STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. 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.

PETITION FOR REHEARING OF APPELLANTS

Amy E. Armstrong
Amelia A. Thompson
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Post Office Box 1380
Pawleys Island, SC 29585
Telephone: (843) 527-0078

Attorneys for the Appellants

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Georgetown, South Carolina

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Pursuant to SCACR Rule 221(a) and SCACR Rule 240(i) the Appellants James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman respectfully petition this Court for a rehearing of Opinion No. 27725, dated July 19, 2017. Rehearing is warranted when the Court has overlooked or misapprehended an argument. Kennedy v. S.C. Retirement System, 349 S.C. 531, 564 S.E.2d 322 (2001).

Summary of Argument

The July 19, 2017 majority Opinion misapprehended the Public Trust Doctrine, misapprehended the nature and scope of the Surface Water Withdrawal Act's registration program, and overlooked the far-reaching implications resulting therefrom.

While recognizing the existence of the Public Trust Doctrine, the majority inexplicably dismissed its applicability here in stating that "it is not necessary that we determine whether the public trust doctrine even applies in this case." Opinion No. 27725, dated July 19, 2017 (hereinafter "Opinion"), p. 40. It is unclear whether the majority understands that waters of South Carolina are a resource covered by the State's Public Trust. But it is clear that the majority did not undertake the Public Trust Doctrine analysis, as set forth in Illinois Central R. Co. v. Illinois. The central purpose of that doctrine is to ensure that the State does not sell or give away ("dispose of") trust assets – such as water – in perpetuity. In other words, the State is required to retain control of trust assets, including the ability to take them back if they are later needed by the State and its people. Instead the majority misunderstood the Appellants' argument as whether the registered withdrawals "may endanger assets held in trust by the State." Opinion, p. 42.

The Public Trust Doctrine, as established by the United States Supreme Court, required this Court to perform a more formal analysis of the Act's registration program. Illinois Central R.

Co. v. Illinois, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892). After recognizing the State's surface waters as trust assets, a proper inquiry would begin with the question: did the Legislature, in passing the Surface Water Withdrawal Act, permanently dispose of any amount of the State's water resources? If the answer to this question is "yes," then the doctrine requires the Court to assess whether those transfers, in this case water transfers via registrations under the Act, fit within one of the two limited exceptions that allow permanent disposals to sometimes occur. In this part of the inquiry, the Court must ask: Do the transfers, *in toto*, constitute a small or *de mininis* amount of water?; Or, do the transfers further the purposes of the trust, e.g., by enhancing the value of remaining trust assets?

Once the Court performs this requisite analysis, Appellants believe that the Court would find that the registrations are permanent disposals of trust assets – the State has relinquished the power to get those assets back if needed by the State or its people. In fact, the Act created vested consumption rights for those private users that the State can revoke only in cases where the registered water user "substantially exceeds" the amount of the registration, i.e., substantially violates the State's grant. The Court would also find that the permanent water transfers initiated by the Act do not fit within either of the two "no permanent disposal" exceptions noted above. The total amount of water being given away to private parties is enormous; and, there is no evidence that giving the water to these parties will further the purposes of the trust, which are limited to fishing, navigation, waterborne commerce, and recreation.

In sum, the majority erred in failing to recognize that (1) surface waters are public trust assets; (2) the Act's registration provisions created permanent transfers of trust assets; (3) the State has no control or ability to reduce or modify the registered withdraw amount; and (4) this

permanent disposal is neither *de minimis*, nor in furtherance of trust purpose, but instead in contravention of, the public interest.

ARGUMENT

I. The Public Trust Doctrine Places A Special Affirmative Obligation on the State to Protect Trust Assets, and is Applicable Here

"When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties." Sax, Joseph, "Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," 68 Mich. Law Rev. 471, 490 (1969-1970). "[C]ertain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs. It is thought that, to protect those rights, it is necessary to be especially wary lest any particular individual or group acquire the power to control them." Id. at 484.

State courts cannot satisfy the Public Trust Doctrine if they fail "to distinguish between the government's general obligation to act for the public benefit, and the special, and more demanding, obligation which it may have as a trustee of certain public resources." Id. at 478. Put differently, state courts, including this Court, have a "judicial responsibility to examine legislative authority . . . for its consonance with the state's special obligation to maintain the public trust." Id. at 511.

The U.S. Supreme Court set forth the analysis for public trust doctrine cases in Illinois Central as such: "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." Illinois Central R. Co. v. Illinois, 146 U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1042 (1892). Where a State's grant fails to "preserve such [public trust] waters for the use of the public," it violates the Public Trust Doctrine. Illinois Central The public trust doctrine gives the State "continuing supervisory control over its navigable waters . . . [and] prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust." National Audubon at 445, 727 (citing Johnson, "Public Trust Protection for Stream Flows and Lake Levels," 14 U.C. Davis L. Rev. 233 (1980)). In the instant case; however, the registrations are tantamount to a vested right because as long as the registrant is acting within the grant, the State is powerless to alter that grant to curtail that use.

South Carolina has adopted Illinois Central's Public Trust analysis; however, South Carolina's law is relatively undeveloped in terms of analyzing the interplay between consumptive water rights and the public trust doctrine. See, e.g., Sierra Club v. Kiawah Resort Assocs., 456 S.E.2d 397, 402 (S.C. 1995); Alston v. Limehouse, 39 S.E. 188, 191 (S.C. 1901); Heyward v. Farmers' Mining Co., 19 S.E. 963, 973 (S.C. 1894); State v. Head, 498 S.E.2d 389, 392 (S.C. Ct. App. 1997). This lack is understandable considering that South Carolina operating under a system of common law riparian rights, up until 2010 when the legislature passed the Surface Water Withdrawal Act and moved to a system of regulated riparianism. However, a number of other states have utilized the Illinois Central test in the context of consumptive water rights. In addition, states like Hawaii and Mississppi, similarly employ a system of regulated riparianism. In this way, cases applying the Public Trust Doctrine to water resources in regulated riparian states are instructive in applying the landmark decision in Illinois Central. Mullvaney, T., "Instream Flows and the Public Trust," 22 Tul. Envtl. L.J. 315, 354-67 (2008-2009).

As is made clear through the long line of cases following Illinois Central, "the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." National Audubon Society v. Superior Court, 33 Cal.3d 419, 441 (1983).

The court in National Audubon explained that the Public Trust Doctrine serves the function of "preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty on the state to take such uses into account in allocating water resources." Id. At 368, 452.

Three types of restrictions on governmental authority are often thought to be imposed by the public trust:

> First, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses. The last claim is expressed in two ways. Either it is urged that the resource must be held available for certain traditional uses, such as navigation, recreation, or fishery, or it is said that the uses which are made of the property must be in some sense related to the natural uses peculiar to that resource.

Sax, J., "Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," 68 Mich. Law Rev. 471, 477 (1969-1970).

The majority should have undertaken the analysis set forth in Illinois Central R. Co. v. State of Illinois, 146 U.S. 387, 13 S.Ct. 110 (1892). That analysis includes determining:

1. whether Public Trust Resources are at issue, and if so,

2. whether the State has transferred those trust resources in perpetuity to private parties, and if so,

3. whether the transfer is in furtherance of trust purposes and/or whether the transfer "substantially impair[s] the public interest in the . . . waters remaining."

A. Surface Waters Are Public Trust Resources

The majority holds that "it is not necessary that we determine whether the public trust doctrine even applies in this case." Order at 40. It is unclear whether the majority is implying that the waters themselves are not public trust resources, but such an implication is contrary to a long line of cases, as well as the South Carolina Constitution, which declares that: "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). Moreover, the U.S. Supreme Court in Illinois Central clearly held that the public trust doctrine applies to "navigable waters."[1] Id. (deciding whether the State can give a railroad control over

[1]"It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. . . . 'tide water,' with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones;' and writers on the subject of admiralty jurisdiction 'took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the establishes doctrine in England, that

that water by grant). That Court explained that when the State holds title to the lands under navigable waters, the "title necessarily carries with it control over the waters above them." Illinois Central at 118, 452. This Court has recognized that the "source of the public rights is the navigable water, and the underlying land is open to those activities of the public that are closely connected with the water . . ." Lowcountry Open Land Tr. v. State, 347 S.C. 96, 111, 552 S.E.2d 778, 786 (Ct. App. 2001) (citing People v Johnson, 7 Misc.2d 385, 166 N.Y.S.2d 732, 736-37 (1957)).

> The doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable; . . . The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The **doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment** - a reason as applicable to navigable fresh waters as to waters moved by the tide.

Illinois Central at 112, 436.

The purpose of the trust over these waters is for people to "enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." Id. at 118, 452. No authority suggests that our surface waters – rivers, streams, lakes and the like – are not public trust resources, and the majority cites none.

B. The State Has Permanently Transferred Public Trust Property

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the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters.'" Illinois Central at 435-436.

"While all citizens may use and enjoy these [public trust] lands subject to the State's control, no citizen has an inherent right to take possession of or alter these lands." Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 29, 766 S.E.2d 707, 715 (2014). The "core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state." National Audubon, 33 Cal.3d 419, 425, 658 P.2d 709, 712 (1983).

National Audubon involved the state's grant of a permit to the City of Los Angeles to divert the flow of four streams flowing into Mono Lake. Id. The court considered the purpose and scope of the trust, as well as the state's powers and duties as trustee, and noted that "the rights of the people in the navigable rivers of the State are paramount and controlling. The State . . . cannot grant the rights of the people to the use of navigable waters flowing over [public trust lands]." Id. at 436. Thus, "parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right" in them. Id. at 358.

However, the registrations created under the Surface Water Act are tantamount to a grant, or vested right, because only if the registrant substantially exceeds the limits of that grant may the State take action to alter, modify or limit the use. Just as with any other grant, the transferee is legally within her bounds to use the transferred asset as she wishes without being subject to control by the grantee, so long as the use is consistent with the grant.

The grant of vested rights is unmistakable, as most clearly expressed in Section 49-4-35(B), which grandfathers existing agricultural uses such that once the Act was passed, those existing private users were automatically given the right to withdrawal as much water as their highest ever reported level or the largest volume of water that their existing infrastructure could

handle. S.C. Code Ann. § 49-4-35(B). These permanent rights to withdraw water were conveyed the moment the Act became law. The majority refers to this section of the Act, but entirely overlooks its import: immediately upon passage of the Act, the State permanently transferred 5.6 billion gallons per day – 63.2 billion gallons per year – of public trust assets to private users. R. pp. 178-200. In addition, **the Act on its face requires the State to grant this special class of private users the right to a set withdrawal amount in perpetuity without regard to reasonableness, future conditions or future uses**. S.C. Code Ann. § 49-4-35(C). These permanent transfers of public resources for private purposes occurred when Act was made law. In this way, the Act has caused the State to transfer or dispose of public trust assets.

C. The State has No Control of the Transferred Public Trust Assets

South Carolina has recognized that public trust resources cannot be placed entirely beyond the direction and control of the State. Heyward v. Farmers' Min. Co., 42 S.C. 138, 19 S.E.2d 963 (1884). Here, the State's action parallels the central issue in Illinois Central, namely "whether the legislature was competent to thus deprive the state of its ownership of the submerged lands . . . and of the consequent control of its waters; or, in other words, whether [a private entity] can . . . control the waters by the grant, against any future exercise of power over them by the state." Illinois Central at 118. While the Act expressly states that a "permit does not convey a property right in the water," no corollary exists for registrations. See S.C. Code Ann. § 49-4-110. Instead, the Act creates permanent vested rights, and only if a registrant ***substantially exceeds*** that vested right (and the violation causes detriment) can the state take action. S.C. Code Ann. § 49-4-35(E) ("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 . . . and the withdrawals result in detrimental effects to the environment or human health**") (emphasis added). In other words, the user has to violate his registration in order for the State to be able to take any action. In this way, the private registered user is entirely in control of how the transferred water is used.

The majority overlooked, and instead confused, the critical distinction between permits, over which the State has some measure of control, and registrations, over which the State has lost control. Once the public trust assets were transferred permanently to private users by the passage of the Act in Section 49-4-35(B), and registrations issued after passage of the Act, the State is powerless to limit those vested rights. This occurred because the Act prevents the State, vis-a-vis DHEC, from taking any action to alter or modify the registered withdrawal amount so long as the grantee is substantially in compliance with the grant. The registered users can exceed their registered withdrawal amount and DHEC cannot take any action if the violation is not "substantial." S.C. Code Ann. § 49-4-35(E).

In this way, the state is powerless to curtail depleting of surface waters by a registered user unless the registrant is in **substantial** violation of its registered amount **and** that withdrawal is causing detrimental effects on the environment or human health. Id. The impairment to waters can occur even at the registered amount. Indeed the Appellants have already witnessed the detrimental impacts that occur when the rivers have insufficient flow. R. pp. 178-200. Yet neither the state, much less the Appellants, could do anything to prevent that impairment. In other words, the disposal of these public trust waters is a complete and utter relinquishment of control over the 6.2 billion gallons per day – 68 billion gallons per year of public trust assets that

have been granted to private users. R. pp. 178-200. Even under extreme drought conditions when flow is severely low and unable to support aquatic species, a registered user can take every drop of water from a waterway so long as she has not substantially violated the registration amount. In this way, the State has lost control of substantial public trust assets.

Contrary to the majority's reading, the plain language of the Act does not give the State the ability to regain control of the assets permanently transferred to registered users. Neither does the Drought Response Act ("DRA") provide any relief, as claimed in footnote 15 of the Opinion. The DRA only allows the state to curtail "nonessential uses," while exempting "essential uses" from curtailment of use. S.C. Code Ann. § 49-23-70(C). The DRA includes 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. § 49-23-10, et seq. Thus, the Drought Response Act does not impose limitations on agricultural uses during times of drought because those uses are defined as exempt essential uses.

The U.S. Supreme Court in Illinois Central explained that when an Act "put it in the power of the company" to determine the use of the trust resource and the "impairing of public right of navigation placed no impediments upon the action of the" grantee, such a law violates the Public Trust Doctrine. Illinois Central at 451. Similar to Illinois Central, the Surface Water Withdrawal Act "sanction[s] the abdication of the general control of the state" over navigable waters and is "not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public." Id. at 452-53. The state cannot "make a direct and absolute grant of the waters of the state, divesting all the citizens of their common

right. It would be a grievance which never could be long borne by a free people." Arnold v. Mundy, 6 N.J.L. 1, 77 (1821). Yet that is exactly what the Surface Water Withdrawal Act does.

The minority correctly identifies what is at stake in this disposal of trust assets: the State's grant may not deplete our rivers today, but in one year, 5 years or 50 years, when conditions change and water levels decline, the registrants can continue withdrawing the same amount, even if it harms the public interest, as long as they have not substantially violated the state's grant.

D. The State's Disposal of Public Trust Property is Not in Furtherance of Trust Purposes and is Substantial

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)). Traditional trust purposes include navigation, fishing, and other water-borne activities. See, e.g.,Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co., 148 S.C. 428, 146 S.E. 434 (1928); Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 127–28, 456 S.E.2d 397, 402 (1995). Importantly, private economic development is not a protected trust purpose. In re Water Use Permit Applications (Wai'ahole I), 9 P.3d 409 (Haw. 2000); In re Water Use Permit Applications (Wai'ahole II), 93 P.3d 643 (Haw. 2004).

The majority opinion overlooks whether the transfer is in furtherance of these trust purposes in accordance with Illinois Central, instead jumping to the conclusion that the State is presently able to promote the "interests of the public." Order, p. 41. In so doing, the majority

has failed to "distinguish between the government's general obligation to act for the public benefit, and the special, and more demanding, obligation which it may have as a trustee of certain public resources." Sax, J. at 511. The majority's conclusion that the Act "is designed to allow use of surface waters to promote the interests of the people, while protecting against any use . . . that is contrary to those interests," contravenes the plain language of the Act. Opinion, p. 42. The majority amplifies this error in concluding that "the Act grants DHEC the power to subsequently restrict . . . registered surface water usage when necessary to protect the public interest." Id.

First, nothing in the Act claims, much less implies, that the registrations "promote the interests of the people." To the contrary, the Act on its face transfers these public trust waters to private users in perpetuity. And the Act expressly **denies** DHEC the ability to reduce or modify registered withdrawals as long as the private user is within the registered limits, or even of the user exceeds those limits by an insubstantial amount. Second, while it is true that the Act requires DHEC to make a reasonableness determination for *permits*, the Act does not require any reasonableness determination for *registrations*. Compare S.C. Code Ann. §§ 49-4-35 & 49-4-80(B).

The majority jumps to its conclusion without undertaking the Illinois Central analysis to determine whether the transfer promotes the interests of the public or does not cause substantial impairment of the public interest in the waters remaining. The Act contains no language to support a conclusion that the Act promotes the people's interest. This Court recently defined "the people" as "a term meaning the citizens of a particular jurisdiction. That interpretation derives from the commonly understood definition of 'the people' as '[t]he mass of

ordinary persons; the populace.'" Kiawah Dev. Partners at 716 (citing The American Heritage Dictionary 919 (2d College ed.1982)). This Court also held that the State cannot allow an activity that substantially impairs the public interest in public trust waters. Sierra Club v. Kiawah Resort Assosc. 318 S.C. 119, 456 S.E.2d 397 (1995); McQueen v. S.C. Coastal Council, 354 S.C. 142, 580 S.E.2d 116 (2003). "To allow the benefits to a private [interest] to override the interests of the people of South Carolina . . . defeats the very purpose of the public trust doctrine." Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 30–31, 766 S.E.2d 707, 716 (2014).

In sum, the Act entirely fails to protect the public assets which have been granted permanently to private users. The Act does not allow DHEC to determine whether a registered use is reasonable. The Act does not allow DHEC to restrict a registrant's water usage to protect the public's interest. Order, p. 42. The Act only allows DHEC to alter or restrict a registrant's water use when it has substantially violated its registration amount *and* caused detriment to the environment or public health. S.C. Code Ann. § 49-4-35(E). It bears restating that unless both a substantial violation and degradation have occurred, DHEC is powerless to restore these public trust assets to the public, where they rightfully belong.

In addition, the disposal authorized by the Act is substantial. In CWS Fisheries, Inc. v. Bunker, the court rejected the argument that the public trust analysis could focus on specific, isolated disposals of trust assets. 755 P.2d 1115 (Alaska 1988). In that case, the Act allowed transfers of individually small transfers, but the court held that the public trust analysis required looking at the overall impact of the statute. Id. The court noted that the

> case does not involve a mere isolated conveyance of a remove piece of tideland. The statute at issue here made available for private ownership virtually all Alaska tidelands . . . To hold that persons receiving title under that statute hold the fee free of any public trust obligations would, we believe, amount to a substantial impairment of the public's interest in the state tidelands as a whole.

Id. at 1120.

Similarly, this Court cannot look at the isolated registrations that have been or could be granted (even though Appellants assert that the trust waters that have already been transferred is substantial). Instead, the Court must consider the overall impact of the Act and the fact that the Act as a whole makes available virtually all of South Carolina's surface waters available for private ownership. In this way, notwithstanding the 68 billion gallons annually that have already been given away, the Act's far-reaching impacts are substantial.

II. The Plaintiffs Are Entitled to Relief Under the Public Trust Doctrine and Need Not Wait to Challenge Unreasonable Uses

The majority opinion rests on its determination that the Appellants' sole remedy is to challenge registered withdrawals as unreasonable, and seek injunctive relief, declaratory relief or damages;[2] however, the majority fails to acknowledge that the Plaintiffs may equally challenge the State's action because it disposes of public trust assets. National Audubon, discussed above, is directly. That case involved permits issued by the California Water Resources Boar to the Department of Water and Power of the City of Los Angeles to divert the flow of four streams flowing into a lake. National Audubon, 658 P.2d 709, 189 Cal. Rptr. 346, 12 Envtl. L. Rep.

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[2]Setting aside the fact that a riparian owner can only bring an action for damages if the registration is violated, no similar language exists to allow a riparian owner to seek injunctive or declaratory relief. While Plaintiffs disagree with the majority's assessment that a registrant's presumption of reasonableness is rebuttable, it is not necessary to revisit that argument because this petition rests on the majority's misapprehension of the Public Trust Doctrine.

20,272 (Cal. 1983). The National Audubon court presented the issue as whether the plaintiffs can "challenge the Department's permits and licenses by arguing that those permits and licenses are limited by the public trust doctrine, or must the plaintiffs challenge the permits and licenses by arguing that the water diversions and uses authorized thereunder are not 'reasonable or beneficial' as required under the California water rights system?" Id. at 717. Similar to South Carolina's Surface Water Act, California statutory law imposes a requirement that a permitted use be "beneficial or reasonable." The National Audubon court concluded that the plaintiffs can maintain a public trust doctrine suit without challenging compliance with the underlying reasonableness requirement codified in state statutory law. Id.

III. The Majority Misapprehended the Nature of Plaintiffs Claim and the SWA Itself

That the courts "have never held [that] the public trust doctrine prohibits the State from allowing riparian landowners to use the water" (Opinion, p. 40), is misplaced and reflects the majority's misapprehension of the law. First, common law riparian rights, which allow riparian owners reasonable use of the water, do not stem from State action, as is the case here where a State law dictates that the State permanently give certain private users the right to take public trust water. Second, a riparian owner's use is always bound by reasonableness such that any unreasonable use of water can be challenged by a downstream riparian owner, unlike the Act's registrants whose use of water can only be challenged if the user is substantially violating the registered amount and such violation is causing detriment to human health or the environment. S.C. Code Ann. § 49-4-35(E). In other words, the registered use could be completely unreasonable – and downright harmful – eliminating every drop of water from a waterway, but the State could not take any action as long as the registrant did not substantially violate the grant

amount. In this way, the Act allows registrants to completely destroy the public trust as long as they do not violate their registered amount. Finally, the Act, which is relatively new, (1) has never been challenged, (2) dramatically changes riparian owners' rights to reasonable use, and (3) grants vested rights in public trust assets for private use.

Moreover, no plaintiff can ever bring an action for damages unless the registered user is in violation of its registration. 49-4-110(B). Under this scenario, a downstream riparian owner like an industrial user who is forced to cease operations, losing millions of dollars, could not obtain damages for its loss as long as the registrant is in compliance with its permanent withdrawal amount. The issue is not whether the standard of proof has changed in a damage action, it is whether a party can even get in the courtroom door when a registrant is not exceeding the registered amount, and is thus in compliance with the registration.

IV. Plaintiffs Have Standing to Enforce Public Trust Doctrine

"For a doctrine whose overarching principles might be thought of as public access to trust resources and to decision makers who allocate those resources, public access to the courts to ensure enforcement requires no great intellectual leap." Blumm, Michael; Schwartz, Thea, "Mono Lake and the Evolving Public Trust in Western Water Law," 37 Ariz. L. Rev. 701 (1995). Indeed, the public's standing to enforce public trust purposes has long been recognized, and significant support exists in state courts for private citizens or organizations suits alleging state and local government violations of the public trust doctrine. See, e.g., Paepcke v. Pub. Bldg. Comm'n, 263 N.E.2d 11 (Ill. 1970) (holding that public trust doctrine allows taxpayers to challenge conversion of city parks); Marks v. Whitney, 491 P.2d 374 (Cal. 1971) (holding that member of general public has standing to request court to declare public trust easement on

privately-held tidelands); Gewitz v. City of Long Beach, 330 N.Y.S.2d 495 (Sup. Ct. 1972) (holding that state resident has standing to dispute city ordinance restricting beach access); United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n 247 N.W.2d 457 (N.D. 1976) (holding that public trust doctrine allows citizens to seek injunction on issuance of future water permits); Superior Pub. Rights, Inc. v. State Dep't of Natural Res., 263 N.W.2d 290 (Mich. Ct. App. 1977) (holding that nonprofit organization whose members were residents may seek to invalidate agreements that permitted private use of public trust lands); Sekirk-Priest Basin Ass'n v. State ex rel. Andrus, 899 P.2d 949 (Idaho 1995) (holding that public trust doctrine conferred standing to environmental group to challenge timber sale on state lands); Center for Biological Diversity, Inc. v. PPL Group, Inc., 83 Cal. Rptr. 3d 588 (Ct. App. 2008) (holding that private parties have standing to bring an action to enforce protection of wildlife because it is a public trust resource).

As the Illinois Supreme Court noted:

> If the "public trust" doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time.
>
> Paepeke at 18.

Similar to South Carolina, Hawaii's public trust doctrine is embodied in its constitution. The Hawaii Supreme Court authored an exhaustive analysis of standing in a public trust case involving water rights. In that case, the court "held that a public trust claim can be raised by members of the public who are affected by potential harm to the public trust–a showing of injury-in-fact is not required for standing." S.C. Law Review, Vol. 68, No. 5 (Spring 2017) (citing In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit

Applications, 287 P.3d 129, 183 (Haw. 2012). "**The court reasons that a citizen's interest in the public trust was a vested property interest and therefore, standing was based upon due process**. Id. at 141. The court ruled that "where uncertainty about present or potential threats of serious damage or degradation to the public trust exists, a 'trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource.'" In re 'Iao at 184. The Hawaii court further explained that:

> The current standing formulation for public trust claims, specifically the "injury in fact" requirement, see Akau v. Olohana Corp., 65 Haw. 383, 388–89, 652 P.2d 1130, 1134 (1982), conflicts with the broad constitutional basis underlying the public trust doctrine. See Waiahole I, 94 Hawai'i at 132, 9 P.3d at 444 ("Article XI, section I and article XI, section 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai'i.") Indeed, the "injury in fact" test "relates essentially to individual harm and therefore emphasizes the private interest...." In re 'Īao, 128 Hawai'i at 281, 287 P.3d at 182 (Acoba, J., concurring). "Such a formulation would appear ill-suited as a basis for determining standing to sue to vindicate the public trust doctrine." Id. (citing Akau, 65 Haw. at 388–89, 652 P.2d at 1134).

Kilakila 'O Haleakala v. Bd. of Land & Nat. Res., 131 Haw. 193, 212–13, 317 P.3d 27, 46–47 (2013).

The court in In re 'Ioa concluded that because its Public Trust Doctrine is embodied in Hawaii's constitution, any public citizen of the State who may be affected by potential harm has standing to bring an action under the Public Trust Doctrine. In re 'Iao, 287 P.3d 129 (Haw. 2012).

Upon a determination that the plaintiff is asserting a claim pursuant to the public trust doctrine embodied in the constitution, "members of the public who are affected by potential harm to the public trust" have standing to bring that claim. In re 'Īao, 128 Hawai'i at 281, 287 P.3d at 182. Under this test, a plaintiff would articulate how he or she, as a member of the public, is adversely affected by the potential harm to the public trust. Such a test accords with

the notion that where the public trust is at issue, "the common good is at stake, and this court is duty-bound to protect the public interest." Id.; see also Arizona v. Cent. for Law in Pub. Interest v. Hassell, 172 Ariz. 356, 837 P.2d 158, 168–69 (App. 1991) ("Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for the dispositions of the public trust.... The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res.")

> Public standing to enforce the trust has particular importance in the water rights context. First, it overcomes whatever standing and burden of proof problems a member of the public might encounter in seeking to enforce the anti-waste and beneficial use requirements of state water law. Members of the public have seldom enforced these requirements, a legacy of the anachronistic concept that water allocation is a private law matter. The trust doctrine makes it clear that water allocation is, in fact, an issue of the greatest public significance.
>
> Second, universal public standing to enforce the trust makes clear that the trust confines, as well as enables, state water regulators; that is, the trust doctrine is not only a grant of authority to continuously supervise and periodically reallocate water uses, but also an obligation to do so. And this obligation is one that the public may enforce in court.

Michael Blumm and Thea Schwartz, "Mono Lake and the Evolving Public Trust in Western Water," 37 Ariz. L. Rev. 701, 712-13 (1995).

The Appellants are citizens of South Carolina and riparian property owners who use the navigable waters along their properties for trust purposes, including fishing, swimming, tubing, boating, canoeing, kayaking, irrigation, and family gatherings. R. 161-177. "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). The disposal of vast amounts of navigable

waters, which are public trust resources, is an issue of great public importance. Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) ("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.") (citing Illinois Central R. Co. v. Illinois, 146 U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1042 (1892)).

When the State has granted private users the right to withdraw 68 billion gallons of public trust waters annually, it has allowed those users to make resource use decisions, thereby subordinating the broad public resource use to those private interests. R. pp. 178-200. As such, the matter is of great public importance and the majority erred in failing to conclude that the Plaintiffs have public importance standing.

The same rationale was adopted by the Illinois Supreme Court:

> If the 'public trust' doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time. The conclusion we have reached is in accord with decisions in other jurisdictions."

Paepcke v. Pub. Bldg. Comm'n of Chicago, 46 Ill. 2d 330, 341–42, 263 N.E.2d 11, 18 (1970) (citing Robbins v. Department of Public Works, 355 Mass. 328, 244 N.E.2d 577; Gould v. Greylock Reservation Com., 350 Mass. 410, 215 N.E.2d 114)).

In sum, Professor Sax best explains:

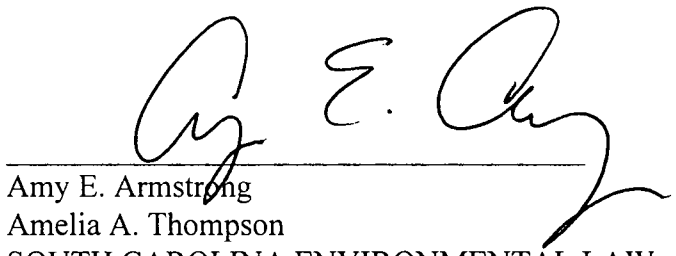
> In public trust cases-that is, a diffuse majority is made subject to the will of a concerted minority. For self-interested and powerful minorities often have an undue influence on

> the public resource decisions of legislative and administrative bodies and cause those bodies to ignore broadly based public interests. Thus, the function which the courts must perform, and have been performing, is to promote equality of political power for a disorganized and diffuse majority by remanding appropriate cases to the legislature after public opinion has been aroused.

Sax, J., p. 560.

CONCLUSION

WHEREFORE, the Appellants James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman seek an Order granting Rehearing, and ultimately reversing the lower court's conclusions with respect to standing and the public trust doctrine; concluding that the registration provisions of the Surface Water Withdrawal Act are unconstitutional for violating the State's special obligations under the Public Trust Doctrine; concluding that the Appellants have public importance standing; and striking down the registration provisions of the Act as unconstitutional.



Amy E. Armstrong
Amelia A. Thompson
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 430 Highmarket Street
Georgetown, SC 29440
Telephone (843) 527-0078
FAX (843) 527-0540

Attorneys for the Appellants

Georgetown, South Carolina

August 3, 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. 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

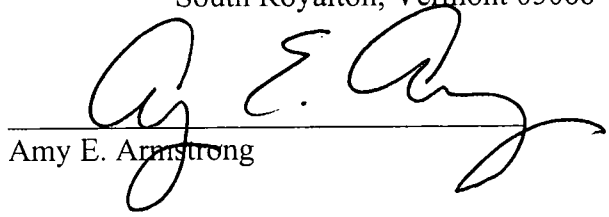
I hereby certify that on this date I served copies of the Appellants' Petition for Rehearing, upon counsel for the Respondent and Amicus Curiae by placing same in the United States Mail, First Class Postage Prepaid, addressed to:

J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

M.McMullen Taylor
1230 Richland Street
Columbia, SC 29201

Lisa Reynolds
Anderson, Reynolds, & Stephens, LLC
P.O. Box 87
Charleston, SC 29402

John D. Echeverria
Vermont School of Law
Post Office Box 96
South Royalton, Vermont 05068



Amy E. Armstrong

August 3, 2017

Georgetown, SC