

## **Court of Appeals Opinion on State Motion to Dismiss Lawsuit— General Counsel’s Summary Analysis of Opinion as It Pertains to North Carolina Fisheries Management Law Going Forward**

According to the express words of the North Carolina Court of Appeals in its September 6, 2022, opinion in the case of *COASTAL CONSERVATION ASS’N et al. v. STATE OF N.C.*, 2022-NCCOA-589, there were three “*dispositive issues on appeal...*” I discuss each of the Court’s “dispositive” issues below, in turn, in terms of their effect on state coastal fisheries management law. Note that as in the preceding sentence, all quotations from the opinion that are used in this document are italicized for easy recognition.

### Issue 1: The Public Trust Doctrine.

The first dispositive issue on appeal was, in the Court’s own words, “*whether: (I) sovereign immunity bars Plaintiffs’ claims for injunctive and declaratory relief seeking judicial review of the State’s obligations and alleged breach of trust under the public trust doctrine...*”

#### Court’s finding.

The state cannot claim sovereign immunity—absolute state agency insulation against claims from N.C. citizens—for alleged violations of the common law public trust doctrine, *i.e.*, sovereign immunity does not apply to claims under the public trust doctrine.

*“Our review of the development of North Carolina law applicable to both sovereign immunity and the public trust doctrine leads us to conclude sovereign immunity does not bar Plaintiffs’ claim implicating the public trust doctrine in this case.”*

***“Application of sovereign immunity in this case ... would effectively reduce the public trust doctrine to nothing more than a ‘fanciful gesture’ and prevent judicial review ... as a plaintiff would never have the ‘opportunity to enter the courthouse doors and present his claims.’”*** (emphasis added).

#### Court’s rationale.

(1) The public trust doctrine is not ordinary common law.

*“Although the doctrine arises from the common law, it is perhaps best understood as “an implied constitutional doctrine”—one that “springs from a*

*fundamental notion of how government is to operate with regard to common heritage natural resources.”*

- (2) The right to fish is a fundamental public right under the public trust doctrine.

*“[P]ublic trust rights, which are ‘those rights held in trust by the State for the use and benefit of the people of the State in common’ ... ‘include, but are not limited to the right to navigate, swim, hunt, fish, and enjoy all recreational activities’ offered by public trust lands.”*

- (3) The right to fish under the public trust doctrine imposes a duty on the state to ensure that the public has a reasonable opportunity to harvest coastal fish stocks.

***“[T]he (public trust doctrine) right to hunt and fish does not exist in the abstract. The public must have access to harvestable wildlife and fish to have a meaningful opportunity to exercise these rights.”***  
(emphasis added).

- (4) Coastal fish stocks are therefore held in trust by the state on behalf of its citizens.

*“Indeed, ‘the State’s wildlife population is a natural resource of the State held by it in trust for its citizens.’... ‘The principle has long been settled the States own the tidewaters themselves, and the fish in them, so far as they are capable of ownership while running . . . [but] [i]t is a title held in trust for the people of the State.”*

*“The marine and estuarine and wildlife resources of the State belong to the people of the State as a whole.”*

***“[A]s Plaintiffs allege, protecting fisheries falls within the purview of the public trust doctrine, and ‘the State can no more abdicate this duty than it can abdicate its police powers in the administration of government and the preservation of the peace.’”*** (emphasis added).

***“Thus, because of the nature of the public trust doctrine as a tool for judicial review of the State’s actions as trustee of fisheries, we conclude sovereign immunity does not apply in this case.”*** (emphasis added).

## Issue 2. The Conservation of Natural Resources Clause of the N.C. Constitution.

The Court's second dispositive issue on appeal was "*whether... (II) Plaintiffs' Complaint states a claim for relief on state constitutional grounds under N.C. Const. Art. XIV, Sec. 5—the Conservation of Natural Resources Clause—for enforcement of public trust doctrine rights...*" Note that the Court frames this issue as being whether the amendment requires enforcement of "public trust doctrine rights." That is highly significant, because the Court expressly implies that the Conservation of Natural Resources Clause embodies the common law public trust doctrine.

### Court's finding.

The Conservation of Natural Resources Clause of the Constitution requires protection of public-trust rights, and specifically, the public trust right to fish.

*"Plaintiffs' Complaint also presents sufficient allegations of a claim arising directly under Article XIV, § 5 of our State Constitution."*

### Court's rationale.

In determining the validity of a constitutional claim, North Carolina courts employ a three-part test: (1) Did a state actor violate the plaintiff's constitutional rights? (2) Did the plaintiff present a "colorable" claim, *i.e.*, a plausible one—one that has a sound legal basis and is strong enough to prevail if the facts alleged can be proven in court? & (3) Did the plaintiff show that there is no other adequate state remedy to address plaintiff's claim?

(1) State actor requirement. Met in our complaint.

*"Here, Plaintiffs alleged the State, acting through two administrative agencies—the North Carolina Division of Marine Fisheries and the North Carolina Marine Fisheries Commission—failed to protect Plaintiffs' constitutionally guaranteed right to harvest fish under Art. XIV, § 5."*

(2) Colorable claim requirement. Met in our complaint.

*"Article XIV, § 5 was added to our State Constitution in 1972 and states: '[i]t shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry . . . .' ... Our Court interpreted this amendment ... as tasking the State with a constitutional duty to not only protect the public lands, but also the public trust rights attached thereto. ... 'Plaintiffs alleged 'the State's mismanagement of coastal fisheries resources . . . has eliminated or, at a minimum, severely curtailed the public's right to fish for [popular fish species].' **Indeed, Plaintiffs' Complaint contains extensive data points***

*documenting the stock status and the stock population trends of certain fish species. Thus, the alleged facts here support Plaintiffs' contention the State did not protect the harvestable fish population for the benefit of all its citizenry.*" (emphasis added).

(3) No adequate state remedy requirement. Met in our complaint.

*"Assuming ... the public trust doctrine claim is barred by sovereign immunity, this remedy cannot be redressed through other means, as an adequate "state law remedy [does] not apply to the facts alleged" by Plaintiffs. ... Thus, alternatively, Plaintiffs have alleged a colorable constitutional claim for which no other adequate state law remedy exists. Therefore, sovereign or governmental immunity cannot bar Plaintiffs' claim."*

### Issue 3. The State Right to Hunt and Fish Amendment.

The Court's third dispositive issue on appeal was "*whether ... (III) Plaintiffs' Complaint states a claim for relief on state constitutional grounds under N.C. Const. Art. I, Sec. 35— Right to Hunt, Fish, and Harvest Wildlife—for enforcement of public trust doctrine rights.*" Note that the Court frames this issue, just as with the previous issue, in terms as being whether this amendment requires enforcement of "public trust doctrine rights." That is again significant, because in doing so, the Court expressly implies that the Right to Hunt & Fish Amendment embodies the common law public trust doctrine.

Court's findings. There are three findings by the Court of Appeals that are of especial note here:

(1) The Right to Hunt and Fish Amendment requires protection of public-trust rights, and specifically, the public trust right to fish.

*"The plain meaning of the ... phrase ... 'shall be forever preserved' places an affirmative duty on the State to protect the people's right to fish."*

(2) The Right to Hunt and Fish Amendment places an affirmative duty on the state to preserve *both* public fishing (the act of attempting to catch fish) and public harvest of fish (actually catching fish), which are not the same thing, and thus, separate trustee duties.

*"Thus, the plain meaning of this phrase indicates the General Assembly, when drafting the proposed amendment, intended to create an affirmative duty on the State to preserve the right of the people to fish and harvest fish. **However, the right to fish and harvest fish would be rendered meaningless without access to fish.**"... "In sum, both the plain language and*

*history of Article I, § 38 support the conclusion this provision imposes an affirmative duty on the State to preserve the people’s right to fish and harvest fish.”* (emphasis added).

- (3) The state’s duty under the Right to Hunt and Fish Amendment necessarily includes the duty to keep fisheries safe from injury, harm, or destruction, in perpetuity.

*“Therefore, the State’s duty necessarily includes some concomitant duty to keep fisheries safe from injury, harm, or destruction for all time.”* (emphasis added) ... *“In sum, both the plain language and history of Article I, § 38 support the conclusion this provision imposes an affirmative duty on the State ... [that] includes some duty to preserve fisheries for the benefit of the public.”*

#### Court’s rationale.

The Court of Appeals again applies the same 3-part test used to analyze the Natural Resources Conservation Clause:

- (1) State actor requirement. Met in our complaint.

In the Court’s own words: *“The first sentence of Section 38 makes clear the right to fish belongs to the people. Moreover, its inclusion in Article I indicates the General Assembly intended for this right to be protected against encroachment by the State....”*

- (2) Colorable claim requirement. Met in our complaint.

Again, in the Court’s words: *“The plain meaning of the ... phrase ... ‘shall be forever preserved’ places an affirmative duty on the State to protect the people’s right to fish.”... “Thus, the plain meaning of this phrase indicates the General Assembly, when drafting the proposed amendment, intended to create an affirmative duty on the State to preserve the right of the people to fish and harvest fish. However, the right to fish and harvest fish would be rendered meaningless without access to fish.”* (emphasis added) ... *“Therefore, the State’s duty necessarily includes some concomitant duty to keep fisheries safe from injury, harm, or destruction for all time.”... “In sum, both the plain language and history of Article I, § 38 support the conclusion this provision imposes an affirmative duty on the State to preserve the people’s right to fish and harvest fish. This includes some duty to preserve fisheries for the benefit of the public. In this case, Plaintiffs’ have alleged facts, which if proven, may tend to show the State did not properly manage the fisheries so as to forever*

*preserve the fish populations for the benefit of the public.*” (emphasis added).

(3) No adequate state remedy requirement. Met in our complaint.

As was true for the Court’s analysis of the Natural Resources Conservation Clause, the Court says “*Plaintiffs seek declaratory and injunctive relief to remedy the State’s breach of their duty to protect the right to fish and harvest fish. Again, presuming arguendo the public trust doctrine claim was to be barred by sovereign immunity. Plaintiffs’ alleged wrong cannot be redressed through other means, as an adequate ‘state law remedy [does] not apply to the facts alleged’ by Plaintiffs.*”