

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

CIVIL ACTION FILE NO. 5:13-cv-00633-BO

THE STATE OF NORTH CAROLINA, by and)
through its agency, the NORTH CAROLINA)
DEPARTMENT OF ADMINISTRATION,)
Plaintiff,)
v.)
ALCOA POWER GENERATING, INC.,)
Defendant.)

**DEFENDANT ALCOA POWER
GENERATING, INC.'S
MEMORANDUM IN SUPPORT OF
ITS MOTION FOR SUMMARY
JUDGMENT**

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Defendant Alcoa Power Generating, Inc. (“APGI”), by and through the undersigned attorneys, hereby submits this Memorandum in Support of Its Motion for Summary Judgment.

PRELIMINARY STATEMENT

For nearly a century, four dams constructed and owned by APGI or its predecessors have sat atop a segment of the Yadkin River in North Carolina. Since 1958, APGI or its predecessors have openly operated those dams as part of a federally licensed hydroelectric project (the “Yadkin Project”) after purchasing and recording deeds to over 300 parcels of land in the Project area. During that entire time, the State never so much as suggested that anyone other than APGI or its predecessors owned the riverbed lying beneath the waters of the Yadkin Project. To the contrary, during federal licensing proceedings, the State repeatedly argued and represented, often under oath, to federal regulators – and federal courts – that the river was not navigable and was privately owned. In the decades since the federal license was granted, the State routinely sought and obtained easements, licenses, and permits from APGI, as owner, to use property within the Yadkin Project, including the riverbed, and agreed not to assert ownership of the Yadkin Project lands.

Now, after all this time, the State is asserting a purportedly “sovereign” right to seize this private property from APGI without compensation. The State rests this remarkable claim on the theory that this 45-mile reach of the Yadkin River (the “Relevant Segment”) was navigable in fact when North Carolina became a state and thus – notwithstanding over a century’s worth of contrary evidence and statements – the bed underlying the Relevant Segment has belonged to the State all along. The State’s claim is wholly without legal or factual foundation. APGI is entitled to summary judgment on the State’s claim for at least three reasons:

First, the undisputed evidence demonstrates that the Relevant Segment was not navigable in fact at the time of statehood. APGI has produced a virtual mountain of evidence demonstrating that the Relevant Segment was not used, or susceptible of being used, in its natural and ordinary condition as a highway for commerce over which trade and travel were conducted in the customary modes of the time, which is the legal test governing navigability for title. To the contrary, the Relevant Segment was notorious to centuries of witnesses for its numerous shoals, falls, the impenetrable Narrows, and other obstructions that made its navigation in the watercraft available at the time impossible. Unsurprisingly, both state and federal

navigability studies completed before the construction of the dams concluded time and again that the Relevant Segment could not be navigated.

The State has produced no contrary evidence. Instead, its claim appears to be based entirely on an 1885 state session law that has nothing to do with navigability or riverbed title, by its terms honored private ownership, and would create insurmountable constitutional problems if used to deprive citizens of property without just compensation. The undisputed evidence of nonnavigability at (and long after) statehood and the legal insufficiency of the 1885 session law alone suffice to enter summary judgment against the State.

Second, while nothing more is required, the undisputed evidence also confirms that APGI owns the riverbed through adverse possession, which is readily established here by virtue of APGI's decades-long use and operation of the Yadkin Project. APGI also bought, paid for, and owns record title to the property; however, at this stage of litigation, adverse possession is the most straightforward means of confirming APGI's ownership and there is no genuine dispute of material fact regarding its elements.¹

Third, as a separate and independent basis, the State explicitly agreed to not assert any claim of ownership over the lands within APGI's Yadkin Project. This lawsuit is barred by those agreements.

At bottom, this lawsuit is a baseless attempt by the State to seize control of the Yadkin Project and the revenue it generates. Because the State's claim finds no support in fact or law, APGI is entitled to summary judgment.

I. STATEMENT OF UNDISPUTED MATERIAL FACTS

This case concerns whether the Relevant Segment was navigable in fact when North Carolina became a state. In order to resolve this issue, the Court must decide whether the Relevant Segment in its natural and ordinary condition was used or susceptible of being used as a highway for commerce in customary modes of trade and travel. For the past 50 years, the Relevant Segment has been the site of four federally regulated hydroelectric dams, three of which date back to the 1910s and 1920s. The Relevant Segment was selected to be used for hydroelectric dams for the very reason that it was not navigable: what is

¹ Record title to the riverbed involves a voluminous and complex record of deeds and other records pertaining to over 190 parcels of property and is not necessary where adverse possession has been established.

good for hydroelectric power generation is bad for navigation. In its natural and ordinary condition, the Relevant Segment was characterized by physical conditions and obstructions that made it an excellent candidate for generating power, but incapable of supporting navigation.

A. The Relevant Segment In Its Ordinary And Natural Condition Was Not Susceptible To Navigation.

The Yadkin River has its headwaters on the eastern slope of the Blue Ridge Mountains in western North Carolina. Ex. 1, Expert Report of Dr. Michael D. Harvey 5, Ex. A to Harvey Dec. (“Harvey Rep.”). The river flows across the Carolina Piedmont region to its confluence with the Uwharrie River, where it forms the Pee Dee River. *Id.* From there, the Pee Dee River flows through Cheraw, South Carolina and continues to its mouth at Winyah Bay near Georgetown, South Carolina. *Id.* Based on geologic mapping by the State, the Yadkin-Pee Dee River can be divided into four parts, “defined on the basis of the regional geology” and “tied to the erosion resistance of the rocks that underlie the river that control the gradient and the width of the valley through which the river flows.” *Id.* at 5-9. One of these four parts contains the Relevant Segment, which lies between River Miles (“RM”) 234 and 279 (with the mouth of the Yadkin-Pee Dee being RM 0). *Id.* at 5. The Relevant Segment lies almost entirely within the Carolina Slate Belt, which “represents the steepest part of the river profile.” *Id.* at 5-9. APGI’s expert in fluvial geomorphology (the study of river systems) provided a longitudinal profile of the entire river demonstrating the steep gradient along the Relevant Segment. *Id.* at 8 fig. 3.

Today, the Relevant Segment contains APGI’s four hydropower facilities and reservoirs: Falls Dam, Narrows Dam, Tuckertown Dam, and High Rock Dam. Harvey Rep. 5. Before construction of these dams – while most of the Relevant Segment was in its natural condition – it was characterized by numerous impediments to effective navigation, including a “volume of water . . . insufficient to float boats of necessary size for transporting goods to and from markets,” “rock of varying resistance to erosion [that] has produced shoals or rock ledges at intermittent points along the river,” and “large rocks and boulders . . . [that] have impeded progress both upstream and downstream.” Ex. 2, Expert Report of Dr. Dan L. Morrill 16-17, Ex. A to Morrill Dec. (“Morrill Rep.”) (summarizing reports of the North Carolina Geological Survey and U.S. Army Corps of Engineers and first-hand accounts); *see also, e.g.*, Harvey Rep. 5-9, 42-43 (the Relevant Segment

“is underlain and controlled primarily by very hard and erosion-resistant metavolcanic rocks that form the steepest slopes and narrowest valleys as well as less erosion-resistant metasedimentary rocks that form bedrock shoals in the wider valley areas”).

For instance, the Narrows, at the base of which the Narrows Dam is now located, featured a four-mile gorge that “produced a torrent of water that even the most optimistic individuals understood was impassable and required portages.” Morrill Rep. 18-19 (quoting an 1899 bulletin by the State’s Geological Survey and first-hand accounts). The continuous turbulent whitewater, bedrock above the surface of the water, and “hydraulic holes” (i.e., whitewater recirculation zones) confirm that the Narrows was “especially hazardous” for the “types of open-decked, wooden watercraft available” that were “available for use in the Piedmont from the time of independence and statehood up through the 1800s.” Harvey Rep. 25-29 & figs. 11-15. Just below the Narrows were two waterfalls with dramatic nine and seven-foot plunges, known as the Falls. *Id.* at 30-33, figs. 16-18. The Falls Dam is now located at the Falls. *Id.* at 30.

Just above the Narrows, six prominent shoals intruded in quick succession: Bull Island Shoal, a 37-foot drop in two miles with two plunges of eight and ten feet near the bottom; Pennington Shoal, a 74-foot drop in 4.5 miles with channel-spanning rock ledges; Milledgeville Shoal, a 14-foot drop in 0.7 miles with a plunge of six feet near the bottom; Motts Falls, a 13.5-foot drop in 0.8 miles with six vertical falls over bedrock varying from six inches to two feet; Bald Mountain Shoal, an 8.5-foot drop in 0.5 miles; and Flat Swamp Mountain Shoal, a 10.2-foot drop in 0.5 miles. *Id.* at 31. High Rock Dam is located near the Flat Swamp Mountain Shoal, where pre-dam photography shows “extensive exposure of bedrock in the bed of the river that presented an impediment to navigation.” *Id.* at 38-39, figs. 23-24. Tuckertown Dam is near the Milledgeville Shoal, where pre-dam photography likewise shows that, due to islands, rapids, and bedrock, navigation “was not possible when the river was in its natural and ordinary condition.” *Id.* at 31, 34-37, figs. 19-22.

These impediments combined to make navigation of the Relevant Segment impossible at statehood – particularly in the kinds of boats available in the Piedmont region from the colonial period to the early 20th Century. In fact, Fred Tarver, a hydrologist employed by the State who was identified by the State’s 30(b)(6)

witness as possessing information on navigability, conceded that, in its natural and ordinary condition, the Relevant Segment “would not be navigable.” Ex. 3, Tarver Dep. 39:25-40:23; *see also id.* at 41:9-14. Indeed, Tarver testified that, even in its current condition, the river below one of the dams remains “riverine,” meaning “[n]atural flow in the river with exposed channel and bedrock, or other forms of substrate” – *i.e.*, “a bunch of rocks sticking up above the surface of the river” – precluding successful navigation. *Id.* at 38:7-39:3.

B. The Historical Record Is Replete With Failed Attempts To Navigate The Relevant Segment At The Time Of Statehood And During The 19th Century.

There is no historical evidence of “successful navigations of the entire Relevant Segment and no documented regular and customary uses of any portion of the Relevant Segment, particularly for travel or trade.” Morrill Rep. 70 (citing U.S. Army Corps of Engineers’ 1977 study of the Yadkin River); *see also id.* at 6; Ex. 4, Expert Report of Dr. Mark Newell (“Newell Rep.”) 1, 5-18, Ex. A to the Newell Dec.; Ex. 3, Tarver Dep. at 32:23-33:4; Ex. 5, Dep. of State 30(b)(6) witness Speros Fleggas (“Fleggas 30(b)(6) Dep.”) at 41:12-15 (admitting that the State “does not have any facts that indicate that anybody used the relevant segment of the Yadkin River to transport any goods”); *id.* at 60:15-65:9 (testifying that the State has “no facts” showing that a boat could or had made it through the Narrows, Falls, or any of the prominent shoals in the Relevant Segment).

To the contrary, travel methods and population patterns during the colonial period confirm that the Relevant Segment was not used for navigation at statehood. For instance, although settlement of the coastal plains began during the 1620s, settlement of the Carolina Piedmont did not begin until at least the 1730s. Morrill Rep. 7, 10. This is “directly attributable to the fact that the coastal plain has navigable rivers, whereas the Carolina Piedmont did not.” *Id.* at 7. From the colonial period until the arrival of railroads in the mid-1800s, inhabitants of the area surrounding the Relevant Segment used roads – even inadequately constructed and maintained ones – rather than rivers, as the principal means of transportation and commerce. *Id.* at 71-106 (summarizing records and journals of early settlers, including the Moravians, other eighteenth and nineteenth century first-hand accounts, and newspaper reports). Likewise, although evidence of local boat-building traditions on other Piedmont rivers exists, no comparable evidence exists along the Relevant Segment. Newell Rep. 1. In short, there were powerful commercial and practical reasons to use the Relevant

Segment for transportation and commerce, yet the historical record reveals no use of the Relevant Segment for either. Morrill Rep. 82-84.

Even after statehood, there is no evidence of successful navigation of the length of the Relevant Segment. “State-sponsored navigation assessments from the first half of the 19th century concluded that the Relevant Segment was not navigable because the Narrows presented an ‘insurmountable difficulty.’” Harvey Rep. 14. That conclusion was confirmed by the catastrophic results in the rare instances when navigation of the Relevant Segment was attempted. For example, in 1887, two U.S. Army Corps of Engineers officers made a “harrowing” attempt. Morrill Rep. 47-50, n.97 (citing contemporary account, *Adventurous Voyagers*, Carolina Watchman, June 9, 1887). When their small skiff could not navigate the narrow channels, the officers had to walk it between the rocks by “turn[ing] the boat with the bow upstream, the [] boatman in the water holding the boat to keep it from going too fast and being dashed against the rocks.” *Id.* at 48 (alteration in original) (quoting *Adventurous Voyagers* at 2-3). Then, “the vessel sank as it went over vertical falls almost eight feet high,” and their provisions were swept downstream. *Id.* at 49. Although they repaired the boat, additional obstacles soon convinced them to carry it overland. *Id.* at 50 (citing *Adventurous Voyagers* at 2-3). Of course, “[t]here was never any thought given to trying to take the boat through the Narrows[.]” *Id.*

In 1890, two Corps officers took a small boat down part of the river above the Relevant Segment and noted the “very swift” current, “large rocks” extending from bank to bank, and “ledge after ledge entirely across the river.” Morrill Rep. 51 (quoting contemporary account, *A Trip Along the Yadkin Valley*, Wilmington Messenger, Jun. 19, 1890). They did not even attempt to navigate within the Relevant Segment, and went overland from Mocksville (above the Relevant Segment) to Salisbury. *Id.* at 52.

Similarly, in 1925, after the Narrows Dam and Falls Dam had been erected and the reservoirs impounded, two men in a “non-sinkable” metal boat attempted to navigate the Relevant Segment. Morrill Rep. 52-55 & 53 n.103. They noted that, above Abbott’s Creek (within the Relevant Segment), ledges of rock extended across the river. *Id.* at 53. As they came downriver toward High Rock, one man had to get out to push and pull the boat through the “[n]arrow channels filled with boulders, rough and jagged rocks slightly hidden by the stream,’ and other obstructions.” *Id.* at 54 (quoting voyager’s firsthand account). At barely

over three feet wide, the boat was still too wide to navigate among all the rocks “and we were ever fearful that she might crash into a boulder and spring a leak[.]” *Id.* (alteration in original). At High Rock, “there was extensive exposure of bedrock in the bed of the river.” Harvey Rep. 31. At Motts Falls, a 13.5-foot drop in 0.8 miles with six vertical falls over bedrock varying from six inches to two feet in height, the area was so treacherous that *both* men had to get out of the boat in order to manage the boat in “the rough, torrential passages Many times too we were thrown against rocks in the stream and somewhat bruised, and often we dropped into water over our heads” *Id.* at 31, 40; Morrill Rep. 54 (same). Other examples of failed navigation attempts abound.² *See generally* Morrill Rep. 47-55.

Even log floats were not possible along the Relevant Segment. There is no record of successful log floats on the Relevant Segment, and Dr. Harvey concluded that one would fail. Harvey Rep. 68.

C. The Record Shows Attempts To Make The Relevant Segment Navigable Were Unsuccessful.

Reflecting that the Relevant Segment was not navigable in its natural and ordinary condition, throughout the late 1700s and 1800s, the state and federal governments considered whether blasting, canals, or other improvements could make some areas within, above, and below the Relevant Segment navigable. Few of the efforts were initiated, and none of them succeeded.

In 1785, a survey of the Yadkin was ordered, but never completed, to determine the cost of creating a channel at least 18 inches deep at low water “for Canoes or Boats of Sixty feet long” (a type customarily used to carry goods at the time). Morrill Rep. 23.

Between 1816 and 1825, the Yadkin Navigation Company attempted to construct improvements to the Yadkin River, including a 14-mile road/portage around the Narrows, which the company recognized would remain impassable. *Id.* at 23-30. After its efforts failed to make any portion of the Yadkin navigable, the company lost the support of the North Carolina Legislature. *Id.* at 27-29 (citing the 1822 annual report of the State’s Board of Public Improvements).

² For example, in 1914, despite being an “expert oarsman” and “splendid swimmer,” and despite having made a “careful investigation,” a man died because his boat capsized in rough water when he and a colleague attempted to traverse the Narrows. Ex. 6, *Harold Stevens Drowned in Yadkin*, Carolina Watchman, May 27, 1914, at 1.

In 1850, the Legislature authorized a second Yadkin Navigation Company to attempt to make the river navigable from Wilkesboro (far above the Relevant Segment) to the North Carolina Railroad that crossed the Yadkin near Salisbury (within the uppermost portion of the Relevant Segment). *Id.* at 32-38. For the small portion within Relevant Segment, the company planned to build canals and locks to create a navigable channel. *Id.* 37. The company ultimately abandoned the project after concluding that it would be far more expensive than initially anticipated, as “the real magnitude of the work contemplated was vastly underrated.” *Id.* at 37-38.

In the 1870s and 1880s, the federal government, through the U.S. Army Corps of Engineers, took up the charge. *Id.* at 40-46. Having learned from the State’s experience, however, the Corps did not even attempt to improve most of the Relevant Segment, which it described as “containing many shoals, rapids, and falls which entirely **preclude any attempt to make it navigable.**” *Id.* at 41 (quoting an 1892 Secretary of War report to Congress) (emphasis added). Instead, the federal project focused only on making the Yadkin navigable from the railroad bridge near Salisbury to Wilkesboro, which is far above the Relevant Segment. *Id.* at 40.

Even above the railroad bridge, the Corps found improving the Yadkin River a considerable task:

This portion of the Yadkin River ... [had a slope of about 2 feet to the mile, and its] **navigation was completely obstructed** by rock ledges, fish and mill dams, and numerous shoals, with a greatest depth of 1 foot at ordinary low water on some of its shoals and ledges. . . . **No river commerce has yet been created.**

Id. at 42-43 (alterations in original, emphasis added) (quoting the 1892 Secretary of War report to Congress) (emphasis added). Starting near Salisbury, about 100 employees labored for several years, “with the aid of steam drills, dynamite, electric batteries, pluck and energy,” having “declared war upon the granite rocks and boulders, which so long have lain in the channel of the Yadkin River, as a foe to progress, and the demands of our civilization.” Ex. 7, *Uncle Sam’s Contract for the Improvement of the Yadkin River*, Charlotte Observer, Sept. 7, 1881, at 1. But even after blasting a 33-mile channel 40 to 70 feet wide that was 24 to 30 inches deep only part of the year, the Secretary of War terminated the Yadkin navigation project in 1892, reporting that “**no freight whatever has been yet carried upon that part of the river.**” Morrill Rep. 44-45 (emphasis added).

D. The State Recognized Private Ownership Of The Yadkin Riverbed.

Consistent with its understanding that the Relevant Segment was not navigable, the State repeatedly recognized private rights to the riverbed throughout the 18th, 19th, and early 20th centuries. Indeed, in exchange for monetary consideration, the State granted private owners tracts within the Relevant Segment at least 103 separate times. Ex. 8, Expert Report of Surveyor Norman Ribelin, Ex. A to Ribelin Dec. (“Ribelin Rep.”) 8-11 (listing riverbed grants out of the State).³ In several instances, the grants were *exclusively* for the historic bed of the Yadkin River, leaving no doubt that the State recognized that the historic riverbed could be privately owned. *Id.* at Ex. 2 (graphically depicting the locations of grants); Ribelin Dec., Ex. B (WL Cotton Grant); *id.* Ex. C (C-W Smithdeal Grant). Likewise, the North Carolina Supreme Court repeatedly held that the Yadkin River was not navigable and was thus susceptible to private ownership. *E.g., State v. Glen*, 52 N.C. 321, 326 (1859); *Cornelius v. Glen*, 52 N.C. 512, 514-15 (1860).⁴

E. The State Repeatedly Took The Position That The Relevant Segment Was Capable Of Private Ownership And Was Not Navigable.

By the early 20th century, it was clear that the very conditions that rendered the Relevant Segment incapable of supporting navigation – steep gradient, raging flows, and shoals and rocks – rendered it a promising location for hydropower dams. Moreover, its widely recognized status as nonnavigable made it an attractive site from a regulatory perspective. Morrill Rep. 56-57. Accordingly, private companies began constructing a series of dams along the Relevant Segment. In 1917, Narrows Dam was constructed at RM 236.5; in 1919, Falls Dam was constructed at RM 234; in 1927, High Rock Dam was constructed at RM 253; and in 1962, Tuckertown Dam was constructed at RM 244.3. Harvey Rep. 5.

In 1937, APGI’s predecessor filed a declaration of its intent to construct Tuckertown Dam with the

³ In addition to these grants by the State, the King of England and Lord Granville, as prior owners, granted tracts within the Relevant Segment a total of 16 times prior to North Carolina’s independence in 1776. In total, APGI thus far has located 119 grants within the Relevant Segment. Ribelin Rep. 8-11, 14.

⁴ An 1894 news article observed that:

[I]t is nevertheless a fact, that the beds of all unnavigable streams are open to entry and grant and an interest in many of the fine water powers in this State has been acquired by parties who took out grants for such parts of river beds. The bed of the Yadkin at the Falls and Narrows was granted to Oliver H. Dockery some thirty years ago.

Ex. 9, *The Bed of the Catamba River Entered*, Charlotte Democrat, Oct. 5, 1894 at 1.

Federal Power Commission (“FPC”), the Federal Energy Regulatory Commission’s (“FERC”) predecessor, seeking confirmation that the FPC had no regulatory authority over the proposed construction. *See In re Carolina Aluminum Co.*, 1 F.P.C. 495, 498, 1937 FPC LEXIS 9, at *5-8 (1937). The State not only actively participated in those proceedings, but affirmatively argued that the Relevant Segment was not navigable, and that its bed and banks belonged to APGI’s predecessor. *See id.* at *8-9. The North Carolina Attorney General specifically addressed both navigability and riverbed title during the FPC hearing:

[T]he Yadkin-Peedee River at the Tuckertown project and below **is not now and has not been a navigable stream** within the purview of [the FPA]; . . . the Yadkin-Peedee River, and particularly that part of it affected by this controversy, is entirely within the jurisdiction of the State of North Carolina as being a nonnavigable stream, and **grants have been and may be made up and down the river, including the area affected by this project to the bed of the stream**[.]

Ex. 10, Transcript of Hearing at 160, *In re Carolina Aluminum Co.*, 1 F.P.C. 495 (Sept. 13, 1937) (No. DI-135) (“FPC Tr.”) (emphasis added). Similarly, the State argued that:

[t]he existing facilities on the Yadkin and Pee Dee rivers in North Carolina have been established by the purchase by the several corporations of the land and riparian rights necessary for their construction, under the rights set forth in the franchises granted them by the State of North Carolina, and in every respect in accordance with the laws of that Commonwealth.

Ex. 11, Br. of Dep’t Conserv. & Dev. at 9-10, *In re Carolina Aluminum Co.*, 1 F.P.C. 495 (1937).

During the same proceedings, when asked whether he considered the Yadkin River navigable at Tuckertown, the Chief Engineer of the Water Resources and Engineering Division of the North Carolina Department of Conservation and Development, T.S. Johnson, testified that “**it seems so ridiculous to think of it as navigable** that I have no other answer, no.” Ex. 10, FPC Tr. at 171 (emphasis added). When asked to testify about the navigability of the Relevant Segment “in its original state,” Johnson stated the following:

- “Of course, before the Narrows dam was built, there was that steep, narrow, rocky gorge with considerable fall within a very short distance which **has always been regarded as an absolute obstacle to any navigation** past it” *Id.* at 172 (emphasis added).
- “[T]he shoals and islands and rocky bed and falls in the river through this whole Tuckertown reach . . . would have effectively **prevented any possible navigation** in fast time over that region; it is, as far as that goes, where the river bed is exposed.” *Id.* at 173 (emphasis added).

- “Q. From the history as you have gone into it on the stream and its use, is there any record of it ever having been navigated?
A. No[t] that I have been able to learn.” *Id.* at 173-74.
- “Q. Now, taking the downstream from Tuckertown, **do you consider i[t] navigable in North Carolina?**
A. **No sir.**
Q. Please say why.
A. Both **for the natural conditions that existed before the works were put in**, and for the various self-evident facts now that there are four dams downstream from the Tuckertown reach, none of which are equipped with locks and dams.” *Id.* at 174 (emphasis added).
- “[T]he falls and the Narrows that I have already described are all reported and described in such a way . . . as to show and from the information I have been able to obtain, is that appearance is correct; that **they never were navigated, and propositions to make them so were never actually put through.**” *Id.* at 175 (emphasis added).

Indeed, the record is replete with instances of the State asserting that the Relevant Segment was not navigable. *See* Attachment A (table of exemplary statements by the State in FPC proceedings).

After the FPC found federal jurisdiction – not because the Relevant Segment was navigable, but rather because the proposed project would affect interstate commerce – APGI’s predecessor filed a petition for rehearing.⁵ Once again, the State’s Attorney General confirmed nonnavigability:

The undisputed testimony showed that **the Yadkin-Pedee River is not navigable** in the vicinity of the proposed Tuckertown plant and any finding, therefore, by the Commission, that the Tuckertown project is to be located on navigable waters of the United States is arbitrary, in direct contradiction of the testimony, and unsupported by any evidence whatsoever.

Ex. 12, N.C. Pet. Rhr’g (Dec. 13, 1937), Tr. of Record at 256, *Carolina Aluminum Co. v. FPC*, 97 F.2d 435 (4th Cir. 1938) (No. 4318) (emphasis added); *see also* Morrill Rep. 61-63. On appeal, to the Fourth Circuit, the State again averred:

The Tuckertown Project is planned to be constructed on the Yadkin River at a point approximately seventy miles from Cheraw, South Carolina, Cheraw, South Carolina being the highest point on the Yadkin River at which the Yadkin-Pedee River is claimed to be navigable, and navigation at said point for purposes of interstate and foreign commerce does not, and has not ever existed in fact.

⁵ The Federal Power Act gave the FPC control over hydropower facilities located, *inter alia*, “in any stream . . . over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States.” 16 U.S.C. § 817(1). As the Supreme Court recently reiterated, the navigability test for purposes of federal regulatory jurisdiction is much broader than the navigability test for purposes of title. *See PPL Montana v. Montana*, 132 S. Ct. 1215, 1228 (2012) (describing differences between standards).

Ex. 13, N.C. Pet. for Leave to File Br. Amici Curiae at 3, *Carolina Aluminum Co. v. FPC*, 97 F.2d 435 (4th Cir. Apr. 8, 1938) (No. 4318); *see also* Morrill Rep. 65. This position was not novel – **the Attorney General cited *State v. Glen* and other state court cases finding the Yadkin was nonnavigable under North Carolina law.** Ex. 14, N.C. Amicus Curiae Br. at 3-4, *Carolina Aluminum Co. v. FPC*, 97 F.2d 435 (4th Cir. 1938); Ex. 13, Pet. for Leave at 3; Ex. 12, N.C. Pet. for Rhr'g, Tr. of Rec. at 256.

Although the denial of its appeal, combined with the Great Depression, led APGI's predecessor to delay construction of the Tuckertown Dam, it resumed the effort in the 1950s. In doing so, APGI's predecessor spent considerable time and money purchasing deeds to virtually all of the land necessary to construct its dam and create reservoirs upstream. *See* Ribelin Rep. Exs. 3 & 4; Ex. 15, Expert Report of Kim W. Gallimore, Ex. A. Gallimore Dec. ("Gallimore Rep."), 3-6. With the State's full knowledge and support, APGI bought and paid for more than 300 different parcels comprising the riverbed (at issue here) and uplands that would be flooded (not at issue in this case). *See* Ribelin Rep. Exs. 3 & 4; Gallimore Rep. 3-6.

The decision to resume the project necessitated another FPC proceeding in 1957. During that proceeding, APGI's predecessor once again argued that the FPC lacked jurisdiction because the Relevant Segment was not navigable and did not affect interstate and foreign commerce. *See* Ex. 16, Carolina Aluminum Co. License Application at 1-2 (Feb. 1, 1956) ("1956 Appl."). Once again, the State supported this position, formally intervening and representing to the FPC that "North Carolina adopts the evidence of the applicants, and exhibits filed in support of the same." Ex. 17, Br. of Int'rv'r N.C. at 3, *In re Carolina Aluminum Co.* (F.P.C. Nov. 11, 1957) (No. IT-5499). That evidence and those exhibits stated that the "location of the Yadkin Project, on the Yadkin River between Miles 234 and 272, is upon a nonnavigable stream," and that the applicant "has acquired and now owns title to all the land and appurtenant water rights for the existing High Rock, Narrows and Falls Developments and has acquired and now holds title to approximately 60 per cent of the land and water rights for the proposed Tuckertown Development." Ex. 16, 1956 Appl. at 19 & Ex. E. As a requirement of obtaining its license, APGI's predecessor prepared a document listing every conveyance of ownership or possessory right into the company (known as "Exhibit F"), Ribelin Rep. Ex. 4, as well as a survey identifying the location on a map of each conveyance (known as "Exhibit K"), *id.* Ex. 3.

Although the FPC once again assumed jurisdiction based on the Yadkin Project's effect on interstate commerce,⁶ it relied on the evidence, exhibits, and representations regarding ownership of the relevant lands when granting the federal license for the Yadkin Project. *See Order Issuing License*, 17 F.P.C. 493 (1957).

F. The State Has Treated APGI As Owner Of All Lands Within The Yadkin Project.

In the following decades, the State has never asserted any ownership rights in the bed underlying the project – until now. Fleggas 30(b)(6) Dep. 107:20-108:10; Ex. 18, Dep. of State 30(b) witness Tim Walton (“Walton 30(b)(6) Dep.”) 92:5-20. To the contrary, the State has repeatedly asserted that the river is not navigable; admitted that APGI owns the riverbed; and sought easements, licenses, and permits from APGI to use the riverbed. *See, e.g.*, Ex. 19, Letter from C. Little to Alcoa (May 9, 2002) (notifying Alcoa of the State's need to access “your property”). For instance, in February 1956, the State Highway and Public Works Commission obtained a Right-of-Way Agreement and easements that cover part of the riverbed for the I-85 bridge. Ex. 20, Right of Way Agreement at 1-2 (Feb. 27, 1956); *see also* Ex. 21, Deed of Easement for Highway Right of Way 1-3 (Oct. 6, 2010) (2010 easement for I-85 widening). Similarly, in 1985, when relocating U.S. 601, the North Carolina Department of Transportation (“DOT”) sought and obtained an easement from APGI that included a right of way to the riverbed. *See* Ex. 22, Deed of Easement (May 9, 1985) at 1 & map.

Indeed, this lawsuit was the first time that the State claimed that it, not APGI, owns the riverbed underlying the Relevant Segment.

II. SUMMARY JUDGMENT STANDARD

The Court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Although the Court must “view[] the evidence in the light most favorable to” the non-moving party, “[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.

⁶ The FPC again did not find the Relevant Segment navigable; rather, it assumed jurisdiction based upon the Project's potential to affect the waters of the Pee Dee, “which is a navigable waterway of the United States at least up to Cheraw, S.C.” *Order Issuing License*, 17 F.P.C. 493, 498 (1957).

574, 586, 606 (1986) (footnote omitted); *see also Wilkins v. Montgomery*, 751 F.3d 214, 220 (4th Cir. 2014). Accordingly, “[t]he mere existence of a scintilla of evidence in support of the [non-moving party’s] position will be insufficient; there must be evidence on which the [fact finder] could reasonably find for the [non-moving party].” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *see also Scott v. Harris*, 550 U.S. 372, 380 (2007) (“When opposing parties tell two different stories, one of which is blatantly contradicted by the record, . . . a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.”); *Coretel Va., LLC v. Verizon Va., LLC*, 752 F.3d 364, 370 (4th Cir. 2014) (“[I]t is ultimately the nonmovant’s burden to persuade [the Court] that there is indeed a dispute of material fact”).

III. ARGUMENT

A. **The Undisputed Evidence Demonstrates That The Relevant Segment Of The Yadkin River Was Not Navigable In Fact.**

In its Complaint, the State claims ownership of the bed of the Relevant Segment of the Yadkin River on the theory that, “at the time North Carolina became a state of the United States of America in 1789 and at all times thereafter, all portions of the [Relevant Segment] have been, and continue now to be, navigable in fact.” Compl. ¶ 27. Accordingly, the State’s claim stands or falls on whether the Relevant Segment of the Yadkin River was navigable in fact, which under controlling case law is to be assessed at the time of statehood.

As the Supreme Court has made plain, and this Court has recognized, “questions of navigability for determining state riverbed title are governed by federal law.” *PPL Montana v. Montana*, 132 S. Ct. 1215, 1227 (2012); Order Denying Remand Mot. at 2, Doc. 34 (Nov. 27, 2013). As the party asserting navigability, the State bears the burden of proof. *See, e.g., United States v. Davis*, 339 F.3d 1223, 1226-27 (10th Cir. 2003); *State of N.D. v. United States*, 972 F.2d 235, 238 (8th Cir. 1992); *see also* 78 Am. Jur. 2d Waters § 149.⁷

To establish navigability for title, the State must prove that the Relevant Segment was “navigable in fact” when North Carolina became a state. *PPL Montana*, 132 S. Ct. at 1227-28. The federal navigability-for-

⁷ To the extent the State intends to argue that North Carolina may announce and apply its own navigability-for-title standard, both Supreme Court precedent and this Court’s prior ruling confirm that the State is mistaken; the State’s claim that it owns the riverbed because it was navigable at statehood necessarily turns on the application of *federal* navigability-for-title law. In any event, because the State has produced *no* evidence that the Relevant Segment is navigable in fact, its claim fails under any standard.

title rule is as follows:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their [natural and] ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Id. at 1228. In assessing navigability, the Court does not evaluate a river in its entirety, but instead considers it “on a segment-by-segment basis to assess whether the segment of the river, under which the riverbed in dispute lies, is navigable or not.” *Id.* at 1229. In other words, nonnavigable stretches of a river cannot be excused as “merely short interruptions.” *Id.* at 1226. Rather, navigability must be assessed based on river segments, and a segment must be “discrete” as defined by reference to shifts in physical conditions, topography, and geography; and “substantial” so as to aid in the practicalities of administering title. *Id.* at 1231. In this case, it is undisputed that the segment at issue is the Relevant Segment as defined in the Complaint, which is the 45-mile length of the Yadkin Project plus 100 yards to the north and 100 yards to the south. Compl. ¶ 27; *see also, e.g.*, Ex. 5, Fleggas 30(b)(6) Dep. 13:18-21; Harvey Rep. 9 (confirming that the Relevant Segment defined by the State corresponds to the physical attributes of the river). Accordingly, the question is whether the Relevant Segment was navigable in its entirety at the time of statehood.

1. The Overwhelming And Undisputed Evidence Establishes That The Relevant Segment Was Not Navigable At Statehood.

APGI has presented a virtual mountain of evidence establishing that the Relevant Segment, in its natural and ordinary condition at the time of statehood, was not navigable in fact. Dr. Harvey, a fluvial geomorphologist who examined the available scientific evidence, concluded in no uncertain terms that the Relevant Segment was not navigable. Harvey Rep. 9-11. Professor Morrill, who was a professor of history at the University of North Carolina at Charlotte for 51 years, conducted a thorough historical investigation and concluded that there is no historical evidence that the Relevant Segment was navigable. Morrill Rep. 1-8. To the contrary, Professor Morrill concluded that the historical evidence uniformly demonstrates its nonnavigability. *Id.* This evidence is confirmed by decades – indeed, centuries – of actions and statements by the State affirming that the Relevant Segment was nonnavigable.

a) The Physical Characteristics Of The Relevant Segment Demonstrate It Was Not Navigable In Fact.

The uncontroverted evidence of the physical characteristics of the Relevant Segment in its natural and ordinary condition at statehood demonstrates that it was not navigable in fact. As previously explained, at statehood, the Relevant Segment was characterized by numerous obstacles to navigability, including the Narrows, Little Falls, Big Falls, and six named shoals with “stair-step profile” underlain by bedrock. Statement of Undisputed Material Facts (“SOF”), *supra* § I.A; Harvey Rep. 9. Given these obstacles and the general conditions of the Relevant Segment, APGI’s expert fluvial geomorphologist concluded that navigation would not have been possible using historically available watercraft. Harvey Rep. 9; *see also* Newell Rep. 1 (describing historical watercraft); *see generally* *PPL Montana*, 132 S. Ct. at 1234 (relying on the opinion of expert fluvial geomorphologist). In reaching that conclusion, Dr. Harvey detailed the physical characteristics of the Relevant Segment, including its geology, flow velocity and depth, and flow patterns. *See, e.g.*, Harvey Rep. 46 (discussing “extreme variability of the daily flows over the year, the result of frontal rainstorms during the winter and spring and cyclonic storms in the summer and fall,” resulted in nonnavigability); *id.* (discussing “the impediments to navigation are primarily related to lack of flow depth, the absence of open, rock-free continuous channels and the high probability of striking rocks both above and below the water surface”); *id.* at 49 (concluding that the Narrows was not navigable due to “the magnitude of the drop (37 feet), the extensive presence of bedrock outcrop and large boulders, and the continuous nature of the whitewater over a distance of 1 mile”); *id.* at 49 (opining that the six prominent shoals were not navigable due to “(1) flow depth, (2) flow velocity, (3) flow direction and (4) [lack of] continuity of suitable conditions for the maneuverability of the watercraft”); *id.* at 53-68 (modeling hydrodynamics of Flat Swamp Mountain Shoal based on topographical data, water flows, particle tracking, and physical descriptions to conclude it and the other shoals were not navigable).

Those findings are confirmed by two North Carolina-sponsored studies during the early 1800s, which concluded that the entire Relevant Segment was nonnavigable in its natural and ordinary condition – that is, without blasting through shoals, removing obstacles, and constructing a canal to avoid the impediments. Harvey Rep. 15-20 (summarizing two investigations commissioned by the State’s Board of

Commissioners for the Improvement of Internal Navigation). Moreover, although whether a river could be *made* navigable is not relevant to determining navigability for title, *PPL Montana*, 132 S. Ct. at 1228-29, the repeated failure of various government plans to improve navigation in the Relevant Segment underscores how insurmountable the barriers to navigation were. *See* Morrill Rep. 4-6, 20-46; Harvey Rep. 15, 20-21, 40-41; *see also Oklahoma v. Texas*, 258 U.S. 574, 590 (1922) (abandoned government attempts to improve navigation are evidence of nonnavigability). One such study concluded that the Narrows was “an insurmountable difficulty in the way of improvement.” Morrill Rep. 20; *see also* Harvey Rep. 20-21 (citing chief engineer’s 1856 report to the stockholders of the Yadkin Navigation Company, which described the Narrows as “an obstruction to [the Yadkin River’s] complete navigation, which cannot be overcome”). And an 1856 report concluded that even the upper part of the Relevant Segment could not be rendered navigable without adding a series of locks and canals. *Id.*

Federal studies and projects confirmed the same. For example, in an 1892 report to Congress, the Secretary of War concluded that a 111-mile section of the river including the entire Relevant Segment “contain[ed] many shoals, rapids, and falls which entirely preclude any attempt to make it navigable.” Harvey Rep. 40-42 (summarizing studies by the U.S. Army Corps of Engineers and quoting 1892 Report of the Secretary of War); Morrill Rep. 41-46 (same). When the federal government attempted to make a portion of the River navigable during the late 1800s, most of which was above the Relevant Segment, those attempts failed and were abandoned in 1892 due to lack of commercial use of even the improved portion of the river. Harvey Rep. 40-41. Indeed, the U.S. Army Corps of Engineers stated that “[n]o commerce” existed upon the river either before or after the improvements and that therefore the project should be abandoned. *Id.* at 40; Morrill Rep. 44.

Significantly, these reports confirm that the Narrows, along with other shoals and falls, were barriers that could not be overcome without some type of portage – be it canals, railroads, or otherwise. As the Supreme Court explained in *PPL Montana*, “[i]n most cases,” the very “need to bypass the river segment” is

sufficient to confirm that it “is nonnavigable.” 132 S. Ct. at 1231. That is clearly the case here.⁸

b) The Historical Record Demonstrates That The Relevant Segment Was Not Navigable In Fact.

Unsurprisingly given its physical characteristics, the undisputed facts establish that the Relevant Segment has never been used or usable as a highway for commerce over which trade and travel were conducted in the customary modes. *See* SOF, *supra* § I.B. To the contrary, the historical record demonstrates that “there were no successful navigations of the entire Relevant Segment and no documented regular and customary uses of any portion of the Relevant Segment, particularly for trade or travel.” Morrill Rep. 70; *see also id.* at 6-7, 47-55 (describing failed navigation attempts). Similarly, marine archeologist expert Dr. Newell found no evidence of customary use on the Relevant Segment of the types of watercraft available in that region at statehood and no “reports of local boat-building traditions on the Relevant Segment of the Yadkin River” that were common to other rivers on which navigation was occurring. Newell Rep. 1. Consistent with the lack of evidence of navigation at statehood, a century later the U.S. Army Corps of Engineers reported on several occasions that there had been no commercial use of the River. *See* Harvey Rep. 41 (summarizing, among others, 1886 and 1888 U.S. Army Corps of Engineers reports); Morrill Rep. 43 (quoting 1885 U.S. Army Corps of Engineers report).

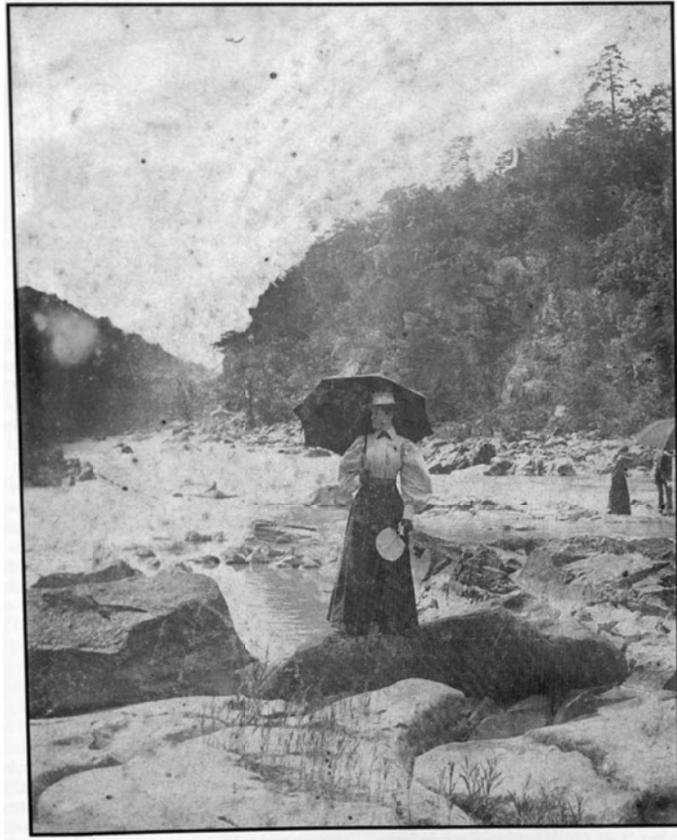
That lack of evidence is not for lack of incentive. Had the Relevant Segment been navigable – or even capable of being rendered navigable – local residents would have used it to bring their goods to market. Morrill Rep. 4-8, 70-106. Instead, they were forced to resort to the much slower and far less efficient use of trails, wagon roads, and plank roads because the Relevant Segment simply was not an option. *Id.* at 20-46, 70-107. In fact, while some of the earliest settlers in the Piedmont, the Moravians, located their settlements within a few miles of the Yadkin River, they sent their goods by wagon to Fayetteville, the head of navigation on the Cape Fear River, instead of using the Yadkin River to ship their goods to coastal markets. *Id.* at 72-76.

Indeed, the Relevant Segment was viewed as an obstacle to be overcome by those engaging in commercial trade and travel in the North Carolina Piedmont; travel would have been easier if it had not

⁸ Although the Supreme Court noted that, at least in theory, there could be a *de minimis* exception to that rule, *PPL Montana* at 1232, the portages at issue here are no more “*de minimis*” than the one in *PPL Montana*.

existed. Morrill Rep. 84-92. Native Americans and settlers established fords, ferries (many tethered at both ends), and bridges to cross the Yadkin on their land-based journeys. *Id.* at 71, 76, fig. 13, 84-92. Ferries and river crossings, like the bridges that took their place, are not probative of navigability; to the contrary, they confirm the river was an obstacle to be crossed. *See id.* at 84-87; Newell Rep. 12-13; *see also Utah v. United States*, 304 F.2d 23, 25-26 (10th Cir. 1962) (holding San Juan River nonnavigable at statehood, where there was evidence that Native Americans crossed the river frequently and used small boats as ferries to go to and from trading posts); *State v. N.D.*, 770 F. Supp. 506, 511 (D.N.D. 1991) (“[T]he existence of a bridge, or a ferry, establishes that the river is an obstruction to commerce which must be overcome.”), *aff’d*, 972 F.2d 235 (8th Cir. 1992); *accord PPL Montana*, 132 S. Ct. at 1233 (“Mere use by initial explorers or trappers, who may have dragged their boats in or alongside the river despite its nonnavigability in order to avoid getting lost, or to provide water for their horses and themselves, is not itself enough.”).

The record is replete with colorful historical accounts of failed attempts to navigate the Relevant Segment. Morrill Rep. 47-56; Harvey Rep. 40, 68. Adventurers and local newspapers recounted repeated efforts that resulted in a disastrous or deadly end, with voyagers drowned and boats broken to pieces. Morrill Rep. 47-55; Ex. 6, *Harold Stevens Drowned in Yadkin*, *supra*. For example, the *Carolina Watchman* detailed two U.S. Army Corps of Engineers officers’ “harrowing” attempt to navigate the Relevant Segment, during which, among other disasters, “the vessel sank as it went over vertical falls almost eight feet high” and their provisions were swept downstream; they ultimately had to carry their repaired boat overland – and all of this even though “[t]here was never any thought given to trying to take the boat through the Narrows[.]” Morrill Rep. 47-55 (collecting first-hand accounts and newspaper reports of failed and incomplete voyages). As put best by **the State’s engineer** when asked during the FPC proceedings whether he considered the Yadkin River navigable at Tuckertown: “**it seems so ridiculous to think of it as navigable** that I have no other answer, no.” Ex 10, FPC Tr. at 171 (emphasis added). One example among many of the historical photographs of the Relevant Segment before the dams underscores the physical conditions precluding navigability:



Ex. 23, Donna Dodenhoff, *Stanly County: The Architectural Legacy of A Rural North Carolina County* 285 (1992); see also Harvey Rep. 24-39, figs. 10-24 (photographs showing rock shoals and rapids).

c) The State’s Own Statements, Actions, And Testimony – And Delay In Asserting Its Claim – Confirm That The Relevant Segment Was Not Navigable In Fact.

Notwithstanding the State’s many opportunities to opine on the subject during the past century, the State never claimed that the Relevant Segment was navigable. To the contrary, it repeatedly insisted that the Relevant Segment was not navigable and that the Yadkin River beds were owned by private parties. Since the 1910s, the State was aware that private companies were establishing dams up and down the Yadkin River (not just in the Relevant Segment). In incorporating APGI’s predecessors, the North Carolina General Assembly authorized APGI’s predecessors to purchase or condemn land and to construct hydroelectric projects along any “unnavigable stream within North Carolina where the company may establish a plant.” Ex. 24, 1905

N.C. Priv. L. ch.122 § 4.⁹ With the State’s knowledge and support, APGI’s predecessors went to great efforts to purchase hundreds of tracts of land ultimately comprising the Yadkin Project. Ribelin Rep. Exs. 3 & 4; Gallimore Rep. 3-6.

When APGI built the dams, the State never suggested that the Relevant Segment was navigable or that the State owned the riverbed. Rather, in the proceedings before the FPC and federal courts, the State asserted repeatedly both that (1) the Relevant Segment was nonnavigable as a matter of law and fact and (2) the riverbed was owned by APGI’s predecessors. See SOF, *supra* § I.E. The State’s position was consistent with the numerous rulings by the North Carolina Supreme Court that the Yadkin River was not navigable and was susceptible to private ownership. See *Dunlap v. Carolina Power & Light Co.*, 212 N.C. 814, 817, 195 S.E. 43, 45 (1938) (“Yadkin, or Pee Dee river, is a nonnavigable stream.”); *Cornelius*, 52 N.C. at 513; *Glen*, 52 N.C. at 326.

Confirming its understanding that the riverbed was owned by APGI, the State has repeatedly sought and obtained easements, licenses, and permits from APGI to use what is described in those documents as APGI’s property – wholly unnecessary if the State actually owned the disputed lands. SOF, *supra* § I.F.

In short, the State’s course of conduct over the past centuries is in and of itself compelling evidence that the Relevant Segment is not navigable in fact. See *PPL Montana*, 132 S. Ct. at 1235 (“State’s long failure to assert title . . . support[s] the conclusion that the river segments were nonnavigable”); *cf. United States v. Oregon*, 295 U.S. 1, 24 (1935) (“It is not without significance that the disputed area has been treated as nonnavigable both by the Secretary of the Interior and the Oregon courts.”). The State’s actions here go well beyond the passive acquiescence that the Supreme Court in *PPL Montana* found probative of nonnavigability – the State not only failed to assert its purported rights for decades, but affirmatively argued that the river was not navigable and endorsed APGI’s private ownership, even testifying to those facts in legal proceedings.

⁹ See also, *e.g.*, Ex. 25, 1901 N.C. Priv. L. ch.6 § 2(3) (authorizing Whitney Reduction Co. “to build and maintain any dam or dams across the Yadkin River”), § 3; Ex. 26, 1899 N.C. Priv. L. ch.151 §§ 2, 9, 10; Ex. 27, 1897 N.C. Pub. L. ch.236 §§ 2, 8-10 (authorizing Yadkin River Power Co. to “locate, acquire, construct, equip, maintain and operate” hydropower facilities “from an initial point on the Yadkin river in Rowan, Davidson, Stanly or Montgomery county”); Ex. 28, 1893 N.C. Priv. L. 310 § 4.

2. The State's Sole Argument As To Navigability Is An Inapposite 1885 Session Law.

The State's 30(b)(6) witnesses identified no admissible evidence of navigability in fact. *See, e.g.*, Ex. 5, Fleggas 30(b)(6) Dep. at 62:2-65:9 (testifying that the State had "no facts" that the obstacles in the Relevant Segment – Flat Swamp Mountain Shoal, Bald Mountain Shoal, Motts Falls, Milledgeville Shoal, Pennington Shoal, Bull Island Shoal, Narrows, Big Falls, Little Falls – could be navigated at any time or that a boat could make it through them); Ex. 29, Dep. of State 30(b)(6) witness Tom Reeder ("Reeder 30(b)(6) Dep.") 56:9-57:18 (testifying to knowing no facts related to navigability); Ex. 18, Walton 30(b)(6) Dep. 117:20-118:5 (testifying that he had "no facts" related to navigability); *see also* Ex. 3, Tarver Dep. at 33:2-4 (testifying that "I've never seen any documentation supporting or denying the navigability of the reach in question"); Ex. 30, State's Resp. to Interrog. No. 5 (citing only the 1885 session law and unspecified "historical records, including photographs" as evidence of navigability).¹⁰ Indeed, one of the State's Rule 30(b)(6) witnesses candidly acknowledged that he is aware of *no* evidence supporting or denying the navigability of the Relevant Segment. Ex. 5, Fleggas 30(b)(6) Dep. 62:2-65:9; *see also* Ex. 3, Tarver Dep. 32:23-33:3. He testified that he recalled from "general history" he learned during "seventh or eighth grade" that "waterways in times of colonization, et cetera, were used as rivers, navigable, were used as commerce by Native Americans." Ex. 5, Fleggas 30(b)(6) Dep. 37:1-12. But even drawing on that history, he could not say whether Native Americans or colonists actually used the Relevant Segment for trade or commercial purposes. *Id.* at 42:2-5. In fact, the State's position on navigability is so extreme that its 30(b)(6) witness testified that a river in North Carolina would be "navigable in fact" even if the person trying to navigate it were to perish and the vessel were smashed into a thousand pieces, so long as the pieces floated down the rest of the river, "one end to the other[.]" *Id.* at 34:4-17.

Rather than provide any evidence of navigability in fact, the State instead appears to base its entire case on an 1885 session law that the State contends was "a conclusive declaration . . . that the Yadkin River is navigable." Resp. to Interrog. No. 12; *see also* Resp. to Interrog. No. 5; Fleggas 30(b)(6) Dep. 15:8-14; 43:6-

¹⁰ Although the State's interrogatory response also referred to unspecified "historical records, including photographs," it failed to provide any specificity and has not produced any records or photographs actually evidencing navigability. *See* Ex. 30 (Resp. to Interrog. No. 5).

47:2. The 1885 session law states, in part: “That the Yadkin river . . . , and the Great Pee Dee . . . , be and the same are hereby declared public highways for the free passage of boats, flats, rafts and other means of transportation.” 1885 N.C. Sess. L. ch.212; *see* Attachment B for full text.

This state session law did not, as a matter of common sense could not, and as a matter of constitutional law cannot transform a factually nonnavigable river into one that is. The law is clear that a state cannot simply declare a river navigable in law when it is not actually navigable in fact. “It is not for a State by courts or legislature, in dealing with the general subject of beds or streams, to adopt a retroactive rule for determining navigability which . . . would enlarge what actually passed to the State, at the time of her admission” *PPL Montana*, 132 S. Ct. at 1235; *accord State v. Pool*, 74 N.C. 402, 407 (1876) (“Suppose the Legislature had enacted that Swift Creek should be considered to be a public highway and a navigable stream. If, in fact, it was neither, the Legislature cannot by a simple declaration make it so.”).

That rule holds particular force when, as here, the State’s actions “would destroy a title already accrued.” *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88 (1922). The British Crown and then North Carolina recognized private ownership in the bed of the Relevant Segment long before 1885. *Ribelin* Rep. 8-11. Indeed, the North Carolina Supreme Court recognized that the Yadkin River was nonnavigable and that its beds were susceptible to private ownership in multiple decisions prior to 1885. *See, e.g., Glen*, 52 N.C. at 326 (“[I]t is certain that the Yadkin river is capable of private ownership, and that some parts of the bed of the river have been granted to private individuals, and the validity of their titles have been upheld by at least one decision of this Court.”); *Cornelius*, 52 N.C. at 512 (“The Yadkin river not being a navigable stream, a grant from the State of the bed of the river passes it as does any other grant of land, and the Legislature has no power to take it away, either for private or public purposes, without making compensation to the owner.”). Any attempt by the State to grant itself title to the beds of the river in 1885 thus would have constituted an uncompensated taking of private property. *See, e.g., United States v. W.R. Cress*, 243 U.S. 316, 322 (1917) (“[T]he legislature cannot, by simple declaration that a stream shall be a public highway, if in fact it be not navigable in its natural state, appropriate to public use the private rights therein without compensation.”). For these reasons, this Court has already rejected the State’s argument: “As to the State’s

reliance on an 1885 state statute regarding its ownership of the Yadkin River bed, states ‘may [not] adopt a retroactive rule for determining navigability which would [serve] to enlarge what actually passed to the State[.]’” Order Denying Remand Mot. at 4, Doc. 34 (quoting *PPL Montana*, 132 S. Ct. at 1235).

Moreover, by its plain terms, the 1885 session law has nothing to do with title or navigability. Contrary to the State’s contention, the session law does not even mention navigability; it states only that certain portions of the Yadkin and Pee Dee Rivers are “declared public highways for the free passage of boats, flats, rafts and other means of transportation.” 1885 N.C. Sess. L. ch. 212. The term “public highway” is not synonymous with navigability and does not preclude privately held **title**. See *Glen*, 52 N.C. at 326-27 (riparian owner “is clearly entitled to the soil entirely across the river, subject to an easement in the public for the purposes of the transportation of lime, flour and other articles in flats and canoes”); accord *PPL*, 132 S. Ct. at 1226-27 (“With respect to public highways, as the name suggests, the public also retained the right of water passage; but title to the riverbed and soil, as a general matter, was held in private ownership.”).

Moreover, the session law endorsed private ownership rights in the Yadkin riverbed by including provisions for just compensation of private owners required to remove or modify their dams. 1885 N.C. Sess. L. ch. 212, §§ 4-6; see Attachment B. These provisions are impossible to square with the State’s current assertion that the 1885 session law divested private citizens of their ownership.

Lest the plain text of the session law leave any doubt, the legislative history demonstrates the General Assembly’s intent *not* to declare the river “navigable.” An early draft of the law was entitled “an Act to declare the Great Pee Dee and Yadkin Rivers **navigable streams** and public highways and to protect fish in the same,” Ex. 31 at 12, H.B. 486 and S.B. 531, 1885 versions (emphasis added), but the phrase “navigable streams” was stricken from the final version, *id.* at 8. See *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 489, 687 S.E.2d 690, 696 (2009) (“Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.” (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987))). In 1885, the General Assembly was presumably well aware both of the title implications of a stream being “navigable” and the North Carolina Supreme Court’s findings in *Glen* and *Cornelius* that the Yadkin was not navigable, and

took those decisions into consideration in deleting the word “navigable.” *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 190, 594 S.E.2d 1, 63 (2004) (“We assume that when the General Assembly acts, it does so . . . with knowledge of relevant decisions by this Court.”). Similarly, the General Assembly also would have been aware of the decision in *Pool* just ten years before the passage of the 1885 law, holding that the legislature could not render a nonnavigable stream navigable “by simple declaration.” 74 N.C. at 407. This historical context also suggests that the session law was at best aspirational, as it was passed contemporaneously with an attempt to blast, modify, and channel around the riverbed, which ultimately failed. Morrill Rep. 20-46.

Consistent with the understanding that the 1885 session law had nothing to do with navigability or title, the North Carolina Supreme Court continued to recognize that the Yadkin River was nonnavigable and that its beds were susceptible to private ownership long after the law was passed. *See Dunlap v. Carolina Power & Light Co.*, 212 N.C. 814, 195 S.E. 43, 45 (1938) (“Yadkin, or Pee Dee river, is a nonnavigable stream. Therefore, for the purpose of determining the riparian rights of the plaintiff, it must be deemed that he owns to the center of the stream.”). The State also acknowledged repeatedly in FPC proceedings that the Relevant Segment was not navigable in fact. SOF, *supra* § I.E; Attachment A.

* * *

The overwhelming and uncontroverted evidence demonstrates that the Relevant Segment of the Yadkin River was not navigable at statehood. The State has failed to produce any competent evidence of navigability. Accordingly, the State’s ownership claim fails as a matter of law.

B. APGI At A Minimum Owns The Riverbed Underlying The Relevant Segment Through Adverse Possession.

Because the State has based its case entirely on the contention that the Relevant Segment was navigable at statehood, the undisputed evidence to the contrary is sufficient to defeat its claim. But to the extent anything further is required, APGI also is entitled to summary judgment that it owns the bed of the Relevant Segment, at a minimum, through adverse possession.

It is well-settled under North Carolina law that the beds of nonnavigable rivers are susceptible to private ownership, which can be established either through deeds **or** through adverse possession. N.C. Gen. Stat. § 1-35; *see also, e.g., Glen*, 52 N.C. at 325-26; *Fitzrandolph v. Norman*, 4 N.C. 564, 572 (1817). For purposes

of this motion, APGI presents uncontroverted evidence that it owns the relevant lands through adverse possession. (APGI also has developed evidence of its title ownership, but it is intensely detailed and voluminous, encapsulating more than 190 tracts of land.)

By statute, the State is prohibited from maintaining an action seeking a declaration of its ownership of real property when a private party has adversely possessed the property for 30 years, or for 21 years under color of title. N.C. Gen. Stat. § 1-35.¹¹ “To acquire title to land by adverse possession, the claimant must show actual, open, hostile, exclusive, and continuous possession of the land claimed for the prescriptive period . . . under known and visible lines and boundaries.” *Merrick v. Peterson*, 143 N.C. App. 656, 663, 548 S.E.2d 171, 176 (2001). Actual possession means physical possession, control and use of the land as if it were one’s own property. *Taylor v. Johnston*, 289 N.C. 690, 224 S.E.2d 567 (1976). The State’s Complaint alleges that, “[d]uring the past 100 years or more,” APGI and its predecessors “enter[ed] upon the bed of the Yadkin River . . . , construct[ed] the Dams and thereafter operate[d] the dams.” Compl. ¶¶ 9, 11. APGI also has provided evidence confirming its actual possession and flooding of the historic riverbed throughout the entire Yadkin Project for at least half a century. Ex. 32, Ellis Dec. ¶¶ 7-20. Accordingly, APGI clearly has been in actual possession. *See Taylor*, 289 N.C. at 711, 224 S.E.2d at 579-80 (construction of dikes creating water-control impoundments, pumping stations, and equipment sheds on property established actual possession thereof).

Possession is “open and notorious” “if it places the true owner on notice of an adverse claim.” *Cochran v. Akers Motor Lines, Inc.*, 257 N.C. 782, 784, 127 S.E.2d 578, 580 (1962). APGI has claimed ownership of the riverbed in its public regulatory filings since at least the 1950s, and APGI consistently has insisted that anyone seeking to enter the riverbed – including the State – obtain its permission to do so. *See* SOF, *supra* § I.F (discussing APGI’s grants of easements, licenses, and permits). APGI is listed as the owner

¹¹ Furthermore, a party may demonstrate that title to property is outside the State and establish adverse possession against the State “by offering a grant [from the State] to a stranger, without connecting himself with it, and then offer proof of continuous adverse possession, under color of title in himself and those under whom he claims, for seven years before the action was brought.” *Mobley v. Griffin*, 104 N.C. 112, 115, 10 S.E.2d 142, 142 (1889); *see also In re King*, 9 N.C. App. 369, 372, 176 S.E.2d 394, 396-97, *aff’d in part*, 279 N.C. 100, 181 S.E.2d 400 (1971). APGI indisputably has established ownership regardless of which adverse possession time period is applied.

of the riverbed on public records in each of the five counties in which it sits, and has paid property taxes on the riverbed to each of those counties. Ex. 32, Ellis Dec. ¶ 10; Ex. 33, Barham Dep. 31:6-32:14. APGI has posted signs at public access points and restricts access to certain portions of the property. *Id.* These actions are more than sufficient to place the State on notice of APGI's adverse claim. *See, e.g., Corbett v. Corbett*, 249 N.C. 585, 590, 107 S.E.2d 165, 169 (1959) (paying taxes shows that possession is adverse and in the character of owner); *McManus v. Kluttz*, 165 N.C. App. 564, 571-72, 599 S.E.2d 438, 445-46 (2004) (open and notorious possession established where party asserting adverse possession was "rarely seen" on property but planted bushes, performed occasional yard maintenance, and built an addition); Walton 30(b)(6) Dep. 48:24-49:1 (admitting payment of taxes suggests ownership).

The same undisputed facts establish that APGI's use has been hostile, which "simply [means] use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right." *Daniel v. Wray*, 158 N.C. App. 161, 172, 580 S.E.2d 711, 719 (2003). Once again, the State's Complaint effectively concedes that APGI's possession satisfies this standard. *See* Compl. ¶¶ 33-34 (APGI "has repeatedly stated to FERC and [State Division of Water Quality] that the State does not own the bed of the Relevant Segment of the Yadkin River" and that APGI "owns all of the real property that is necessary to operate" the Project); *id.* ¶ 35 (APGI "has repeatedly stated publicly that it owns the bed of some or all of the Relevant Segment of the Yadkin River"). Although these allegations focus on FERC licensing proceedings in 2006, APGI made the same claims in the FPA proceedings during the 1930s and 1950s – proceedings in which the State not only participated, but supported APGI's claims. SOF, *supra* § I.E. Multiple times during just the past decade – including once while this lawsuit was pending – the North Carolina DOT sought permits from APGI to use the disputed lands¹² – permits it surely would not need if the State owned the land. *See Spinks v. Taylor*, 303 N.C. 256, 262, 278 S.E.2d 501, 505 (1981) (stating that "the owner of real estate has a right to enter upon and enjoy his own property"). Indeed, the State has frequently referred to the disputed lands as "APGI's property." SOF, *supra* §§ I.E-F.

APGI's possession of the riverbed has been exclusive and continuous. Exclusivity "contemplates the

¹² *E.g.*, Ex. 34, Industrial Use Construction Permit (Sept. 6, 2013); Exs. 19, 21; Ex. 35, NCDOT Activity Permit (Aug. 27, 2002).

exclusive use of the ordinary functions of the type of land at issue, given its present state.” *Jernigan v. Herring*, 179 N.C. App. 390, 394-5, 633 S.E.2d 874, 878 (2006); *Rushing v. Aldridge*, 214 N.C. App. 23, 34, 713 S.E.2d 566, 573 (2011) (exclusive use “is denoted by the exercise of acts of dominion over the land, in making the ordinary use . . . , such acts to be so repeated as to show that they are done in the character of owner”). Continuity requires only a showing that “actual use . . . has extended over the required period and that during it, the claimant has, from time to time, continuously subjected the land to its susceptible use.” *McManus*, 165 N.C. App. at 575, 599 S.E.2d at 446-47. For more than 50 years, APGI or its predecessors have operated the Yadkin Project under an exclusive federal license; no one else has done so. APGI has paid taxes on the riverbed; no one else has done so. APGI has granted easements and licenses; no one else has done so. APGI has restricted access to the dams and the riverbed; no one else has done so.

In short, APGI has been in actual, open, hostile, exclusive, and continuous possession of the challenged riverbed for over 50 years – more than the requisite statutory period, regardless of which statutory period is used.

C. The State Agreed Not To Assert A Claim Of Ownership For Land Within The Yadkin Project And Has Waived The Claims Of The Present Lawsuit.

APGI is entitled to summary judgment on the separate and independent ground that the State has explicitly agreed not to challenge APGI’s rights with respect to lands within the FERC-licensed project. Specifically, last September, as an express condition of its permit to rebuild US 29/70 and Interstate 85 bridges over the Relevant Segment, the DOT promised that the State

will not assert or attempt to assert or to claim any of the Project lands or waters, the Yadkin-Managed Buffer or other property or rights of Yadkin or Alcoa, whether or not the use of same is granted in the permit, and the grant of the permit will not be deemed to vest title thereto in the [State].

Ex. 34 at 3 ¶ 13. Previously, in 2002, the DOT sought and obtained a similar permit with an identical agreement not to assert the present claims. Ex. 35 at 3 ¶ 12.

These agreements clearly and unequivocally waive the State’s right to challenge APGI’s ownership of the property within the Yadkin Project. *Hartford Acc. & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (“It must be presumed the parties intended what the language used clearly expresses, and the

contract must be construed to mean what on its face it purports to mean.”); *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 492, 219 S.E.2d 190, 195 (1975) (“A waiver is a voluntary and intentional relinquishment of a known right or benefit.”). One of the DOT’s express powers, as an agency of the State, is the power to enter into agreements for easements and licenses in order to improve public roadways. *See* N.C. Gen. Stat. Ann. § 136-18; *High Rock Lake Partners, LLC v. N.C. DOT*, 366 N.C. 315, 318-19, 735 S.E.2d 300, 303 (2012). When DOT enters into such agreements, it binds both itself and the State. *See* Fleggas 30(b)(6) Dep. 9:20-24, 12:16-20 (DOT is an agency of the State, acting on its behalf); Walton 30(b)(6) Dep. 108:20-23 (same). This waiver is consistent with North Carolina statutory law, which specifically precludes the State from intermeddling in federally regulated hydropower projects. *See* N.C. Gen. Stat. Ann. § 146-1(a) (Department of Administration’s authority to manage and control submerged lands “shall [not] apply to a privately owned lake or any hydroelectric reservoir licensed by the Federal Energy Regulatory Commission”).

Accordingly, North Carolina’s attempt to gain control over the submerged land in the FERC-licensed Yadkin Project violates its own promises to refrain from doing just that.

IV. CONCLUSION

The State’s belated attempt to seize privately owned property would raise disturbing questions of constitutional dimensions even if supported by the facts. Here, however, the State’s factual showing misses the mark entirely. The undisputed evidence is that the Relevant Segment of the Yadkin River was not navigable in fact at the time of statehood, and that APGI owns those lands. In any event, the State has at least twice agreed not to assert its present claim. Accordingly, APGI respectfully requests that the Court grant summary judgment in favor of APGI on Plaintiff’s claim, and dismiss this action in its entirety.

This the 21st day of July, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2014, I electronically filed DEFENDANT ALCOA POWER GENERATING, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Lewis Wardlaw Lamar, Esq., Ann Wilkinson Matthews, Esq., Gary Mark Teague, Esq., and Donald R. Teeter, Sr., Esq.

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