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Opinion No 86-79

September 29, 1986

James A. Quinn, Esquire
Deputy Chief Counsel
South Carolina Wildlife &
Marine Resources Department
Post Office Box 167
Columbia, South Carolina 29202

Dear Mr. Quinn:

You have requested an opinion as to the power of the Wildlife Department to exclude individual hunters or fishermen from certain canals which run through the Department's impounded rice fields at Santee Coastal Reserve and South Island. These fields were conveyed to the Department by private individuals.

The canals in question are apparently artificial watercourses dug many years ago. Your letter states that "[t]hese canals though not physically blocked off have been patrolled by Department personnel and our predecessors in interest for many years. Numerous cases have been made for trespass and trespass to hunt in these canals."

Few cases have been decided with regard to public rights in artificially-constructed canals. The U.S. Supreme Court held in Vaughn v. Vermillion Corp., 444 U.S. 206 (1979) that the public had no right of use of private canals connected to public waterways, at least where the property was posted with numerous "No Trespassing" signs and the where the owners "employ[ed] people to supervise activities in the canals and on the lands, and on numerous occasions such people have prohibited strangers from entering and using the property in question." 444 U.S. at 207. Accord, National Audobon Society v. White, 302 So.2d 660 (La. App. 1974). While no South Carolina case has had occasion to address these precise facts, the rationale of the rule, as stated by the Louisiana court, appears sound:

> We believe that a canal built entirely on private property, with private funds and for private purposes, is a private

thing, for the same reasons that a road built on private property for private purposes is a privately owned road.

302 So.2d at 665.

Obviously, a question of fact is presented as to whether in these specific cases the facts will support the claim that the canals have been continuously maintained as private canals through continuing efforts to exclude the public. If such can be proven, there is no reason to believe that the courts of South Carolina would reach a different result from that reached by the cases above.

In State ex. rel. Medlock v. South Carolina Coastal Council and Reeves, Op. No. 22602 (7/27/86) the Supreme Court found from the evidence that a number of artificial canals were "used by the general public as natural watercourses to gain access to the interior of the island" and that they "have become the functional equivalent of natural streams." Slip op. at 3. In fact, in the Reeves case, the streams had been open to and used by the public for many years, and these facts underly the above-quoted statements by the Court. There is thus no inconsistency between Reeves and the rule in the other cases cited above; the results of the cases simply reflect the presence or absence of patrolling or other evidence of keeping canals open or closed to the public.

For these reasons, based on the facts as set forth in your letter, it is the opinion of this Office that artificial canals from which the public has been continuously and consistently excluded would not constitute navigable waters of the State.

Sincerely yours,

Kenneth P. Woodington
Senior Assistant Attorney General

KPW:jca

Reviewed and approved:

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