THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE COURT OF COMMON PLEAS

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2016-000428

James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman,

Appellants,

vs.

South Carolina Department of Health and Environmental Control,

Respondent.

INITIAL BRIEF OF APPELLANTS

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I. STATEMENT OF THE CASE

This is an appeal from the circuit court's grant of summary judgment to the South Carolina Department of Health and Environmental Control ("Department" or "Respondent") by order dated January 4, 2016. On September 4, 2014, James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman ("Riparian Property Owners" or "Appellants") filed the present facial challenge to the constitutionality of the South Carolina Surface Water Withdrawal, Permitting Use and Reporting Act of 2010, S.C. Code Ann. §§ 49-4-10 to 49-4-180 ("the Act") for lack of due process, violation of the public trust doctrine, and the taking of riparian property rights through the Act's agricultural use registration program.

On November 13, 2014, the Department filed a motion to dismiss. On November 21, 2014, the Riparian Property Owners filed a motion for preliminary injunction. Both motions were heard and denied at a hearing on January 15, 2015.

On January 28, 2015, the Department answered the complaint, defending the constitutionality of the Act and asserting several affirmative defenses, including lack of standing and ripeness.

On February 13, 2015, the Department filed a petition for extraordinary relief including removal and original jurisdiction in the South Carolina Supreme Court. That petition was denied on April 9, 2015, and discovery proceeded thereafter.

On September 14, 2015, the parties filed cross-motions for summary judgment, which were heard on November 17, 2015. On January 4, 2016, the Honorable R. Markley Dennis, Jr. issued an Order denying the Riparian Property Owners' motion for summary judgment and granting the Department's motion for summary judgment. On February 23, 2016, the Appellants

served a Notice of Appeal in the Court of Appeals. On March 26, 2016, Appellants filed a Motion to Transfer the case to this Court, which was granted on April 19, 2016.

II. STATEMENT OF THE FACTS

A. Registrations under the Surface Water Withdrawal Act

On Thursday, June 24, 2010, Governor Mark Sanford signed the Surface Water Withdrawal, Permitting Use and Reporting Act, S.C. Code Ann. §§ 49-4-10 to 49-4-180. The purpose of the law was to regulate the use of water from the State's rivers and streams.

The Department is the agency charged with the implementation and enforcement of the Surface Water Withdrawal Act. The Act establishes two mechanisms authorizing withdrawal of surface waters – a permitting system and a registration system. Significantly for this case, the Act allows riparian owners who are consuming water for agricultural uses to simply "register" their water use, rather than seek a permit. The Act does not restrict the amount of water that any one agricultural user can consume on a daily, annual, or total basis and the registration never expires. Registration does not require notice to adjacent riparian owners, nor does it provide those owners with an opportunity to object.

Under the Act, a "surface water withdrawer"[1] is generally required to apply for a permit. S.C. Code Ann. § 49-4-25.[2] The Act establishes a permitting program whereby an applicant provides detailed information about its proposed surface water withdrawals. S.C. Code Ann. § 49-4-80. In turn, the Department must make a reasonableness determination for the proposed use, in consideration of enumerated criteria,[3] and make various other findings concerning the

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[1] "'Surface water withdrawer' means a person withdrawing surface water in excess of three million gallons during any one month from a single intake or multiple intakes under common ownership within a one mile radius from any one existing or proposed intake." S.C. Code Ann. § 49-4-20 (28). "'Withdrawal' means to remove surface water from its natural course or location, or exercising physical control over surface water in its natural course or location, regardless of whether the water is returned to its waters of origin, consumed, transferred to another river basin, or discharged elsewhere." S.C. Code Ann. § 49-4-20 (29).

[2] "Except as provided in Sections 49-4-30, 49-4-35, 49-4-40, and 49-4-45, all surface water withdrawals by a surface water withdrawer are unlawful unless made pursuant to a surface water withdrawal permit issued pursuant to this chapter." S.C. Code Ann. § 49-4-25.

[3]

> To determine whether an applicant's proposed use is reasonable, the department must consider the following criteria:(1) the minimum instream flow or minimum water level and the safe yield for the surface water source at the location of the proposed surface water withdrawal;(2) the anticipated effect of the applicant's proposed use on existing users of the same surface water source including, but not limited to, present agricultural, municipal, industrial, electrical generation, and instream users;(3) the reasonably foreseeable future need for the surface water including, but not limited to, reasonably foreseeable agricultural, municipal, industrial, electrical generation, and instream uses;(4) whether it is reasonably foreseeable that the applicant's proposed withdrawals would result in a significant, detrimental impact on navigation, fish and wildlife habitat, or recreation;(5) the applicant's reasonably foreseeable future water needs from that surface water;(6) the beneficial impact on the State and its political subdivisions from a proposed withdrawal;(7) the impact of applicable industry standards on the efficient use of water, if followed by the applicant;(8) the anticipated effect of the applicant's proposed use on the following if the permit is granted:(a) interstate and intrastate water use;(b) public health and welfare;(c) economic development and the economy of the State; and(d) applicable federal laws and interstate agreements and compacts; and(9) any other reasonable criteria that the department promulgates by regulation that it considers necessary to make a final determination.

water supply, adequacy of flow, significance of withdrawal, etc. S.C. Code Ann. § 49-4-80. Additionally, if the public requests a hearing on the permit or if it is a new application, The Department must conduct one. S.C. Code Ann. §§ 49-4-80 (K) (1), 49-4-90.

"Upon a determination by the department that, based upon its examination of the criteria in [S.C. Code Ann. § 49-4-80] (B), the applicant's use is reasonable, the department shall issue a permit to the applicant." S.C. Code Ann. § 49-4-80 (J). Permits are issued for a defined time period ranging from twenty (20) to fifty (50) years. See S.C. Code Ann. § 49-4-100 (B). Once the permit issues, it may be revoked for any one of several listed reasons,[4] including any violation of the terms or certain changes in the natural conditions. S.C. Code Ann. § 49-4-120 (A). Permit holders are also subject to reporting requirements. S.C. Code Ann. § 49-4-50.

In contrast, the Act contains a registration process for agricultural users,[5] exempting those

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S.C. Code Ann. § 49-4-80 (B).

[4] The department may modify, suspend, or revoke a permit under the following conditions: (1) the permit holder withdraws water not authorized by his permit or fails to comply with the terms and conditions of his permit; (2) the permit holder obtains a permit by misrepresentation or fails to disclose a material fact in his application; (3) the permit holder ceases to withdraw water for a period of at least thirty-six consecutive months; or (4) a permanent change in natural conditions results in a permitted activity endangering human health or the environment.

S.C. Code Ann. § 49-4-120 (A).

[5] "Agricultural use" means:(a) plowing, tilling, or preparing the soil at an agricultural facility;(b) planting, growing, fertilizing, or harvesting crops, ornamental horticulture, floriculture, and turf grasses;(c) application of pesticides, herbicides, or other chemicals, compounds, or substances to crops, weeds, or soil in connection with the production of crops, livestock, animals, or poultry;(d) breeding, hatching, raising, producing, feeding, keeping, slaughtering, or processing livestock, hogs, aquatic animals, equines, chickens, turkeys, poultry, or other fowl normally raised for

users from the permitting process that all other water users must undertake. S.C. Code Ann. §§ 49-4-35, 49-4-50. Only agricultural users of water are entitled to register their water use. See S.C. Code Ann. § 49-4-20 (23) ("'Registered surface water withdrawer' means a person who makes surface water withdrawals for agricultural uses at an agricultural facility[6] that is filing a report pursuant to Section 49-4-50."). The Act provides for an even more abbreviated approval process for existing surface water withdrawers. S.C. Code Ann. § 49-4-35(B) ("An existing registered surface water withdrawer already reporting its withdrawals to the department as of January 1, 2011, may maintain its withdrawals at its highest reported level or at the design capacity of the intake structure which will be permanent as of January 1, 2011, and is deemed to be registered with the department."). The Act does not restrict the amount of water than any one registered surface water withdrawer can consume on a daily, annual, or total basis and the registration never expires. S.C. Code Ann. § 49-4-10, et seq.

Once an agricultural user has registered its water use, its surface water withdrawals are "presumed to be reasonable," S.C. Code Ann. § 49-4-110 (B), even though a registered surface

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> food, mules, cattle, sheep, goats, rabbits, or similar farm animals for commercial purposes;(e) producing and keeping honeybees, producing honeybee products, and honeybee processing facilities;(f) producing, processing, or packaging eggs or egg products;(g) manufacturing feed for poultry or livestock;(h) rotation of crops;(i) commercial aquaculture;(j) application of existing, changed, or new technology, practices, processes, or procedures to an agricultural use;(k) the operation of a roadside market; and(l) silviculture.

S.C. Code Ann. § 49-4-20 (3).

[6] "'Agriculture facility' means any land, building, structure, pond, impoundment, appurtenance, machinery, or equipment which is used for the commercial production or processing of crops, trees, livestock, animals, poultry, honeybees, honeybee products, livestock products, poultry products, or products which are used in commercial aquaculture." S.C. Code Ann. § 49-4-20 (2).

water withdrawer has not provided information and been found to be a reasonable user by the Department pursuant to the permitting criteria listed in Section 49-4-80. The Department may only reduce the amount of water withdrawal for a registered surface water withdrawer if both of two conditions are met: 1) the registered user withdraws "substantially more surface water" than its registered amount, and 2) the state can prove that such withdrawals are "detrimental" to the environment or human health. S.C. Code Ann. § 49-4-35(E).[7] To date, several registered surface water withdrawers have exceeded their monthly and/or yearly allowances repeatedly. The Department has done nothing more than maintain that information. (Pls.' Mot. Summ. J. Ex. C, Excess Withdrawal Tables.) Furthermore, the Act does not provide any remedy to riparian owners when a registered user exceeds its registered amount.

Although these two separate systems of permitting and registration exist under the Act, registered surface water withdrawers can also apply for surface withdrawal permits. S.C. Code Ann. §§ 49-4-55, 49-4-35(F).

When the Act went into effect in 2011, DHEC began issuing registrations. As of the close of discovery, there were 231 total surface water withdrawal registrations, which are collectively registered to withdraw 6.2 trillion gallons per month and 68 trillion gallons per year from South Carolina's surface waters for agricultural use. (Pls. Mot. Summ. J. Ex. B, Permit

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[7]

> The department may modify the amount an existing registered surface water withdrawer may withdraw, or suspend or revoke a registered surface water withdrawer's authority to withdraw water, if the registered surface water withdrawer withdraws substantially more surface water than he is registered for or anticipates withdrawing, as the case may be, and the withdrawals result in detrimental effects to the environment or human health.

S.C. Code Ann. § 49-4-35(E).

Information Spreadsheet.)[8]

The Department divides South Carolina into eight major river basins or watersheds: Broad, Catawba, Edisto, Pee Dee, Salkehatchie, Saluda, Santee, and Savannah. Watershed Map, available at https://www.scdhec.gov/HomeAndEnvironment/Water/Watersheds/watershedmap/ (last visited Sept. 3, 2015). There are registered surface water withdrawers in all eight major river basins. (Pls. Mot. Summ. J. Ex. B.) As discussed below, the Appellants' riparian properties are located in the Pee Dee, Salkehatchie and Saluda River Basins.

B. Riparian Property Owners

Mr. Jowers has lived in Bamberg County for sixty-five years, enjoying the South Edisto and Little Salkehatchie Rivers. (Pls. Mot. Summ. J. Ex. A, Jowers Affidavit.) Mr. Jowers's property is bounded by the Little Salkehatchie River, which he uses for fishing and recreation. (Id.) Mr. Jowers testified that : "[c]urrently the water level in the River is problematically low, but still flowing. Right now the upstream farms do not need much water. However, during the times of year when crops are growing there is a great pull on the River. I want to protect myself and other citizens from running out of water, because we all rely and depend upon our water resources." (Id. at ¶¶ 12-14.) Mr. Jowers also expressed concern about fish kills, which happened only about thirty miles downstream from his property. (Id.) Mr. Jowers is fearful of a fish kill happening where he lives because one of the uses he makes of the River is fishing. (Id.)

[8] In 2013 and 2014, several registered surface water withdrawers exceeded their registered withdrawal amounts. (Pls. Mot. Summ. J. Ex. C, Excess Withdrawal Tables (The Department's listings of withdrawals in excess of registered amounts, measured in millions of gallons of water)). These excess withdrawals did not result in the modification or revocation of registrations.

Mr. Jowers resides in the Edisto River Basin Watershed and his riparian property is in the Salkehatchie River Basin Watershed.[9] At least two registered surface water withdrawers are upstream from his property, Riddle Dairy Farm and Gary Hege Farm. (Ex. B.) These two withdrawers are registered to use 91.3 million gallons per month and 366.34 million gallons per year of water, collectively. (Id.) The Department's data also indicates that there are at least fifteen registered surface water withdrawers in the Salkehatchie River Basin, some of which have multiple registrations. (Id.) Collectively, these agricultural users are registered to withdraw over 1.5 billion gallons per month and over 6.5 billion gallons per year from the surface waters in the Salkehatchie River Basin. (Id.)

Mr. Anastos has lived on his property on the North Saluda River since 1978, which has approximately 2,500 feet of frontage along the River. (Pls. Mot. Summ. J. Ex. A, Anastos Affidavit.) Mr. Anastos grew up in the North Saluda River area and has enjoyed the River with his family his whole life. (Id.) He and his family use the river for fishing, swimming, kayaking, and irrigation. (Id.) In his Affidavit, Mr. Anastos stated: "I remember how the North Saluda River was before the Poinsett Reservoir was built. It had small mouth bass and catfish, and was at least fifty percent larger than it is today. Now those recreational fish species are completely gone, and only smaller species of fish live in the River. I do not want to see the River further degraded or destroyed. I do not want to lose more species of fish in the River. I am also

[9] The Little Salkehatchie River is in the Salkehatchie River Watershed. See "Salkehatchie River Basin Watershed," available at https://www.scdhec.gov/HomeAndEnvironment/Water/Watersheds/WatershedMap/SalkehatchieWatershed/ (last visited May 17, 2016).

concerned about the whole state's water system being further degraded or destroyed." (Id. at ¶¶ 9-12.)

Mr. and Mrs. Ruhlman live on property bounded by the North Saluda River, and enjoy swimming, tubing, boating, kayaking and canoeing in the River. (Pls. Mot. Summ. J. Ex. A, Ruhlman Affidavit.) Their property has approximately 480 feet of river frontage, and is situated at shoals that were the site of Keeler Mill, a grist mill constructed with the home around 1880, although the mill burned down in the mid-twentieth century. (Id.) Despite this rich history, it was the North Saluda River itself which formed the primary reason for the Ruhlman's move to that property. (Id.) The Ruhlmans are concerned about upstream uses, including agricultural uses, withdrawing water and interfering with their use and enjoyment of the North Saluda River. (Id.) Mrs. Ruhlman is also involved in a few Greenville area organizations which "work to respond to environmental threats to the rivers in the Upstate of South Carolina." (Id. at ¶12.)

Mr. Anastos's and Mr. and Mrs. Ruhlman's riparian properties are in the Saluda River Basin.[10] The Saluda River Basin has at least nineteen registered surface water withdrawers, some of which have multiple withdrawal points. (Pls. Mot. Summ. J. Ex. B; Ex. D, Saluda Unimpaired Flow Report, at 6-7; Ex. E, Saluda Model Framework, at 5, 9, 12.) These agricultural users are registered to withdraw over 650 million gallons per month and over 2.9 billion gallons per year, collectively, from the basin. (Pls. Mot. Summ. J. Ex. B.) It appears that at this time no registered surface water withdrawers are upstream from Mr. Anastos, but at least one is upstream from Mr.

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[10] The North Saluda River is in the Saluda River Basin Watershed. See "Saluda River Basin Watershed," available at https://www.scdhec.gov/HomeAndEnvironment/Water/Watersheds/WatershedMap/SaludaWatershed/ (last visited May 17, 2016).

and Mrs. Ruhlman, Beechwood Farm. (Pls. Mot. Summ. J. Ex. B.) It is registered to use 12 million gallons per month and 65.5 million gallons per year. (Id.)

Mr. Williamson and his family have property on Black Creek, which has been in the family since the 1760s. They use Black Creek to paddle, fish and swim, and hold regular family picnics beside the creek. (Pls. Mot. Summ. J. Ex. A, Williamson Affidavit.) Mr. Williamson's family has been working to protect Black Creek through political activities for a couple hundred years. (Id.) The Creek is a swift-flowing coastal plains stream, which makes it unique. (Id.) Mr. Williamson testified that: "Over the past 10 to 15 years I have noticed that Black Creek is a bit lower in water levels than it used to be. Flooding is also much less frequent. Black Creek used to flood on our property every year. Now it only floods once every 3 to 4 years." (Id. at ¶ 13.)

At least seven registered surface water withdrawers in that basin are upstream from his property, registered to use over 337 million gallons per month and over one billion gallons per year of water. (Pls. Mot. Summ. J. Ex. B.) Mr. Williamson's property is part of the Pee Dee River Basin Watershed.[11] There are at least nineteen registered surface water withdrawers in the Pee Dee River Basin, most of which have multiple registrations. (Pls. Mot. Summ. J. Ex. B.) These agricultural users are registered to withdraw over 1.1 billion gallons per month and over 2.7 billion gallons per year from the Pee Dee Basin. (Id.)

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[11] Black Creek is in the Pee Dee River Basin Watershed. "Pee Dee River Basin Watershed," available at https://www.scdhec.gov/HomeAndEnvironment/Water/Watersheds/WatershedMap/PeeDeeWatershed/ (last visited May 17, 2016).

III. ARGUMENT

The lower court's opinion contains multiple errors which stem from a misunderstanding and misapplication of basic property law. That fundamental misapplication led to the underlying conclusion that the Appellants "have no property rights under the law," a conclusion which infected the entire order. (Final Order filed Jan. 8, 2016, No. 2014-CP-06-322, at 8).

"Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal. Anything which destroys one or more of these elements of property to that extent destroys the property itself." Moss v. S. Carolina State Highway Dep't, 223 S.C. 282, 287, 75 S.E.2d 462, 464 (1953). "Property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Grimsley v. S. Carolina Law Enf't Div., 396 S.C. 276, 284, 721 S.E.2d 423, 427 (2012).

While the lower court properly cites to Grimsley, it ignores the "cognizable property interests rooted in state [common] law" that are bestowed upon riparian owners in South Carolina. Id. at 283, 427. Instead the lower court erroneously looks only at whether the Appellants have ownership rights to the water itself. Appellants have never alleged ownership of the water itself,[12] but rather that they have rights to consumptive use and enjoyment of the water as riparian property owners.

The lower court overlooks the Act's mandate that registered users are entitled to

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[12]Ownership of the water is in State, as trustee for the public under the Public Trust Doctrine. See McQueen v. DHEC, 354 S.C. 142, 580 S.E.2d 116 (2003).

withdraw uncapped amounts of water in perpetuity and that those withdrawals are presumed reasonable. Even more importantly, the lower court overlooks whose rights were taken in order that the registered users could receive these new rights which are far superior to anyone else in the State, in particular riparian owners.

In adopting and implementing the Act, the state of South Carolina has unconstitutionally taken riparian owners' rights and given them to others for their private use. By issuing registrations, and thus taking riparian rights, the state has violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution. It is also a violation of the Due Process Clause to issue such registrations without notice or opportunity for a meaningful hearing for the public. Finally, in establishing and granting agricultural registrations, the state has violated the Public Trust Doctrine, which prohibits the state from permanently divesting itself of public trust property, including water. Thus, the state violated, and continues to violate, the Constitution both: 1) upon passage of the Act, and 2) upon the issuance of registrations pursuant to the Act.

A. The Appellants' Property was Unconstitutionally Taken by the Surface Water Withdrawal Act.

1. Riparian Rights are Property

Since South Carolina became a state in 1788, those who own land traversed or bounded by a natural watercourse have held common law riparian rights. Omelvany v. Jaggers, 1835 WL 1419 (May 1835). Riparian rights are property. See id.; Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001, 104 S. Ct. 2862, 2872, 81 L. Ed. 2d 815 (1984); Schroeder v. City of New York, 371 U.S. 208 (1962); Yates v. Milwaukee, 77 U.S. 497, 504 (1870) ("This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it

cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."); Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1292 (Fed. Cir. 2008); Lowe v. Ottaray Mills, 93 S.C. 420, 77 S.E. 135, 136 (1913); McMahan v. Walhalla Light & Power Co., 102 S.C. 57, 86 S.E. 194, 195 (1915); White v. Whitney Mfg. Co., 38 S.E. 456, 461 (1901); Mathewes v. Port Utilities Comm'n of Charleston, S.C., 32 F.2d 913, 914 (E.D.S.C. 1929) (listing riparian rights as a type of property); Robert Meltz, Takings Law Today: A Primer for the Perplexed, 34 Ecology L.Q. 307, 317 (2007). More specifically, riparian rights are a special type of property rights which attach only to properties which abut or encompass a surface water of the state, such as a stream or a river.

The court below dismissed the case because of a finding of no ownership right in water. Riparian Property Owners do not allege an ownership right in the water, but rather that the right to the reasonable use of the river appurtenant to their property. Riparian rights do not give the bearer ownership of the water, but rather reasonable use of the water, and it is that right itself which is the damaged property here. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001, 104 S. Ct. 2862, 2872, 81 L. Ed. 2d 815 (1984); Schroeder v. City of New York, 371 U.S. 208 (1962); Omelvany v. Jaggers, 1835 WL 1419 (May 1835); Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1292 (Fed. Cir. 2008) ("Although [the riparian property owner's] right was only partially impaired, in the physical taking jurisprudence any impairment is sufficient."); Lowe v. Ottaray Mills, 93 S.C. 420, 77 S.E. 135, 136 (1913); McMahan v. Walhalla Light & Power Co., 102 S.C. 57, 86 S.E. 194, 195 (1915); White v. Whitney Mfg. Co., 38 S.E. 456, 461 (1901); Mathewes v. Port Utilities Comm'n of Charleston, S.C., 32 F.2d 913, 914 (E.D.S.C.

1929); Robert Meltz, Takings Law Today: A Primer for the Perplexed, 34 Ecology L.Q. 307, 317 (2007).

Riparian property is more valuable than non-riparian property because of the special rights of use that attach to it. Riparian rights include:

- The right to access the adjacent public waterway;
- The right to wharf out (build a wharf, pier, or similar structure) to connect the upland with a navigable channel;
- The right to accretions;
- The right to non-consumptive use of the water, for example, the diversion of water to generate power for a mill; and,
- The right to consume water (mainly relevant for properties bordering freshwater waterways.)

Josh Eagle, Coastal Law, Wolters Kluwer 278 (2011).

Property interests are not created by the Constitution itself, "[r]ather they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001, 104 S. Ct. 2862, 2872, 81 L. Ed. 2d 815 (1984) (internal quotation marks omitted). An owner is someone who possesses the right to use and enjoy what she owns, to exclude others from using her property, and to alienate her property as she chooses. The contours of these rights vary by state and by type of property; in all cases, however, **rights are only as good as the law's willingness or capacity to enforce them against interference by other people**. Thus, the term property refers

to the rights inherent in the person's relationship to something, and not the thing itself. Josh Eagle, Coastal Law, Wolters Kluwer174 (2011); Robert Meltz, Takings Law Today: A Primer for the Perplexed, 34 Ecology L.Q. 307, 317 (2007). Put another way, "[p]roperty in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal. Anything which destroys one or more of these elements of property to that extent destroys the property itself." Moss v. S. Carolina State Highway Dep't, 223 S.C. 282, 287, 75 S.E.2d 462, 464 (1953).

The Appellants are citizens of South Carolina and property owners whose land is traversed or bounded by a natural watercourse, otherwise known as riparian owners. White's Mill Colony Inc. v. Williams, 363 S.C. 117, 129, 609 S.E.2d 811, 817 (Ct. App 2005) (citing Lowe v. Ottaray Mills, 93 S.C. 420, 77 S.E. 135, 136 (1913)). In this case, the property at issue is the Riparian Property Owners' riparian right to consume water.[13] Omelvany v. Jaggers, 1835 WL 1419 (May 1835); Lowe v. Ottaray Mills, 93 S.C. 420, 77 S.E. 135, 136 (1913); White v. Whitney Mfg. Co., 38 S.E. 456, 461 (1901).

Under the common law, each riparian owner is entitled to take an uncapped amount of water for consumptive use, subject to three important limitations. First, riparian owners cannot take water for consumptive use such that it unreasonably interferes with downstream riparian owners' right to consumptive use. McMahan v. Walhalla Light & Power Co., 102 S.C. 57, 86 S.E. 194, 195 (1915). All riparian owners located on a given waterway share the risks of low

[13] The right to consume water is a separate right within the suite of riparian property owner rights. Eagle, Coastal Law, at 278 (listing riparian rights as to "access adjacent public waterway," "wharf out," accretions, and both consumptive use and non-consumptive use of water).

flow conditions equally. Thus, the core nature of the riparian right is that it is a correlative right, with available water flows shared equally among all riparian owners. Second, the state is entitled to restrict riparian withdrawals to the extent those withdrawals threaten the established public trust uses of the river: navigation, commerce, and recreation. Third, the state is entitled to restrict riparian withdrawals if the state itself requires use of the water. Rice Hope Plantation v. S. Carolina Pub. Serv. Auth., 216 S.C. 500, 59 S.E.2d 132 (1950) (overruled on other grounds, McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985)).

In this case, the Riparian Property Owners have riparian rights under common law, that are property, because they own land adjacent to rivers and creeks in South Carolina. This common law right has been eliminated by the Act and replaced with something inferior.[14]

2. The Surface Water Withdrawal Act of 2010 Harms Riparian Rights

The Act substantially reorders private and public water rights in South Carolina, harming the Appellants' riparian rights. The Act has harmed existing riparian rights to consumptive use of water in two ways. First, the Act has made it difficult, and in some cases impossible, for the Riparian Property Owners to protect their common law right to consumptive use.[15] The Act has

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[14] Furthermore, the Act could, by allowing registrants the right to drastically lower flows, also impact the Riparian Property Owners' other riparian rights, such as the right to enjoy the surface of the adjacent watercourse.

[15] As explained above, the Act creates a presumption that a registered surface water withdrawer's use is reasonable against the other riparian users. S.C. Code Ann. § 49-4-110 (B). Furthermore, the Act only allows a reduction in the registered withdrawal amount if both the registered user withdraws substantially more than the registered amount and the state can prove that excess withdrawal is detrimental to human health or the environment. S.C. Code Ann. § 49-4-35 (E).

effectively made the prior common law property right into a right without a remedy by severely limiting the Riparian Property Owners' recourse in the event that registered surface water withdrawers unreasonably interferes with that right.

Second, in making the agricultural registrations permanent in duration, the Act has dramatically altered the Riparian Property Owners' prior common law rights to access all of the water in the watercourse. The Act relegates riparian owners who are ineligible for registration to a second-class status as compared to their pre-Act status, vis a vis water flows.

The passage of the Act was therefore an instant and actionable harm to the Riparian Property Owners. Since they lost their right to enforce unreasonable consumptive uses against registered users, that right was rendered meaningless on the day the Act was passed. Suppose, for example, that the legislature had limited another property right: the right to exclude. If an act was passed presuming certain specified citizens were invited into someone else's house every Saturday, the right to exclude from one's home would be meaningless. The individuals would retain the right to exclude, but if the court has to presume the interlopers were invited on Saturdays, there would be no way to enforce that right. Such a law would degrade the value of the property, and be a regulatory taking. Furthermore, the law on its face would be actionable because the right to exclude was altered upon its passage. Thus, the homeowner would not have to wait until people acted under the new law and entered his home to challenge the law.

The issue here is the same. The Riparian Property Owners have a right to consumptive use free from unreasonable withdrawals from their fellow riparians. The General Assembly passed a law that presumed all water withdrawals from an entire class of users are reasonable,

rendering the Riparian Property Owner's right to reasonable consumptive use meaningless, or at least so substantially injured that it does not have the same value as it had prior to the Act. See Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1292 (Fed. Cir. 2008) ("Although [the riparian property owner's] right was only partially impaired, in the physical taking jurisprudence any impairment is sufficient."). On the day that the Act became law the fundamental character of real property had been altered. Appellants, like the hypothetical homeowner, do not have to wait until registrants make unreasonable uses which further harm their property to challenge the Act. In this case, the legislature did not eliminate all of their riparian property rights, just as in the hypothetical where the right to exclude was not eliminated entirely, but rather so harmfully altered those rights that a taking has occurred.[16]

3. The Harm caused by the Act to Riparian Rights is an Unconstitutional Taking

Article I, Section 13(A) of the South Carolina Constitution provides: "private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property. Private property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use." S.C. Const. art. I, § 13. See also Byrd v. City of Hartsville, 365 S.C. 650, 662 n.6, 620 S.E.2d 76, 82 n.6 (2005) ("Takings analysis under South Carolina law is the same as the analysis under federal law.") Appellants

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[16] This Court has construed the word 'taken' as to include the word 'damaged.' Moss v. S. Carolina State Highway Dep't, 223 S.C. 282, 287, 75 S.E.2d 462, 464 (1953); Chick Springs Water Co. v. State Highway Dep't, 159 S.C. 481, 157 S.E. 842 (1931).

have uncovered no public purpose or benefit in taking private property rights and giving them to other private individuals. See, e.g., Jean H. Toal, *Edens: The Prime Obstacle to a Redevelopment of South Carolina Water Law*, 23 S.C. L. Rv. 63, 64 (1971) ("South Carolina has a very narrow view of what constitutes a public use for which the eminent domain power can be constitutionally invoked."). Although takings analysis generally focuses on whether a direct appropriation or regulatory taking has occurred on the part of the government which would grant private property owners the right to compensation,[17] this case involves the more direct outright prohibition against the government taking private property for private use.[18]

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[17] See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014-15 (1992) (discussing direct appropriation and regulatory takings).

[18] The Department does not require any showing of public use or make any finding related to public use as part of its registration process. (Pls.' Mot. Summ. J. Ex. G, The Department's Supplemental Admissions.) Thus it appears from all available information, and the Riparian Property Owners assert, that there is no public use for the taking in this case. However, should the court find that the taking is for public use, the Appellants would to argue that they are entitled to compensation. See, e.g., Early v. S. Carolina Pub. Serv. Auth., 228 S.C. 392, 408, 90 S.E.2d 472, 479 (1955) (finding a taking where the government interfered with riparian rights through upstream salination of a waterway which abutted plaintiff's property, and awarding damages). Under the Fifth Amendment to the United States Constitution and Article 1, Section 13(A) of the South Carolina Constitution, if the government takes private property for public use, it must compensate the owner. See Byrd v. City of Hartsville, 365 S.C. 650, 662 n.6, 620 S.E.2d 76, 82 n.6 (2005). If the government takes private property for public use, the property owner may invoke the constitutional provision without resorting to enabling legislation. Smith v. Greenville, 229 S. C. 252, 262, 92 S. E. 2d 639, 644 (1956). To the extent the Department asserts that the registrations are a valid exercise of the state's police power, this argument also fails to deprive property owners of their right to compensation. See Stoddard v. W. Carolina Reg'l Sewer Auth., 784 F.2d 1200, 1205-06 (4th Cir. 1986) (holding that even a valid exercise of police power for public use must still be compensated if it is a taking pursuant to the South Carolina Constitution). Public use of the water is not a requirement for registrations pursuant to the Act or The Department. (Pls.' Mot. Summ. J. Ex. C.)

Article I, Section 13(A) of the South Carolina Constitution provides that **"private property shall not be taken for private use without the consent of the owner."** See Clemson Univ. v. First Provident Corp., 260 S.C. 640, 649, 197 S.E.2d 914, 918 (1973) (holding that "the attempted taking [to widen a drainage ditch on another's private property] is for private use and is prohibited under . . . the Constitution"); Beaudrot v. Murphy, 53 S.C. 118, 30 S.E. 825, 826 (1898) (holding that a statute which authorized private property to transfer to another private citizen was unconstitutional). A private to private taking cannot be compensated, but must be struck down as unconstitutional. See, e.g., Boyd v. Winnsboro Granite Co., 66 S.C. 433 (1903) (holding that a railroad no longer had the right to use condemnation proceedings to take property because of the South Carolina Constitution's prohibition against the taking of private property for private use without the consent of the owner).

The private-to-private transfer of property is also prohibited by the "public use" requirement in the Fifth Amendment to the United States Constitution. U.S. Const. amend. V. The fundamental purpose of the Fifth Amendment's prohibition of takings is to protect "individual property owners from bearing public burdens 'which, in all fairness and justice, should be borne by the public as a whole.'" Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 332 (2002), (quoting Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563 (1960)). See also Byrd v. City of Hartsville, 365 S.C. 650, 662 n.6, 620 S.E.2d 76, 82 n.6 (2005) ("Takings analysis under South Carolina law is the same as the analysis under federal law.")

"[T]he taking provision of the South Carolina Constitution does not require a landowner to prove physical invasion of his property in order to recover. He will prevail if he simply establishes that his property has been damaged or that he has **been deprived of the ordinary beneficial use and enjoyment of his property**." Stoddard v. W. Carolina Reg'l Sewer Auth., 784 F.2d 1200, 1206 (4th Cir. 1986) (emphasis added) (citing Spradley v. South Carolina State Highway Department, 256 S.C. 431, 434, 182 S.E.2d 735, 737 (1971); South Carolina State Highway Department v. Wilson, 254 S.C. 360, 366–67, 175 S.E.2d 391, 395 (1970); Gasque v. Town of Conway, 194 S.C. 15, 21, 8 S.E.2d 871, 873 (1940); Parish v. Town of Yorkville, 96 S.C. 24, 25, 79 S.E. 635 (1913).) The reason for this rule is that "[t]he constitutional prohibition against taking private property for public use without just compensation must have been intended to protect all the essential elements of ownership which make property valuable, including, of course, the right of user, and the right of enjoyment." Moss v. S. Carolina State Highway Dep't, 223 S.C. 282, 287, 75 S.E.2d 462, 464 (1953). In this case, the Riparian Property Owners have been deprived of the ordinary beneficial use and enjoyment of their properties because they can no longer protect their riparian property rights by challenging others' uses as unreasonable.[19] See also Belvedere Development Corp. v. Department of Transp., Div. of Admin., 476 S.O.2d 649, 652 (1985) (finding an unconstitutional taking of a riparian property rights); Young v. Wiggins, 240 S.C. 426, 435, 126 S.E.2d 360, 365 (1962) ("As between individuals, no necessity, however great, no refusal, however unneighborly, no obstinacy, however unreasonable, no offers of

[19] The Appellants also they fear fish kills, further loss of water flow, and inability to make use of the water will result if this unconstitutional registration process is allowed to continue. (Pls. Mot. Summ. J. Ex. A.)

compensation, however extravagant, can compel or require any man to part with an inch of his estate.") (internal quotation marks omitted).

Prior to the Act, all riparian owners on a given waterway had equal property rights in the reasonable use of that water.[20] After the Act, the Appellants lost this correlative right while agricultural users were given far superior rights to all other types of riparian owners, including those who use water for recreational, domestic, industrial, or any other purposes. Prior to the Act, no riparian owners were entitled under the law to any permanent fixed amount of water. After the Act, agricultural users are entitled to register to take a fixed amount of water in perpetuity. Prior to the Act, all riparian owners could challenge upstream riparian owners' consumptive use as unreasonably interfering with their rights to consumptive use. After the Act, downstream riparian owners cannot challenge upstream riparian owners' consumptive use as unreasonably interfering with their rights to consumptive use, because the Act deems registered water use to be presumptively reasonable.

Rights are only as good as the law's capacity to enforce them against interference by others. Eagle, Coastal Law, at 174. In giving permanent rights that are presumed reasonable, the Riparian Property Owners' ability to enforce their rights against interference by agricultural users is severely diminished. The Department has taken property rights of riparian owners not entitled to registration and given that property to agricultural users eligible for registration. Thus, the Act

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[20] See, e.g., White, 38 S.E. a 461 ("As between different proprietors on the same stream, the right of each qualifies that of the other, and the question always is not merely whether the lower proprietor suffers damage by the use of the water above him, nor whether the quantity flowing on is diminished by use, but whether, under all the circumstances of the case, the use of the water by one is reasonable and consistent with a correspondent enjoyment by the other.").

enables the taking of private property for private use through its registration process, and that registration process violates the South Carolina and United States Constitutions.

B. The Registration Process that Exempts Agricultural Users from Permitting Requirements in the Act Violates Due Process

The Fourteenth Amendment provides in pertinent part that no state shall "deprive any person of life, liberty, or property,[21] without due process of law." U.S. Const. amend. XIV. A fundamental requirement of procedural due process is an opportunity to be heard, and that opportunity must be granted at a meaningful time and in a meaningful manner. U.S. Const. amends. V, XIV. "The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review," Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 562, 505 S.E.2d 598, 603 (Ct. App. 1998), overruled on other grounds. See also Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 1191 (1965) ("It is an opportunity which must be granted at a meaningful time and in a meaningful manner.")

1. Inadequate Notice

In Leventis v. South Carolina Dep't of Health & Envtl. Control, the South Carolina Court of Appeals heard arguments from the Sierra Club that the Department "violated its due process rights by entering into an *ex parte* stipulated agreement with Laidlaw," thereby circumventing the regulatory procedures for permit issuance and review. 340 S.C. 118, 131, 530 S.E.2d 643, 650 (Ct. App. 2000). The court stated: (1)"Due process is flexible and calls for such procedural

[21] The lower court's erroneous holding that riparian rights are not property led to the finding below that due process was not violated in this case.

protections as the particular situation demands," (quoting Stono River Envtl. Protection Ass'n v. South Carolina Dep't of Health and Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 341 (1991)); and (2) "The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review," (quoting Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 562, 505 S.E.2d 598, 603 (Ct. App. 1998), overruled on other grounds). Although the Court of Appeals ultimately upheld the issued permit, it did limit its findings to the specific facts of the case because it was concerned with the Department's circumvention of the Sierra Club's due process rights. The court stated:

> Although DHEC issued the final permit to Laidlaw after completing the procedures required for permit issuance, including issuing a draft permit, giving public notice, affording an opportunity for public comment, and preparing responses to oral and written comments received, DHEC then effectively circumvented the permitting procedures by modifying the final permit through ex parte negotiations with Laidlaw.

Leventis, at 135, 530 S.E.2d at 652.

The Department acknowledges that the Act "has a specific public notice process for issuing a permit to withdraw, but no such process for agricultural registrations." (Pls.' Mot. Summ. J. Ex. F, Agricultural Registrations Powerpoint, 9). Thus, pursuant to the Act, where there is no public notice to afford public comment, the registration process circumvents due process. In Leventis, the court determined due process was not violated because of other procedural measures that had taken place. In this case, none of these other measures exist for review. In sum, no public notice is not adequate public notice.

In addition to the complete lack of public notice in this case, there is also no personal

notice to riparian owners who are downstream from or adjacent to the registered surface water withdrawers. The issuance of registrations is an action "in which [the Riparian Property Owners] may be deprived of property rights and hence notice and hearing must measure up to the standards of due process." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). In Schroeder v. City of New York, 371 U.S. 208 (1962), a property owner received no notice of condemnation proceedings that affected some of her property. The City did post signs on trees and publish notice in the mail, but the court found these types of notices, which were not seen by the property owner, to be insufficient.

> The general rule that emerges from the Mullane case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question. "Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."

Schroeder v. City of New York, 371 U.S. 208 (1962) (quoting Mullane, 339 U.S. at 318.)

Personal notice to riparian owners is thus also required in this case because the owners' property rights are affected or may be affected by the issuance of registrations. Mullane, 339 U.S. at 313. As already stated, The Department gives no notice of any kind regarding registrations. Thus, no notice also fails to meet the personal notice required to riparian property owners pursuant to the Due Process Clause.

2. No Meaningful Opportunity to be Heard

The right to a hearing, including the right to introduce evidence[22] and confront witnesses, has also been denied the Appellants in this case, constituting a further violation of their due process rights. This Court has consistently held "that some form of hearing is required before an individual is *finally* deprived of a property interest." Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976); see also Brown v. South Carolina State Bd. of Educ., 301 S.C. 326, 329, 391 S.E.2d 866, 868 (1990) (determining that a regulation was "unconstitutional because it does not provide for notice and an opportunity to be heard when the State deprives a teacher of his or her teaching certificate"). The challenged statute or regulation must, on its face, provide opportunity for a hearing before the Riparian Property Owners' rights are affected. See Brown, 301 S.C. at 329, 391 S.E.2d at 868.[23]

In this case, there is no hearing procedure whatsoever to challenge the issuance of registrations pursuant to the Act. The reason that there is no availability for public notice or input is that the Department "has no discretion in issuing an agricultural withdrawal if it is within the safe yield." (Pls. Mot. Summ. J. Ex. F, at 9). Because The Department has no discretion, any hearing or input from the public would be meaningless. (Id.) Thus, the Act is also facially

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[22] In Brown v. South Carolina State Bd. Of Educ., appellant's teaching certificate was revoked based on cancellation of NTE scores. 301 S.C. 326, 391 S.E.2d 866 (1990). Although many aspects of the revocation were deemed a violation of procedural due process rights, the Court commented specifically that the "hearing appellants was granted did not comport with procedural due process since the Board did not disclose any evidence substantiating cancellation of the NTE scores in order to allow the appellant the opportunity to contest the allegations against her." 301 S.C. 326, 329, 391 S.E.2d 866, 868 (1990).

[23] In Brown, the appellant was granted a hearing as a favor, however the Court determined that type of hearing would not save the regulation from constitutional attack under the Due Process Clause. See also Coe v. Armour Fertilizer Works, 237 U.S. 413, 35 S.Ct. 625, 59 L.Ed. 1027 (1915).

unconstitutional for lack of adequate opportunity for the public or adjoining riparian owners to be heard. See Mathews, 424 U.S. at 333; Brown, 301 S.C. at 329, 391 S.E.2d at 868.

3. Lack of Judicial Review

Perhaps the most blatant facial violation of due process in the Act is that it erases judicial review for riparian owners. As discussed above, a riparian owner is able to challenge upstream consumptive use under the common law by showing that it "unreasonably" interferes with a downstream riparian owner's right to consumptive use. See also McMahan v. Walhalla Light & Power Co., 102 S.C. 57, 86 S.E. 194, 195 (1915). However, the Act erases a riparian owner's common law challenge through the courts, and thus any meaningful judicial review, by making registered withdrawal uses both permanent and "reasonable." S.C. Code Ann. § 49-4-110 (B).[24] Furthermore, riparian owners have no right to challenge the registered withdrawals or reduce them under the Act. Only the Department may do so, and then only if: 1) the registered user withdraws "substantially more surface water" than its registered amount, and 2) the state can prove that such withdrawals are "detrimental" to the environment or human health. S.C. Code Ann. § 49-4-35(E). Thus, the Act has eliminated the common law cause of action for riparian owners to challenge unreasonable uses. For this reason, the Act denies judicial review for

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[24] The Department has asserted that the statute merely creates a presumption of reasonableness that could be rebutted in a cause of action with a higher burden to overcome. This interpretation of the statute is untested in the courts. However, even if it were accurate, the statute would still not allow any damages against registrants for unreasonable consumptive use if that use did not violate the registration. S.C. Code Ann. § 49-4-110 (B) ("No private cause of action for damages arising directly from a surface water withdrawal by a permitted or registered surface water withdrawer may be maintained unless the plaintiff can show a violation of a valid permit or registration."). Thus, under either interpretation of the statute, judicial review is unavailable to challenge uses as unreasonable as long as those uses are within the registered amounts.

riparian owners in violation of the Due Process Clause.

The lower court's order rests its denial of procedural due process on the erroneous assertion that riparian rights are not property. However, as discussed above, riparian rights are property. The court also focuses on the State's imposition of limitations as to safe yields. The Riparian Property Owners do not claim that South Carolina doesn't have any power to regulate surface water withdrawals. Many states have adopted some type of permitting system while preserving common law riparian and due process rights.[25] While all of these states have permitting systems, none of them have a registration process like South Carolina's that effectively exempts certain users from permitting requirements while still granting them the rights of permittees, bypassing notice and comment, and foreclosing judicial review. South Carolina alone seeks to violate the due process rights of its citizens.

C. The Act Violates the Public Trust Doctrine because the State has Lost Control of a Public Trust Resource

1. The Waters at Stake are Public Trust Resources

The Court below erroneously concluded that only tidal waters are subject to the Public

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[25] See, e.g., Alabama, Ala. Code Ann. § 9-10b-2 (1975); Arkansas, Ark. Code Ann. § 15-22-215 (1975); Connecticut, Conn. Gen. Stat. § 22a-365 to 380 (1995); Delaware, Del. Code Ann. Tit. 7 §6001 (1973); Florida, Fla. Stat. Ann. §373.219 (1972); Georgia, Ga. Code Ann. § 12-5-31 (1964); Hawaii, Haw. Rev. Stat. § 174-C5 (1987); Iowa, Iowa Code §445B.268 (1982); Kentucky, Ky. Rev. Stat. Ann. § 151.140 (1978); Maryland, Md. Code Ann., Envir. §5-501 (1973); Massachusetts, Mass. Gen. Laws Ann. ch. 21G §3 (1985); Mississippi, Miss. Code Ann. § 5-3-13 (2001); New Jersey, N.J. Rev. Stat. Ann. § 58: 1A-7 (1981); North Carolina, N.C. Gen. Stat. Ann. § 143-215.15; New York, N.Y. Envtl. Conserv. Law §15-1501 (1997); Virginia, Va. Code Ann. §62.1-247 (1989); Wisconsin, Wis. Stat. Ann. §30.18 (1999).

Trust Doctrine. (Final Order filed Jan. 8, 2016, No. 2014-CP-06-322, at 16). However, the constitution and the case law impose no such limitation. All navigable waterways are public trust assets: "All navigable waters shall forever remain public highways free to the citizens of the State and the United States . . . ." S.C. Const. art. XIV, § 4. Under the Public Trust Doctrine the state holds presumptive title to the water and land below the high water mark in trust for the benefit of all the citizens of South Carolina. See McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003); State v. Pacific Guano Co., 22 S.C. 50, 84 (1884); Port Royal Mining Co. v. Hagood, 30 S.C. 519, 9 S.E. 686 (1889); State v. Hardee, 259 S.C. 535, 193 S.E.2d 497 (1972). The State "cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003) (citing Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 456 S.E.2d 397 (1995)).

While the issue in McQueen is tidal wetlands, the language does not so limit the public trust doctrine. "The state has the exclusive right to control lands below the high water mark for public benefit." McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003). The trial court also mistakenly relies on State v. Head to limit the public trust doctrine to tidal waters. State v. Head, 330 S.C. 79, 86, 498 S.E.2d 389, 392 (1997) (holding that "in the case of non tidal, non navigable streams, the adjacent property owners hold title from the shoreline to the center of the stream bed."). The trial court's reliance is misplaced for two reasons. First, the Appellants in the present case are not alleging a loss of public trust submerged lands, but loss of the surface water. Second, Head does not stand for the proposition that non tidal surface water access in navigable streams is not a public trust asset. Id. ("Thus, if a nontidal

watercourse is navigable, then a person who legally accesses the watercourse, and fishes from within a boat on the watercourse, cannot be convicted of violating § 50-1-90, as such a person has a constitutional and statutory right to be there.") While non tidal submerged lands may be private property, the use and enjoyment of the surface waters on navigable streams and rivers is a public trust asset, and it is the right to control this surface water which is being disposed of.

> The underlying premise of the Public Trust Doctrine is that some things are considered too important to society to be owned by one person. Traditionally, these things have included natural resources such as air, water (including navigation and fishing), and land (including but not limited to seabed and riverbed soils). Under this Doctrine, everyone has the inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks.

Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) (citing Syridon and LeBlanc, The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action, 6 Tul.Envtl.L.J. 287 (1993)). Thus, the navigable waters at issue in this case are public trust assets.

2. The Public Trust Doctrine Prohibits the Transfer of Surface Waters Authorized by the Act

Under the Public Trust Doctrine, the state is entitled to transfer trust assets, such as navigable waterways, to private parties in perpetuity in only two limited circumstances: First, if

the transfer is in furtherance of trust purposes, e.g., helps to promote navigation;[26] second, if the transfer has a *de minimis* impact on the public's ability to engage in established trust uses. Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) (citing Illinois Central R. Co. v. Illinois, 146 U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1042 (1892) (**"the control of the State for the purposes of the trust can never be lost**, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining") (emphasis added). Courts have interpreted disposals broadly, to include state actions that effectively dispose of trust assets by allowing private interference with established trust uses. See, e.g., McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003) (finding that the state cannot allow for activity that will impair marine life, water quality or public access).

The provisions of the Surface Water Withdrawal Act effectively dispose of substantial, permanent rights in South Carolina's navigable waterways to agricultural users. The Department has no discretion in issuing registrations to agricultural users, which is why no due process is afforded as explained above. (See Pls.' Mot. Summ. J. Ex. F ("The department has no discretion in issuing an agricultural withdrawal [registration] if it is within the safe yield")). Under the Act, the state cannot revoke, reduce, or modify registered uses of water unless the registered user withdraws in excess of the registered amount and that excess withdrawal is detrimental to human

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[26] See, e.g., Clarke v. S. Carolina Pub. Serv. Auth., 177 S.C. 427, 181 S.E. 481, 486 (1935) (holding "that navigation, health betterment, flood control, and the reforestation of watersheds are public purposes" for which the state may constitutionally use public trust resources).

health or the environment. In other words, the state has lost complete control of registered amounts of water in perpetuity; the registered owner has complete control over whether or not the state can ever alter the registered amount. As discussed above, there is no public use, and thus no public interest, in so disposing of these public trust assets.

This permanent disposal of a vast amount of South Carolina's public trust assets violates the public trust doctrine because the registration process allows "activity that substantially impairs the public interest in marine life, water quality, or public access." McQueen, 354 S.C. at 149, 580 S.E.2d at119-20. The public interest in surface waters includes use and enjoyment, such as fishing, swimming, boating, paddling or otherwise recreating. See Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 127-28, 456 S.E.2d 397, 402 (1995). The surface waters impacted by the Act are all surface waters in the state, every creek, pond, river and lake. Registrations have been issued statewide in every water basin, without the state fully studying the existing uses and water qualities in those various systems. The public is losing billions of gallons of water every month to private agricultural users operating under registrations which are presumed reasonable, are issued without notice, and which amounts to substantial impairment of public trust assets. Therefore, the great loss of surface waters allowed pursuant to the Act is a violation of the public trust doctrine which constitutes substantial impairment of public trust assets.

D. Appellants have Standing to bring a Facial Challenge to the Constitutionality of the Surface Water Withdrawal Act

South Carolina courts recognize three types of standing: statutory standing, constitutional

standing, and public importance standing. ATC Inc. v. Charleston County, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). In this case, the Riparian Property Owners meet both public importance standing and constitutional standing requirements.

1. Constitutional Standing

The U.S. Supreme Court has provided a three-part test to establish standing under Article III of the Constitution:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... trace[able] to the challenged action of the Department, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted). See also DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006). The South Carolina Supreme Court has adopted this test. Smiley v. S.C. Dep't of Health & Envtl. Control, 374 S.C. 326, 328, 649 S.E.2d 31, 32 (2007); Sea Pines Ass'n for the Prot. Of Wildlife v. S.C. Dep't of Natural Res., 345 S.C. 594, 550 S.E.2d 287 (2001).

Appellants have suffered and continue to suffer injury through the taking without due process of their riparian rights. The injury occurred immediately upon passage of the Act because the moment the Act was signed into law, the Appellants's rights were fundamentally altered. The lower court's conclusion that the Appellants' suffered no injury was based on the erroneous

conclusion that riparian rights are not property.(Final Order filed Jan. 8, 2016, No. 2014-CP-06-322, at 8). However, riparian rights to consumptive use are property that was taken with the Act became law, and this taking injury continues as long as the law is in place. Thus an injury has occurred in this case, and the matter is ripe for adjudication.

Already, the Department has issued 231 registrations, which collectively authorize the withdrawal of 6.2 billion gallons per month, and 68 billion gallons per year of surface water. (Pls.' Mot. Summ. J. Ex. B.) The Riparian Property Owners rely on the rivers and streams adjacent to their properties for continuing use and enjoyment. From Mr. Jowers's fishing to Mr. Williamson's family picnics, each Appellant makes use of his or her riparian ownership rights. The Department has, through the Act, taken the Riparian Property Owners' private property and transferred it to private agricultural users.

Navigable waterways, such as the rivers and streams at issue in this case, are public trust assets. McQueen, 354 S.C. at 149, 580 S.E.2d at 119. In addition to the property right injuries to the Appellants in this case, there is harm to the public, which includes the Appellants, if these surface waters are not preserved for the use and enjoyment of all South Carolinians. The Department has disposed of, and may continue to dispose of, these public trust assets.[27] The Department could permanently allocate all of the water in all of the state's waterways to agricultural users (other than minimal amounts that the Act requires for "safe yield"). Indeed, The Department has no discretion in issuing registrations, thus it must continue to allocate water

[27] The lower court erroneously found that the public trust doctrine stops at the influence of the tides. (Final Order filed Jan. 8, 2016, No. 2014-CP-06-322, at 16). However, the public trust extends to all navigable waterways. Loss of control by the state over that surface water, which is to be held in trust for the benefit of the public, is an injury in fact.

as long as agricultural users continue to apply for registrations.

The registration process thus causes a great amount of harm to the public. By allocating away public trust surface water to private agricultural users, the Act is causing, and continues to cause, the loss of public uses. The public uses of surface water include the ability to navigate on the water, fish, swim, boat, and recreate. The Act will cause further harm to the Riparian Property Owners (and other South Carolinians), and that harm has no remedy outside the instant case. Not only did the Riparian Property Owners lose the right to challenge registered withdrawals, but the State has lost much of its control over surface water because of those unchecked registered withdrawals as well.

The registration process in the Act is especially dangerous because it leaves the state with little to no recourse or control over agricultural users once they have been registered. Registrations never expire, are presumed reasonable and the Act does not restrict the amount of water any one agricultural user can consume on a daily, annual, or total basis. S.C. Code. Ann. § 49-4-10, et seq.

Moreover, to reduce the registered amount or otherwise modify the registration: (1) an agricultural user would have to withdraw "substantially more[28] surface water than he is registered for or anticipates withdrawing"; and (2) The Department must prove that the withdrawals "result in detrimental effects to the environment or human health." S.C. Code Ann. § 49-4-35(E). Therefore, the Act allows registrants to deprive the Appellants, other downstream riparian owners, and the public of water even in times of drought or when such usage results in fish kills or even permanent loss of a navigable waterway, as long as the withdrawal does not exceed the

[28] "Substantially more" is not a term defined in the Act.

registered amount.

In this case, the Riparian Property Owners waited until the Act went into effect, the Department issued registrations pursuant to the Act, and registrants began withdrawing water before bringing suit. The facts are sufficiently fleshed out, and the harm is certainly real, so that the Court may render a verdict. The Riparian Property Owners are not asking the Court to interpret the law without seeing how it applies, but are asking the Court to evaluate the law that is now in effect and being implemented by the Department. The Riparian Property Owners do not have to wait until they cannot make any consumptive use of water to bring suit. Their rights were harmed the moment the Act passed. Furthermore, most of the Riparian Property Owners are downstream from registered surface water withdrawers, all of the Riparian Property Owners are within the same watersheds as registered surface water withdrawers, and the Department continues to issue more registrations under the Act as they are requested. Indeed, the Department is required under the Act to do so.

The violation of the public trust doctrine has already happened where The Department has given away public waters for private gain. These injuries are real, concrete, and ripe to be heard before this Court. Now is the time to resolve this issue, before all of the state's waters are allocated away.

As to particularized injury, these Riparian Property Owners are each suing for their own unique property rights as riparian owners. These Riparian Property Owners are particularly and uniquely injured. Part of the nature of a takings claim is that it involves unique property, and the Riparian Property Owners are each uniquely harmed by the loss of that property. The fact that Riparian Property Owners seek to abolish an unconstitutional law, which would benefit the entire

state, does not undermine standing. See Federal Election Comm'n. v. Akins, 524 U.S. 11 (1988) (finding "injury in fact" where a harm is concrete, though widely shared); Sierra Club v. Morton, 405 U.S. 727, 734 (1972); Pye v. U.S., 269 F.3d 459, 469 (4th Cir. 2001) ("So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury."); see also U.S. v. SCRAP, 412 U.S. 669, 688, 93 S. Ct. 2405 (1973) ("To deny standing to persons who are in fact injured because many others are also injured, would mean that the most injurious and widespread . . . actions could be questioned by nobody. We cannot accept that conclusion.").

An injury may be "actual or threatened." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974). In this case, the injury to each plaintiff is not just the loss or threatened loss of water on his/her property; it is the loss of the right to challenge a use as unreasonable. That right was lost the moment the Act was signed into law, and is an actual and concrete injury that forms the basis for the Riparian Property Owners' takings and due process claims. Thus, the injury to property and property rights is actual and imminent, not conjectural or hypothetical.

The injury of loss of riparian water rights is directly caused by the Act as administered by the Department. There is no intervening cause at issue in this case. There is not even a long chain of causation to follow. Any argument that other types of water users cause or could potentially cause the same harm does not undercut standing for the harm caused by the Department. American Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505 (4th Cir. 2003) (recognizing standing to sue hog farms for pollution of a waterway even though there were other sources of pollution along the river that similarly caused loss of enjoyment of the water for

Riparian Property Owners).

Redressibility is also met in this case. If the Court finds the Act is unconstitutional, the Court may strike it down in whole or part, which would restore the Appellants' riparian water rights. Striking the Act as unconstitutional would also redress the lack of due process because it would restore the riparian system and the Riparian Property Owners would have the ability to challenge unreasonable uses by upstream agricultural users.

2. Public Importance

In addition to meeting the elements of constitutional standing, this case also presents issues of such significance as to rise to the level of public importance standing. "The public importance exception grants standing to a party who has not suffered a particularized injury where the issue involved is of such public importance that its resolution is required for future guidance." S. Carolina Public Interest Foundation v. S. Carolina Transp. Infrastructure Bank, 403 S.C. 640, 645-46, 744 S.E.2d 521, 524 (2013). "Whether an issue of public importance exists necessitates a cautious balancing of . . . competing policy concerns underlying the issue of standing." ATC, 380 S.C. at 198-200, 669 S.E.2d at 341 (quoting Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)). "The key to public importance analysis is whether a resolution is needed for future guidance . . . [y]et the very nature" of the doctrine "resists a formulaic approach, as each case must turn on 'the competing policy concerns'" of standing. Id.

In Baird v. Charleston County, doctors alleged that the Charleston County government had committed an illegal act by issuing hospital bonds beyond the County's statutory authority. 333 S.C. 519, 524-26, 511 S.E.2d 69, 72 (1999). The Court found that this allegation was sufficient to establish public importance standing because allegations of illegal government

action are of public importance. Id. at 531, 511 S.E.2d at 75. The relevance of illegal government action for public importance standing has been repeatedly emphasized by the Supreme Court. See e.g., South Carolina Public Interest Foundation at 645, 744 S.E.2d at 524 (finding an allegation of unconstitutional government action "the precise instance where the public importance exception should apply").

Baird also found that the alleged illegal government action harmed a "profound public interest." 333 S.C. at 531, 511 S.E.2d at 75. In that case, the issuance of illegal hospital bonds was of public importance because it affected public health and welfare. Id. To determine the public interests at stake, the Court looked to the overall public policy embodied by the allegedly violated statute—the Hospital Bonds Act—and its stated purpose "to promote the public health and welfare." Id. The Court found that the alleged illegal government action implicating widely applicable public interests was sufficient to establish public importance standing.

In this case, Riparian Property Owners agree with the Department that "because the law, itself, is significant," the public interest requires resolution of this case.[29] (The Department's Petition for Extraordinary Relief, at 8.) Constitutional challenges to state law have been found to meet the significant public interest requirement for standing. See, e.g., Davis v. Richland Cnty. Council, 372 S.C. 497, 500, 642 S.E.2d 740, 741-42 (2007) (finding "Commissioners have standing to challenge the constitutionality of an Act which authorizes their removal from office" under public importance standing); Sloan v. Dep't of Transp., 365 S.C. 299, 304-05, 618 S.E.2d

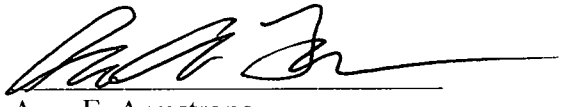
[29] The trial court erroneously concluded that there was no public interest exception because the Riparian Property Owners did not complain of any actual or imminent withdrawals. (Final Order filed Jan. 8, 2016, No. 2014-CP-06-322, at 6). To clarify, the public interest at issue is the ability of the state to protect its resources, an ability which was actually and immediately hindered when the Act was passed.

876, 878-79 (2005) (holding that plaintiff had standing to bring his challenge despite the fact that his case was moot). Furthermore, the Riparian Property Owners' challenge requires resolution for "future guidance" as to whether South Carolina will continue to recognize riparian rights or allow private-to-private property transfers in direct contradiction of our state constitution. See Baird v. Charleston Cnty., 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). Thus, this case falls within the public importance exception to standing.

Therefore, the Riparian Property Owners have demonstrated the elements of constitutional standing, as well as public importance standing.

IV. CONCLUSION

In sum, the Act is unconstitutional as a matter of law because it violates due process rights, the takings clause, and the public trust doctrine, for both riparian owners and the people of South Carolina. Thus, the Appellants James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman request that this Court enter an Order overturning the ruling of the lower court, granting summary judgment in their favor, and striking down the registration provisions of the Act as unconstitutional, effective immediately.



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May 17, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM THE COURT OF COMMON PLEAS,
BARNWELL COUNTY

The Honorable R. Markley Dennis, Jr., Judge

Appellate Case No. 2016-000428

James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman ..... Appellants,

vs.

South Carolina Department of Health and Environmental Control, ... Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the Appellants' Initial Brief and Designation of Matter upon counsel for the Respondent by placing same in the United States Mail, First Class Postage Prepaid, addressed to:

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