WHOSE WATER IS IT ANYWAY? A SURVEY OF GEORGIA LAW ON SURFACE WATER AND GROUNDWATER WITHDRAWAL RIGHTS

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Abstract: The era of apparently abundant water resources in Georgia is over as increasing population places increasing demands on such resources. As overall demand exceeds available supply, conflicts are emerging between competing uses. The competing uses involve domestic, governmental, commercial, agricultural, industrial, electrical, navigational, and natural demands, among others. This paper discusses many of the legal issues which are and will be presented by these competing demands and discusses the legal and regulatory framework and criteria which govern the allocation of Georgia's water resources.

WATER ALLOCATION ISSUES FACING GEORGIA

Georgia has historically been blessed with an apparent abundance of water resources. High rainfall feeding the surface waters of the state and the massive Floridan aquifer underlying most of the southern part of the state have provided plentiful and readily available water sources for domestic, municipal, industrial, agricultural and other uses. However, that history of apparent abundance is over.

Alabama, Georgia, and Florida are at war (subject to a temporary truce) over the allocation of surface waters shared by those states. In-state users of surface waters are no closer to consensus on how Georgia's ultimate share of those waters is to be allocated. Counties and municipalities have squared off against each other over proposed interbasin transfers. Lake front property owners want water in the lakes for recreation. Electric producers, farmers, governments, and others want that same water flowing through the dam, albeit at different times and in different amounts, to support their own needs. The State's Wildlife Resources Division wants a higher minimum instream flow to be free from withdrawals so as to support aquatic habitat, while the State's Environmental Protection Division wants to keep a free hand to maximize the amount of water available for withdrawal by and allocation to competing human users. Commercial entities want permits to withdraw surface water for use on their riparian lands or to sell to non-riparian users, while governmental entities worry whether there will be enough water left to serve their citizens. On the groundwater front, South Carolina has threatened suit against Georgia as a result of over-withdrawal of the Floridan aquifer in the Savannah area which has resulted in salt water intrusion of Hilton Head's groundwater supplies. Meanwhile, some wells in Brunswick have become contaminated by salt water encroachment caused by massive withdrawals from more inland wells. The State has threatened unilateral downward modification of some groundwater permits along the coast, while placing no limits on expansion of withdrawals in other areas within the coastal region.

Water is an essential, irreplaceable, and valuable public resource, yet to date no entity in Georgia has been required to pay for its withdrawal, regardless of the quantity and nature of use. Meanwhile, regulators and economists discuss implementation of user's fees, willful depletion and contamination, market-based private ownership, and transfer of water rights.

With all of these considerations and competing interests, numerous questions are raised with respect to legal rights. Whose water is it anyway? Does it belong to the State to dole out as it deems fit? Does it belong to everyone and no one? Does it belong to those who own land next to it or on top of it? Does it belong to nature?

In the face of competing users, does a preexisting user have priority over a future user? If drinking water needs come first, what about farmers' needs to grow the crops we eat and what about industries' needs to support the jobs which pay wages and provide valuable goods and services? Does a municipality have priority over a private water utility? Does a riparian user have priority over a distant user? What's left for the fish? And what's left to float the fisherman's boat or the shipper's barge?

How much of it does each user get? Should water allocation be based on acres owned, riverfront footage, gross revenue, payroll, number of households, number of employees, or position on the river or aquifer? Or is it based on need? If so, whose and how much?

Who decides who gets how much and when? Is it a judge or jury or EPD? Does an EPD permit protect a user from a lawsuit by an aggrieved other user?

Most of these questions are yet unanswered in Georgia. While other states have addressed some of these questions, decisions in those states are not binding in Georgia. In the West where these conflicts have existed for years, the fundamental underpinnings of water law are radically different from those that apply in Georgia.

This paper will not attempt the massive undertaking to answer each of these questions or propose solutions to each of these dilemmas. Instead, it is the author's hope that in raising these questions and outlining the basic existing legal framework relating to water rights in Georgia, the reader can be better equipped to understand the issues and their potential outcomes. This paper will therefore provide a brief summary of the common law, statutory, and regulatory basis of water resources law in Georgia.

SURFACE WATER RIGHTS

Common Law Reasonable Use Doctrine

Description. At common law, in Georgia, as well as in most eastern states, the "reasonable use doctrine" applies to surface water rights. The reasonable use doctrine is contrasted with the "appropriation" doctrine which is prevalent in the western states. Under the appropriation doctrine, a riparian owner "owns" the water which he appropriates, and he can, as a general rule, withdraw and transfer it as he pleases, regardless of downstream owners' needs.

Under the reasonable use doctrine, pure private ownership of water by a riparian owner does not exist. Instead, a tension exists between private and public water rights. On the one hand, surface water is deemed to be a communal resource. On the other hand, riparian landowners possess limited private property rights to withdraw and otherwise use the waters of the stream. The riparian owner's right consists of the right to a "reasonable use" of the waters of the stream. Notwithstanding this right of reasonable use, it has been held that a riparian owner has no ownership of the water itself but has a simple usufruct (in the nature of a limited leasehold right) for the use of the water as it passes along. *Goble v. Louisville & N. R.R.*, 187 Ga. 243, 200 S.E.2d 59 (1939). "Riparian proprietors have no title to the water which flows over their land, but are entitled to a reasonable use thereof. . . . The property, therefore, consists not in the water itself, but in the added value which the stream gives to the land through which it flows. This is made up of the power which may be obtained from the flow of the stream, from the increased fertility of the adjoining fields because of the presence of the water, and of the value of the water for the uses to which it may be put." *Price v. High Shoals Mfg. Co.*, 132 Ga. 246, 251, 64 S.E.2d 87, 89 (1909) (emphasis added). The riparian owner is entitled to "a reasonable use of the water, for domestic, agricultural, and manufacturing purposes; provided, that in making such use, he does not work a material injury" to other riparian proprietors. *Pyle v. Gilbert*, 245 Ga. 403, 405, 265 S.E.2d 584, 586 (1980) (emphasis added). "Riparian proprietors have a common right in the waters of the stream, and the necessities of the business of one can not be the standard of the rights of another . . . ." 245 Ga. at 406-07, 265 S.E.2d at 587 (emphasis added).

Public Welfare. The reasonable use equation is not limited to a balancing of the needs and uses of riparian owners. A riparian owner's right of reasonable use is also subject to considerations of "public welfare." 132 Ga. at 251, 64 S.E. at 89. An unreasonable use of water by a riparian owner is one in which "others are deprived in whole or in part of the common benefit." *White v. East Lake Land Company*, 96 Ga. 415, 417, 23 S.E.2d 393, 394 (1895). Under the reasonable use doctrine, the protection of natural flows is contemplated, subject to some reasonable level of diminution resulting from necessary, unavoidable, and reasonable uses. 132 Ga. 246, 64 S.E. 87, 88.

Defining Reasonable Use. Can reasonable use and unreasonable use be defined more precisely? Although numerous cases have addressed various factual scenarios, the general answer is no. Whether or not a particular use is reasonable depends on the circumstances of the particular case and is generally a question for judge or jury. *Pool v. Lewis*, 41 Ga. 162, 169 (1970). Factors to be considered include the character and size of the stream, the needs of the user, the uses to which it has been put and may be put, adverse effects on others, the needs of others, and enumerable other factors.

In the Restatement of the Law, Second, Torts, an effort was made to express a consensus with respect to various determinants of reasonable use. These determinants were as follows: (a) the purpose of the use; (b) suitability of the use to the water course or lake; (c) the economic value of the use; (d) social value of the use; (e) the extent and amount of the harm it causes; (f) the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other; (g) the practicality of adjusting the quantity of water used by each proprietor; (h) the protection of existing values of water uses, land, investments and enterprises; and (i) the justice of requiring the user causing harm to bear the loss." Such factors are obviously broad, vague, non-exclusive, and open to dispute on the merits of each case. The identification, development and proof of all relevant factors, together with the art of persuasion and argument of legal precedent and analogy, will be essential tools to establish the reasonableness and unreasonableness of particular withdrawals.

SURFACE WATER PERMITTING SYSTEM

Statutory/Regulatory Authority

In the face of the inherent vagueness and uncertainty of the common law reasonable use doctrine, the Georgia legislature and the Department of Natural Resources ("DNR/EPD") have entered the fray. It is unclear whether the regulatory authority invoked by the State derives from its police powers to protect citizens against harm or from its public trust duties as trustee for the common benefit of its citizenry in public resources. Although the regulatory scheme strongly resembles and draws upon the reasonable use doctrine, it is unclear the degree to which the regulatory scheme has legally superseded or has simply augmented the role of the courts in applying the reasonable use doctrine. In any event, the legal basis for the State's exercise of regulatory authority has not been challenged.

Withdrawal Permit Scope and Classification

O.C.G.A. § 12-5-31 (the Georgia Surface Water Withdrawal Act) and the regulations promulgated thereunder at Georgia Rules and Regulations Chapter 391-3-6-.07 establish a permit system administered by EPD for the withdrawal of more than 100,000 gallons per day on a monthly average. The Act recognizes the possibility that EPD in the exercise of its permitting authority would assume the type of fact finding and decision making with respect to competing uses of water which the courts traditionally exercise under the reasonable use doctrine. The Board of Natural Resources was directed by the legislature to "establish a reasonable system of classification for application in situations involving competing uses, existing or proposed, for a supply of available surface waters. Such classifications shall be based upon but not necessarily limited to the following factors:

1. The number of persons using the particular water source and the object, extent, and necessity of their respective withdrawals, diversions, or impoundments;

2. The nature and size of the water source;

3. The physical and chemical nature of any impairment of the water source adversely affecting its availability or fitness for other water uses;

4. The probable severity and duration of such impairment under foreseeable conditions;

5. The injury to public health, safety, or welfare which would result if such impairment were not prevented or abated;

6. The kinds of businesses or activities to which the various uses are related and the economic consequences;

7. The importance and necessity of the uses, including farm uses, claimed by permit applicants and the extent of any injury or detriment caused or expected to be caused to other water uses;

8. Diversion from or reduction of flows in other water courses;

9. The prior investments of any person in lands, and plans for the usage of water in connection with such lands . . . provided, however, that the granting of such permits shall not have unreasonably adverse affects upon other water uses in the area, including potential as well as present use; and

10. The varying circumstances of each case.

O.C.G.A. § 12-5-31(e); Ga. Reg. 391-3-6-.07(7). In light of permit application requirements, it is plain that water conservation plans and drought contingency plans are additional factors to be considered in the permit decision process. Ga. Reg. 391-3-6-.07(4)(b) 8, 9.

Allocation for Instream Water Uses

Although neither the Act nor the regulations expressly address protection of natural stream values, the "other water uses" which must be protected from "unreasonably adverse effects," see O.C.G.A. § 12-5-31(e)(9), would likely be deemed to include natural uses and attributes of water such as providing aquatic habitat for fisheries and aquatic plants, in-stream water quality, assimilative capacity for wastewater, in-stream flow quantity to support boating use, aesthetic values, and wetlands preservation. Although the EPD regulations provide substantial flexibility in determining the minimum instream flow below which withdrawals will not be allowed, the present policy of EPD is to establish only a ten year drought condition (7Q10 flow) as the minimum protected instream flow. A higher minimum instream flow has been proposed by the Wildlife Resources Division of the Department of Natural Resources for the purpose of attempting to factor in the natural uses and attributes of stream flow as well. There has been little discussion relating to optimum flows versus minimum flows, but both should be relevant in water withdrawal decisions.

Priority of Water Uses

Although the legislature did not prioritize the types of competing uses of water in permit decisions, such legislative prioritization was given in the instance of emergency orders during drought. In such instances, first priority is given to providing water for human consumption and the second priority is given to farm use. O.C.G.A. § 12-5-31(c)(3). That said, the legislature then created an ambiguity in the priority system by noting: "The importance and necessity of water for industrial purposes are in no way modified or diminished by this Code section." O.C.G.A. § 12-5-31(l)(4). Thus, it is difficult to determine where industrial use falls in the drought priority system.

In the regulations, priorities for competing applications in non-drought situations are given a marginal degree of extra definition: "When there are competing applications for water from the same source, and the source is insufficient to supply all applicants, the following order of priorities shall prevail (Ga. Reg. 391-3-6-.07(8)):

1. Emergency facilities for essential life support measures.

2. Domestic and personal uses, including drinking, cooking, washing, sanitary purposes and all health related activities.

3. Farm uses . . . .

4. Industrial uses (including those industries on public water systems).

5. Other uses such as lawn sprinkling, non-commercial car washing, garden watering, etc.

6. Outdoor recreation uses.

Having applied these various factors, if the EPD director determines that "two or more competing applicants or users qualify equally, then the director is to allocate water on a prorated or other reasonable basis between them." O.C.G.A. § 12-5-31(f). However, in such event, the director "shall give preference to an existing use over an initial application." O.C.G.A. § 12-5-31(f).

New vs. Existing Uses. The legislature was seemingly inconsistent in its direction to EPD with respect to the treatment of existing versus new and potential future uses. On the one hand, the legislature refers to protection of potential as well as pending uses, O.C.G.A. § 12-5-31(g), allows for mid-term modifications and revocations of permits to mitigate newly-developed concerns and competing uses, O.C.G.A. § 12-5-31(k), and states that a permit renewal application is to be treated in the same manner as a new permit application, O.C.G.A. § 12-5-31(j). On the other hand, EPD is directed to give preference to an existing use over a new application. O.C.G.A. § 12-5-31(f).

Permit Decision Considerations

The tension of the reasonable use doctrine carries forward into the legislature's direction to the EPD director in making permit decisions. On the one hand, it is mandatory upon the director to issue a permit to meet the reasonable needs of an applicant. O.C.G.A. § 12-5-31(g). On the other hand, it is mandatory upon the director that the grant of such permit "shall not have unreasonably adverse affects upon other water uses in the area, including but not limited to public use, farm use, and potential as well as present use." O.C.G.A. § 12-5-31(g).

Although permits may be granted for a duration of up to 50 years (in the case of a governmental body), any such permit is revocable or modifiable in mid-term if it is determined that such permitted withdrawal "would prevent other applicants from reasonable use of surface water . . . or for any other good cause consistent with the health and safety of the citizens of this state and with this article." O.C.G.A. § 12-5-31(k).

Permit decisions by EPD are subject to review by an administrative law judge (ALJ) under the Administrative Procedures Act. O.C.G.A. § 50-13-13. However, as a practical matter, substantial deference is given EPD by the ALJ with respect to its exercise of discretion, so long as EPD acts consistent with the facts of each case and within the general confines and mandates of the Surface Water Withdrawal Act and its regulations. An ALJ decision, while reviewable by the Courts, is entitled to even greater deference and no right of jury trial exists.

GROUNDWATER RIGHTS

Common Law

Very little case law exists in Georgia with respect to groundwater rights. While it would appear from the few decided cases that an underground aquifer is to be treated similarly to a surface stream, no cases have expressly addressed the legal rights relating to aquifers. Instead, the few groundwater cases in Georgia to date have distinguished between (a) "percolating water" in the subsurface as to which the owner of the land overlying the water was held to have "exclusive proprietorship," and (b) subsurface water which had become "a part of a well defined underground stream." *Stoner v. Patten*, 63 S.E.2d 897, 898 (1909). The *Patten* case implied, without using the term or expressing its attributes, that the reasonable use doctrine would apply to an underground stream by stating: "An underground stream of water differs from a surface stream only with respect to its location above or below the surface." 63 S.E.2d at 898. Thus, the rights and limitations of the reasonable use doctrine would apply to owners of land overlying an aquifer.

Assuming that the reasonable use doctrine applies to competing uses of groundwater aquifers in Georgia, the same standards referenced above with respect to surface water should apply. While many of the attributes of groundwater characteristics and withdrawal differ markedly from surface water, most of the legal issues relating to withdrawal rights would be treated similarly. The Restatement of the Law, Second, Torts, has expressly adopted the surface water determinants of reasonable use with respect to groundwater use. Restatement of the Law, Second, § 858(2). In addition, the Restatement also notes the following circumstances under which a groundwater withdrawal will be deemed unreasonable and therefore unlawful: (a) the withdrawal of groundwater unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artisan pressure; (b) the withdrawal of groundwater exceeds the proprietor's reasonable share of the annual supply or total store of groundwater; or (c) the withdrawal of the groundwater has a direct and substantial effect upon a water course or a lake and unreasonably causes harm to a person entitled to the use of its water."

GROUNDWATER PERMITTING SYSTEM

Statutory/Regulatory Authority

The General Assembly and the Department of Natural Resources have established a permit system for groundwater withdrawals which is parallel and extremely similar to the surface water withdrawal permit system. Such permit system is established in O.C.G.A. §§ 12-5-90 to 12-5-107 (the Georgia Groundwater Use Act), and in Chapter 391-3-2 of the Georgia Administrative Rules and Regulations. The overall purpose of the permitting system is to allow for full beneficial use of groundwater, while conserving the resource for sustainable future use and protecting against salt water encroachment and adverse effects on other water users. O.C.G.A. §§ 12-5-91, 95(a)(2). A permit is required to withdraw groundwaters in excess of 100,000 gallons per day. O.C.G.A. § 12-5-96(a). Subject to the general direction of the legislature that "the general welfare and public interest require that the water sources of the state be put to beneficial use to the fullest extent to which they are capable," O.C.G.A. § 12-5-91, EPD is given authority to deny a permit

application if the effect of such proposed water use "upon the water resources of the area is found to be contrary to public interest." O.C.G.A. § 12-5-96(c)(4). The considerations to be applied in making permit decisions are virtually identical to those stated with respect to surface water permits. Compare O.C.G.A. §§ 12-5-96(d), 12-5-31(e).

Permit Decision Considerations

Similar to surface water permits, EPD is directed to accommodate the reasonable needs of preexisting groundwater users, "provided, however, that the granting of such permit shall not have unreasonably adverse effects upon other water uses in the area, including public use, and including potential as well as present use." O.C.G.A. § 12-5-97(f). In considering groundwater permit applications, EPD is to consider "the prior investments of any person in lands and the nature of any plans for the usage of water in connection with such lands," subject to consideration of unreasonable adverse effects of such withdrawal on potential as well as present use. O.C.G.A. § 12-5-97(f), (g).

No express statutory or regulatory priorities among competing types of uses are established for permit application purposes. However, priority is established during emergency periods of water shortage in language identical to that used in the Surface Water Withdrawal Act. Compare O.C.G.A. § 12-5-102(c)(d); 12-5-31 (l)(4), (5).

Groundwater permits may be issued for the longer of either ten years or the period necessary for reasonable amortization of the applicant's water withdrawal facilities. O.C.G.A. § 12-5-97(a). Such permits are subject to modification during their term if there is found to be an unreasonable effect upon the water uses or users in the area, including public and farm use, and including potential as well as present use. Ga. Reg. 391-3-2-.05(5)(a).

CONCLUSION

Both surface water and groundwater supplies in Georgia constitute a hybrid private and public resource. The formerly ample resources are now subject to overuse. As a result, thresholds of overall use are being established and competition for water within such thresholds is becoming more intense. As municipalities, counties, farmers, industries, residential developers, private water utilities and others compete for these resources, application of the reasonable use doctrine and the permitting system with respect to competing uses will increase. While the common law reasonable use doctrine and the regulatory permitting criteria appear to be substantially similar, arguments can and will be made that significant differences exist between the two systems. In addressing such differences and in refining the approach to these competing demands, Georgia case law and administrative decisions will emerge, slowly struggling with the difficult legal, equitable, and technical issues presented by competing water uses.