

REBUTTING REGULATED RIPARIAN

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REFERENCE: *Proceedings of the 2005 Georgia Water Resources Conference*, held April 25-27, 2005, at the University of Georgia, Kathryn Hatcher, editor, Institute of Ecology, The University of Georgia, Athens, Georgia

Abstract. As water becomes a more limited resource throughout the country, more states are asking, “Is the allocation of water a guaranteed, commoditized property right or a protected public resource?” Georgia has attempted to answer this question, and balance urban and rural water needs, by adopting a Regulated Riparian water allocation policy. The State issues water use permits, by county, while maintaining traditional riparian use as a means to recognize long-term, good water stewards.

However, an ambiguous term, such as “Regulated Riparian,” can send mixed signals that lead to tension, conflict, and confusion, especially when the subject is already rife with tension. In addition, the current policy attempts to manage water by using political jurisdictions – Georgia’s 159 counties – rather than watershed or basin boundaries. Finally, for any water management system to be effective, Georgia must take the next step by legislating clear water allocation objectives and identifying consistent funding mechanisms.

This paper proposes a three-pronged water allocation policy for Georgia that 1) solidifies relationships with long-term good water stewards while making clear that the state owns the resource, 2) manages water use on a watershed basis, not a county-by-county basis, and 3) establishes clear funding mechanisms, such as an ad-valorem tax converted to property tax and user pay systems.

INTRODUCTION

Throughout the country, water is becoming, or has become in some regions, a limited resource. Ever-increasing water demands coupled with growing environmental requirements build a strong case that water supply problems are going to get worse before they get better, and that allocations will become more contentious. This creates the backdrop for the popular expression, “Water is the oil of the 21st century.”

Is water allocation a guaranteed, commoditized property right? Or is it a protected public resource, so essential that, if left solely to arbitrary market forces, only negative, perhaps catastrophic, outcomes could be expected?

There are numerous water allocation models in use throughout the country, among them riparian, common

law, administrative, and appropriative systems plus hybrids combining several approaches. In the nation today, the overriding water allocation policy trend is moving away from viewing water as a property right and toward protecting the public interest through a regulated or administrative approach.

What is remarkable in Georgia’s case is that the state is only now debating the water policy question. The current Regulated Riparian policy attempts to balance urban and rural water needs by issuing water use permits by county and by maintaining traditional, riparian use as a means of recognizing long-term, good water stewards. But can this policy, with its seemingly conflicting title – “Regulated Riparian” – fully serve the state? Is the state clearly identified as the owner/manager of the water resource? Is the policy environmentally and financially sound?

This paper outlines benefits and potential problems with the Regulated Riparian policy and proposes a better water allocation policy for the state.

BACKGROUND

The United States has entered a new age of water management. The country is no longer divided between traditional eastern and western approaches to water issues in which eastern states take water for granted while westerners think of water supplies as limited, if not scarce. At the same time water allocation agreements are being drawn between urban and agricultural interests in California, states including Georgia, Florida, and Alabama are contesting water rights.

National Trends

More states are answering the age-old question, “Is water a commodity or a public resource?” with an approach that treats water as a public resource to be administered by the government. The California Supreme Court played a part in setting this new tone when it ruled that Mono Lake was for the public’s benefit and use.

The courts, preferring to steer clear of the complexities of water issues, will not likely challenge this model. Their only action might be to establish a custodian, as in the case of the Arizona-versus-California water debate, in

which the Secretary of the Interior was appointed water master.

The answer, then, is for states to legislate water allocation policies that attempt to balance urban and rural needs while protecting the resource. Many states recognize that this approach requires tough decisions, and that not all stakeholders will be completely satisfied with the outcome. But, they also realize that the time is here to set water allocation policies before water issues become more critical.

Georgia's Current Policy

Georgia current water allocation policy is called a Regulated Riparian doctrine. The policy defines water as a public resource subject to regulation rather than a common resource, as in strict riparian doctrine, or a private resource, as in appropriative rights doctrine

The regulator in Georgia's case is the Georgia Environmental Protection Division (EPD), which issues water use permits by county for large water use. The permits, however, do not take away the right to use water from riparian landowners. This policy attempts to recognize the need for regulated water management as urban demand grows while traditional, or rural, use is unchanged. In 2004, HB 237 passed giving the EPD the lead role in creating a statewide water management plan by 2007.

POTENTIAL PROBLEMS

While science plays a valuable role in a review of water allocation policy, 30 years of experience in the nation's water policy arena, overseeing solutions to water issues in both eastern and western states, provides a comprehensive insight into potential problems with Georgia's current Regulated Riparian policy.

Ambiguous Terms

Using an ambiguous term, such as "Regulated Riparian," is never recommended when dealing with policy issues. At best, balancing water needs and interests is a tense undertaking, and ambiguity does nothing to ease concerns and mistrust. At worst, ambiguous terms can lead to unexpected, even disastrous outcomes.

An experience with another region's water policy negotiations illustrates the problem with ambiguous terms. During a water dispute with Native Americans, an agreement was drawn stating that the water could be used for "tribal customs." Policy planners expected "tribal customs" to be hunting or fishing. The tribe's next step, however, was construction of a casino, a "tribal custom" in its view but an unexpected outcome for water policy planners.

Cumbersome Administration

The Georgia EPD regulates water use by issuing permits county-by-county. This administrative choice may appear practical. But Georgia has 159 counties, reportedly due to an old, undocumented rule of thumb that every Georgia citizen should be within a one-day round trip horse or wagon ride from a county seat of government. Regardless of their origins, the large number of counties, one of the largest in the 50 states, points to a recognition by early residents that small counties brought many benefits from better law enforcement and government representation to greater job potential.

These political advantages, however, do not translate to advantages for water allocation policy. Topographic features that impact water use, such as ridges and natural waterways, are rarely a factor in the location of Georgia's county boundaries. Thus, water management by county could yield unforeseen, potentially damaging consequences within a watershed that spans two or more counties. For administrative and environmental reasons, water management using natural watershed and basin boundaries is a key feature in good water allocation policy.

Planning is not Implementing

No matter how comprehensive a policy may be or how well it serves stakeholder interests, without legislation to reinforce the policy, there is always room for backsliding. Georgia's Regulated Riparian policy is not supported by legislation. In addition, no funding mechanism has been identified to uphold the policy during the critical years ahead. A premium managed system requires consistent funding.

CONCLUSIONS

A better water allocation policy for Georgia would maintain the best features of the current Regulated

Riparian doctrine including

1. The recognition that water is a public resource to be held in trust by a regulatory administrative system,
2. A balance of urban and rural needs, and
3. Preservation of traditional riparian rights for long-term, good water stewards.

Three improvements to the current policy would result in a more effective water allocation policy for Georgia.

Usufruct Water Use Relationships

"Usufruct" is a term used to describe a provision in which one party owns a resource and another is given usufruct, or, literally, "use and fruits" of the resource as long as the resource is returned in good condition. Another term for usufruct is "common law life use." A usufruct relationship is not the same as that of "trustee" or

“steward.” These terms typically refer to a paid overseer of the resource, not someone who clearly benefits from use of the resource for a period of time.

Georgia should establish usufruct relationships with long-term riparian users that show a record of good water use. This would solidify rural water use relationships by making clear that the state owns the resource yet still giving full benefits to riparian users. Usufruct relationships would only require review if the water use changes or if evidence could be presented that the resource was not being maintained in good condition.

Management By Watershed

Managing water use on a watershed or basin basis makes more sense when administrating the resource. Georgia should complete a watershed management plan and abandon the cumbersome, potentially damaging, county-by-county system.

Legislate and Fund

A legislated policy with a clear funding mechanism is needed to fully support a water allocation policy so that it remains a constant within the state, not a moving target. Examples of possible funding mechanisms include an ad-valorem tax converted to property tax and user pay systems. Consistent funding will ensure a premium managed system.

DISCUSSION AND RECOMMENDATIONS

Georgia should not feel comfortable with the current, unlegislated Regulated Riparian doctrine as its water allocation policy. While the state is on the right track in its view that water as a public resource held in the state’s trust and by recognizing long-term good water stewards, there is a better policy choice. The recommended approach is a clearly defined policy managing water use on a watershed basis and enjoying the support, and inherent fortitude, of legislation and established funding.

The time is now for Georgia to set work in motion for a better water allocation policy. The state is running out of water, and changing policy at a later date may be next-to-impossible. While a new policy may not fully satisfy every stakeholder, the state, and its citizens, deserve nothing less than the best water allocation policy that can be created.

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