REVISING U.S. STATE WATER ALLOCATION LAWS

Stephen E. Draper

AUTHOR: Ph.D., P.E., J.D., 1447 Peachtree St., N.E., Suite 804, Atlanta, Georgia 30309.
REFERENCE: Proceedings of the 1993 Georgia Water Resources Conference, held April 20 and 21, 1993, at The University of Georgia, Kathryn J. Hatcher, Editor, Institute of Natural Resources, The University of Georgia, Athens, Georgia.

INTRODUCTION

Since 1950, surface water withdrawals in the fifty United States have increased over 129%. (USGS, 1990) In 1985, the fifty states withdrew almost 265,000 Million gallons per day (MGD) from surface waters, consuming almost 23% of the withdrawals. (Ibid.) In some areas of the country, surface waters in specific basins have been completely allocated and water must be imported from other basins to meet the increasing demands.

The increase in water demand in Georgia has been greater than most other states. In 1985, Georgia users withdrew over 4300 MGD from surface waters, an increase of 165% over 1950 withdrawals. (Ibid.; Hodler, 1986) In the Atlanta Metropolitan Area alone it is estimated that by the year 2010 surface water withdrawals will have increased another 58% over the present water demand. (Stevens, 1991)

The growing demand for use of a finite amount of water means that Georgia and other states must allocate their water resources efficiently to insure that water is available for reasonable and beneficial uses when and where it is needed. A new initiative by the American Society of Civil Engineers will help states structure their water allocation laws to achieve the objective of efficient water use. It is called a Model State Water Allocation Code.

THE NEED FOR EFFECTIVE WATER LAWS

The laws of the individual states do not always effectively or efficiently allocate the rights to water. Some Southeastern states have obsolete laws that evolved when the primary state industry was agriculture. Until recently, these obsolete laws provided sufficient water to all potential users because the states were blessed with a seemingly inexhaustible quantity of water.

The decade of the 1980's has shown, however, that the U.S. water supply is not inexhaustible and economic growth may be hindered by the lack of sufficient water allocate to new industry and commercial development. Georgia has been faced with the problem of unfulfillable water demand with the realization that the Chattahoochee River cannot supply an inexhaustible amount of water to all potential users. (Draper, 1991)

Georgia's existing water laws, like the laws of many states, do not incorporate the allocation of water rights effectively. The Official Code of Georgia, Title 12, Chapter 5, Water Resources, does contain a comprehensive section concerning water quality. (OCGA 12-5, Article 1) The Chapter also effectively regulates the withdrawal of groundwater. (OCGA 12-5, Article 3) It does not, however, indicate either the uses for which groundwater may be withdrawn or the basis for the right to withdraw. Rather the Georgia Code specifically reinforces that the traditional common law water rights remain in effect, at least for groundwater. (OCGA, § 12-5-104) Withdrawals under 0.10 MGD are unrestricted by Georgia. (OCGA § 12-5-31) Agricultural uses initiated before July 1988 are given relief with only a token admonishment that the use must be "reasonable." Finally, priority of use during periods of water shortage are designated first to human consumption and second to farm use; no other uses are prioritized. (Ibid.) The right to use water, or a policy to allocate use of water in Georgia, is not adequate to deal with the existing problem of Chattahoochee waters or future problems in other Georgia river basins. Discussion of the right to use surface water within the state is limited to a single paragraph. (OCGA § 12-5-21) Four acceptable off-stream uses for surface water are listed. A fifth acceptable in-stream use is presented elsewhere. (OCGA Title 52, Waters of the State) A sixth acceptable in-stream use is authorized for the Chattahoochee and Altamaha River Basins (OCGA § 12-5-401) and a seventh acceptable in-stream use for the Altamaha River Basin. (§ 12-5-421) In contrast, the Corps of Engineers has designated at least nine acceptable water uses in the Chattahoochee River Basin. (COE, 1991)

MODEL WATER ALLOCATION CODE

The American Society of Civil Engineers has initiated the Model Water Rights Allocation Code Project to address the issue of inadequate state water allocation laws in the

United States. The purpose of the project is to "develop proposed legislation suitable for adoption at the state level of government for allocating water among competing interests and resolving quantity-related conflicts." (Davis, 1991; 1992)

The Model Water Allocation Code will provide a source of legal norms to states seeking to improve their water laws. (Ibid.) Federal water law, other than interstate allocation and transfer, is not involved. The ASCE Model Code has been prepared for legislative use of the states. To prepare code provisions acceptable to legislatures, equitable to persons affected, and practical to administer, the task committee is using existing state legislation that has proven to be effective and is adding new provisions to conform to changing water resources practices, recent federal legislation and U.S. Supreme Court decisions.

Membership in the Model Code Task Committee includes both engineers and lawyers. While most members are associated with western "prior appropriation" states, an increasing number of lawyers and engineers from the eastern "riparian" states have joined. As of October 1992 membership includes 77 engineers and 31 lawyers, 35% of whom practice in riparian water law states. (Task Committee Report, 1992)

Earlier code studies, such as those conducted in Alaska, Wisconsin, Virginia and Florida, are being reviewed for relevance to the Model Code. Model laws proposed by the Uniform State Laws Commissioners are also used. (Commissioners, 1986) Early in the formulation stage the committee decided that the Model Code should not be a mandated set of laws that a state was expected to enact into existence as a package. Rather, the Code should provide models of efficient and effective water laws that each state could extract, discard, or modify to address specific water allocation problems the particular state might have. (Shabman, 1991)

The draft outline for the Model Code covers the following topics in its provisions. (Task Committee Draft, 1992)

- **Policy.** The Model Code seeks to present suggested provisions annunciating the state policies that form the foundation of both efficient water resource management and meaningful legal principles. As the centerpiece, the Committee has chosen the policy of restricting water use to "beneficial and reasonable" use.
- **Waters Subject to Allocation.** The intent of the Model Code is to provide a reference of water sources that exist and suggest permitting provisions that may be appropriate in different situations. For instance, the Model Code contains provisions involving water rights for atmospheric water, a troublesome area for some appropriation states.
- **Administration.** The mechanism to administer water allocation is well established in some states like Georgia. That is not the case in all states, however. This Model Code presents provisions that include both regulation by agency, as in Georgia, and regulation by special water courts, as in Colorado. Provisions for alternative dispute resolution are included.
- **Establishing Water Rights.** The intent of the Code is codify water law and replace existing common law. Therefore, the Code provides suggested provisions that establish the basis of water rights.
- **Scope of the Water Rights.** Provisions are included in the Model Code establishing the duration of water rights, identifying the location of potential use, and suggesting possible restrictions during periods of shortage.
- **Status of the Water Rights.** Common exclusions in state water law are provisions which relate to private transfer, forfeitures and abandonment of water rights. The Model Code presents provisions addressing these common omissions.
- **Augmentation/Conservation.** Few states address the question of water rights for water resulting from weather modification. The concept of specific, integrated water rights for conservation as an acceptable use is rarely present in water laws. The Model Code provides suggestions in both areas.
- **Water Transfer.** Water transfer is a pervasive legal problem in almost every region of the country. Interbasin transfer is a specific concern of the Atlanta, Georgia region. (ARC, 1987; Stevens, 1991) The Model Code provides alternatives that integrate interjurisdictional, interbasin and interstate.

Since 1990, three drafts of the ASCE Model Code have been prepared and published. The first two drafts have been reviewed by a variety of selected federal, state, regional and local agencies. The third draft is presently under review. The fourth and final draft will be prepared for general public circulation before September 1994.

Lawmakers seeking to deal with the important issues of water resources and management must be able to learn from the proposed code what their public policy choices are. Consequently, the Model Code provides commentary to each of the recommended textual code provisions. The commentary describes the issue which a Model Code provision addresses, discloses the different ways the issue has been treated throughout the country, and expresses the reason a particular option was selected for the Code.

FUTURE NEEDS

Several significant issues have surfaced in the preparation of the Model Code. The goal of the Code is to provide ways for a state to manage water allocation effectively through the codification of effective state water laws. The orientation of the Model Code is establishing and regulating the acceptable uses for which water may be withdrawn or used in-stream. Water quality matters are to be covered in a separate statute. However, with the Supreme Court decision in a recent

Arkansas - Oklahoma dispute, (Draper, 1991) the water quality-quantity association will probably expand in the Model Water Allocation Code.

Another significant Model Code issue has been the possible merger of Riparian and Prior Appropriation water law systems. The consensus of the committee members has been that total merger is difficult at best and not politically viable in any event. Where possible, the Model Code will contain universal provisions but necessarily separate sections will be prepared for many of the topics noted above.

An important issue is keeping the Model Code current. To address this issue, the Special Standards Division of ASCE has recently created a permanent State Water Allocations Law Standards Committee that will assume primary responsibility for final publication of the Code, its dissemination and the Code's updating as water resources practices change and court decisions evolve.

RECOMMENDATIONS

The Model Code is intended for state legislators, legislative drafters, and their advisers and staffs. For the Model Code to be effective, however, these persons must be aware of the project and provide support for the concept. This can be accomplished only through the wide participation of water resource professionals and attorneys involved in water and environmental law.

- The Environmental Law Committee of the Georgia Bar will be asked to participate in review of the draft Code.
- The Georgia Society of Professional Engineers can also play a role in making Georgia lawmakers understand the need for a Georgia Water Allocation Act.
- All Georgia water resources professionals should use their professional contacts and influence to make Georgia lawmakers aware of how important reforming water allocation rights are to the future of Georgia.

LITERATURE CITED

Atlanta Regional Commission, 1987, *Atlanta Region Water Resources Data Summary, December 1987.*

Corps of Engineers, Mobile District, 1991, *Draft Plan of Study, Comprehensive Study, Alabama-Tallapoosa and Apalachicola-Chattahoochee-Flint River Basins.*

Davis, R., 1991, "The Once and Future ASCE Model Water Allocation Law," *Unpublished Essay*, Brigham Young University School of Law, Provo, UT.

Davis, R., 1992, "Lunacy, Legerdemain, or Levitation: Legal Assessment of the ASCE Model Water Code," *Proceedings of the Water Resources Sessions at Water Forum '92*, p.225, A.S.C.E., New York, N.Y..

Draper, S., 1991, "Legal Issues of Water Allocation for the Apalachicola-Chattahoochee-Flint River Basin," *Proceedings of the 1991 Georgia Water Resources Conference*, page 148, Institute of Natural Resources, Athens, GA.

Draper, S., 1991, "Arkansas v. Oklahoma: Uniting the Doctrines of Equitable Apportionment and Interstate Pollution Control," *Unpublished Essay*; Georgia State University School of Law, Atlanta, GA.

Fanning, J., 1991, "Water Use in Georgia, 1980-89," *Proceedings of the 1991 Georgia Water Resources Conference*, page 9, Institute of Natural Resources, Athens, GA.

Hodler, T. and H. Schretter, 1986, *The Atlas of Georgia*, University of Georgia, Athens, GA.

Marella, R., 1991, "Water Use in the Apalachicola-Chattahoochee-Flint Rivers Basin, 1985," *Proceedings of the 1991 Georgia Water Resources Conference*, page 10, Institute of Natural Resources, Athens, GA.

Official Code of Georgia, 1992.

Task Committee on Model State Water Code, 1992, *Model State Water Rights Allocation Code (3d Draft).*

Task Committee on Model State Water Code, 1992, *Final Report, Model Water Code Task Committee, ASCE.*

Shabman, L., 1991, "What Should the ASCE Model Water Code Committee Do?," *Proceedings of the Water Resources Sessions at Water Forum '92*, page 237, A.S.C.E., New York, N.Y.

Stevens, P., 1991, "Reallocation of Lake Lanier, Georgia," *Proceedings of the 1991 Georgia Water Resources Conference*, page 139, Institute of Natural Resources, Athens, GA.

United States Geological Survey, 1990, *National Water Summary 1987*, Water-Supply Paper 2350, USGPO.