

Jowers v. South Carolina Dept. of Health and Environmental Control  
423 S.C. 343 (2018)  
Supreme Court of South Carolina

JUSTICE FEW:

This is a challenge to the registration provisions in the Surface Water Withdrawal Act. [Plaintiffs are riparian property owners.] The plaintiffs claim those provisions are an unconstitutional taking, a violation of due process, and a violation of the public trust doctrine. The circuit court granted summary judgment against the plaintiffs on the grounds the case does not present a justiciable controversy, both because the plaintiffs lack standing and the dispute is not ripe for judicial determination. We affirm.

We originally decided this case in an opinion filed July 19, 2017. *Jowers v. S.C. Dep't of Health & Env'tl. Control*, Op. No. 27725, 2017 WL 3045982 (July 19, 2017). The plaintiffs filed a petition for rehearing as to our ruling that their claims for a violation of the public trust doctrine do not present a justiciable controversy. Neither side challenged our rulings that the plaintiffs' claims of an unconstitutional taking and a violation of due process are not justiciable, which were unanimous rulings. Therefore, we have not reconsidered those rulings, and we have repeated the explanation of them in section V of this opinion. We have reconsidered our ruling concerning the public trust claim, and we address that claim in section VI.

**I. The Surface Water Withdrawal Act**

The Surface Water Withdrawal, Permitting, Use, and Reporting Act regulates surface water withdrawals in South Carolina. S.C. Code Ann. §§ 49-4-10 to -180. Surface water is defined as “all water that is wholly or partially within the State ... or within its jurisdiction, which is open to the atmosphere and subject to surface runoff, including, but not limited to, lakes, streams, ponds, rivers, creeks, runs, springs, and reservoirs ....” § 49-4-20(27). The Department of Health and Environmental Control is charged with the implementation and enforcement of the Act. § 49-4-170. The Act establishes two mechanisms to regulate surface water withdrawals—a permitting system and a registration system.

The Act requires most “surface water withdrawers” to obtain a permit before withdrawing surface water. § 49-4-25. A “surface water withdrawer” is defined as “a person withdrawing surface water in excess of three million gallons during any one month ....” § 49-4-20(28). A permit applicant must provide detailed information to DHEC about the proposed surface water withdrawal. § 49-4-80(A). DHEC must provide the public with notice of a permit application within thirty days, and if residents of the affected area request a hearing, DHEC must conduct one. § 49-4-80(K)(1). If DHEC determines the proposed use is reasonable, DHEC must issue a permit to the applicant. §§ 49-4-25, -80(J). In making its determination of reasonableness, DHEC is required to consider a number of criteria. § 49-4-80(B).

[Subsection 49-4-80(B) sets forth the criteria for determining reasonableness: (1) minimum instream flow or minimum water level and the safe yield; (2) anticipated effect of the proposed use on existing users; (3) reasonably foreseeable future need for surface water; (4) reasonably foreseeable detrimental impact on navigation, fish and wildlife habitat, or recreation; (5) applicant's reasonably foreseeable future water needs; (6) beneficial impact on the State; (7) impact of applicable industry standards on the

efficient use of water; (8) anticipated effect of the proposed use on: (a) interstate and intrastate water use; (b) public health and welfare; (c) economic development and the economy of the State; and (d) federal laws and interstate agreements and compacts; and (9) any other reasonable criteria DHEC promulgates by regulation. § 49-4-80.]

Permits are issued for a term of no less than twenty years and no more than fifty years. § 49-4-100(B). After a permit is issued, surface water withdrawals made pursuant to the terms and conditions of the permit are presumed to be reasonable. § 49-4-110(B).

Agricultural users are treated differently under the Act. “[A] person who makes surface water withdrawals for agricultural uses at an agricultural facility” is classified as a “Registered surface water withdrawer,” § 49-4-20(23), and is not required to obtain a permit, § 49-4-35(A). Instead, agricultural users simply register their surface water use with DHEC and are permitted to withdraw surface water up to the registered amount. § 49-4-35(A). Because agricultural users are exempt from the permit requirement, their surface water use is not subject to the subsection 49-4-80(B) reasonableness factors.

The Act establishes two ways for agricultural users to register their water use with DHEC—one for users who were already reporting their use to DHEC when the Act was rewritten in 2010, and one for users who were not yet reporting their use. [The Water Use Reporting and Coordination Act was originally enacted in 1982, Act No. 282, 1982 S.C. Acts 1980. It was completely rewritten in 2010 and renamed the Surface Water Withdrawal, Permitting, Use, and Reporting Act, Act No. 247, 2010 S.C. Acts 1824-49. The 1982 Act provided for a regulatory “reporting system for agricultural users.” 1982 S.C. Acts at 1982.]

For those already reporting, the Act allows the user to “maintain its withdrawals at its highest reported level or at the design capacity of the intake structure” and the user is deemed registered. § 49-4-35(B). For users who were not yet reporting their use, the Act requires the user to report its anticipated withdrawal amount to DHEC for DHEC to determine whether the use is within the “safe yield” of the water source. § 49-4-35(C). Safe yield is defined as,

[T]he 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.

§ 49-4-20(25). After DHEC determines whether the anticipated withdrawal amount is within the safe yield, it “must send a detailed description of its determination to the proposed registered surface water withdrawer.” § 49-4-35(C).

The Act grants DHEC oversight over registered withdrawals. Subsection 49-4-35(E) provides,

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.

§ 49-4-35(E).

Registration has three effects important to the plaintiffs' claims in this case. First, unlike permits, which are issued for a term of years, registrations have no time limits. *Compare* § 49-4-35(C) (allowing registered users to continue making withdrawals "during subsequent years" with no reference to time limits), *with* § 49-4-100(B) (establishing time limits for permits). Second, the Act presumes all registered amounts are reasonable. § 49-4-110(B). Third, the Act changes the elements for a private cause of action for damages by requiring plaintiffs to show a registered user is violating its registration.

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#### **IV. The Plaintiffs' Theory of Injury**

The plaintiffs' claims of unconstitutional taking and violation of due process are based on their allegation the Act has deprived them of "riparian" rights. The public trust claim, on the other hand, is based on the allegation the Act disposes of assets the State holds in trust for our citizens.

##### **A. Riparian Rights**

The property rights the plaintiffs allege have been taken from them under the registration provisions of the Act are known under the common law as riparian rights. The word riparian means "pertaining to or situated on the bank of a river, or a stream." Under the common law, riparian property owners—those owning land adjacent to rivers or streams—hold special rights allowing them to make "reasonable use" of the water adjacent to their property. We have described "reasonable use" as follows,

All that the law requires of the party, by or over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish, or affect, the application of the water by the proprietor below on the stream ....

*White v. Whitney Mfg. Co.*, 60 S.C. 254, 266, 38 S.E. 456, 460 (1901)

Thus, the right of reasonable use is "subject to the limitation that the use may not interfere with the like rights of those above, below, or on the opposite shore." Under the common law, if a riparian owner unreasonably interferes with another riparian owner's right of reasonable use, the injured owner's remedy is to bring an action for damages, or for an injunction, or both.

##### **B. Public Trust Assets**

The Constitution of South Carolina provides, "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. Consistent with this provision, the State owns all property below the high water mark of any navigable stream. Courts have long recognized this ownership as a trust. In 1884, this Court held:

The state had in the beds of these tidal channels not only title as property, ... but something more, the *jus publicum*, consisting of the rights, powers, and privileges ... which she held in a fiduciary capacity for general and public use; in trust for the benefit of all the citizens of the state, and in respect to which she had trust duties to perform.

*State v. Pac. Guano Co.*, 22 S.C. 50, 83-84 (1884);

We now call this the “public trust doctrine.” Under the public trust doctrine, the State “cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access.” *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003). The plaintiffs argue the Act violates the public trust doctrine by disposing of the State’s water to agricultural users. According to the plaintiffs, “the State has lost complete control of registered amounts of water in perpetuity.”

Having explained the plaintiffs’ theory of injury, we turn now to the registration provisions of the Act to determine whether the terms of the Act support the plaintiffs’ allegation of an injury in fact such that this case presents an actual controversy.

#### **V. The Takings and Due Process Claims**

The plaintiffs’ takings and due process claims are based on their allegation that they have lost their riparian right to bring a challenge to another riparian owner’s future unreasonable use. Significantly, the plaintiffs do not allege they have sustained any injury resulting from any withdrawal of surface water that has already been made by an agricultural user. The allegation the plaintiffs do make is based on two provisions of the Act: (1) subsection 49-4-110(B), which states registered withdrawals are presumed to be reasonable and changes the elements for a private cause of action for damages, and (2) subsection 49-4-100(B), which requires permits must be issued for a specific term, but is silent as to time limits for registered uses. The plaintiffs argue these provisions allow registered users to withdraw a fixed amount of water that will forever be deemed reasonable, which in turn prevents them from ever successfully challenging a registered agricultural use, regardless of how conditions may change in the future. Based on this argument, the plaintiffs allege their “rights were fundamentally altered” the moment these provisions were signed into law, and thus they have suffered an “injury in fact” sufficient to establish standing, and have presented an actual controversy that is ripe for judicial determination.

We find the Act does not support the plaintiffs’ allegations of injury. First, we find nothing in the Act preventing the plaintiffs from seeking an injunction against a riparian owner for unreasonable use. Prior to the Act, a riparian owner could bring an action challenging another riparian owner’s unreasonable use and seeking an injunction. After the Act, a riparian owner may still challenge another riparian owner’s use as unreasonable—including a registered agricultural user. If such a plaintiff can prove a registered agricultural use is unreasonably interfering with his right of reasonable use, and otherwise establish the elements for an injunction, then the plaintiff may be entitled to injunctive relief.

Second, we find nothing in the Act preventing a riparian owner from filing a declaratory judgment action to protect his right of reasonable use. \* \* \*

Third, we find nothing in the Act prohibiting private causes of action for damages against registered agricultural users. In fact, the Act specifically contemplates such actions. \* \* \* We are aware of no authority—and the plaintiffs cite none—for a finding that a change to the elements a plaintiff must prove in an action for damages deprives a future plaintiff of property rights under the takings or due process clauses.

Finally, we find no support in the Act for the plaintiffs' argument that the presumption of reasonableness will prevent future plaintiffs from proving a registered use is unreasonable. Under the common law, the plaintiff has the burden of proving—by a preponderance of the evidence—a defendant's use is unreasonable.

The Act, however, provides, "Surface water withdrawals made by permitted or registered surface water withdrawers shall be presumed to be reasonable." § 49-4-110(B). The Act is unclear whether the presumption is rebuttable or conclusive. Employing the rules of statutory construction, we find the presumption is rebuttable. Therefore, under the Act, a plaintiff may still meet his burden by proving—by a preponderance of the evidence—the defendant's use is unreasonable. \* \* \*

## **VI. The Public Trust Claim**

As we did with the plaintiffs' takings and due process claims, we begin our discussion of the public trust claim with the fact the plaintiffs do not allege that any public trust asset has been lost as a result of any withdrawal of surface water that has already been made by any agricultural user. \* \* \*

However, the plaintiffs advance a novel theory of justiciability based on their argument the Act "effectively dispose[s] of substantial, permanent rights in South Carolina's navigable waterways to agricultural users." They allege the State has "lost complete control of registered amounts of water in perpetuity" and the "registered owner has complete control over whether or not the State can ever alter the registered amount." According to the plaintiffs, the registration provisions create a "vested right" to use the registered amount in perpetuity, "without regard to reasonableness, future conditions, or future uses." Because the State "permanently transferred public trust property" to private registered users, the plaintiffs argue, they suffered an injury the moment the Act became law, despite the fact no public trust asset has yet been lost. In sum, the plaintiffs' theory of the justiciability of their public trust doctrine claim is based on the possibility that future surface water withdrawals might—depending on unknown future circumstances—endanger assets held in trust by the State, and their argument that the Surface Water Withdrawal Act prohibits the State from protecting trust assets from that potential future loss.

Even under this theory, the plaintiffs have failed to present a justiciable controversy. First, as we have already explained, the theory depends on the possible occurrence of unknown future circumstances that might—or might not—cause the loss of trust assets. Claims that depend on contingent, future harm are not justiciable.

Second, this theory depends on the argument that the State has no ability to act to protect trust assets if circumstances arise in the future that make action necessary. This argument is wrong, most importantly because the State contends it does have the ability to act to protect trust assets. \* \* \*

The State asserts it could bring “a common law challenge to the reasonableness of the withdrawal.” As we explained in detail above, nothing in the Act abolishes a riparian owner’s common law right to bring an action that challenges another riparian owner’s use as unreasonable. Likewise, nothing in the Act prevents the State from bringing a similar action to protect the assets it holds in trust.

\* \* \* Not only does the State have the power to act, it also is under a duty to act. This action was brought against DHEC because it administers the Surface Water Withdrawal Act. \* \* \* Regulation 61-68—one of the regulations DHEC promulgated under that obligation—provides, “It is a goal of the Department to maintain and improve all surface waters to a level to provide for the survival and propagation of a balanced indigenous aquatic community of flora and fauna and to provide for recreation in and on the water.” \* \* \*

These duties are important in understanding the power of the State to enforce \* \* \* the South Carolina Constitution, which provides, “All navigable waters shall forever remain public highways free to the citizens of the State ....” The State’s duty to protect navigable streams is clear, and it may take the necessary action at the necessary time to fulfil that duty. If some future registered user defendant takes the position the State cannot act, the courts can address it then. Alternatively, if the State fails to take action sometime in the future if and when action is necessary, the plaintiffs could bring this same action and it would present a justiciable controversy. \* \* \*

The final reason the plaintiff’s novel theory of justiciability must fail is that the philosophical foundation of the plaintiff’s public trust claim requires it. The public trust doctrine provides that the State has the inherent authority to act to protect public trust assets. \* \* \* If a situation ever arises in which public trust assets are actually being lost due to excessive surface water withdrawals, the very nature of the public trust doctrine requires the State to act, and provides that it must prevail. \* \* \*

The dissent argues, however, “the public trust violation itself is the alleged injury,” and thus the claim is actually ripe. The argument does not accurately represent the plaintiffs’ theory. The “public trust violation”—under the plaintiffs’ theory—would be the future loss of water, not the 2010 Act. The injury—under the plaintiffs’ theory—is an existing inability to challenge a future loss of water, an inability created by the 2010 Act. Thus, the plaintiffs’ own theory does not support the dissent’s argument for ripeness, as the theory depends on the possibility of a future loss of water. The claim is not ripe. \* \* \*

KITTREDGE and JAMES, JJ., concur. HEARN, J., concurring in part and dissenting in part in a separate opinion in which BEATTY, C.J., concurs.

JUSTICE HEARN:

I concur with the majority’s analysis of Appellants’ takings and due process claims, but I respectfully dissent on the issue of the public trust doctrine. Because of the Surface Water Withdrawal Act’s inherent connection to the public waterways of South Carolina, I would find that Appellants’ public trust claim comes squarely within the public importance exception to standing. Cognizant of the fact that the public

importance exception is used sparingly by this Court, I believe if there is ever a time when the doctrine should be applied, this is it. \* \* \*

In its current form, the public trust doctrine protects the public's "inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks." *Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 127–28, 456 S.E.2d 397, 402 (1995). Concomitant with the public's right to enjoy the public trust assets, the public trust imposes on a state three types of duties or restrictions with regard to its management of public trust assets. To wit,

[F]irst, 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.

*Juliana v. United States*, 217 F.Supp.3d 1224, 1254 (D. Or. 2016) (quoting Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 477 (1970) ). Inherent in its public trust duties, the State "cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116, 120 (2003). \* \* \*

Given the interests protected by the public trust, and the fact that public waterways extend to every corner and every county in South Carolina, I find it difficult to imagine a claim better suited to the public importance exception than an alleged public trust violation. The majority states the public importance exception is not appropriate in this case because Appellants' claim is not ripe. Respectfully, I disagree. Appellants have alleged a current and ongoing injury—the State's abrogation of its duties as trustee to administer and manage the trust corpus. Under their theory, the public trust violation itself is the alleged injury, not a speculative future harm to waterways caused by the Act. Therefore, because of the complex and dynamic character of South Carolina's public waterways, I believe the merits of Appellants' public trust claim require full development at trial to determine the extent to which, if any, the Act has authorized activities that substantially impair the public interest in marine life, water quality, and public access. For example, given the ever-changing nature of rivers and streams, expert testimony would be most helpful to the Court in determining what types of harm have resulted from the Act, and more importantly, whether the State's remaining enforcement powers may be marshalled quickly enough to prevent further harm. The majority points to a number of tools the State retains to protect public waterways, and while I agree, I believe the analysis is incomplete until the record fully demonstrates how quickly those methods may be brought to bear to rectify any impairments to public waterways resulting from the Act.

Accordingly, I would reverse the circuit judge's grant of summary judgment as to the public trust claim. However, rather than rule on the merits of Appellants' claim at this stage without the benefit of a fully developed record, I would simply remand to the circuit court for further proceedings.