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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March, 2002
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

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3 O.C.G.A. § 44-8-1.
5 O.C.G.A. § 4-4-8-3.
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.

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.

Georgia EPD is authorized, under the State’s police powers, to regulate private and public use of surface and ground waters.\(^9\) Pursuant to the State’s police power, the Georgia Code

\(^8\) *Franco’s Pizza & Delicatessen v. Dep’t of Transportation*, 178 Ga. App. 331, 343 S.E. 2d 123 (1986).
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. Georgia is thus known as a “Regulated Riparian” state.

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. 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. 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.

11 Joseph W. Dellapenna, Regulated Riparianism, in WATERS AND WATER RIGHTS.
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:

A. **Consumptive and Non-Consumptive Uses.** Currently, the Georgia statutes and regulations do not distinguish between the consumptive and non-consumptive uses, although in some circumstances EPD may take into account water consumption in the issuance of a water withdrawal permit. Water uses which are not consumptive should be treated differently under the existing statutes and regulations. A policy promoting reuse of water as a non-consumptive use of water would encourage conservation and reuse efforts.

B. **Transferability of Water Rights.** Under Georgia common law, water rights are transferable.\(^\text{14}\) Georgia’s water withdrawal statutes explicitly provide, however, for transferability of water rights only for permits for farm uses.\(^\text{15}\) An explicit provision authorizing the transfer of water withdrawal rights for non-farm uses would promote the highest and best

\(^{15}\) 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.

C. 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.

D. 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.

E. 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 Chamber supports expanding the methods of public notice to include mailing to nearby landowners who might be affected by a water use, and where
appropriate, extending the period of public notice and the period during which review of a permit decision can be sought. In expanding the extent of 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 supply 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 accordance with the directive of Senate Resolution 142, the Chamber encourages the Committee to consider approaches that involve working within the current laws, and consider proposing a process for defining DNR Regulations promulgated pursuant to Georgia’s water withdrawal laws and, only if strictly necessary, propose amendments to the current statutory scheme which has been designed in accordance with Riparian and property law. The Chamber also submits that, in this era of ever increasing demands upon state resources regarding water quality and supply, this state can ill-afford to completely revamp Georgia’s water withdrawal program, and should not endeavor to do so when there has been no indication that the current system is incapable of addressing the problems at hand.