

# South Carolina Surface Water Withdrawal Act: State Supreme Court Addresses Constitutional Challenge



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The Supreme Court of South Carolina considered the constitutionality of the registration provisions of its Surface Water Withdrawal Act (“Act”). See *Jowers v. South Carolina Dept. of Health and Environmental Control*, 2017 WL 3045982 (S.C. July 19, 2017).

The Court addressed whether certain provisions of the state statute are an unconstitutional taking, a violation of due process, and a violation of the public trust doctrine.

South Carolina’s Surface Water Withdrawal Act establishes two mechanisms to regulate surface water withdrawals.

The Act’s Permitting System provides that the withdrawal of over 3 million gallons of water during any month requires acquisition of a permit. South Carolina Department of Health and Environmental Control (“DHEC”) determines the reasonableness of the water use. There is a presumption that the use is reasonable. Permits are issued for a term of 20 to 50 years.

The Registration System applies to agricultural users. Unlike the Permitting System, agricultural users are not required to obtain a permit. Agricultural users register with the DHEC and are allowed to withdraw surface water up to that registered amount. Agricultural users are not subject to the reasonableness determination. Further, unlike the Permitting System, the registration system is not subject to time limits. Finally, the burden is on the plaintiff suing an agricultural user to show a registered user is violating its registration.

Plaintiff-Appellants are property owners along rivers or streams in several South Carolina Counties. They argued that:

1. The Act violates the Due Process Clause and the Taking Clause by depriving them of their riparian rights, and
2. The Act violates the Public Trust Doctrine by disposing of assets the states hold in trust.

The Court notes common law riparian rights are special rights granted to owners of property situated on the bank of a river or stream. Riparian property owners are allowed to make “reasonable use” of the water adjacent to their property. This right is limited so that the use may not interfere with the same rights granted to other riparian property owners.

The Plaintiff-Appellants argue that because of the statute's presumption of reasonableness and lack of time limit for registered users their rights were "fundamentally altered."

The Court disagrees for several reasons:

1. Nothing in the Act prevents the Plaintiff-Appellants from seeking an injunction against a riparian owner,
2. Nothing in the Act prevents the Plaintiff-Appellants from filing a declaratory action against registered agricultural users and including the DHEC as a defendant causing the state agency to modify the amount of water a registered user may withdraw,
3. The shift of standard of proof to plaintiffs to show a registered user has violated the Act does not prohibit private causes of actions for damages against registered agricultural users, and
4. The presumption of reasonableness is a rebuttable one, and Plaintiff-Appellants could meet this burden by showing the use is unreasonable.

The Public Trust Doctrine means that a state cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access.

Plaintiff-Appellants argue that the Act violates this doctrine by disposing of the state's water to registered agricultural users.

The Court disagrees finding that the Act promotes the interest of the people, while also protecting against any use of surface water that is contrary to those interests. It states the Act provides several ways for the DHEC to protect against a violation of the Public Trust Doctrine which include:

1. Under § 49-4-25, the Act allows DHEC to grant a permit only if it "determines that the applicant's proposed use is reasonable",
2. Under § 49-4-120(A), the DHEC may "modify, suspend, or revoke a permit under [listed] conditions", and
3. Under § 49-4-35(E), the DHEC may "modify the amount of an existing registered surface water withdrawer may withdraw, or suspend or revoke a registered surface water withdrawer's authority to withdraw water.

In conclusion, the Court found that the Plaintiff-Appellants lacked standing and their claim was not ripe for judicial review. The Court affirmed the circuit court's decision in favor of the DHEC.

[A copy of the opinion can be downloaded here.](#)