



North Carolina Department of Administration

Beverly Eaves Perdue, Governor

Moses Carey, Jr., Secretary

January 11, 2012

James P. "Ryke" Longest, Jr., Esq.
Duke University School of Law
Post Office Box 90360
Durham, North Carolina 27708-0360

Re: Request for Declaratory Ruling from Yadkin Riverkeeper, Inc. ("YRI")

Dear Mr. Longest:

In December, the Department of Administration ("DOA") received the Request for Declaratory Ruling referenced above. From the outset, let me thank you for all the good work that you and your client do to protect North Carolina's rivers.

After careful consideration, the Request for Declaratory Ruling is denied, in the exercise of informed discretion, for the independently sufficient grounds that follow below.

Substantively, your Request for a Declaratory Ruling ("Request") is actually comprised of several separate requests for rulings. As a general matter, however, none of the requests ask the agency to issue a declaratory ruling "as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency," as contemplated by N.C. Gen. Stat. § 150B-4. Furthermore, we do not believe that your client has standing under N.C. Gen. Stat. § 150B-4 (*i.e.*, is a "person aggrieved" as defined in N.C. Gen. Stat. § 150B-2) with respect to the issues for which your client seeks a declaratory ruling. We also do not believe, as your Request revolves around an effort to compel DOA to assert title, that the declaratory ruling process is intended to be used as a venue for such determinations. Further explanation applicable to each of the requests is as follows:

- a) **Request that DOA declare that the Department of Administration has the duty to maintain an accurate inventory of all state-owned lands.**

The request does not ask the agency to issue a declaratory ruling "as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency." *Id.* § 150B-4. This request instead asks that DOA issue a declaratory ruling which, in effect, merely quotes a statute (N.C. Gen. Stat. § 143-341(4)(a)); this is not an appropriate basis for issuing a declaratory ruling.

Mailing Address:
1301 Mail Service Center
Raleigh, N.C. 27699-1301

Telephone (919) 807-2425
Fax (919) 733-9571
State Courier #51-01-00

Location:
116 West Jones Street
Raleigh, North Carolina 27603

www.doa.state.nc.us

An Equal Opportunity/Affirmative Action Employer

b) Request that DOA declare that the State of North Carolina owns the bed of the Yadkin River in trust for the People of North Carolina as subject to the doctrine of the Public Trust.

(1) The State's sovereign title to submerged lands does not result from a ruling "as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of" DOA. N.C. Gen. Stat. § 150B-4. On the contrary, the State's title to submerged lands, where it exists, results from application on highly case-specific facts of the common law "public trust doctrine."

Under the "public trust doctrine," the State holds title to lands under navigable waters as an incident of sovereignty, and the use of those waters is subject to a trust for public purposes, such as commerce, navigation, fishing and recreation. The State's title to lands under navigable waters subject to the public trust doctrine constitutes "an interest in the property based on an 'attribute of sovereignty.'" *Fabrikant v. Currituck County*, 174 N.C. App. 30, 42, 621 S.E.2d 19, 28 (2005).

(2) In addition, the North Carolina Supreme Court has determined that "in North Carolina, the public trust doctrine operates as a rule of construction creating a presumption that the General Assembly did not intend to convey lands in a manner that would impair public trust rights." *Gwathmey v. State ex rel. Department of Env't, Health, & Natural Resources*, 342 N.C. 287, 304, 464 S.E.2d 674, 684 (1995). That presumption could be rebutted by a connected chain of title to a special legislative grant "conveying the lands in question free of all public trust rights, but only if the special grant does so in the clearest and most express terms." *Id.*

In most instances, as here, anything other than relying upon common law and statutory presumptions¹ in favor of the State (in an effort to determine if submerged lands are connected by a chain of title to a special legislative grant), would require an extensive title search, potentially going back to Colonial times, at taxpayer expense. Any person who seeks to assert or prove title in contravention of the presumptions of title in the State should and does bear the associated burden and costs. Moreover, resolving a title issue in the declaratory ruling process is difficult to reconcile with the procedures for resolving title issues to which the State is a party (*e.g.* N.C. Gen. Stat. § 146-79), which of course would be resolved in the North Carolina General Courts of Justice.

Furthermore, even if there were a statute or rule administered by DOA requiring application of a given state of facts in this type of instance, the documentation submitted purportedly addressing the question of title is incomplete and inadequate to make a determination of whether there has been an express special legislative grant conveying the lands in question, and whether and where the river is navigable for purposes of the public trust doctrine.

¹ *e.g.* N.C. Gen. Stat. § 146-79.

In passing, it is noted that the short deadline imposed on the agency by N.C. Gen. Stat. § 150B-4(a1)(1) is wholly inadequate to allow a complete and thorough examination of evidence of navigability, a multitude of statutes, or title documents potentially going back to Colonial times within the time allowed. Thus, we do not believe for this reason also that the declaratory ruling process is intended to be available for this kind of inquiry, even if it were otherwise proper.²

(3) Even if the declaration sought were otherwise appropriate, the granting of the Request would be impracticable and could prejudice the position of the State with regard to defending interests in the bed of the Yadkin River. Specifically, DOA's asserting a claim of title in response to this request could create a justiciable controversy against the State by a party or parties that believe they have title. Thus, it could result in compelling a waiver of sovereign immunity. N.C. Gen. Stat. 150B-4(a) does not contemplate that result.

(4) Finally, DOA's rule 1 N.C.A.C. 1B.0603 subpart (e) provides that the Secretary will "ordinarily refuse to issue a declaratory ruling: . . . (3) where the subject matter of the request is involved in pending litigation in any state or federal court in North Carolina." Title to the bed of the Yadkin River in the State is asserted as the basis for a claim by your client in administrative litigation to which it is a party in the Office of Administrative Hearings (consolidated cases 09 EHR 3078, 09 EHR 3179, and 09 EHR 4092), which it may or may not have standing to bring. While OAH is not a state or federal court, the impropriety and inadvisability of DOA being compelled, particularly by an adverse litigant, to make a pronouncement on a matter in an ongoing contested case is just as clearly undesirable and inappropriate. Appeals from decisions rendered in contested cases go ultimately to North Carolina's General Courts of Justice, culminating with North Carolina's appellate courts.

c) Request that DOA declare (i) that the State of North Carolina has asserted to FERC that the license for the Yadkin Project no longer serves the public interest and (ii) that the Department of Administration is obligated to assist the State in its efforts to recapture the Yadkin Project.

(1) The first part of this two-part request is inappropriate as it does not call for a declaratory ruling "as to the validity of a rule or as to the applicability to a given state of

² The much narrower scope of issue contemplated by the declaratory ruling statute is exemplified by the following list of appropriate reasons to grant a request from DOA's rules, specifically DOA's rule 1 N.C.A.C. 1B.0603 subpart (c), that:

- (1) [a DOA] rule in question is unclear on its face;
- (2) circumstances are so changed since the adoption of [some DOA rule] that a declaratory ruling is warranted;
- (3) the factors specified in the request were not given appropriate consideration by the agency at the time [that DOA rule] was adopted;
- (4) [a] statute administered by [DOA] is unclear in its application to the requesting person's facts; or
- (5) a fair question exists regarding the validity of [a DOA] rule.

facts of a statute administered by the agency or of a rule or order of the agency.” N.C. Gen. Stat. § 150B-4. It merely asks that DOA declare as a matter of fact that the State has asserted a particular position in a dispute before a federal agency. The pleading attached to the Request speaks for itself and requires no “declaration” by DOA. Thus, it is not an appropriate subject for a declaratory ruling.

(2) The second part of this request is inappropriate for the same reason and also because it fails to show how YRI has standing to compel DOA to declare that it must or must not participate in a proceeding before a federal agency, FERC, where the State is already acting. It is particularly undesirable for DOA to make declaratory rulings as to issues that are already in dispute in a legal forum to which the State is already a party.

- d) **Request that DOA declare that it is the proper agency of the State of North Carolina to defend the State’s real property interests in the bed of the Yadkin River in the Yadkin Project.**

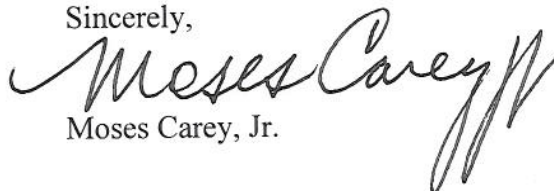
This request does not call for a declaratory ruling “as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency,” N.C. Gen. Stat. § 150B-4, and therefore is an inappropriate request. Further, for reasons set forth elsewhere in this letter, YRI does not show it has standing to make this request.

- e) **Request that DOA declare that it must investigate whether title has been granted away from the State in the bed of the Yadkin River in the vicinity of the Yadkin Project.**

This request does not call for a declaratory ruling “as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency,” N.C. Gen. Stat. § 150B-4, and therefore is an inappropriate request. To be clear, however, it makes no difference to DOA’s response to this request (and indeed, to all your requests) whether the Yadkin River is navigable or whether the State has the interest that the YRI contemplates, or some greater or lesser interest; the request is still inappropriate under N.C. Gen. Stat. § 150B-4.

Thank you, nonetheless, again for your interest in these issues and for your work for North Carolina’s rivers.

Sincerely,



Moses Carey, Jr.