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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BARNWELL COUNTY
COURT OF COMMON PLEAS

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2016-000428

JAMES JEFFERSON JOWERS, SR., ANDREW J. ANASTOS,
BEN WILLIAMSON, MELANIE RUHLMAN AND
ANTHONY RUHLMAN, ... APPELLANTS,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, ...RESPONDENT.

AMICUS CURIAE BRIEF OF CONGAREE RIVERKEEPER, INC.

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STATEMENT OF INTEREST

Congaree Riverkeeper, Inc. ("CRK") is a South Carolina non-profit corporation affiliated with the Waterkeeper Alliance, a network of grassroots waterkeeper organizations working to protect and advocate for rivers and other waterways worldwide. CRK works to protect water quality and water quantity of the Congaree, Lower Broad and Lower Saluda Rivers and their tributaries through several means. CRK monitors water quality by sampling water at strategic locations on the Congaree, Lower Broad and Lower Saluda Rivers and their tributaries to determine if certain common pollutants exceed limits found within South Carolina water quality classifications and exceed the pollutant limitations within wastewater discharge permits. CRK is engaged in the federal licensing process for hydropower facilities on the Lower Broad and Lower Saluda Rivers to advocate for stream flow releases downstream sufficient to support healthy fisheries and habitat for aquatic life, water quality, navigation, and human recreation. CRK actively participates in a regional group of river and water advocacy organizations working on stream flow protection issues, meeting regularly with the Environmental Protection Agency to seek improvements to stream flow policy. CRK educates local and state leaders and the public about river conservation issues. CRK champions proposed legislation that conserve and protect water resources. If warranted, CRK engages in litigation to protect our rivers from misuse.

Within the geographical focus of CRK's environmental protection efforts – the Lower Saluda, Lower Broad and Congaree River and their tributaries – there are twenty-nine (29) surface water withdrawals governed by the South Carolina Surface Water Withdrawal, Permitting, Use and Reporting Act of 2010, including twelve (12) agricultural withdrawals.

Appellants have challenged the agricultural registration provision of the South Carolina Surface Water Withdrawal, Permitting, Use and Reporting Act (the "Act") as unconstitutional under the Takings Clause and the Due Process Clause, and as violative of the Public Trust Doctrine. CRK submits that the lower court erred in ruling that Appellants lacked a property interest sufficient to support their takings and due process claims. Further, the lower court erred in dismissing Appellants' public trust claim for failing to meet this Court's "public importance" exception to the State's standing requirements. With all due respect to the parties, the Appellants' takings claim is flawed and should be rejected, and the Respondent misstates riparian common law and the Public Trust Doctrine. Finally, CRK submits that Appellants have brought a viable claim that the Act violates the Public Trust Doctrine.

INTRODUCTION

The use of rivers, lakes and streams in South Carolina has been governed by the common law doctrine of riparian rights. *See Omelvany v. Jaggers*, 20 S.C.L. (2 Hill) 634, 640 (1835); *White v. Whitney Manufacturing Co.*, 60 S.C. 254, 266, 460 S.E. 456, 460 (1901). Under riparian common law, owners of properties contiguous to a natural watercourse hold a right to reasonable use of waters adjacent to their properties. *Id.* The traditional riparian right of use includes the right to use water for domestic, agricultural and recreational purposes, to use the shoreline or bank for access to water, and to construct a dock or pier. 78 AM. JUR. 2d Waters § 35. South Carolina courts have not expressly identified any order of preference for particular types of water use.

A succession of droughts coupled with increasing water demand revealed flaws in riparian common law. J. Blanding Holman IV, THE ADVENT OF MODIFIED RIPARIANISM IN SOUTH CAROLINA, 16 SOUTHEASTERN EVTL. L. J. 291, 303 (Spring 2008). State Water Law Review Committees created by

Governor Riley in 1982, and Governor Sanford in 2004, were charged with recommending changes to water law and policy. In 1982, the Water Law Review Committee highlighted several shortcomings with the existing common law riparian water law doctrine. One of the more central criticisms was riparianism's lack of recognition of the public interest in maintaining a certain stream flow sufficient to support "all uses of water within the channel, including fish and wildlife populations, recreation, aesthetics, water quality, hydropower generation, navigation, riparian vegetation, and floodplain wetlands."[1] Again in 2004, the Committee called attention to the problem that "the cumulative effect of all riparian owners ... withdrawing water may be reasonable as to each other, but fails to account for what is reasonable for protection of the entire river system as a public resource."[2] The South Carolina Water Plan of 2004[3] adopted the Committee's recommendation, stating that a certain minimum instream flow within rivers should be maintained in order to "protect human health and safety," "maintain navigability," and "to prevent irreversible damage to the ecosystem." S.C. Dept. of Natural Resources, SOUTH CAROLINA WATER PLAN, pp. 26-27 (2nd ed. 2004).

Surface water withdrawals that are consumptive in nature have the greatest impact on stream flow. A consumptive water use is one that uses water in a way that lessens the amount of water available for other uses because a portion of the water used does not return to the

[1] Governor's State Water Law Review Committee, REPORT AND RECOMMENDATIONS, p. 10 (S.C. 1982).
[2] Governor Sanford's Water Law Review Committee, WATER LAW REPORT, p. 13 (Jan. 2004).
[3] The S.C. Water Resources Planning and Coordination Act charges the Department of Natural Resources ("DNR") with the responsibility of recommending to the Governor and General Assembly a comprehensive water resources policy. S.C. Code Ann. § 49-3-10 *et seq*. DNR is given the power to review the actions and policies of other state agencies that possess water resource responsibilities to ensure consistency with the State Plan, and recommend to the General Assembly any amendments to state law required to implement a state water policy. S.C. Code Ann. § 49-3-40(a)(3) and (a)(6).

water source.[4] Withdrawals of water for thermoelectric power generation, drinking water supply, agricultural irrigation and golf course irrigation are all consumptive water uses to varying degrees.[5] "Irrigation withdrawals can be especially detrimental to instream flow because this use is almost entirely consumptive[6] and occurs primarily during dry periods when streamflow may already be at low levels."[7]

DHEC's summary of reported surface water use across the State for the year 2015 shows the number of surface water withdrawal intakes by category of use:

Surface Water Use Category	Number of Facilities	Number of Intakes
Aquaculture	2	3
Golf Courses	81	97
Industry	35	42
Agriculture	92	191
Mining	9	11
Hydroelectric	34	38
Thermoelectric	12	17
Nuclear Power	4	9
Public Water Supply	62	86
Totals	**331**	**494**

Bureau of Water, DHEC, 2015 Reported Water Use, South Carolina

Although the number of intakes for power production is relatively small, the amount of water used for generating electricity is by far the largest category of water withdrawals in South Carolina. Hydroelectric power generation uses trillions of gallons of water per year; however, hydroelectric[8] power is a non-consumptive, instream water use. Similarly, thermoelectric power

[4] S.C. Dept. of Natural Resources, SOUTH CAROLINA WATER PLAN, p. 99 (2nd ed. 2004) *available at* http://dnr.sc.gov/water/waterplan/index.html.

[5] S.C. Dept. of Natural Resources, SOUTH CAROLINA WATER ASSESSMENT, p. 9-13 (2009) *available at* http://www.dnr.sc.gov/water/hydro/HydroPubs/assessment.htm.

[6] "Because irrigation water is usually either taken in by plants, evaporated, or soaked into the soil, little if any of the water is returned to its source." *Id.* at p. 4-13.

[7] *Id.* at p. 9-13.

[8] Hydroelectric power produces electricity using falling water as a source of energy. S.C. Dept. of Natural Resources, SOUTH CAROLINA WATER PLAN, p. 99 (2nd ed. 2004).

generation uses trillions of gallons of water per year, but thermoelectric[9] water use generally does not constitute a significant consumptive use of water use.[10] Due to the very large volumes of water used for energy production, water used for hydroelectric and thermoelectric power generation is typically carved out in order to gain an undistorted view of the State's other major water uses.[11] Statewide, excluding hydropower and thermoelectric, 61% of surface water is used for water supply.[12] 35% is used for industrial processing.[13] 3% is used for agricultural irrigation.[14] 1% is used to irrigate golf courses. South Carolina's remaining surface water uses – aquaculture and mining – use less than 1% of surface water.[15]

The percentages of surface water used by different categories of users vary widely from one basin to another.[16] According to DHEC's report of annual withdrawal amounts by surface water users in 2015, excluding thermoelectric and hydroelectric use, water supply comprised 93% of use in the Broad River Basin, 5% was used for industrial purposes, with mining, golf

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[9] Thermoelectric power is "electrical power generated using fossil fuels (coal, oil, or natural gas), geothermal heat, or nuclear energy." S.C. Dept. of Natural Resources, SOUTH CAROLINA WATER PLAN, p. 99 (2nd ed. 2004).

[10] *See* Timothy H. Diehl & Melissa A. Harris, WITHDRAWAL AND CONSUMPTION OF WATER BY THERMOELECTRIC POWER PLANTS IN THE UNITED STATES, 2010, p. 1 (USGS 2014) (stating that "[t]otal estimated withdrawal for 2010 was about 129 billion gallons per day (Bgal/d), and total estimated consumption was about 3.5 Bgal/d."); *see also* U.S. Department of Energy, ENERGY DEMANDS ON WATER RESOURCES: REPORT TO CONGRESS ON THE INTERDEPENDENCY OF ENERGY AND WATER, p. 9 (Dec. 2006) (stating that "[w]ater withdrawal statistics for thermoelectric power are dominated by power plants that return virtually all the withdrawn water to the source. While this water is returned at a higher temperature and with other changes in quality, it becomes available for further use.").

[11] *See* Bureau of Water, S.C. DHEC, 2014 REPORTED WATER USE REPORT, p. 4; *see also* S.C. DNR, SOUTH CAROLINA WATER ASSESSMENT, p. 4-5 (2009) ("Given that the amount of water used to generate power at hydroelectric facilities is so much greater than all other uses, and given that water used for hydroelectric power production is an instream water use, it can be helpful to exclude hydroelectric power generation and any other instream uses when comparing absolute and relative water-use data.") *available at* http://www.dnr.sc.gov/water/hydro/HydroPubs/assessment.htm.

[12] Bureau of Water, S.C. DHEC, 2015 REPORTED WATER USE, SOUTH CAROLINA, p. 4.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] For a map depicting locations of surface water withdrawals within each basin, *see* DHEC, S.C. Water Atlas at https://gis.dhec.sc.gov/watersheds/.

courses, and irrigation comprising the remaining 2%. In the Catawba Basin, excluding thermoelectric, water supply made up 43% of surface water use and industrial use amounted to 54%, with agricultural and mining uses making up the remaining 1%. In the Edisto Basin, agricultural use comprised 31% of surface water use, water supply used 67% of surface water withdrawn, and industry and golf courses comprised 2%. In the Pee Dee Basin, 40% of surface water withdrawn was for water supply purposes, 54% was used for industrial purposes, and mining, golf courses and agriculture used 6%. In the Salkehatchie Basin, 73% of surface water was used for agriculture, 15% was used for golf course irrigation, and 12% was used for aquaculture. In the Saluda Basin, 63% of surface water withdrawals were used for water supply, 36% for industrial use, and golf courses, agriculture and aquaculture made up 1%. In the Santee Basin, water supply comprised 84% of surface water use, 15% was used for industrial purposes, and golf courses, agriculture and mining used 1%. In the Savannah Basin, excluding thermoelectric, 78% of surface water withdrawn was used for water supply, 20% was used for industry, and golf course, agriculture and mining made up 2% of use.

In 2014, a new agribusiness entered the State and obtained a right under the Surface Water Withdrawal, Permitting, Use and Reporting Act to withdraw a maximum of 3.2 trillion gallons annually from the South Fork of the Edisto, an amount comparable to only one existing agribusiness in South Carolina withdrawing from the Broad River.[17] This figure is close to or exceeds the maximum permitted annual surface water withdrawals of the City of Clinton, City of

[17] R. p. 179, 181.

Camden, Town of Cheraw, City of Georgetown, Georgetown County Water and Sewer District, and City of Abbeville.[18]

OVERVIEW OF THE S.C. SURFACE WATER WITHDRAWAL ACT

In 2010, after years of debate, the legislature enacted the Surface Water Withdrawal, Permitting, Use and Reporting Act, creating a complex, difficult to navigate, regulatory scheme for most[19] surface water withdrawals[20] in excess of three million gallons during any single month[21] from the same general location. S.C. Code Ann. § 49-4-10 *et seq.*; S.C. Code Ann. § 49-4-20(28); § 49-4-25. Generally speaking, the Act regulates surface water use by requiring most surface water withdrawers to obtain a permit from the South Carolina Department of Health and Environmental Control ("DHEC") in order to lawfully withdraw water and to annually report the quantity of surface water withdrawn. S.C. Code Ann. § 49-4-25; S.C. Code Ann. § 49-4-50. In the case of existing water uses, the Act directs DHEC to issue a permit in an amount constituting the greatest volume shown by the withdrawer's documented historical water use; current permitted treatment capacity; design capacity of the water intake; a volume needed to pay for outstanding bond issues through sale of surface water; or for public water utilities that own their water supply reservoirs, the safe yield of that reservoir. S.C. Code Ann. § 49-4-70(B)(1).

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[18] *See* DHEC, S.C. WATER ATLAS at https://gis.dhec.sc.gov/watersheds/.

[19] Aside from withdrawals in amounts less than three million gallons per month, certain types of water withdrawals are exempt from the Act, such as withdrawals from farm ponds, withdrawals from ponds solely supplied by rainwater or groundwater, and withdrawals for wildlife management. S.C. Code Ann. § 49-4-30(A). In addition, surface water used for hydroelectric generation is exempted from the Act's permitting requirements but must report the volume of use. S.C. Code Ann. § 49-4-30(B).

[20] "Withdrawal" is broadly defined as "to remove or divert water from its natural course or location regardless of whether the water is returned to its waters of origin, consumed, or discharged elsewhere." S.C. Code Ann. § 49-4-20(29).

[21] For purposes of comparison, the average water consumption of a family of four in the United States is estimated to be 400 gallons per day, or about 12,000 gallons per month. *See* Environmental Protection Agency, *Indoor Water Use in the United States*, *available at* https://www3.epa.gov/watersense/pubs/indoor.html.

Applicants for new surface water withdrawals and existing surface water withdrawers seeking more water than the Act's grandfathered volumes undergo a review before DHEC to determine whether the proposed withdrawal amount is "reasonable." In its determination of reasonableness, DHEC must consider the following criteria:

1. the minimum instream flow or minimum water level and the safe yield for the surface water 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, including, but not limited to present agricultural, municipal, industrial, electrical generation and instream users;
3. the reasonably foreseeable future water 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 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 the applicable industry standard 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 a 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
9. any other reasonable criteria that DHEC promulgates by regulation that it considers necessary to make a final determination.

S.C. Code Ann. § 49-4-80(B).

As reflected in criterion 1, minimum instream flows are a linchpin of the regulatory permitting process. A minimum instream flow is designed to protect existing water users and ecosystem integrity by ensuring that rivers, streams and lakes are not depleted through

overuse.[22] A minimum instream flow serves to dilute pollutants, including bacteria, thereby protecting the recreational value of rivers.[23] Minimum instream flows also protect the health of riverine ecosystems by ensuring enough water is left in rivers to sustain aquatic species.[24] Finally, minimum instream flows prevent saltwater intrusion into freshwater during times of drought, which preserves drinking water supply for millions of people residing or visiting South Carolina's coast.[25]

The Act includes, first, a general definition of minimum instream flows: "the flow that provides an adequate supply of water at the surface water withdrawal point to maintain the biological, chemical, and physical integrity of the stream taking into account the needs of downstream users, recreation, and navigation ...." S.C. Code Ann. § 49-4-20(14). The Act then prescribes a formula for calculating specific minimum insteam flows that vary seasonally as a percentage of the "mean annual daily flow" which is defined as "the arithmetric mean of individual daily mean discharges (stream flow) for a period representative of historic stream flow records, using flow measurements published by [the United States Geological Survey] or as determined by other [DHEC] approved, hydrologically valid data." S.C. Code Reg. 61-119(B)(16). In January, February, March and April, the minimum instream flow is 40% of the mean annual daily flow. *Id.* In May, June, and December, the minimum instream flow is 30% of the mean annual daily flow. In July, August, September, October and November, the minimum instream flow is 20% of the mean annual daily flow. For river segments influenced by licensed

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[22] William L. Graf, MINIMUM FLOW RULES FOR SOUTH CAROLINA RIVERS, pp. 5-6 (2009) *available at* http://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1168&context=geog_facpub.
[23] *Id.*
[24] *Id.*
[25] *Id.*

impoundments, the minimum instream flow is simply the release flows mandated by the licenses. S.C. Code Ann. § 49-4-150(A)(3).

Minimum flows serve as the baseline for calculating the "safe yield," the amount of water a permittee is allowed to withdraw without reducing river flows below the minimum instream flow. *See* S.C. Code Ann. § 49-4-20(25) (defining "safe yield "as "the amount of water available for withdrawal from a particular surface water source in excess of the minimum instream flow or minimum water level for that surface water source," to be "determined by comparing the natural and artificial replenishment of the surface water to the existing or planned consumptive and nonconsumptive uses."). The Act also directs permittees to avoid making withdrawals in amounts that would cause the water source to fall below the water source's minimum instream flow. S.C. Code Ann. § 49-4-150(A)(1)(b). In the event that the stream flow of a water source is less than or equal to the minimum instream flow, permittees must discontinue consumptive water use from that water source and implement a contingency plan that provides for a secondary water source to be used on a temporary basis. S.C. Code Ann. § 49-4-150(A)(1)(b); S.C. Code Ann. § 49-4-160(a). This plan is an enforceable part of the permit. S.C. Code Ann. § 49-5-160(A).

The Act prescribes distinctive permitting standards for certain surface water permittees. A withdrawer that owns a federal or state licensed reservoir is entitled to receive a permit to withdraw water from the reservoir without further State review. S.C. Code Ann. § 49-4-45(A)(1). Nonconsumptive water users are entitled to a permit upon a showing that proposed withdrawals

result in no or minimal changes in water quantity, and are only subject to the Act's reporting requirements.[26] S.C. Code Ann. § 49-4-40(A).

All permits are issued for a term of no less than 20 years and no greater than 50 years, depending upon the nature of the applicant and its circumstances. S.C. Code Ann. § 49-4-100(B). All surface water withdrawals approved by DHEC are presumed to be reasonable. S.C. Code Ann. § 49-4-110(B). A permittee cannot be held liable in a suit for damages so long as the requirements of the permit are met. *Id.*

Even though agricultural water use is highly consumptive, agricultural water withdrawers are not required to obtain a permit. S.C. Code Ann. § 49-4-35. Agricultural use is defined broadly in the Act to include crop production, ornamental horticulture, silviculture, floriculture, turf production, and livestock production. S.C. Code Ann. § 49-4-20(3). Instead of undergoing the permitting process, agricultural surface water users merely register and report their water use to DHEC. S.C. Code Ann. § 49-4-35. Public notice is not required for agricultural registrations. *See id.* Agricultural surface water users are not subject to any determination of whether their withdrawal amounts are reasonable under the criteria in S.C. Code Ann. § 49-4-80(B).

The only limit on the amount of water an agricultural water user may withdraw is DHEC's determination of whether the proposed water withdrawal is within the safe yield of the water source. S.C. Code Ann. § 49-4-35(C). As established by regulation that governs both permittees and agricultural registrants, the safe yield, year-round, is 80% of a river's mean annual daily flow

[26] Under the Act, "nonconsumptive use means a use of surface water withdrawn in such a manner that it is returned to its waters of origin with no or minimal changes in water quantity." S.C. Code Ann. § 49-4-20(16).

for river segments not influenced by an impoundment.[27] S.C. Code Reg. 61-119(L)(3)(a) *citing to* 61-119(E)(3)(a)(ii). Mean annual daily flow represents an average of daily stream flows over an extended period. But actual stream flow fluctuates on a monthly, weekly and even daily basis. Actual stream flow during the growing season has been historically shown to be less than 80% of the mean annual daily flow. Put another way, the safe yield as defined in the Act and its regulations will often be greater than the actual amount of water flowing during the summer and even fall months, the period of the year when use of water is at its greatest. According to calculations made by the South Carolina Department of Natural Resources, the safe yield of many rivers in South Carolina, including the Congaree River, will, in actuality, not be available more than half of the year.[28]

For other consumptive water users, a river's minimum instream flow will serve to curtail water withdrawals when a river's stream flow falls below the flow needed to adequately maintain the river's "biological, chemical, and physical integrity ... taking into account the needs of downstream users, recreation, and navigation." S.C. Code Ann. § 49-4-20(14). But agricultural water users are not required to cease withdrawing water when their withdrawals cause rivers to fall below the minimum instream flow. Agricultural users withdrawing water at their registered amount may lawfully reduce the stream flow to the point where navigation is impaired, downstream users' water uses are injured, coastal water supplies are threatened by saltwater

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[27] This regulation appears to contradict the statutory definition of safe yield as the amount of water available in excess of minimum instream flow, which varies by season – 40% of mean annual daily flow from January through April, 30% of mean annual daily flow in May, June and December, and 20% of mean annual daily flow from July through November. *Compare* S.C. Code Ann. § 49-4-20(14) and (25) with S.C. Code Reg. 61-119(E)(3)(a)(ii)(A).

[28] S.C. Department of Natural Resources, Comments on Proposed DHEC Surface Water regulations (Submitted September 26, 2011) *available at* http://www.edistofriends.org/sites/edistofriends.org/files/SCDNR%20Comments%20on%20DHEC%20Surface%20Water%20Regulations%20(26Sep2011).pdf.

intrusion, and aquatic life suffers. Nothing in the Act prevents agricultural users from depleting the flow of a river or stream. [29]

DHEC may modify, withdraw, suspend or revoke a registration if the withdrawals are in an amount substantially higher than the registered amount and these withdrawals cause detrimental effects to the environment or human health. S.C. Code Ann. § 49-4-35(E) (emphasis added). Even though an agricultural registration does not undergo any determination of reasonableness, the Act nonetheless provides that registered withdrawals are presumed reasonable. S.C. Code Ann. § 49-4-110(B). The Act also provides that registrants are not liable for damages unless a violation of the registration has occurred. *Id.* Finally, agricultural registrations are granted in perpetuity. *See* S.C. Code Ann. § 49-4-35(E) (stating that DHEC may modify, suspend or revoke a registration, with no reference to any term limitation of a registration) *compared with* S.C. Code Ann. § 49-4-100(B) (establishing term limits for permits).

ARGUMENTS

Appellants argue that the Surface Water Withdrawal Act violates the Takings Clause, the Due Process Clause and the Public Trust Doctrine. CRK supports Appellants' position that they possess riparian property interests sufficient to bring their constitutional claims. Further, the lower court erred in dismissing Appellants' public trust claim for failing to meet this Court's "public importance" exception to the State's standing requirements. In the interest of brevity, CRK does not address Appellants' procedural Due Process claim. However, with all due respect to the parties, CRK submits that the Appellants' takings argument is fundamentally flawed and

[29] In 2005, the S.C. Drought Response Act was amended to include water use for agricultural food production as an essential water use not subject to mandatory curtailment of water use during a severe drought. S.C. Code Ann. § 49-23-70(C). Thus, the Drought Response Act does not impose limitations on agricultural use during times of drought.

should be rejected, and the Respondent misstates riparian common law and the natural resources subject to the Public Trust Doctrine. Finally, CRK supports Appellants' position that the Act violates the Public Trust Doctrine.

I. APPELLANTS POSSESS RIPARIAN PROPERTY INTERESTS.

In deciding the parties' cross-motions for summary judgment, the trial court concluded that Appellants lacked a property interest in the waters of the State. R. p. 9. While seemingly recognizing riparian common law, the court nonetheless misread riparian doctrine by concluding that Appellants do not possess a property interest in the water flowing past their riparian land. Respondent appears to support the same mistaken notion.

It has long been held in South Carolina that "the possessor of lands through which a natural stream runs, has a right to the advantage of the stream flowing in its natural course, and to use it as he pleases, and for any purposes of his own not inconsistent with a similar right of the proprietors of the land above and below ...." *Omelvany v. Jaggers*, 20 S.C.L. (2 Hill) 634, 638-639 (1835). While an owner of riparian land has no property interest in the water itself, it is undeniable that riparian owners possess a right to access and reasonably use the water within a river or stream. *White v. Whitney Mfg. Co.*, 60 S.C. 254, 265, 38 S.E. 456, 460 (1901); *Lowcountry Open Land Trust v. State*, 347 S.C. 96, 99, 552 S.E.2d 778, 780 (Ct. App. 2001). The riparian interest in using water is automatically conveyed in the transfer of title to riparian land. 78 AM. JUR.2d Waters § 32. Whether water is used or not does not alter or extinguish a riparian interest. *Id.* A common law riparian owner is entitled to use water for any beneficial purpose, so long as it is reasonable and not inconsistent with a likewise reasonable use by other riparian owners on

the same stream above and below. *White*, 60 S.C. 254, 265, 38 S.E. 456, 457 (1901); *McMahan v. Walhalla Light & Power Co.*, 102 S.C. 57, 59, 86 S.E. 194, 195 (1915).

Respondent mistakenly relies on *Rice Hope Plantation v. S.C. Public Service Authority*, 216 S.C. 500, 59 S.E.2d 132 (1950) to support the argument that Appellants lack a property interest in water. Respondent's Brief, p. 9. *Rice Hope* addressed the State's "absolute power in the interests of commerce, to make necessary changes in a stream." *Rice Hope*, 59 S.E.2d 132, 144, 216 S.C. 500, 528 (1950). In the context of addressing the rights of a private riparian owner as against the State's authority to improve navigation by damming and diverting a river, the *Rice Hope* Court held that the private owner's rights are subordinate to the State's power and therefore, no taking was found. *Id.* at 528, 144. This decision does not suggest that riparian interests do not exist. Rather, it indicates that the State's power to improve navigation is superior to private riparian interests. The dispute before this Court does not pertain to the State's "absolute power" to construct navigational improvements. This case simply concerns the State's regulation of riparian common law rights. *Lowcountry Open Land Trust v. State*, 347 S.C. 96, 108-109, 552 S.E.2d 778, 785 (Ct. App. 2001).

The trial court erred in ruling that Appellants do not possess a property interest in using the waters of the rivers and streams that flow contiguous to their property.

II. THE PUBLIC IMPORTANCE EXCEPTION TO STANDING APPLIES TO APPELLANTS' PUBLIC TRUST CLAIM.

After determining that Appellants failed to demonstrate any injury-in-fact sufficient to support standing, the circuit court declined to invoke the "public importance" exception to constitutional standing requirements. Under the public importance exception, standing may be conferred "when an issue is of such public importance as to require its resolution for future

guidance." *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008). The circuit court reasoned that "future guidance" was not needed because Appellants had not complained of actual or imminent water withdrawals and no one else had previously challenged the Act. R. p. 6. The lower court erred in not allowing the Appellants to proceed with their public trust claim under the public importance exception.

The question of whether the Appellants have complained of actual or imminent surface interference with water withdrawals is relevant in addressing the requirement of injury under constitutional standing requirements. *See ATC South*, at 195-196, 337-339. However, the public importance exception is invoked when the plaintiff cannot meet the constitutional standing requirements. *See id.* at 198, 341. Whether the Appellants have complained about actual or imminent withdrawals is immaterial in the analysis of whether to confer prudential standing under the public importance exception.

Without citing any supporting authority, the circuit court also erred in reasoning that the public importance exception should not apply because no prior legal challenges have been made to the Act. This logic would foreclose plaintiffs who fail to meet traditional standing requirements from ever bringing novel cases. In other cases where the public importance exception was invoked, courts have ascribed no significance to whether the claims at issue were ever litigated before. If anything, the fact that a case raises novel questions of law affecting the public interest arguably supports the need for future guidance instead of weighing against it. Appellants should have their day in court to challenge the agricultural registration provision of the Act as violating their inalienable right to free and open use of navigable rivers, as held in public trust by the State. *See* S.C. Const. art XIV, § 4; Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust*

Doctrines: Classifications of States, Property Rights, and State Summaries, 16 PENN ST. ENVTL. L. REV. 1, 23 (Fall 2007) (stating that South Carolina "has enshrined public trust protections in both its Constitution and its statutes"); *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 80-81, 753 S.E.2d 846, 853 (2014) (recognizing the public importance of determining the constitutionality of a state law").

III. APPELLANTS' TAKINGS THEORY LACKS MERIT AND SHOULD BE REJECTED.

This Court should affirm the circuit court's rejection of Appellants' takings claim. While the circuit court's analysis of the takings issue is problematic in certain respects, CRK supports the bottom-line conclusion, for the reasons set forth below.

In the first place, Appellants have chosen to mount a facial takings challenge to the Act, making their prospects for success quite low. A facial claim asserts that the measure being challenged is always unconstitutional -- as applied in every possible case. *See State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016) (a facial challenge "requires the challenger show the legislation at issue is unconstitutional in all its applications"). A facial challenge is distinguished from an as-applied challenge, which alleges that a particular application of the measure is unconstitutional. A facial challenge is, by its nature, much more difficult to sustain than an as-applied challenge. *Id.* at 13 ("A facial challenge is "the most difficult ... to mount successfully"), *quoting United States v. Salerno*, 481 U.S. 739, 745 (1987). Thus, Appellants face an "uphill battle" with their takings claim. *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495 (1987) (rejecting a facial takings claim).

Appellants contend that the Act results in a facial "taking" of riparian rights under either or both of two theories. First, they assert that Act effects a *per se* taking of riparian rights because

the Act represents a direct appropriation or physical invasion of riparian rights. *See* Appellant's Brief, at 17 (analogizing this claim to a claim based on abrogation of the right to exclude); *id.* at 13 (relying on *Casitas Mun. Water District v. United States*, 543 F.3d 1276 (Fed Cir. 2008)). Second, they assert that the Act is so economically burdensome that it represents a regulatory taking. *See* Appellant's Brief, at 13 (contending that the Act results in a taking because a riparian right "does not have the same value as it had prior to the Act"); *id.* at 20 (relying on *Stoddard v. W. Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1206 (4th Cir. 1986)).

In presenting these alternative theories, Appellants invoke well-established subcategories of takings doctrine. *See Lingle v. Chevron USA., Inc.*, 544 U.S. 528, 536-540 (2005) (explaining the different species of "takings" claims). However, these two types of takings claims are governed by quite different rules. In the case of a direct appropriation or a physical invasion, a *per se* rule applies, meaning the government action generally will be held to be a taking, no matter how minor the intrusion. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (state law requiring landlord to permit cable companies to install cables on exterior of apartment building held to be a *per se* physical taking). By contrast, in the case of a regulatory restriction on the use of property, the government action is evaluated using a complex formula focusing on the economic impact of the action, the degree of interference with "investment-backed" expectations, and the character of the government action, *see Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), except in the rare case when the regulation destroys all of the property's economically viable use, in which case a *per se* rule applies. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In a regulatory taking case, the critical issue of economic impact is determined not by looking at the restricted property interest alone but rather at the

"parcel as a whole." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327 (2002).

Appellants' allegations and evidentiary submissions fail to establish a valid claim of a "taking" under either of these two theories. Proceeding on the premise that there is a "taking" in this case, Appellants contend that the Act either results in a private taking or a public taking. But, for the reasons explained below, there is no basis for finding a facial taking in this case, based on either the *per se* physical takings theory or the regulatory takings theory. Absent a demonstration of a "taking," Appellants' takings claim collapses, whether it is based on a private taking theory or a public takings theory.

The Act does not involve the kind of direct appropriation or physical invasion of private property that will support a finding of a *per se* taking. A *per se* physical taking occurs, for example, when the government seizes a property for its own use, *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (government seizure of and operation of coal mine during WW II), or permanently floods the private property behind a dam with a reservoir. *See Pumpelly v. Green Bay Co.*, 80 U.S. 186 (1871). Likewise, in the water context, the Supreme Court has recognized that a government edict that a specific, discrete water interest be transferred from one industrial firm to another industrial firm constituted a direct appropriation governed by a *per se* rule. *International Paper Co. v. United States*, 282 U.S. 399 (1931).

By contrast, the Act does not involve the kind of direct appropriation or physical invasion warranting application of a *per se* rule. The State of South Carolina has adopted legislation altering the traditional common law of riparian water law, and in the process has modified to some degree the relative rights of different water users. The specific claim in this case is that by

granting new, superior rights to agricultural water users, the Act has indirectly "taken" the rights of other riparian water users. But this legislative modification of preexisting rights does not appropriate or occupy anyone's riparian rights. Instead, it affects the economic value and/or utility of the rights of Appellants and other riparians, presenting a potential regulatory takings claim, not a *per se* physical takings claim.

Longstanding precedent recognizes the distinction between an appropriation and a restriction on use in the context of water. In *Hudson County Water Co. v. United States*, 209 U.S. 349 (1908), the Supreme Court rejected a takings claim based on legislation restricting the sale of riparian water rights. In a unanimous opinion authored by Justice Oliver Wendell Holmes, the Court stated:

> [i]t appears to us that few public interests are as obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardians of the public welfare may permit for the purpose of turning them to a more perfect use. *Id.* at 356.

In accordance with this venerable precedent, modern courts have repeatedly recognized that takings claim based on restrictions on the use of water should be evaluated, at most, as potential regulatory takings. *See, e g., Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012); *Allegretti & Co. v. Cnty. of Imperial*, 42 Cal. Rptr. 3d 122 (Cal. Ct. App.. 2006), *cert denied*, 549 U.S. 1113 (2007).

Appellants' novel *per se* takings theory ignores the fact that water law in South Carolina, and across the country, has undergone a constant process of evolution without triggering takings liability, much less a finding of *per se* takings liability. *See* Robert H. Abrams, *Water Law Transition*, 66 S.C. L. REV. 597, 598 (2015) (observing that "practical re-ordering of law has been a

necessary staple of American water law"). Originally, South Carolina followed the "natural flow" version of riparian doctrine, under which a riparian owner is entitled to the flow of water past his land "without diminishment or alteration." *Omelvany v. Jaggers*, 20 S.C. L. 634, 640 (1835). In the face of growing industrial demands on the State's water resources, the Court abandoned the natural flow theory for the reasonable use theory; under this new doctrine a riparian owner can alter the quantity and quality of water passing by his land so long as the use is "reasonable." *White v. Whitney Mfg. Co.*, 60 S.C. 254, 265, 38 S.E. 456, 460 (1901). The same evolution in water law in favor of reasonable use riparianism occurred in most other states across the Eastern United States. *See generally* Barton H. Thompson, Jr, et al, LEGAL CONTROL OF WATER RESOURCES 55-65 (2013). The important point for present purposes is that this transition occurred without any claims, or at least any successful claims, that the transition resulted in constitutional takings, much less *per se* takings.

More recently, riparian doctrine has undergone further evolution, in South Carolina and elsewhere. The South Carolina Surface Water Withdrawal, Permitting Use and Reporting Act of 2010, is similar to legislation adopted in about 20 other states in the Eastern United States embracing the system of "regulated riparianism." Under this new riparian water law system, water users are required to seek and obtain some type of advance authorization from the government to divert water, the relative rights of different types of water users are adjusted, and other changes are made to the pre-existing common law. *See* LEGAL CONTROL OF WATER RESOURCES, at 136 n. 78; Preface, THE REGULATED RIPARIAN WATER CODE iii-x (1997). To our knowledge, there is no instance in which a state's legislative adoption of a system of regulated riparianism has been held to result in a *per se* taking (or indeed a taking on any theory). *See Omernik v. State*, 64 Wis.

2d 6, 20-23 (1974) (rejecting riparian landowner's takings challenge to Wisconsin statute establishing regulated riparianism); *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663 (Fl. 1979) ("Legislation limiting the right to the use of the water is in itself no more objectionable than legislation forbidding the use of property for certain purposes by zoning regulations."). Thus, by asking the Court to declare South Carolina's enactment of its version of regulated riparian doctrine a *per se* taking, Appellants are asking this Court to take a revolutionary step without precedent in any other jurisdiction in the United States with a riparian water law doctrine.

The implausibility of Appellants' *per se* theory is underscored by focusing on the provision of the Act that expands the universe of persons eligible to use the surface waters of the state to include non-riparians. S.C. Code Ann. § 49-4-60. This represents a significant change from the traditional common law, which limited surface rights holders to those who owned land adjacent to a river or other water body. Appellants appear to be suggesting that any legislative modification of the common law that impairs the value or utility of some pre-existing riparian right results in a *per se* taking of that right. Under that theory, however, the provision of the Act allowing non-riparians to use surface waters would be a *per se* taking because it necessarily subtracts, to some degree, from the prior rights of pre-existing common law rights holders. But the notion that expanding the universe of eligible surface water right holders should be regarded as taking is utterly unrealistic, because this is a commonplace element of the movement toward regulated riparianism, and has never been challenged as a taking, much less a *per se* taking. *See*

LEGAL CONTROL OF WATER RESOURCES, at 53 (regulated riparianism 'totally rejects the classical tie of water rights to riparian lands").[30]

Finally, appellants suggest that the decision of the U.S. Court of Appeals for the Federal Circuit in *Casitas Mun. Water Dist. v. United States*, 543 F3rd 1276 (Fed. Cir, 2008), supports the argument that any government action adversely affecting a pre-existing water interest is a *per se* taking. But this suggestion is based on a misreading of *Casitas*, which does not question that, generally speaking, government laws affecting the value or utility of an interest in water are governed by the deferential regulatory takings standards. The very narrow holding of *Casitas* was that the plaintiff might be able to establish a *per se* physical taking based on the special facts of that case – in particular the assumed fact that the plaintiff could claim actual ownership of the water itself (not a usufructury interest) once the plaintiff had diverted the water from the river into a canal, and the fact that the government had required the plaintiff to divert the water from the canal into a fish ladder. *Id.* at 1346. Whatever the merits of applying a *per se* takings standard

[30] In the western United States, some states historically had water law systems based on a combination of prior appropriation and riparian doctrines. Many such states sought to simplify their water law systems by enacting statutes abolishing unexercised riparian rights – "generally successfully and without constitutional problems." LEGAL CONTROL OF WATER RESOURCES at 399; *see also id.* at 211. In one state, Oklahoma, a divided Supreme Court ruled that legislative abolishing of all unexercised water rights (apart from domestic uses) constituted a taking. *See Franco-American Charolaise Ltd. v. Oklahoma Water Resources Board*, 855 P. 2d 568 (Ok. 1990). Apart from articulating a minority viewpoint, *Franco-American* is distinguishable from this case because it involved a statute that directly and explicitly impaired pre-existing riparian rights. In California, the Supreme Court struck down a legislative measure abolishing riparian rights as inconsistent with the California Constitution's Reasonable Use Clause. *See Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 3 Cal 2d 489 (1935). But the Court subsequently upheld the authority of the State to subordinate unexercised riparian rights to all appropriations made before a riparian attempts to exercise her rights, thereby upholding broad state authority to adjust the relative priorities of property interests in water. *See In re Waters of Long Valley Creek System*, 25 Cal. 3d 339 (1979). *Long Valley* affirmatively supports the conclusion that a legislative modification of pre-existing common law water rights is not a *per se* taking.

on the special facts of the *Casitas* case (which are doubtful), the *Casitas* case is a far cry from this facial challenge to general state legislation adjusting the rights of riparian water rights holders.[31]

Appellants' alternative theory – that the Act works a regulatory taking – should also be rejected, especially because they have framed their case as a facial challenge. The basic inquiry in a regulatory takings case is whether the government regulation is so economically burdensome that it is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Columbia Venture, LLC v. Richland County*, 413 S.C. 423, 447, 776 S.E.2d 900, 913 (2015), *quoting Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005). On the facts presented in this case, there is no showing that many, some or even any individual riparian rights holders have been economically burdened by the act, much less to the point of a taking.

The weakness of Appellants' regulatory takings claim is compounded by the fact that a regulatory takings claim must be evaluated in light of the "parcel as a whole." *See e.g. Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, 401 S.C. 280, 306, 737 S.E.2d 601, 614 (2013). As Appellants correctly explain, common law riparian interests are not free-standing rights that exist in isolation; rather, "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 river." Appellants Brief, p. 13. In other words, a riparian water interest is simply one of the sticks in the bundle of rights held by riparian landowners. Thus, to determine whether the effects of the

[31] Ultimately, the Federal Circuit determined in *Casitas* that the plaintiff only had a right under California law to use such water as plaintiff could put to "beneficial use," and since plaintiff had not been deprived of any beneficial use of water by the regulation at issue. the case was not even ripe. *See Casitas Municipal Water District v. United States*, 708 F3d 1340 (Fed Cir. 2013).

Act rise to the level of a regulatory taking, the economic impact of the Act has to be evaluated by measuring the effect of the restrictions on riparian water rights relative to the total value of the land and the associated water rights. It is perhaps theoretically possible that the Act might have an adverse impact on the parcel as a whole that rises to the level of a regulatory taking. But it is literally impossible to believe that the Act's provisions will have that effect in every conceivable application of the Act, which is what Appellants are required to establish to sustain a facial regulatory takings claim.

To support their regulatory takings claim, appellants rely on a thirty-year-old decision of the U.S. Court of Appeals for the Fourth Circuit stating that a claimant can make out a viable takings claim under the South Carolina Constitution by "establish[ing] that his property has been damaged or he has been deprived of the ordinary beneficial use and enjoyment of his property." *Stoddard v. Western Carolina Regional Sewer Authority*, 784 F.2d 1200, 1206 (4th Cir. 1986). The takings standard articulated in *Stoddard* does not comport with this Court's modern statements of the test in inverse condemnation cases. *See e.g. Dunes West Golf Club, LLC v. Town of Mt. Pleasant,* 401 S.C. 280, 314, 737 S.E.2d 601, 619 (2013) ("The 'common touchstone' of each regulatory taking theory is 'to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.'"), *quoting Lingle v. Chevron USA, Inc.,* 544 U.S. 528, 539 (2005). In addition, common law nuisance doctrine provided the primary basis for the finding of liability in *Stoddard,* and the discussion of the takings was almost incidental. Finally, the *Stoddard* decision does not involve riparian rights and ignores the important parcel as a whole rule.

The fact that Appellants' takings claim is without merit does not mean that Appellants' concerns about the Act might not provide the basis, in some future case, for a successful, alternative constitutional challenge to the Act. As CRK reads the Appellants' Complaint and their briefs in this Court, their primary objection to the Act is that it grants superior rights to agricultural water users as compared to other water users, by granting agricultural water users a separate process for obtaining authorizations to divert water (a "registration" as opposed to a normal "permit"), by subjecting riparian agricultural water users to less stringent restrictions to protect the environment, and by effectively conferring water rights on agricultural users in perpetuity. The effect of the preference for agricultural water users, they allege, is to impair, to some degree, at least in the future, the water rights of other existing and prospective water users, including Appellants. While such alleged impairments cannot support a viable takings claim (especially a facial takings claim of this type), they might well support a viable claim of a due process violation.

When, as in this case, legislation does not affect some fundamental right and is not based on a suspect classification, a due process challenge to social or economic legislation is evaluated using a straightforward standard: whether the legislation "bears a reasonable relationship to any legitimate interest of government." *R.L. Jordan Co. v. Boardman Petroleum*, 338 S.C. 475, 478, 527 S.E.2d 763, 765 (2000). While this standard is deferential, it is not completely toothless. At a bare minimum, legislation must serve some identifiable public purpose, and it must rationally advance that purpose. Thus, as this Court has recognized, under this standard. "anti-competitive protectionist legislation intended to protect personal financial interests" will be struck down as a violation of due process. *Kristin v. South Carolina Department of Labor, Licensing and*

Regulation, 2016 LEXIS 271 * 19, 790 S.E. 2d 763, 771 (2016); *see also St Joseph Abbey v. Castille*, 712 F3d 215 (5th Cir. 2013) (striking down as a violation of due process a rule issued by the Louisiana Board of Funeral Directors granting funeral homes an exclusive right to sell caskets). While Appellants have not presented a substantive due process claim in this case, and greater factual development would be needed to test the merits of such a claim, it is difficult to see what public purpose is served by advantaging agricultural water users above all other water users, including municipal water suppliers. The Act, which is devoid any supporting legislative findings, appears on its face to simply reflect the power of the agricultural lobby. Under the Due Process Clause, the strength of a special interest advocate, standing alone, is an insufficient justification for legislative distinctions in a society governed by the rule of law.

Finally, it bears emphasis that the allegations of this Complaint fit far more comfortably in the realm of due process than in the realm of takings. The basic purpose of the Takings Clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Further, the Supreme Court has explained that the Takings Clause "is designed not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis in original). Thus, the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power," the requirement to pay compensation. *Id.* at 314. On the other hand, the basic purpose of the Due Process Clause is to block egregiously

arbitrary and unreasonable governmental action and to support injunctions against such unconstitutional government action in appropriate cases. *See St Joseph Abbey v. Castille, supra.*

Given these understandings of the Takings and Due Process Clauses, it is apparent that Appellants' allegations are better viewed as raising a due process issue than a takings issue. The Appellants' basic objection to the Act is that it confers an unfair advantage on some water users relative to others for no apparent reason other than that the legislature has opted to favor the former group. In other words, the objection is that the legislation is arbitrary and unreasonable. The obvious remedy for this type of defective legislation is to declare it invalid. On the other hand, it would not serve the cause of justice and fairness to apply the Takings Clause and compensate financially those water users who do not enjoy the same special advantage as agricultural water users. That application of the Takings Clause would leave the arbitrary legislative distinctions in the Act in place and saddle the general taxpayer with the financial burden of making up for this unfairness to other water users.

IV. THE PUBLIC TRUST DOCTRINE ATTACHES TO NON-TIDAL RIVERS, AND APPELLANTS HAVE BROUGHT A VIABLE CLAIM THAT THE ACT'S AGRICULTURAL REGISTRATION PROVISION HAS VIOLATED THE PUBLIC TRUST DOCTRINE.

Finally, CRK supports Appellants' claim that the Act violates the Public Trust Doctrine. In rejecting this claim, the trial court noted that tidal waters were subject to the public trust doctrine, and side-stepped the Appellants' claim in part by suggesting that the public trust does not attach to non-tidal waters. R. pp. 16-17. The circuit court overlooked well-settled law establishing that both tidal and non-tidal navigable waters are held by the State in public trust. Correcting for this error and considering the Act in light of the Public Trust Doctrine, the Act's

agricultural registration provision violates the State's duty to preserve and responsibly manage surface water held in trust for the public's use and enjoyment.

A. The Public Trust Doctrine Attaches to Non-Tidal Navigable Rivers.

"The State, as a sovereign, holds the property right of unobstructed navigation of the navigable waters of the State in trust for the people of the State and of the United States." *State ex rel. Lyon v. Columbia Water Power Co.*, 63 S.E. 884, 890, 82 S.C. 181, 193 (1909). All navigable waters of the State, both tidal and non-tidal, are held in trust by the State for public use and benefit. *See id.* at 186, 887 (enjoining obstruction of non-tidal navigable waters because the State as trustee of navigable waters has obligation to protect the valuable public right of navigation); *see also S.C. Steamboat Co. v. Wilmington C. & A.R. Co.*, 46 S.C. 327, 24 S.E. 337, 339 (1896) (finding the Pee Dee River to be navigable, and a public highway pursuant to Constitution); *Rice Hope Plantation v. S.C. Public Service Authority*, 216 S.C. 500, 59 S.E.2d 132, 144 (stating that "the waters of the ocean and its bays, and of public watercourses and lakes, ... are part of the public domain."); *Sierra Club v. Kiawah Resort Assocs*, 318 S.C. 119, 127-128, 456 S.E.2d 397, 402 (1995) ("everyone has the inalienable right to ... recreate upon the high seas, territorial seas and navigable waters as well as to land on the seashores and riverbanks."). Indeed, the South Carolina Constitution declares that "all navigable waters of the State shall forever remain public highways ...." S.C. Const. art XIV, § 4 (emphasis added). Given the unique importance of navigable waterways, the law confers special treatment of these resources as common property by virtue of a public easement. Barton H. Thompson, Jr., *The Public Trust Doctrine: A Conservative Reconstruction and Defense*, 15 SOUTHEASTERN ENVTL. L.J. 47, 67 (Fall 2006).

B. The Act's Agricultural Registration Provision Violates the Public Trust Doctrine.

"The control of the State for the purposes of the trust can never be lost, except as to such [public trust property] 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." *Sierra Club v. Kiawah Resort Assocs*, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) *citing to Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 453 (1892). In *Kiawah Resort*, this Court addressed the question of whether the State's approval of a dock permit constituted a violation of the State's obligations under the Public Trust Doctrine. *Id.* The Court's determination of whether the State had lost control of public trust property turned on an examination of the relevant regulations concerning dock permits. *Id.* Because the regulations stated that "no permit shall convey, nor be interpreted to convey, a property right in the land or water in which the permitted activity is located," this Court concluded that the State had not lost control of the public resource. *Id.*

Here, by contrast, the Act does purport to convey public trust assets. The Act states that a "permit does not convey a property right in the water to the permittee." S.C. Code Ann. § 49-4-110(A) (emphasis added). The Act does not make the same statement concerning agricultural registrations. The General Assembly could have added registrations to this section but chose not to do so. Under this Court's rules of statutory construction, the word "registration" cannot be read into the statute. *See Kinard v. Moore*, 220 S.C. 376, 68 S.E.2d 321, ***14 (1951) ("The court has no right to add the words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy"); *see also Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (stating "that to express or include one thing implies the exclusion of another, or of the

alternative."). The omission of registrations in the Act's declaration that issuance of a permit does not convey to the permittee a property interest in water leads to the conclusion that registrations do convey a property right in the quantity of surface water registered. Therefore, under the reasoning of *Kiawah Resort*, the State has, in violation of its duty to protect public trust assets, attempted to grant away large quantities of navigable surface waters withdrawn by agricultural registrants. *See Sierra Club v. Kiawah Resort Assocs*, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) *citing to Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 453 (1892).

Other features of the Act concerning agricultural registrations should leave no question that the Act has effectively relinquished control over public trust assets to the detriment of the public. When an agricultural user submits an application for a registration, the Act gives no consideration to whether the proposed water quantity would be used efficiently or beneficially, now or at any time. *Compare* S.C. Code Ann. § 49-4-35 with § 4-9-80(B)(6) and (7). The registered amount of surface water for withdrawal is conferred in perpetuity. S.C. Code Ann. § 49-4-35. Thus, the State has forfeited its ability to manage its public trust asset for future generations. *See* Robert H. Abrams, *Water Law Transitions*, 66 S.C. L. REV. 597, 617-620 (Spring 2015). In doing so, the legislature has abdicated its trust over surface waters of the State by relinquishing large quantities of surface water to the absolute control of private agricultural entities. *See Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 453 (1892). "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties ....").

CONCLUSION

For the foregoing reasons, this Court should reverse the circuit court's decision denying that Appellants hold any riparian property interest in using water, reverse the circuit court's refusal to permit Appellants to invoke the public importance exception to standing doctrine, and reverse the circuit court's conclusion that the Public Trust Doctrine does not attach to non-tidal navigable rivers. Should this Court decide Appellants' takings claim, CRK respectfully disagrees with Appellants' takings theory that the Act has taken their riparian common law rights, and ask that this Court reject this claim. Should this Court decide Appellants' claim based upon the Public Trust Doctrine, CRK respectfully asks this Court to rule that the agricultural registration provisions of the Act violate the Public Trust Doctrine.

Respectfully Submitted,

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Nov. 14, 2016.

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BARNWELL COUNTY
COURT OF COMMON PLEAS
The Honorable R. Markley Dennis, Jr.

Appellate Case No. 2016-000428

JAMES JEFFERSON JOWERS, SR., ANDREW J. ANASTOS,
BEN WILLIAMSON, MELANIE RUHLMAN, AND
ANTHONY RUHLMAN, ... APPELLANTS,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL, ... RESPONDENT.

CERTIFICATE OF SERVICE

I certify that I have served upon the Parties' counsel Congaree Riverkeeper's Motion for Leave to File a Brief of *Amicus Curiae* with Brief conditionally attached, and Motion to Admit John D. Echeverria *Pro Hac Vice* as co-counsel for Congaree Riverkeeper, by depositing a copy of it in the United States Mail, postage prepaid, and by electronic mail, on this the 14 day of November, 2016, addressed to counsel of record, as follows:

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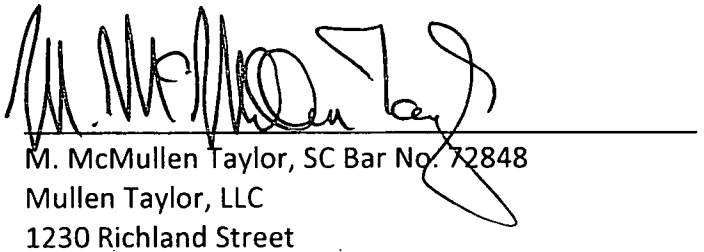

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