

consents to the NCFA's motion to intervene in this matter. Plaintiffs have not yet advised as to their position on the NCFA's motion to intervene.

21. Attached as Exhibit A is a copy of the NCFA's proposed Motion to Dismiss the Complaint, which pursuant to Rule 24(c) provides notice of the claims and defenses for which NCFA seeks intervention.

WHEREFORE, the NCFA respectfully requests that the Court grant its Motion to Intervene as a matter of right, pursuant to Rule 24(a)(2) of the North Carolina Rules of Civil Procedure, or, in the alternative, that the NCFA be granted permissive intervention, pursuant to Rule 24(b).

Respectfully submitted this 28<sup>th</sup> day of January, 2021.

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# EXHIBIT A

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
20 CVS 12925

COASTAL CONSERVATION  
ASSOCIATION d/b/a CCA NORTH  
CAROLINA *et al.*,

*Plaintiffs,*

v.

STATE OF NORTH CAROLINA,

*Defendant,*

and

NORTH CAROLINA FISHERIES  
ASSOCIATION,

*Intervenor-Defendant.*

**[PROPOSED] MOTION TO DISMISS  
PLAINTIFFS' COMPLAINT OF NORTH  
CAROLINA FISHERIES ASSOCIATION,  
INC.**

Intervenor-Defendant North Carolina Fisheries Association, Inc. ("NCFA"), pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, by and through the undersigned counsel, hereby moves to dismiss the Complaint filed herein by plaintiffs and this civil action with prejudice. In support hereof, the NCFA would show unto the Court that each of Plaintiffs' First and Second Claims for Relief asserted in the Complaint must be dismissed because neither states a claim upon which relief can be granted. For these reasons, this civil action must be dismissed.

In further support hereof, the NCFA would show the Court that the first and second claims for relief asserted in the Complaint are deficient in at least the following ways:

1. Plaintiffs mischaracterize the public trust doctrine, which provides no basis for their claims against the State. (Compl. ¶ 1.) The public trust doctrine is a fixture of the common law, recognized by North Carolina in *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 44 S.E. 39 (1903) (citing *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892)). However, contrary to Plaintiffs' assertion (Compl. ¶ 1) the public trust doctrine has never been incorporated into the Constitution of North Carolina. See *Gwathmey v. State Dep't of Env't, Health, & Nat. Res.*, 342 N.C. 287, 304, 464 S.E.2d 674, 684 (N.C. 1995) (holding that, given "the absence of a constitutional basis for the public trust doctrine," the doctrine "cannot be used to invalidate acts of the legislature" and that that no constitutional provision expressly or impliedly prevents the General Assembly from abrogating the public trust doctrine).

2. Article XIV, Section 5 of the North Carolina Constitution does not constitutionalize the public trust doctrine. Instead, Section 5 merely declares a policy of conservation and protection of land and water, while reciting several guiding principles such as control of air, water and noise pollution, as well as preservation of recreational areas and "places of beauty."

3. Plaintiffs also misconstrue the 2018 constitutional amendment articulating the right of "people to hunt and fish" in Article I, Section 38 which also does not create a constitutional public trust. The plain language of Article I, Section 38, does not include any phrase or language suggesting that the amendment constitutionalizes the public trust doctrine. Additionally, the plain language of Article I, Section 38 specifically notes that people's right to hunt and fish are subject to "laws enacted by the General Assembly and rules adopted pursuant to authority granted by the General Assembly" for the purposes of, "promot[ing] wildlife conservation and management[.]" Article I, Section 38 cannot form the basis of Plaintiffs' challenge to the very laws and rules the

State has adopted for its management of coastal fisheries, such as The Fisheries Reform Act of 1997, 1997 N.C. Sess. Laws 1114, ("FRA") and rules enacted thereunder.

4. Accordingly, the public trust doctrine is not a basis by which Plaintiffs can challenge the actions of the State under the FRA.

5. Plaintiffs have failed to establish a constitutional basis for their public trust claims because such a basis does not exist. Given the absence of a constitutional basis for the public trust doctrine, the doctrine cannot be used to invalidate otherwise lawful actions of the legislature. *See Gwathmey*, 342 N.C. at 304, 464 S.E.2d at 684. Accordingly, the FRA abrogated the common law public trust doctrine to the extent it conflicts with the FRA.

6. Other than their unsupportable constitutional claims, Plaintiffs do not provide an alternative basis for their claims.

7. Both by plain meaning and by fact, Article XIV, Section 5, does not create a private right of action or otherwise provide a basis for relief for Plaintiffs in this case. Instead Section 5 is a general policy statement concerning the conservation and protection of land and water, which establishes only that it "shall be a proper function" of the State to acquire land for the purposes of preserving, for example, forests, wetlands, historical sites, and "places of beauty."

8. Both by plain meaning and by fact, Article I, Section 38, does not create a private right of action or otherwise provide a basis for relief for Plaintiffs in this case. To the extent Article I, Section 38 creates a right in the public to hunt and fish by traditional means, such right is expressly made subject to laws enacted by the General Assembly and rules adopted pursuant thereto for the purposes of wildlife conservation and management. The FRA is a valid statute purposed for wildlife resource management.

NCFA reserves the right to assert other appropriate bases for its Motion to Dismiss as may appear. In further support of this Motion to Dismiss, in addition to the Plaintiffs' Complaint, NCFA will rely on its forthcoming memorandum in support of this Motion, and all other matters properly before the Court pursuant to Rule 12(b)(6).

*WHEREFORE*, the undersigned respectfully move that the Court enter an order dismissing Plaintiffs' Complaint with prejudice, and granting unto NCFA such other and further relief as the Court deems just and appropriate.

This the 28<sup>th</sup> day of January, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Motion to Intervene upon all parties to this matter by placing a copy in the United States Mail, First Class, postage prepaid and addressed as follows:

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This the 28 day of January, 2020.

  
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