THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BARNWELL COUNTY
Court Of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2016-000428

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

v.

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

1. Do Appellants have standing to bring this action?
2. Does this suit present a justiciable controversy?
3. Is this suit ripe for adjudication?
4. Do Appellants have a property interest to assert a takings or substantive due process claim?
5. Do Appellants have liberty or property interests to assert a procedural due process claim?
6. Does the Surface Water Withdrawal Act, S.C. Code Ann. § 49-4-10, *et seq*, deprive Appellants of any constitutionally protected rights?
7. Do Appellants have a claim based upon a public trust interest in state waterways?
8. Have Appellants established a claim for compensation?

STATEMENT OF FACTS

The South Carolina Department of Health and Environmental Control adopts the following summary from the background section of the Order under appeal:

> Plaintiffs reside or own property along creeks or rivers in Bamberg, Greenville and Darlington Counties. Not one of them resides in or owns land in Barnwell County where this suit is filed. [Record (R.). pp. 347, 348, and 349] (Response of Petitioners to DHEC's Interrogatories and Requests for Admission, pp.4 & 5, ¶10 and p.6, ¶2.) They do not allege any injury whatsoever tied to any withdrawals of water. In fact, Plaintiffs admit that no injury has occurred to their property, their use thereof or to themselves, and that they have not lost use of the waterways. [R. p. 349] (Plaintiff's response to DHEC's discovery requests at p. 6, ¶4 (admission). Instead they complain about "theoretical[] possib[ilities]" ([R. p. 39] Complaint, ¶35), and allege loss of rights to challenge withdrawals by registered upstream users or the possibility of interference with their own rights to take or consume water even though such agricultural withdrawals have occurred. They claim "a loss of riparian property rights, violation of due process rights and violation of the public trust doctrine on the day the Act became effective ([R. p. 347] Plaintiff's response to discovery requests at page 4, ¶9 (Interrogatories)), " but they have no standing to make

such claims when they have not been injured by a withdrawal.

Under the Act at issue, statutorily defined "registered surface water withdrawers" are required to register surface water withdrawals with the Department of Health and Environmental Control but are not required to obtain a permit. S.C. Code Ann. § 49-4-20(23) ("Registered surface water withdrawer" means a person who makes surface water withdrawals for agricultural uses at an agricultural facility that is filing a report pursuant to Section 49-4-50); §49-4-35(A) ("Registered surface water withdrawers must register their surface water use with the department on forms provided by the department . . . subject only to the reporting requirements of Section 49-4-50. [Those] withdrawers are authorized to withdraw surface water up to their registered amount."); §49-4-35(C) ("a proposed registered surface water withdrawer must report its anticipated withdrawal quantity to the department for determination as to whether that quantity is within the safe yield for that water source at the time of the request. . . A proposed registered surface water withdrawer may not begin his proposed withdrawals until he notifies the department of his anticipated withdrawals and the department provides written notification to the proposed registered surface water withdrawer that authorizes him to proceed, if the anticipated withdrawals are within the safe yield at the time of the request."); §4-9-20(25)("Safe yield" means 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. Safe yield is determined by comparing the natural and artificial replenishment of the surface water to the existing or planned consumptive and nonconsumptive uses."). Therefore, registered users cannot withdraw more water for agricultural purposes than is within the safe yield amount.

Plaintiffs claim no injury under the above statute other than alleged loss of rights to challenge withdrawals that have not occurred. Therefore, they have no legal basis for asking relief from this Court from events that have not happened, and they have no constitutional or other interest that has been infringed.

ARGUMENT

Appellants have brought this action challenging the constitutionality of the Surface Water Withdrawal Act without any injury to establish standing and without any property right that has been infringed. Instead, they make claims based upon possible future events and loss of water consumption that may never occur. They claim that the law limits their ability to protect against such events, but the Act does not remove any common law right that they may have to challenge any limitation on such water use. Appellants' case is based on speculation about hypothetical future events and such speculation is not a proper foundation for a lawsuit. In short, they seek an advisory ruling, but this Court has made quite clear that it "will not issue advisory opinions . . . ." *Sangamo Weston, Inc. v. National Sur. Corp.*, 414 S.E.2d 127, 130, 307 S.C. 143, 148 (1992).

I

APPELLANTS LACK STANDING TO BRING THIS ACTION

> Standing to sue is a fundamental requirement in instituting an action." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called "constitutional standing"; and (3) under the public importance exception. *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008).

Bodman v. State, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013). Appellants claim that they have constitutional standing and public importance standing, but they have neither, as found by the the Circuit Court.

A

Appellants Fail to Meet Constitutional Requirements for Standing

> The principle of standing under the United States Constitution is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Supreme Court has provided a three-part test to establish standing: First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61 (internal citations omitted).

ATC S., supra, 380 S.C. 191, 195-96, 669 S.E.2d 337, 339 (2008) "Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained." *Commander Health Care Facilities, Inc. v. S. Carolina Dep't of Health & Envtl. Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006).

The Circuit Court found that Appellants, "their property and their use thereof had not been injured by any agricultural water withdrawal and they have not loss use of the waterways." R. p. 4. "[T]hey have no injury at all." R. p. 4. Although they include an assertion without foundation in the record that "the Act is causing, and continues to cause, the loss of public uses" (Brief of Appellants at p. 35), Appellants do not argue that they have lost use of their land or the adjacent waterways. Instead, they claim injuries due to alleged denials of rights even though they have not suffered any loss of use of waterways to give them cause to assert such alleged rights. As stated by the Circuit Court:

> [Appellants] claim a loss of property rights to challenge a use under the law, but as discussed, *infra,* they have no property rights and have lost no right to challenge a loss as unreasonable.They claim a loss of public trust interest in the water, but they rely on cases

> applicable to tidal waters rather than fresh water. They have no public trust interest that has been violated as to the waters on which they border. Accordingly, [Appellants] have no standing and have not brought a justiciable controversy to this Court.

In other words, they claim a loss of property rights and public trust interests that they never possessed as an alleged basis for challenging losses that have not occurred.

Appellants contend that they "do not have to wait until they cannot make any consumptive use of the water to bring suit" (Appellants' Brief at p. 36), but the Circuit Court found that they lacked standing because they "have not been injured whatsoever by any agricultural water withdrawal." R. p. 14 (emphasis added).[1] What degree of loss of use might give Appellants standing in the future need not be reached because so far, they have no loss and therefore, no standing. As stated by the Circuit Court in discussing improper venue, Appellants' "decision to bring their suit in a county from which they are completely disconnected [Barnwell] underscores their lack of injury to support standing." R. p. 18.

B

Appellants Have No Public Importance Standing

> The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of "future guidance" that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance. *Baird*, 333 S.C. at 531, 511 S.E.2d at 75 ("[A] court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted); *Sloan v. Sanford*, 357 S.C. at 434, 593 S.E.2d at 472 ("[U]nder certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted).

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1 Appellants do not appear to rely on claims of future harm despite this reference to future consumptive use and their complaint's assertion of "theoretically possible" harm, nor could they do so. As found by the Circuit Court, a "'prospective concern of future harm' is not sufficient to satisfy the *Lujan* test." *Commander Health Care Facilities*, 634 S.E.2d at 667.

ATC S., Inc. v. Charleston Cnty., *supra*, 669 S.E.2d at 341.

Appellants reference DHEC's statement in its Petition for Extraordinary Relief to the Supreme Court that the law is significant, but they do not note that public interest for seeking original jurisdiction is not the same as public importance for establishing standing. As stated in *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 71, 753 S.E.2d 846, 848 (2014):

> Rule 245 is concerned with whether a case should be resolved by this Court in the first instance because of the public interest involved and the need for prompt resolution, whereas the public importance exception is concerned with whether a case is of such public importance that the requirement of standing should be waived. Thus, because the two rules aim to answer different questions—whether the public interest requires expeditious resolution of a case versus whether the public interest requires resolution of a dispute for future guidance despite the lack of standing—the grant of the petition for original jurisdiction has no effect upon whether the public importance exception applies.

Carnival Corp. 753 S.E.2d 846 at 853. *Carnival* found a lack of public importance standing. As found by the Circuit Court, "[s]uch importance is absent here, as well, for the reasons noted above." R. p. 7.

Appellants set forth no reason why future guidance is needed here other than "whether South Carolina will continue to recognize riparian rights or allow private-to-private property transfers in direct contradiction of our state constitution." Appellants' Brief at p. 40. As referenced above and discussed *infra,* Appellants have no property interests upon which to base their claims and they have suffered no loss of use. Further, as stated by the Circuit Court, "[t]he statute has been in effect for nearly five years since January 1, 2011, and DHEC is not informed that any other suits have been brought challenging the Act. Act No. 247, § 1 2010 S.C. Acts.

When Appellants do not complain of any actual or imminent water withdrawals affecting them and when other challenges have not been made to the law, 'future guidance' is not needed." R. p. 6 (Order at p. 6).

II

THIS CASE PRESENTS NO JUSTICIABLE CONTROVERSY AND IS NOT RIPE FOR ADJUDICATION

> "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983). *See also Hitter v. McLeod*, 274 S.C. 616, 266 S.E.2d 418 (1980). In determining a ripeness issue under the "case or controversy" requirement of Article III of the United States Constitution, federal courts use a two-factor test: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. *Fort Sumter Tours, Inc. v. Andrus*, 564 F.2d 1119 (4th Cir.1977) . . . *Thrifty Rent–A–Car Sys., Inc. v. Thrifty Auto Sales of Charleston, Inc.*, 849 F.Supp. 1083, 1085–86 (D.S.C.1991) (stating additionally that a "court should not decide a controversy grounded in uncertain and contingent events that may not occur as anticipated or may not occur at all").

Waters v. S. Carolina Land Res. Conservation Comm'n, 321 S.C. 219, 227-28, 467 S.E.2d 913, 917-18 (1996); *see also James v. Anne's Inc.*, 701 S.E.2d 730, 732, 390 S.C. 188, 192-93 (2010). The Circuit Court noted the above quotation by the Supreme Court from District Judge Norton's Opinion in *Thrifty Rent–A–Car*, and stated as follows:

> this court should not decide a controversy grounded in uncertain and contingent events that may not occur as anticipated or may not occur at all." The withdrawals that Plaintiffs claim may not occur at all or not in any way that might injure Plaintiffs. If such withdrawals do occur in the future, and Plaintiffs believe that they have been injured, they can attempt to bring their action then as did the *Laidlaw* Plaintiffs. They can attempt to seek temporary injunctive relief. Clearly, at this point, this case does not present a justiciable controversy that is ripe for adjudication. [footnote omitted]

R. p. 7).

III

APPELLANTS HAVE NO PROPERTY INTEREST THAT HAS BEEN TAKEN

Appellants claim takings of their "riparian property rights," but they have no property rights in the waters of this state upon which to bring a takings or due process claim nor have they suffered any loss if they did have sugh rights.

A

They Have No Property Interest To Establish a Takings or Substantive Due Process Claim

A property interest is required to establish a takings or substantive due process claim. *Grimsley v. S. Carolina Law Enforcement Div.*, 396 S.C. 276, 283-84, 721 S.E.2d 423, 427 (2012).[2] South Carolina law is quite clear, and the Circuit Court recognized, that Appellants have no property interest in the waters of the State. R. pp. 9 and 10; *Omelvany v. Jaggers*, 20 S.C.L. 634,

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2 As stated in *Grimsley*:

> The Takings Clause provides that private property shall not be taken for public use without just compensation. *Rick's Amusement, Inc. v. State*, 351 S.C. 352, 357, 570 S.E.2d 155, 157 (2001). Similarly, to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. *Worsley Co. v. Town of Mount Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000). Thus, parties claiming such violations must first show they have a legitimate property interest. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Snipes v. McAndrew*, 280 S.C. 320, 324, 313 S.E.2d 294, 297 (1984) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972)).

638, 1835 WL 1419, at *3 (S.C.App.L & Eq. 1835)[3]. They state that they do not allege an ownership right in the water, but "rather the right to reasonable use of the water." Brief of Appellant at p. 13. Under South Carolina law, a claim of right of use in the waters passing an owner's land does not give the Appellants a foundation for bringing a takings or substantive due process claim against the State. "[A]n owner of land adjacent to navigable waters, whose fast lands are left uninvaded, has no private riparian rights of access to the waters to do such things as 'fishing and boating and the like', for which rights the government must pay.'" *Rice Hope Plantation v. South Carolina Public Service Authority*, 59 S.E.2d 132, 144, 216 S.C. 500, 528 (S.C. 1950) overruled in part on other grounds by *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985)(emphasis in *Rice Hope*). Moroever, no restrictions existed on the withdrawals of water at common law by adjacent landowners other than what is "reasonable." *Lowe v. Ottaray Mills*, 77 S.E. 135, 137 (S.C. 1913), *see infra,* p. 11.

White's Mill Colony, Inc. v. Williams, 363 S.C. 117, 609 S.E. 2d 811, 817 (Ct. App. 2005) is not contrary to the claims in this case. The Court of Appeals stated in that decision that "[u]nder the common law, owners of land along rivers, streams, lakes and other bodies of water possess a property right incident to their ownership of the bank and bed of a watercourse that is distinct from those rights that may be enjoyed by the public at large. In general, these special rights allow abutting landowners to make 'reasonable use' of the body of water for any lawful purpose, whether for commerce or recreation." Appellants cite this case but do not

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3 "[T]he proprietor of each bank of a [non-tidal] stream is the proprietor of half the land covered by the stream, but there is no property in the water. . . . He has no property in the water itself, but a simple use of it while it passes along." *Id* (emphasis added) quoting 3 Kent's Com. 353; *accord, White v. Whitney Mfg. Co.*, 38 S.E. 456, 459 (S.C. 1901)(proprietor "has no property in the water itself" quoting 3 Kent, Comm. 353).

quote this language and with good reason. At issue in *White's Mill* was access to the surface waters not what Appellants state is the "the property at issue . . . the . . . riparian right to consume water" (Appellants' Brief at 15).

Omelvany makes clear that no property interest exists in the water, itself, and *Lowe* demonstrates that only a reasonable use standard limits use of the waters by upstream landowners. Moreover, under *Rice Hope,* "no private riparian rights of access to the waters [exist]. . . for which the government must pay." Appellants quote *Moss v. South Carolina State Highway Dept.,* 75 S.E.2d 462, 464, 223 S.C. 282, 287 (S.C. 1953) that "[p]roperty in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal." Appellants lack that crucial threshold element of ownership of the "thing," in this case the water.

B

The Act Does Not Deprive Appellants of Any Rights

Much of the following discussion comes from the Order of the Circuit Court R. pp. 12-14.

Appellants' only claim of taking is that they cannot challenge future uses as unreasonable, and they fear fish kills, loss of flow and loss of use of the water. None of those losses of fish, flow or use have occurred. They cite no case that says that a taking can occur on the basis of a loss of procedural rights for events that have not occurred or due to possible future loss of use that has not occurred. Instead, the Supreme Court has said that "[a] deprivation of the ordinary beneficial use and enjoyment of one's property is equivalent to the taking of it, and is as much a 'taking' as though the property was actually appropriated." *Spradley v. South Carolina State Highway Dept.,* 182 S.E.2d 735, 737, 256 S.C. 431, 434 (S.C. 1971). No such damage or deprivation of use and enjoyment has occurred in this case. Appellants cite *Young v. Wiggins,* 240 S.C. 426, 126

S.E. 2d 360 (1962), but that case involved a condemnation of land for the purpose of flooding the area to create a lake. Appellants land has not been condemned.[4] Furthermore, Appellants have not lost procedural rights as discussed *infra,* under procedural due process.

Prior to the passage of the Act, no limitations existed on withdrawals of water for agricultural or other purposes other than those existing at common law. Common law rights of use have been described as follows in *Lowe, supra,* 77 S.E. at 136:

> The courts in this state have held that the different owners of land, through which a stream flows, are entitled to the reasonable use of the stream; and that any injury to a lower owner incidental to the reasonable use of the stream by a higher owner gives no right of redress. *White v. Manufacturing Co.*, 60 S. C. 254, 38 S. E. 456; *Griffin v. Nat'l Light & Thorium Co.*, 79 S. C. 351, 60 S. E. 702. The opinions in these cases both quote with approval what was decided in *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102, wherein it was said: "As between different proprietors on the same stream, the right of each qualifies that of the other; and the question always is, not merely whether the lower proprietor suffers damage by the use of the water above him, nor whether the quantity flowing on is diminished by the use, but whether, under all the circumstances of the case, the use of one is reasonable and consistent with the correspondent enjoyment by the other."

See also, White and *Omelvany, supra.* The Act does not restrict these rights.

In fact, the Act imposes limitations where none existed. Under the Act, registered users for agricultural purposes (more than three million gallons per month) cannot withdraw more water for agricultural purposes than is within the safe yield amount. S.C. Code Ann. §49-4-20(25), 35(C) and 50. Such limitations did not exist before. Although Appellants contend that registered withdrawers have exceeded safe yields and that DHEC has not taken action against them, they have not shown that any such withdrawals were substantial and detrimental to health or the

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4 Similarly, *Belvedere Development Corp. v. Dept. of Transportation,* 476 So. 2d 649 (FL 1962) involved a condemnation of land that did not compensate the landowners for the value of their riparian rights of access to water.

environment under §49-4-35. ("The department may modify the amount an existing registered surface water withdrawer may withdraw, or suspend or revoke a registered surface water withdrawer's authority to withdraw water, if the registered surface water withdrawer withdraws substantially more surface water than he is registered for or anticipates withdrawing, as the case may be, and the withdrawals result in detrimental effects to the environment or human health.").

Appellants have not suffered any present loss of rights upon which to base this suit. They have no property that has been taken nor have they been denied substantive due process.

IV

APPELLANTS HAVE NOT BEEN DENIED PROCEDURAL DUE PROCESS

"The Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.' " *State v. Dykes*, 744 S.E.2d 505, 509, 403 S.C. 499, 506 (2013); *see also Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)("Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.") ; *Kerry v. Din*, 135 S.Ct. 2128, 2132 (U.S.,2015)(plurality opinion) ("[N]o process is due if one is not deprived of "life, liberty, or property . . . ."); *Bundy v. Shirley*, 772 S.E.2d 163, 169, 412 S.C. 292, 303 (2015)("Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution."). Appellants are not deprived of a property right, as discussed above nor have they identified any "deeply rooted" liberty interest.

Although Appellants claim a loss of a right to challenge a possible future deprivation of

their loss of use of an adjacent waterway, they have not cited a single case finding a due process violation in the denial of a right to challenge an event that has never occurred and might never happen. Moreover, the Act does not cut off any rights of action that Appellants have at common law or "erase judicial review." Appellant's Brief at 27. It contains no limitations on actions for injunctive relief. Although §49-4-110(B) does state that "[s]urface water withdrawals made by permitted or registered surface water withdrawers shall be presumed to be reasonable," such a presumption is rebuttable. *State Acc. Fund v. South Carolina Second Injury Fund*, 762 S.E.2d 19, 22, 409 S.C. 240, 246 (S.C.,2014)[5] Although the section also states that "[n]o private cause of action for damages arising directly from a surface water withdrawal by a permitted or registered surface water withdrawer may be maintained unless the plaintiff can show a violation of a valid permit or registration," this Court need not determine whether this provision would limit any common law damage action that Appellants might have if injured because they have not been injured whatsoever by any agricultural water withdrawal nor have they set forth a basis for an award of damages or compensation and any such claim arising more than three years prior to September 4, 2014, would be barred by the statutes of limitation. S.C. Code Ann. §15-3-350.

Although Appellants contend that the Act contains no provisions for notice to them or opportunity to be heard, they have no property interest requiring such procedures, nor did they have such procedures at common law. They had no recourse against a water withdrawer prior to the passage of the Act other than by bringing suit. They still have such rights of litigation when

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5 A presumption is a "legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts." Black's Law Dictionary 1304 (9th ed.2009). "A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption." *Id.*

they believe they have been injured. Because they have not been injured and have no standing, such rights of litigation do not extend to this case.

V

APPELLANTS HAVE NO CLAIM BASED UPON A PUBLIC TRUST INTEREST IN STATE WATERWAYS

As the Circuit Court found, Appellants claim a violation of the public trust interest in the waterways, but they rely on authority addressing tidal waterways which are not the subject of this suit. R. p. 16. "Under the public trust doctrine, the State holds presumptive title to tidal land below the high water mark to be held in trust for the benefit of all people of South Carolina." *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003). *Estate of Tenney v. S. Carolina Dep't of Health & Envtl. Control*, 393 S.C. 100, 106, 712 S.E.2d 395, 398 (2011). As more fully explained *in State v. Head*, 330 S.C. 79, 86, 498 S.E.2d 389, 392 (Ct. App. 1997):

> [T]he South Carolina Constitution provides: "All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed; and no tax, toll, impost or wharfage shall be imposed ... unless the same be authorized by the General Assembly." S.C. Const. art. XIV, § 4. See also S.C. Const. art. XIV, § 1. Moreover, S.C.Code Ann. § 49-1-10 (Rev.1987) similarly provides: "All streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of accidental obstructions and all navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free...." These constitutional and statutory provisions expressly sanction the preexisting common-law rights of the public in navigable watercourses. *State ex rel. Lyon v. Columbia Water Power Co.*, 82 S.C. 181, 63 S.E. 884 (1909). The state holds tidal navigable watercourses subject to a public trust, and the state's ownership of public trust resources is generally not alienable: "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 Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453

> (1892), quoted in *Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 127-28, 456 S.E.2d 397, 402 (1995). *See also State v. Hardee*, 259 S.C. 535, 193 S.E.2d 497 (1972). It appears, however, that in the case of nontidal navigable streams, while the adjacent property owners hold title from their shoreline to the center of the stream bed, the public has an easement in use of the waterway.

Appellants do not cite a single South Carolina case applying the public trust doctrine to non-tidal rivers. They cite S.C. Const. art XIV, §4 regarding navigability of State waterways, but they do not claim infringements of rights of navigation. Moreover, as the Circuit Court acknowledged, most certainly, the State has important interests in nontidal waterways as well as tidal waters, but the degree of that interest should not be decided in this case when Appellants have not lost use of the waterways, when their property has not been injured due to any withdrawal of water under the statute and when they have no standing to assert any claim, particularly one claiming a loss of public trust interests. When case law recognized rights of upstream owners to use the waterways, Appellants have no basis for claiming that the State has "lost control" of a public resource.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Orders of the Circuit Court. Appellants have brought this case without injury to establish standing, without a property interest upon which to base a constitutional claim, and with no loss even if they did have such an interest. They seek an advisory ruling that is beyond the jurisdiction of this Court.

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September 26, 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

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2016-000428

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

v.

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

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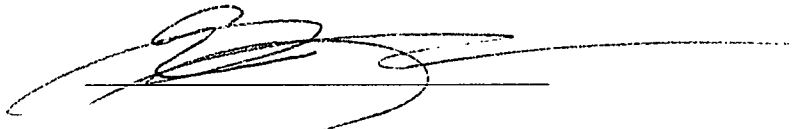
RULE 211(b) CERTIFICATE

I hereby certify that DHEC's Final Brief complies with Rule 211(b), SCACR.



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CERTIFICATE OF SERVICE

I hereby certify that I have served the Appellants with DHEC's Final Brief by mailing copies to each of their attorneys at the address below via the United States Mail this September 2016.

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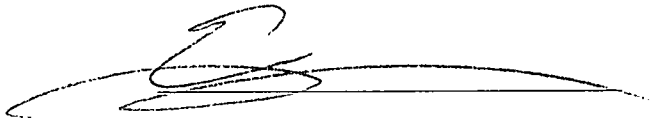

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