

ACKNOWLEDGING A GEORGIA FARMER'S PROPERTY INTEREST IN WATER

The notion of private property is fundamental to the existence of our Nation. It is a fundamental duty of the government to protect, rather than to destroy, personal property.¹ Every man has the right to enjoy his property to the fullest extent; and whenever that right is invaded by another and injury accrues to him, and therefore he is entitled to damages.²

I. INTRODUCTION

Georgia's current law regarding use and regulation of water which flows on private property is susceptible to divergent interpretations regarding whether water itself, or merely the use of water by farmers constitutes a property right subject to divestment through eminent domain, or whether water is a public resource subject to regulation in the public interest. If the water rights of farmers are subject to divestment through eminent domain, then application of the takings clauses of the Georgia and Federal Constitutions is required.

Historically, "Georgia has been blessed with an abundant supply of water."³ However, "increased water consumption, as well as an extended drought from 1998 until 2002, has made it clear that water is a finite resource."⁴ As these conditions worsened in 2007, Governor Sonny Perdue declared a state of emergency due to this "drought of historic proportions."⁵

1. Estate of E. Wayne Hage. v. United States, 82 Fed. Cl. 202, 208 (2008).

2. Price v. High Shoals Mfg. Co., 64 S.E. 87, 89 (Ga. 1909).

3. Georgia Water Coalition Frequently Asked Questions (FAQs) <http://www.garivers.org/gawater/faqs.html> (last visited Mar. 23, 2009). The Coalition was formed in 2002, and is an alliance of 150 organizations whose mission is to ensure that water is managed fairly for all Georgians, and protected for future generations.

4. *Id.*

5. *Georgia's Governor Declared Drought Emergency*, MSNBC, Oct. 20, 2007, <http://www.msnbc.msn.com/id/21393296/>.

“According to the U.S. Census Bureau, from 1990 to 2000, the population in Georgia increased 26.4%, compared to the national increase of 13.1%.”⁶ Similarly, between 1990 and 2000, Greater “Atlanta added more than 1 million people and its water use climbed nearly 30 percent to about 420 million gallons per day. Now, metropolitan Atlanta boasts roughly 5 million people and projects an additional 2 million more by 2030, when water usage could climb past 700 million gallons per day.”⁷ “Agricultural water consumption in Georgia is 1,580 million gallons per day and accounts for 57.4 percent of all water consumed in the state.”⁸ This population increase, as well as the recent drought conditions, has strained Georgia’s water supply.

II. AN OVERVIEW OF GEORGIA’S WATER LAW

In the 1848 case of *Hendrick v. Cook*, the Supreme Court of Georgia declared a riparian regime, stating “[e]ach riparian proprietor 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 the other proprietors.”⁹ Courts have consistently reiterated that a property owner has rights not only in his property, but also has a property right in the use of the water which runs through or on his property.¹⁰ In addition to riparian rights an individual has in the use of water flowing on his property, Georgia has a permitting system in place where large users of surface water must obtain a permit to withdraw the water.¹¹ The act

6. Georgia Water Coalition 2006 Report 1, <http://www.garivers.org/gawater/pdf%20files/waterreportfinalversion.pdf> (last visited Dec. 8, 2008).

7. *Georgia Farmers See Water Hogs in Atlanta*, MSNBC, Nov. 14, 2007, <http://www.msnbc.msn.com/id/21793386/>. (last visited Apr. 14, 2009).

8. Georgia Water Coalition Frequently Asked Questions (FAQs), *supra* note 3.

9. 4 Ga. 241, 256 (1848) (emphasis in original).

10. *See Price v. High Shoals Mfg. Co.*, 64 S.E. 87, 89 (Ga. 1909).

11. Surface Water Act. The language in O.C.G.A. § 12-5-105 discussing water withdrawal rights of groundwater closely parallels and is extremely similar to the surface water withdrawal permit system found in O.C.G.A. § 12-5-31. Accordingly, water rights will refer to both groundwater rights and surface water rights for the purposes of this comment.

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specifically distinguishes between farmers and non-farmers.¹² Unlike non-farmers, when a farmer obtains a permit pursuant to the terms of the act, his permit grants him unlimited use of the water.¹³ Moreover, his permit is irrevocable, fully transferable, and unlimited in duration.¹⁴ When compared to the traditional attributes of property, the permit seems to reinforce that the holder of the permit has a property right for the use, transfer, and exclusion of the water on his property, particularly in light of Georgia's riparian regime. In enacting the statutes governing water allocation permits, the state legislature did not overturn Georgia's riparian tradition. Moreover, a literal interpretation of such statutes conveys to the farmers a private property interest in the use of water.

Recently, as Georgia's population has grown and drought conditions worsened, considerable debate concerning the managing of the surface and ground waters in the state has arisen. Scholars,¹⁵ as well as environmental action groups, such as the Georgia Water Coalition, believe that the "surface and ground waters must be managed as a public resource, regulated by the state in the public interest, and in a sustainable manner."¹⁶ A closer view of these groups' agendas, however, reveals that such groups have misinterpreted Georgia's prior case law, and attempted to re-characterize water use as a public, instead of a private right.

A recent Nevada case decided by the United States Federal Claims Court held that the government's regulatory actions amounted to a taking, because they interfered with the plaintiff's use of the water.¹⁷ Similar results could occur in Georgia if regulations were to interfere with a landowner's interest in the use of the water which comes upon his land.

12. See O.C.G.A. §§ 12-5-31 and 12-5-105 (2008).

13. *Id.*

14. *Id.*

15. John L. Fortuna, *Water Rights, Public Resources, and Private Commodities: Examining the Current and Future Law Governing the Allocation of Georgia Water*, 38 GA. L. REV. 1009 (2004).

16. Georgia Water Coalition Frequently Asked Questions (FAQs), *supra* note 3.

17. Estate of E. Wayne Hage v. United States, 82 Fed.Cl. 202 (2008).

A. Two Theories of Water Allocation

In the United States, two theories of water allocation have developed in order to govern the rights of citizens to use water: the riparian theory and the theory of prior appropriation. The theory of riparian rights dominates in the states east of the Mississippi River, where, traditionally, water has been abundant. The classic theory of riparian rights has been stated as follows:

Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was ... to run, without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. . . . Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate.¹⁸

Riparian rights are “usufructory” in nature.¹⁹ A usufructory right entitles one to use and enjoy the fruits of another’s property for a period without damaging it or diminishing it, although the property might naturally deteriorate over time.²⁰ A riparian owner thus does not own the water as it flows in a stream, but merely the right to use the water while it flows over his property, so long as he returns it to its normal course.²¹ Given the usufructory nature of water of riparian rights, they are necessarily tied to ownership of land abutting a water source.²²

18. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 3:7 (Marie-Joy Paredes & Lisa A. Fiening eds., 2008) (quoting 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW 617-22 (13th ed. 1888)).

19. *Id.*

20. BLACK’S LAW DICTIONARY 1580 (8th ed., 2004).

21. TARLOCK, *supra* note 18, at § 3:9; *see also* Ctr. Townhouse Corp. v. City of Mishawaka 882 N.E. 2d 762, 768 (Ind. App. 2008) (“A riparian landowner does not own the water in a stream that runs along his property, but he does own the right to the reasonable use of the stream as part of the title to his real estate.”).

22. *See* Crawford Co. v. Hathaway, 93 N.W. 781, 792 (Neb. 1903) (“The

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A riparian owner may use the waters flowing over his property, so long as such use is reasonable, as most states have adopted a reasonable use rule.²³ The details of the reasonable use rule vary in different states, but regardless of the approach, the central theme is to ensure that a particular riparian owner's use of the water is not detrimental to the uses of other riparian owners. "Each riparian owner. . . has the right to the use of the stream, so long as such right does not interfere with the rights of other riparian owners to do the same."²⁴ Riparian owners essentially serve as a check on each others uses.

The prior appropriation theory of water rights developed in the western United States, where water is less readily available. "The central goal of the prior appropriation doctrine has always been to provide for the consumptive use of water."²⁵ The theory was born out of the customs of the California miners, who settled disputes over the use of water "by simple priority rules."²⁶ Prior appropriation law is premised upon the principle of "first in time, first in right."²⁷ Unlike the riparian system, prior appropriation rights are not tied to the ownership of riparian land, but rather, are dependent upon an appropriation of water from a source, and application of that water to a beneficial use.²⁸ Prior appropriation doctrine allows "a water user to divert water over another's property."²⁹

B. Common Law Doctrine of Riparian Rights in Georgia

Since Hendrick, Georgia has recognized a riparian regime.³⁰

riparian owner acquires title to his usufructuary interest in the water when he appropriates the land to which it is an incident, and when the right is once vested it cannot be divested except by some established rule of law.").

23. TARLOCK, *supra* note 18, at § 3:12.

24. Ricci, Boenning, and Pasko. *Battles Over Eastern Water*, 21 SUM NAT. RESOURCES & ENV'T 38, 38 (2006).'

25. Christopher L. Len, *Synthesis – A Brand New Water Law*, 8 U. DENV. WATER L. REV. 55, 62 (2004).

26. TARLOCK, *supra* note 18, at § 5:3.

27. Fortuna, *supra* note 15, at 1022.

28. TARLOCK, *supra* note 19, §§ 5:24 - 5:30.

29. Len, *supra* note 25, at 62 (citing Bruce Barcott, *There's an Old Saying in Colorado: You Can Steal My Wife, but Not My Water*, LEGAL AFF., July-Aug. 2004, at 48-49).

30. *Hendrick v. Cook*, 4 Ga. 241 (1848).

In 1909, the Supreme Court of Georgia reaffirmed its position that a riparian owner's use of water, rather than title to the water itself, flowing on his property is a private right.³¹

In *Price*, the plaintiffs were riparian owners, and mill operators on the Apalachee River, brought suit against an upstream riparian owner, who operated machinery, using power from the river waters. The plaintiffs complained of lost business at their mill because the defendant erected a reservoir on the river above the plaintiffs' mill, creating a pond of water covering a considerable area, which caused the evaporation and absorption of the water, thereby diminishing the supply to which the plaintiffs were entitled.³² The plaintiffs also alleged that gates were placed in this dam by the defendant, which were closed in the evening and shut off the flow of the water until they were opened the next morning, with the result that the plaintiffs did not receive enough water to operate their mill until early afternoon.³³ The plaintiffs argued that the use and detention of water by the defendant was unreasonable and entirely beyond the size and capacity of the stream, and that the obstruction, detention, retardation, and diminution of the water were subversive of the rights of the plaintiffs and caused them damages of \$1,000 annually.³⁴

Addressing the nature of rights that riparian owners enjoy in the waters on their lands, the Court stated:

[T]he right to have a natural water course continue its physical existence upon one's property is as much property as is the right to have the hills or forests remain in place. Such flow and use belong 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 in 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. The property, therefore, consists, not in the water itself, but in the added value which the stream gives to the

31. *Price v. High Shoals Mfg. Co.*, 64 S.E. 87, 88 (Ga. 1909).

32. *Id.*

33. *Id.*

34. *Id.*

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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. The right to the continued existence of these conditions is property, to protect which the owner may resort to any or all the instrumentalities which may be employed for the protection of private property rights.³⁵

The Court held that a new trial was required, because the instructions given by the trial court did not adequately protect the property rights of the plaintiff.³⁶ The Court advised that the following charge be given on retrial: "If the defendant made an unreasonable use of the water, so as to damage the plaintiffs, it was an illegal invasion of their property rights and a continuous and positive tort, and the plaintiffs could recover whatever damages they sustained. . ."³⁷

The common law development of water rights in Georgia has focused on, and not strayed from, the theory of riparian rights. O.C.G.A. § 44-8-1, defining water rights, codifies the riparian regime, providing that "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."³⁸ The prohibition of diversion is not a prohibition against use of water for irrigation,³⁹ although diversion may be prohibited, if for other purposes.⁴⁰

C. Georgia's Permitting System

In Georgia, regulations concerning water usage have increased over the past half-century.⁴¹ "In 1977, the Georgia

35. *Id.* at 89.

36. *Id.*

37. *Id.* at 90.

38. O.C.G.A. § 44-8-1 (2008).

39. *Pyle v. Gilbert*, 265 S.E.2d 584, 588 (Ga. 1980).

40. *Id.*

41. See Joseph W. Dellapenna, *The Law of Water Allocation in the Southeastern States at the Opening of the Twenty-First Century*, 25 U. ARK. LITTLE ROCK L. REV. 9, 68 (2002). ("Over the past forty years, the Georgia General Assembly has enacted a broad range of statutes that regulate various

General Assembly amended the Water Quality Protection Act of 1964⁴² (the “Surface Water Act”) and established a revocable permit system to govern large users of surface water.”⁴³ Under this Act, “users withdrawing, diverting, or impounding surface water greater than 100,000 GPD (gallons per day) on a monthly average are required to obtain a permit from the Environmental Protection Division of the Department of Natural Resources (“EPD”).”⁴⁴ The language used in the Surface Water Act is very similar to that used in the Ground Water Act, so it will be used interchangeably throughout this comment when discussing agricultural permits. Both Acts “distinguish between farm and non-farm uses, and the nature of the use determines both the scope and duration of the permit.”⁴⁵ Georgia Comprehensive Rules and Regulations § 391-3-2.02, defines “farm use” as “irrigation of any land used for general farming, forage, aquaculture, pasture, turf production, orchards, or tree and ornamental nurseries; provisions for water supply for farm animals, poultry farming, or any other activity conducted in the course of a farming operation.”⁴⁶ Non-farm use permits are issued for water withdrawn for any activity other than those described in the aforementioned definition of “farm use.”⁴⁷ Examples of “non-farm” uses include public drinking water,

aspects of water use in the state. Two statutes directly address the allocation of water to particular uses through the requirement of permits for the use of water—The Ground-water Use Act of 1972 (“Ground Water Act”) and a 1977 amendment to the Georgia Water Quality Protection Act of 1964 (“Protection Act”). These statutes impose similar permit systems on water users; the first applies to users of groundwater and the second to users of surface water. Both statutes are premised on the idea that the general welfare and public interest require that the water resources of the state be put to beneficial use to the fullest extent to which they are capable, subject to reasonable regulation in order to conserve the waters and to provide and maintain conditions which are conducive to the development and use of water resources.”).

42. O.C.G.A. § 12-5-1 (2008).

43. Fortuna, *supra* note 15, at 1034.

44. *Id.*

45. *Id.* at 1035.

46. GA. COMP. R. & REGS. 391-3-2.02 (2008).

47. Interview with Christopher Ward, Environmental Compliance Specialist, Agricultural Permitting Unit, Environmental Protection Division, Georgia Department of Natural Resources, March 25, 2009.

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and municipal and industrial water withdrawals.⁴⁸ “Non-farm use permits may be suspended or modified if it is determined that the quantity of water allowed to be withdrawn under the permit is either (1) greater than needed for the use upon which the permit is based; or (2) interferes with the reasonable use of another applicant.”⁴⁹ In addition, “non-farm use permits may be revoked, suspended, or modified for nonuse.”⁵⁰

“The Surface Water Act contains special provisions which govern the issuance of permits for ‘farm uses.’”⁵¹ Many of these provisions seem to convey a property right, on which the farmer relies for his continued operation. The Act states “that if the use was initiated prior to July 1, 1988 and the permit application was filed prior to July 1, 1991, the Surface Water Act exempts farm use permit applications from evaluation under the reasonableness standards applied to non-farm use permits.”⁵² Moreover, the permits are of “unlimited duration and may be transferred or assigned to subsequent owners of the lands which are the subject of the permit.”⁵³ Also, “permits for farm use, after initial use has commenced, shall not be revoked, in whole or in part, for nonuse.”⁵⁴ The language used in the Act is similar to one of the basic principles of property law, which is that it “grants owners the power to control the resources they own.”⁵⁵ Control may take various forms, including the privilege to use the property, the power to transfer or assign it (alienability), and the right not to have it taken from you.⁵⁶

The rights given to farmers under O.C.G.A. §12-5-31 and O.C.G.A. § 12-5-105 closely resemble the general characteristics and attributes associated with private property. A “fundamental maxim of property law is that [an] owner of a property interest may dispose of all or part of that interest as he

48. *Id.*

49. Fortuna, *supra* note 15, at 1035.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 1036.

54. O.C.G.A. §12-5-105(b)(2) (2008).

55. JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 24 (2d ed., 2005).

56. *Id.*

sees fit.”⁵⁷ Property rights “also consist of the group of rights which the so-called owner exercises in his dominion of the physical thing, such as the right to possession, use and dispose of it.”⁵⁸ Moreover, a basic principle of private property is that it should be alienable.⁵⁹ Alienability is the idea that private property should be freely transferable from one person to another.⁶⁰ Finally, owners of private property are generally free to exclude others.⁶¹ “The power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.”⁶² Accordingly, “the term property comprehends not only the legal thing possessed, but also, in strict legal parlance, means the rights of the owner in relation to land or a thing; the right of a person to possess, use, enjoy, and dispose of it, and the corresponding right to exclude others from the use.”⁶³ Georgia’s permitting system, codified at O.C.G.A. § 12-5-31 and O.C.G.A. § 12-5-105, seems to recognize both the historically established riparian rights system, and a prior appropriation doctrine, usually associated with the West. O.C.G.A. § 12-5-31(a)(3), closely paralleled by O.C.G.A. § 12-5-105(a) provides:

Notwithstanding any other provision of this Code section to the contrary, a permit for the withdrawal or diversion of surface waters for farm uses shall be issued by the director to any person when the applicant submits an application which provides reasonable proof that the applicant’s farm use of surface waters occurred prior to July 1, 1988, and when any such application is submitted prior to July 1, 1991. If submitted prior to July 1, 1991, an application for a permit to be issued based upon farm uses of surface waters occurring prior to July 1, 1988, shall be granted for the withdrawal or diversion of surface waters at a rate of withdrawal or diver-

57. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998); *see also* *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-378 (1945).

58. *Phillips*, 524 U.S. at 170; *see also* *Gen. Motors Corp.*, 323 U.S. at 378; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

59. SINGER, *supra* note 55, at 10.

60. *Id.*

61. *Id.* at 7-11.

62. *Loretto*, 458 U.S. at 435.

63. *Bowers v. Fulton County*, 146 S.E.2d 884, 890 (Ga. 1966) (quoting *Woodside v. City of Atlanta*, 103 S.E.2d 108, 114-115 (Ga. 1958)).

sion equal to the greater of the operating capacity in place for withdrawal or diversion on July 1, 1988, or, when measured in gallons per day on a monthly average for a calendar year, the greatest withdrawal or diversion capacity during the five-year period immediately preceding July 1, 1988. If submitted after July 1, 1991, or, regardless of when submitted, if it is based upon a withdrawal or diversion of surface waters for farm uses occurring or proposed to occur on or after July 1, 1988, an application shall be subject to evaluation and classification pursuant to subsections (e), (f) and (g) of this Code section, but a permit based upon such evaluation and classification shall be issued to ensure the applicant's right to a reasonable use of such surface waters.⁶⁴

III. GEORGIA'S PERMITTING SYSTEM CREATES PROPERTY RIGHTS

Historically, property interests have been recognized in a variety of contexts. For example, in *Phillips v. Washington Legal Foundation*, the Supreme Court of the United States held that "interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal" for purposes of the Takings Clause.⁶⁵ There, the Court stated that "while the interest income at issue may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property."⁶⁶ Also, the Supreme Court of Georgia has held that land owners and developers acquire vested property rights in the land they develop in reliance on existing zoning laws.⁶⁷

Similar to the fundamental principles of owning private property, the express language in O.C.G.A. §§12-5-31 and 12-5-105 states that all permits issued under the Act "may be transferred or assigned to subsequent owners of the lands which are the subject of such permit" and that "permits for farm use, after initial use has commenced, shall not be revoked, in whole or in part, for nonuse."⁶⁸ Moreover, "permits for farm uses are

64. O.C.G.A. § 12-5-31(a)(3) (2008).

65. 524 U.S. 156, 172 (1998).

66. *Id.* at 170; *see also* *Hodel v. Irving*, 481 U.S. 704, 715 (1097).

67. *DeKalb County v. Chapel Hill, Inc.*, 205 S.E.2d 864, 868 (Ga. 1974).

68. O.C.G.A. §§12-5-105(b)(1), (b)(2) (2008).

of unlimited duration.”⁶⁹ A permit is also exclusive in that “all permits are issued [only] to land owners who have the deed for the location where the well or pump station [is] located.”⁷⁰ However, these permits may be assigned for use to their tenants.⁷¹

As stated earlier, the Georgia Code provides that “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.”⁷² Turning to Georgia’s common law, “the right of a riparian owner to have the non-navigable stream flow to him in its natural manner has . . . been held to be within the constitutional protection against governmental taking without compensation.”⁷³ Moreover, a “riparian right is property which cannot be taken except for public use and upon payment of just compensation.”⁷⁴ “An action that deprives property owners of the basic rights that make up riparian rights, including the general use of water, wharfing rights, access to navigable waters, and the right to accretions, requires compensation for the property owners.”⁷⁵ Given the fact that the Georgia General Assembly drafted the permitting statutes with this background of water law, the inference arises that they must have, at a minimum, understood

69. Fortuna, *supra* note 15, at 1036.

70. Interview with Edward Rooks, Geologist, Agricultural Permitting Unit, Environmental Protection Division, Georgia Department of Natural Resources, April 3, 2009. See also Agricultural Water Use Permits, Agriculture Permitting Unit, Georgia DNR Environmental Protection Division, <http://www.nespal.org/sirp/apu/> (last visited Apr. 14, 2009).

71. *Id.*; see also Agricultural Water Use Permits, Agriculture Permitting Unit, Georgia DNR Environmental Protection Division, <http://www.nespal.org/sirp/apu/> (last visited Apr. 14, 2009).

72. O.C.G.A. § 44-8-1 (2008).

73. Robert Clark Kates, *Georgia Water Law* 284-285 (Institute of Government, The University of Georgia 1969) (citing *City of Elberton v. Hobbs*, 49 S.E. 799 (Ga. 1905)).

74. 26 AM. JUR. 2D *Eminent Domain* § 181 (citing *U.S. v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *Kaukauna Water-Power Co. v. Green Bay & M. Canal Co.*, 142 U.S. 254 (1891); *City of Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004*, 607 A.2d 1163 (Del. 1992)).

75. 26 AM. JUR. 2D *Eminent Domain* § 181 (citing *Belvedere Dev. Corp. v. Dep’t. of Transp., Div. of Admin.*, 476 So. 2d 649 (Fla. 1985)).

the right to use water is a private property right.⁷⁶ The legislature did not expressly contravene the existing common law regime of riparian rights. “Unless the contrary manifestly appears from the words employed, the language of a Code section should be understood as intending to state the existing law, and not to change it.”⁷⁷ Furthermore, when “the exercise of police power in regulating the use of land infringes upon the landowner’s right to its unfettered use of the land, then such regulation of land use is in derogation of common law, requiring strict construction against the [state] and liberal construction in favor of the landowner.”⁷⁸ “In construing a legislative act, a court must first look to the literal meaning of the act.”⁷⁹ “Statutes are to be construed in accordance with their real intent and meaning and not so strictly as to defeat their legislative purpose, and statutory construction ‘must square with common sense and sound reasoning.’ ”⁸⁰

A literal reading of O.C.G.A. § 12-5-31 and O.C.G.A. § 12-5-105 indicates that the language used conveys to some farmers a property interest in the use of water, and to others, to the reasonable use of water. Both statutes state that the permits are transferable, irrevocable, and are of unlimited duration.⁸¹ Moreover, any regulation that would infringe upon a farmer’s right to use the land and water would be liberally construed in favor of the farmer.⁸²

However, it should be mentioned that courts in other

76. See *Thornton v. Anderson*, 64 S.E.2d 186, 189 (Ga. 1951) (citing 59 C.J. 1038, § 616 for the proposition that “All statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it. They are therefore to be construed in connection and in harmony with the existing law, and their meaning and effect is to be determined in connection, not only with the common law and the constitution, but also with reference to other statutes and the decisions of the courts.”).

77. *Threlkeld v. Whitehead*, 98 S.E.2d 76, 80 (Ga.App. 1957).

78. *Dekalb County v. Post Apartment Homes*, 506 S.E.2d 899, 901 (Ga. App. 1998).

79. *City of Atlanta v. Miller*, 569 S.E.2d 907, 908 (Ga.App. 2002) (quoting *Diefenderfer v. Pierce*, 396 S.E.2d 227, 228 (Ga. 1990)).

80. *Id.* at 908-909 (quoting *Tuten v. City of Brunswick*, 418 S.E.2d 367, 404 (Ga. 1992)).

81. O.C.G.A. § 12-5-105 and O.C.G.A. § 12-5-31 (2008).

82. *Dekalb County v. Post Apartment Homes*, 506 S.E.2d at 901.

jurisdictions have sustained regulations of the use of water against constitutional challenges.⁸³ These jurisdictions hold that “usufructuary water rights, in sum, have always been incomplete property rights, so the expectations or right holders to the enjoyment of these rights are generally weaker than the expectation of the right to exploit the full value of the dry land.”⁸⁴ In *Cherry v. Steiner*, an Arizona court, applying their law, stated the rule that “a landowner whose land overlies groundwater has only the right to use the water, but maintains no proprietary interest in the actual water.”⁸⁵ Accordingly, the court held that “without an interest in the percolating water, the plaintiffs may not assert a wrongful taking of their property.”⁸⁶ In *Cherry v. Steiner* the court stated that the plaintiffs had no proprietary interest *in the water*. However, the property interest asserted is not in the actual water itself. The property interest lies in the right to *use* the water, granted under the terms of the permit. Moreover, while other jurisdictions hold that water rights, being usufructory in nature, are incomplete property rights, the argument is not that there is a complete right to water, but a right to use the water.

IV. OPPOSITION TO WATER USE AS A PRIVATE PROPERTY RIGHT

The notion of water use as a private property right is not without its dissenters. Scholars,⁸⁷ as well as groups, such as the

83. *In re Water Use Permit Applications*, 9 P.3d 409, 493 (Haw. 2000); *see also Village of Tequesta v. Jupiter Inlet Corp.*, 371 So.2d 663, 669-70 (Fla. 1979) (“holding that restriction on landowner’s water use deprived owner of no beneficial use of the land itself, and thus did not constitute a taking”).

84. *In re Water Use Permit Applications*, 9 P.3d at 493 (internal quotations omitted).

85. *Cherry v. Steiner*, 543 F. Supp. 1270, 1277 (Ariz. 1982).

86. *Id.*

87. *See Fortuna*, *supra* note 15. (Argument that Georgia should not establish a private water market to promote greater efficiency in these times of scarcity. The common-law riparian regime never supported “private ownership” of surface water on land. *Price’s* language of “right to use” as well as its insistence on the “reasonable use” requirement in relation to other users affirmed this conclusion. Georgia’s permitting system, a form of regulated riparianism, was designed to allow Georgia to allocate water effectively in times of shortage. Under this system, the reasonableness of

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Georgia Water Coalition, favor the allocation of water as a public resource. The concern is that increasing scarcity of water will result in a move towards private water markets. The Georgia Water Coalition recommends altering the permit system to bring farm use permits in line with all other permits. This move will give the government the ability to modify such permits, giving the government greater flexibility to address growing water scarcity.

The Georgia Water Coalition believes the permits issued to farmers “do not convey any property right that would require compensation if modified or changed.”⁸⁸ All non-farm use permits, as well as those farm use permits issued after July 1, 1988, are subject to evaluation under reasonableness criteria established by EPD.⁸⁹ The Coalition recommends changing the current system of water withdrawal permits to bring all agricultural permits, including those issued prior to July 1, 1988, under the same reasonableness standards as all other water users.⁹⁰

Under the Coalition’s proposal, “agricultural withdrawals will continue, subject to the same metering, reporting, and permitting conditions that apply to other water users in the state.”⁹¹ According to the Coalition, “when all users, including

use is regulated by a regulatory agency (the EPD) rather than the courts. Additionally, determinations of reasonableness are made prior to the issuance of permits. Unlike non-farm use permits, farm-use permits are of unlimited duration, may be transferred to subsequent owners of the land, may not be revoked/suspended for non-use, and may not be modified because 1) the quantity permitted to be withdrawn is greater than need or 2) use would prevent reasonable non-farm use of other applicants. Additionally, if the use initiated prior to July 1, 1988, and the permit application was filed prior to July 1, 1991, the permit application was not subject to the reasonableness standard. The government reserved the right to modify all existing permits under emergency orders in periods of extreme shortage. Thus, current law gives the state the ability to respond to growing scarcity. Thus, private water markets should not be legislatively established or recognized under current law.)

88. Georgia Water Coalition Frequently Asked Questions (FAQs), *supra* note 3.

89. Fortuna, *supra* note 15, at 1035.

90. Georgia Water Coalition Frequently Asked Questions (FAQs), *supra* note 3.

91. *Id.*

agricultural users, monitor and report their withdrawals, Georgia will finally be in a position to maintain its water resources at the highest quality, while preventing foreseeable shortages.”⁹² In short, the Coalition believes that the current water allocation system is unfair in that it gives farmers too much freedom in their withdrawal of water. Accordingly, the Coalition recommends that a statewide plan be enacted which would bring agricultural permits under the same standards as all other users.⁹³

The Georgia Water Coalition is incorrect in its interpretation of Georgia’s case law as well as statutes. According to the Coalition, *Price* establishes water use as public in nature, rather than as a private right. They argue that *Price* provides for the public nature of water by stating that “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 in which it flows.”⁹⁴ Consequently, there is no one “owner” of a given water supply.⁹⁵ However, *Price* explicitly stated the contrary.⁹⁶

The Coalition further argues that because O.C.G.A. § 12-5-105 and O.C.G.A. § 12-5-31 do not contain provisions for the payment of just compensation for the taking of a water use permit, these permits do not convey any property interest to the

92. *Id.*

93. *Id.*

94. *Price v. High Shoals Mfg. Co.*, 64 S.E. 87, 89 (Ga. 1909).

95. Georgia Water Coalition Frequently Asked Questions (FAQs), *supra* note 3.

96. *Price*, 64 S.E. at 88 (“Every riparian owner is entitled to reasonable use of the water. Every such proprietor is also entitled to have the stream pass over his land according to its natural flow, subject to such disturbances, interruptions, and diminutions as may be necessary and unavoidable on account of the reasonable and proper use of it by other riparian proprietors. Riparian proprietors have a common right in the waters of the stream, and the necessities of the business of one cannot be the standard of the rights of another; but each is entitled to a reasonable use of the water with respect to the rights of others. What is a reasonable use is a question for the jury, in view of all the facts in the case, taking into consideration the nature and use of the machinery, the quantity of the water used in its operation, the use to which the stream can be applied, the velocity of its current, the character and size of the water course, and the varying circumstances of each case.”).

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permit holder,⁹⁷ although the issuance of farm permits is mandated, at least if the water use was initiated prior to July 1, 1988. Although Georgia has, and continues to adhere to the doctrine of regulated riparianism, perhaps inadvertently, the doctrine of prior appropriation also applies, under certain circumstances, pursuant to the permitting statutes.

V. EMINENT DOMAIN

At the exponential rate that Georgia's population is increasing, coupled with recent drought conditions, there is a very real possibility that there will not be enough water to satisfy the needs of both farmers and non-farmers. Because use of the water is recognized as a private right in Georgia, government regulations of the right must not "go too far."⁹⁸ An innocent farmer who has reasonably relied on water as his source of livelihood and has made expenditures based on that reliance could possibly suffer extreme hardships as the result of future government regulatory actions. Having established that Georgia's farmers have rights in the use of water flowing on their property, we turn to the question of whether, if a permit should be revoked, denied, or otherwise regulated to the point of denying a farmer of the beneficial use of that water, the government has worked a taking, requiring payment of just compensation.

Pursuant to Article I, Section III, Paragraph I(a) of the Georgia Constitution, "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."⁹⁹ O.C.G.A. § 22-1-2(a) defines eminent domain as:

[T]he right of the state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state on account of public exigency and for the public good. . . Notwithstanding any other provisions of law, neither this state nor any political

97. Georgia Water Coalition Frequently Asked Questions (FAQs), *supra* note 3.

98. *See Mann v. State*, 603 S.E.2d 283, 285 (Ga. 2004); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

99. GA. CONST. art. I, § 3, ¶ 1(a) ; *City of Atlanta v. Sig Samuels Laundry and Dry Cleaning*, 652 S.E.2d 533 (Ga. 2007).

subdivision thereof nor any other condemning authority shall use eminent domain unless it is for public use. Public use is a matter of law to be determined by the court and the condemnor bears the burden of proof.¹⁰⁰

Moreover, the Fifth Amendment to the United States Constitution protects citizens by providing that if private property is taken for public use, those citizens should be justly compensated.¹⁰¹ Article IX, section 2, paragraph 5 of the Georgia Constitution generally provides the law of eminent domain for the state of Georgia. Specifically, it states that “the governing authority of each county and of each municipality may exercise the power of eminent domain for any public purpose.”¹⁰² Also, “each exercise of eminent domain by a non-elected housing or development authority shall be first approved by the elected governing authority of the county or municipality within which the property is located.”¹⁰³

A. Fifth Amendment Takings

The Fifth Amendment to the United States Constitution provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”¹⁰⁴ There are three different situations wherein a taking can occur. A government’s permanent physical occupation constitutes a *per se* taking, “without regard to whether the action achieves an important public benefit, or has only a minimal economic impact.”¹⁰⁵ Also, where government regulations result in a complete deprivation of “all economically beneficial use” of an owner’s property, a *per se* taking has occurred.¹⁰⁶ However, failure to find a permanent physical occupation by the government, or to find regulations that deprive an owner of all economically beneficial use of her property, does not end the inquiry. A government may take a person’s property interest via

100. O.C.G.A. § 22-1-2 (2008).

101. U.S. CONST. amend. V.

102. GA. CONST. art. IX, § 2, ¶ 5.

103. O.C.G.A. § 22-1-2 (2008).

104. U.S. CONST. amend. V.

105. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 420 (1982).

106. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

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regulations that “go too far,” yet fall short of depriving an owner of all beneficial use of her property. The United States Supreme Court has recognized that:

government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster-and that such “regulatory takings” may be compensable under the Fifth Amendment.” In Justice Holmes’ storied but cryptic formulation, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”¹⁰⁷

Determining how far is “too far” is the difficult task, and there is no set formula for determining when governmental regulation “goes too far” and constitutes a taking.¹⁰⁸ Such determinations are made through the application of the *Penn Central* factors. These factors are: (1) the extent to which the regulation has interfered with distinct investment-backed expectations; (2) the character of the governmental action; and (3) the economic impact of the regulation on the claimant.¹⁰⁹ The reasoning of *Loretto*, *Lucas*, and *Penn Central* each centers “directly upon the severity of the burden that government imposes upon private property rights.”¹¹⁰

The *Penn Central* test has been applied to find regulatory takings in Georgia. In *Mann v. Georgia Department of Corrections*, the Supreme Court of Georgia held a statute requiring a registered sex offender to relocate if a statutorily defined entity, “where minors congregate,” moved to within 1,000 feet of his or her residence.¹¹¹ Applying the *Penn Central* factors, the Court held that the statute constituted a regulatory taking.¹¹²

Addressing the economic impact factor, the Court held that prohibiting Mann from living in the home that he and his wife

107. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

108. *Lucas v. S.C. Coastal Council*, 505 U.S. at 1015 (Court declined to establish any “set formula” for determining when Government regulation is a taking).

109. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

110. *Lingle*, 544 U.S. at 539.

111. 653 S.E.2d 740, 741 (Ga. 2007).

112. *Id.*, at 745.

purchased for the sole purpose of use as a residence would “utterly impair” the use of his property as his home.¹¹³ Turning to the question of investment backed expectations, the Court held that the statute in question “precludes appellant (Mann) from having any reasonable investment-backed expectation in any property purchased as his private residence,” because it would require him to move, any time an entity listed in the statute moved within his proximity.¹¹⁴ Finally, in analyzing the character of the governmental action, the Court, while respecting the important interest of the State in protecting children from sex offenders, declared that the severity of the economic impact on Mann, as well as the disallowance of investment backed expectations in property purchased as his private home, outweighed the interest of the government, particularly in light of the fact that only the sex offender, and not the public at large, was required to bear the expense associated with such protection.¹¹⁵

Conversely, in a recent decision by the Supreme Court of Georgia, the Court held that “a compensable taking does not occur where the complained of government activity merely interferes with a property owner’s desire to use” public property.¹¹⁶ Specifically, in *City of Atlanta v. Sig Samuels Laundry and Dry Cleaning*, a unanimous Supreme Court of Georgia ruled that an owner of a local laundry and dry-cleaning business should not be compensated for a taking in connection with the city of Atlanta’s planned installation of a sidewalk on public property.¹¹⁷ In that case, the City planned to construct a sidewalk on public land the owner had been using for additional parking.¹¹⁸ The Court reversed a trial court’s determination that the owner should be compensated for the City’s taking by installation of the sidewalk.¹¹⁹

According to the holding of *Sig Samuels Laundry and Dry Cleaning*, a compensable taking would not occur in Georgia,

113. *Id.*, at 744.

114. *Id.*

115. *Id.*, at 745.

116. *City of Atlanta v. Sig Samuels Laundry and Dry Cleaning*, 652 S.E.2d 533, 534 (Ga. 2007).

117. *Id.*

118. *Id.*

119. *Id.*

contra to a fair reading of *Price*, if a governmental entity decides to acquire farmers' water, once it is determined that water is a public resource, since *Price* holds that the "right [of a riparian owner] to . . . use the water shall be regarded and protected as property."¹²⁰ This private property interest is very similar to the property rights that are vested in users of water in many of the western states, and under *Estate of E. Wayne Hage v. U.S.*, should require compensation if a taking did occur.

VI. TAKINGS AND THE ESTATE OF E. WAYNE HAGE

In Nevada, farmers "own the right to use the water, so long as that water is put to beneficial use."¹²¹ In *Estate of Wayne Hage v. U.S.*, the Court found that the Government's construction of fences which excluded the plaintiff's cattle from waters historically used by the plaintiffs amounted to a physical taking because the plaintiffs had a permit for their cattle to access the water.¹²² Applying Nevada law, the Court recognized that the plaintiffs had a vested water right in the water they were using, and also found that the plaintiffs would have put the waters to beneficial use.¹²³ The Court awarded the plaintiffs damages for the value of their water rights plus the value of their improvements.¹²⁴ In doing so, the Court applied the familiar takings jurisprudence of the Supreme Court of the United States, beginning with a brief discussion of *Loretto v. Teleprompter Manhattan CATV Corp.*¹²⁵ The Court did not find a taking on *Loretto* grounds.¹²⁶

The Court did not end its analysis there, however, as several of the Hages' claims were not *per se* "physical" takings, but fell into the category of regulatory takings.¹²⁷ The Court applied

120. *Price v. High Shoals Mfg. Co.*, 64 S.E. 87, 89 (Ga. 1909) (quoting JOHN M. GOULD, GOULD ON WATERS §291 (3d ed., Callaghan and Co. 1900)).

121. *Estate of E. Wayne Hage v. United States*, 82 Fed. Cl. 202, 208, 210 (2008).

122. *Id.* at 211.

123. *Id.* at 210-212.

124. *Id.* at 214-216.

125. *Id.* at 208.

126. *Id.*

127. *Id.*

Lucas v. South Carolina Coastal Council, and *Penn Central Transp. Co. v. New York City* to determine that the Government's actions, such as the requirement of a special use permit for clearing brush, and the regulations barring the Hages from access to the creek beds and ditches, as well as restrictions relating to the tools they could use to clear them, which led to willow proliferation, constituted a regulatory taking of the Hages' property.¹²⁸

In considering the *Penn Central* factors to determine whether the Government's actions amounted to a taking, the Court held:

First, Plaintiffs [the Hages] clearly had investment-backed expectations in the water rights as those rights had been purchased along with the Ranch. In an arid region such as central Nevada water is highly valuable and sought after. It gives the land most of the land's value. It is unreasonable to expect that Plaintiffs would even purchase the ranch without the water rights which gave it its value. The Government interfered with their expectations by allowing riparian growth to increase upstream and by preventing, through threats, Plaintiffs' access to the areas upstream to clear the obstructions in the water flow. The second factor, the character of the governmental action, is different for the riparian growth policy than for the threats. On one hand, there is no evidence that the policy that led to a proliferation of willows and other growth in the stream bed was malicious in nature. On the other hand, the threats and intimidation that pervaded the relationship between Plaintiffs and the Forest Service interfered with Plaintiffs' vested water rights by barring necessary maintenance. The third factor, the economic impact of the regulation on the claimant, leans decidedly against the Government. The severe reduction in water flow to Plaintiffs' patented lands deprived them of the water they needed for irrigation making the ranch unviable and which they could have sold in the market.¹²⁹

Similar to the permits at issue in *Hage*, farmers in Georgia are given permits which either actually provide them with, or imply a property interest in the water they use. While the common law of Nevada requires that waters be put to beneficial use, the common law of Georgia requires only that the use be

128. *Id.* at 208-213.

129. *Id.* at 212.

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reasonable.¹³⁰ However, O.C.G.A. §12-5-105 and O.C.G.A. § 12-5-31 exempt farm use permits under the common law reasonableness standards, if the water use was initiated prior to July 1, 1988, and the permit application was filed prior to July 1, 1991. This exemption strengthens the argument that many farmers in Georgia have acquired vested property rights in their water or the use of water granted under the current permitting system.

VII. FARMERS AND VESTED RIGHTS IN WATER USE

Georgia has long recognized that land owners and developers acquire vested property rights in the land they develop in reliance on existing zoning laws. In fact, the Supreme Court of Georgia has held that “vested rights were acquired by [a land developer] which can not be destroyed by the enactment of a later ordinance.”¹³¹ Such prior nonconforming uses are allowed to continue under state zoning enabling acts to some extent, because it would be an unconstitutional taking of property not to allow the continued existence of such uses.¹³² In the zoning context, once an owner has obtained a building permit and begun substantial expenditures toward construction and, or development, a city may not change the zoning classification, because the owner has a vested right.¹³³ This doctrine is premised on the idea that it is “fundamentally unfair to apply new zoning restriction laws retroactively on owners who have invested substantially in reasonable reliance on the laws in place at the time they acted.”¹³⁴

In *City of Duluth v. Riverbrooke Properties, Inc.*, the Georgia Court of Appeals held that a subdivision acquired vested property rights under a preliminary developmental plan approved by the City of Duluth.¹³⁵ In that case, the Court determined that the developers reasonably relied on the

130. *Price v. High Shoals Mfg. Co.*, 64 S.E. 87, 89 (Ga. 1909).; *Pyle v. Gilbert*, 265 S.E.2d, 584, 586 (Ga. 1980); O.C.G.A. § 44-8-1 (2008).

131. *DeKalb County v. Chapel Hill, Inc.*, 205 S.E.2d 864, 868 (Ga. 1974).

132. *SINGER*, *supra* note 55, at 719.

133. *Id.*

134. *Id.*

135. *City of Duluth v. Riverbrooke Properties, Inc.*, 502 S.E.2d 806, 811 (Ga. App. 1998).

preliminary approval of development plans which contained a lake that was to “serve as an amenity for recreational use and to improve the appearance and as an incidental detention pond for surface water run-off and sediment of construction mud to protect the Chattahoochee River for water quality control.”¹³⁶ After receiving complaints from residents living near the lake, the City determined that the subdivision was in violation of regulations enacted subsequent to the City’s approval of the original regulations.¹³⁷ However, the Court determined that the subdivision acquired vested property rights under the preliminary developmental plan filed under the original regulations and, as a matter of law, such vested rights in the subdivision were “grandfathered” from the effect of the subsequent regulations.¹³⁸

Similar to the vested property rights given to developers who reasonably relied on existing zoning ordinances, farmers’ right to use water should also be recognized as a vested property interest. Farmers in Georgia, like developers, make substantial expenditures based on their reliance of state action. The water permits resemble zoning ordinances, because both induce the respective actors to base their livelihood thereon. However, while Georgia recognizes the vested property interest given to developers who have reasonably relied on zoning ordinances, the State has not yet explicitly recognized the vested property interest of farmers who have, likewise, reasonably relied on the permits. Accordingly, since Georgia’s farmers have a vested property interest in the water they use, the right should be recognized as a private property interest, similar to the laws of many western states, and consistent with *Price*.

Georgia recognizes farmers’ rights to use water as a vested property interest, thus O.C.G.A. §12-5-31 and O.C.G.A. § 12-5-105 should be clarified to require payment of just compensation if the state revokes or regulates the use of the permit.

VIII. CONCLUSION AND RECOMMENDATION

In conclusion, as written, current Georgia law creates an unintentional ambiguity with regards to whether the use of

136. *Id.* at 809.

137. *Id.* at 809-810.

138. *Id.* at 811.

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water by farmers constitutes a property right subject to divestment only through eminent domain, or whether water is a public resource subject to the states regulatory power. The latter is a conclusion with which this paper takes issue. The laws of many western states follow the appropriation doctrine which recognizes a user's ownership in the water or its use. This recognition is due to the fact that users of water make decisions based on their reasonable reliance of this use. As was illustrated in the *Hage*, farmers in the western states are able to receive "just" compensation when water is taken for public purposes.

The increase in Georgia's population, coupled with recent drought conditions, raises the possibility that a governmental entity would determine that water being used for farming purposes would need to be acquired for other public purposes. In this situation, what would happen to the farmer who has reasonably relied on the permits for his livelihood? Georgia's common law riparian tradition, and language of the permitting statutes infer the notion of private property rights in the use of water, but as evidenced by the views of the Georgia Water Coalition, this language is apparently susceptible to a different interpretation. To resolve the inevitable dispute over what rights are actually conveyed to farmers by O.C.G.A. §§12-5-31 and 12-5-105, it is recommended that the state legislature should conduct a study to determine the value of the farm use permits, and institute a compensation schedule to provide payment to farmers that may have their permits modified, suspended, or revoked. This solution would not only compensate the farmers for the value of their property rights in the permits, but would also reduce the State's litigation costs involved in defending lawsuits challenging the governmental conduct. Moreover, as a matter of policy, compensation for the loss of the farm water use permits is the proper course of conduct for the State.

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