]othing in this part shall change or modify existing common or statutory law with respect to the rights of the use of surface water in this state."[18] This leads to the obvious conclusion that the Code provisions for groundwater use supplant any common law rights that conflict with the Code. We are left with the curious result that the *Pyle* decision applies to surface water rights but does not apply to groundwater rights. In the Code authorizes only withdrawal rights for farm use and then only when the land itself is transferred.

The second question involves the extent of the decision regarding whether it applies to more than just farm use. The third question is whether there is a restriction against transfer out of the watershed. If so, the fourth question arises, whether the grant can involve interbasin transfer.[19] This ruling can be interpreted in several ways. One "minimalist" interpretation would hold that, with regard to groundwater withdrawal rights, the Court's decision must defer to the Code, which clearly limits water rights transfers to agricultural withdrawals and then only when the agricultural land itself is transferred. Therefore, only surface water withdrawal rights may be transferred and then only to non-riparians within the watershed (e.g., grantees whose use is reasonable with respect to the downstream users' own riparian rights).[20] That would limit transfers to the same water use sector, farm use.

A second, moderate, interpretation holds that the *Pyle* decision applies to both surface and groundwater rights (e.g., the *Pyle* decision prevails over the Code in all respects) but only to farm uses[21] and only within the same watershed. This is an interpretation of the majority opinion, not from the clear language of a rather vague and indistinct opinion. A third, expansive, interpretation claims that there are no restrictions on the grant except in the case where the grantee's use is unreasonable use of surface water, as determined by a jury. Obviously, since there are four variables, 24 perturbations are possible.

Existing Practices

Prior to the *Pyle* decision, "[m]unicipalities 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] The case, *Pyle v. Gilbert*, removed the restriction on non-riparian land and if the decision applies to more than withdrawals for farm use, municipalities can now provide water service to all city citizens. The decision would then also open the way for municipalities and counties to sell treated water to neighboring, non-riparian municipalities. If the *Pyle* decision applies only to farm use, then the municipalities must rely on the Code provision

---

[18] §12-5-104.

[19] For an explanation of questions regarding watershed restrictions, *see* Joseph W. Dellapenna, *Riparian Rights and Non-Riparian Land*: *A* White Paper to the Joint Comprehensive Water Plan, Study Committee, June 2002, found at www.cviog.uga.edu/water,

[20] *Id.*

[21] The Role of Water Rights and Georgia Law in Comprehensive Water Planning for Georgia, *Op. Cit.*

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

regarding Public Water Systems[23] that allows the sale of treated water but is silent on whether water may be sold to persons not riparian to the withdrawal source.

Implications of Water Rights Transfers

The Georgia Code is quite clear. Water right transfers are limited to withdrawal rights for farm use and then only as adjunct to the transfer of land upon which the withdrawal occurs. If a change in use is contemplated, the new owner must reapply to EPD for a new permit. However, the Code also has a provision that preserves the common law of surface water rights (riparian rights). No such provision exists for groundwater rights, however. Therefore, the *Pyle* decision applies at least to surface water withdrawal for farm use. Unfortunately, the court ruling was quite imprecise and left many questions regarding the width and breadth of the right to grant. If the right to grant is restricted to a grantee within the basin and the water available to downstream users is unchanged,[24] few problems would arise. However, if the grant results in less water available to downstream users because the grantee uses the water in another basin (interbasin transfer) or significantly increases consumptive use, a serious conflict between the riparian rights of downstream users and the grantee may develop

[23] §12-5-170 - §12-5-193.

[24] For a discussion of the critical importance of managing water by consumptive use in addition to the amount and timing of the water withdrawal, *see* Stephen E. Draper, *Modification of Permits Based on Consumptive Use: A* White Paper to the Joint Comprehensive Water Plan, Study Committee, June 2002, found at www.cviog.uga.edu/water,
See also Dellapenna, *Op. Cit.*