GEORGIA'S FUTURE WATER USE POLICY: REGULATED RIPARIANISM OR RADICAL REVISIONISM?

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Abstract. During the last few years, increasing attention has been focused on water use in Georgia and its management by the Georgia DNR and EPD. In 2001, the General Assembly appointed a Joint Comprehensive Water Plan Study Committee to develop a framework for comprehensive water planning and to recommend options for necessary revisions to Georgia's water laws. That committee has concluded its work and submitted its report and recommendations to the Governor and the General Assembly. As bills addressing water issues are considered in the 2003 session, the legally protected right of cities and counties, businesses and farmers to use water should be preserved not taken under the guise of water allocation needs.

INTRODUCTION

Like most Eastern states Georgia has enjoyed an abundance of water -- until recent years brought drought conditions. The Joint Comprehensive Water Plan Study Committee Report recommends extensive water planning including reconsideration of the allocation of water resources. In addition to this ongoing planning process, bills may be introduced in the 2003 General Assembly which would seek to alter the currently recognized legal right of riparian owners to use water.

Riparian rights to use water have been part of Georgia's legal framework for wall over one hundred years. Indeed, they are codified in Georgia's statutes (O.C.G.A. §§ 44-8-1; 44-8-3; and 51-9-9). Initially, these rights were limited to "reasonable use." More recently, Georgia statutes required permits from EPD for certain water withdrawals. Thus, riparian rights in Georgia are regulated under the water withdrawal permit system.

As the concern over water allocation has increased, some have suggested that no private rights of water use should be recognized. This position ignores the codification of water rights in Georgia. Moreover, interference with these rights would constitute an unlawful "taking" requiring compensation to those affected.

GEORGIA STATUTES RECOGNIZE AND PROTECT PRIVATE WATER RIGHTS

Georgia currently has in place an extensive system of private water rights. Various Georgia statutes recognize and protect these rights.

O.C.G.A. § 44-8-1 specifically provides:

> Running water belongs to the owner of the land on which it runs; but the landowner has no right to divert the water from its usual channel, nor may he so use or adulterate it as to interfere with the enjoyment of it by the next owner.

O.C.G.A. § 44-8-3 provides:

> The owner of a non-navigable stream is entitled to the same exclusive possession of the stream as he has of any other part of his land. The legislature has no power to compel or interfere with the owner's lawful use of the stream, for the benefit of those above or below him on the stream, except to restrain nuisances.

O.C.G.A. § 51-9-9 provides:

> The owner of realty has title downwards and upwards indefinitely; and an unlawful interference with his rights, either below or above the surface, gives him a right of action.

These statutes recognize the property interest of private land owners of surface water and groundwater. As the Georgia Supreme Court recognized in Robertson v. Arnold, 182 Ga. 664, 186 S.E. 806 (1936). "The right of the owner of land through which a nonnavigable stream flows to have its waters come to his land in the natural and usual flow is inseparably annexed to the soil, and is parcel of the land itself, and comes within the protection of the constitutional provision which forbids the taking of private property for public purposes without just and adequate compensation being first paid." Further, the Georgia Supreme Court in Price v. High Shoals Manufacturing Co., 132 Ga. 246 (1908), held that the flow and use of

the water belongs to the land through which it passes, is inseparably connected to the land as a part of it, and is a private property right to the proprietor of the land 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. Although the right to water has sometimes been characterized as a "usufruct," a usufruct is also a protected property interest. The Georgia Court of Appeals in Franco's Pizza and Delicatessen v. Department of Transportation, 178 Ga. App., 331, 343, S.E. 2d 123 (1986) recognized the principle of protecting the "sacred right of property owners to just and adequate compensation before private property is taken or damaged for public purposes" and held that a usufruct is such a property right.

Therefore, it is clear that existing legislation in Georgia recognizes and protects the property rights of landowners in surface water and ground water. Any attempt to change that legislation to alter the status of those property rights would constitute a major change in the current state of property law in Georgia. Such changes may also constitute a "taking" requiring compensation to the owner.

GEORGIA STATUES AND REGULATIONS ALREADY CONTAIN PROVISIONS REQUIRING A BALANCING OF WATER NEEDS AND IMPACTS

The Georgia system of riparian rights for surface water and landowner rights to groundwater was recognized when the Georgia legislature enacted the Georgia Water Quality Control Act and the Groundwater Use Act of 1972. The Georgia Water Quality Control Act declares that "the government of the state shall assume responsibility for the quality and quantity of such water resources and the establishment and maintenance of a water quality and water quantity control program adequate for present needs and designed to care for the future needs of the state." [O.C.G.A. § 12-5-21]. The Groundwater Use Act declares that "the water resources of the state shall be put to beneficial use to the fullest extent to which they are capable, subject to reasonable regulation in order to conserve these resources and to provide and maintain conditions which are conducive to the development and use of water resources." [O.C.G.A. § 12-5-91].

Persons who withdraw quantities of surface water greater than 100,000 gallons a day on a monthly average must obtain a permit from the Georgia Environmental Protection Division. [O.C.G.A. § 12-5-31]. As to groundwater, a permit is required for withdrawal of groundwater in excess of 100,000 gallons per day. [O.C.G.A. § 12-5-96]. Thus, the property rights to surface and groundwater provided by the legislation discussed above are subject to these permitting requirements. As part of the permitting process, the Director of EPD is already required to balance the need for surface or groundwater with other concerns. Permits for surface water withdrawals are issued to meet the applicant's needs, unless the terms of the permit would have unreasonably adverse effects upon other water users in the area. The permit may not be granted if the Director determines that such unreasonably adverse effects would occur. [O.C.G.A. § 12-5-31(g)]. Similarly, the statute requires that certain factors must be considered in the granting of groundwater withdrawal permits. These factors include "the physical and chemical nature of any impairment of the aquifer affecting its availability or fitness for other water uses": "probable severity and duration of such impairment under foreseeable conditions"; and the "injury to public health, safety or welfare which would result if such impairment were not prevented or abated." [O.C.G.A. § 12-5-96(d)].

It is apparent that the Georgia General Assembly has already achieved a balance between the recognized need of governments, businesses and farmers to use surface water and groundwater and the interests of the citizens of Georgia in preventing adverse effects on others. The language of these statutory provisions is broad in scope and already grants to the Director of EPD considerable power in administering the surface water and groundwater permitting programs. Moreover, if affected persons disagree with the Director's decision to grant such permits, they may challenge the permit decision within 30 days of its issuance by filing a Petition for an Administrative Hearing. An Administrative Law Judge who is part of the Office of State of Administrative Hearings presides at such a hearing, takes oral testimony and documentary evidence, accepts proposed findings of fact and conclusion of law and post-hearing briefs and then makes a decision. That decision may be appealed to the Superior Court with further review by Georgia appellate courts.

LEGISLATIVE ISSUES

The Joint Comprehensive Water Plan Study Committee ("JSC") recommended consideration of seven principles for Georgia's water rights structure

(JSC Final Report, 2002 -- Recommendation 26). One of those recommended principles is that Georgia should continue to regulate large withdrawals under the Regulated Riparian doctrine. Similarly, the Georgia Water Coalition ("GWC") recommended continuation of the Regulated Riparian system in Georgia. (GWC Report, 2002 -- Recommendation 2). In addition, the JSC's Water Rights Structure Working Group recognized that usufructory rights such as riparian rights must be protected if the use is reasonable. [Final Report -- Water Rights Structure Working Group (2002), p. 22]. These principles are compatible with the state's role as a regulator of activities which impact the environment.

However, statements in other publications have raised the question whether the state should be declared to be the owner of water resources rather than the regulatory police officer. Certain groups have taken the position that no individual or industry owns water (*Plan for Use of State Rivers' Water is Near*, Atlanta Journal Constitution, August 2002). Rather, the contention is that the state or the public owns all water resources. Of course, this position is contrary to existing Georgia statutes which clearly recognize individual property rights in water (O.C.G.A. § 44-8-1; 44-8-3; 51-9-9). Moreover, the Supreme Court of the United States has held that "water is an article of commerce" and rejected claims that a state owns water within its boundaries. Sporhase v. Nebraska, 458 U.S. 941 (1982). Therefore, any legislation which affects the existing water rights of permit holders and riparian owners must be carefully crafted to avoid an unconstitutional "taking".

Some groups have also raised concerns that recognizing private property rights in water will result in the exportation of large amounts of water from Georgia to other states or countries. This assertion ignores the current protections in Georgia law. Withdrawals of 100,000 gallons per day or more require a permit from EPD. The regulations governing permit issuance require EPD to determine impacts on stream flow, impacts on other users and potential impairment of aquifers. Also, adversely affected citizens may challenge such permits if they disagree with the permit conditions. Therefore, restrictions on out of state water transfers may be imposed by EPD or developed as a result of a permit challenge.

LITERATURE CITED

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