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September 6, 2011

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BY HAND DELIVERY

The Honorable Roy Cooper
Attorney General of North Carolina
North Carolina Department of Justice
114 West Edenton Street
Raleigh, North Carolina 27603

Re: Ownership of the Submerged Bed of the Yadkin
River at the Site of the Yadkin Hydroelectric
Project

Dear Mr. Attorney General:

I have been following the State of Montana's lawsuit against a Montana public utility over the ownership of submerged riverbed lands lying under the flowing waters of a federally licensed hydropower project in that State. As you probably know, the State of Montana prevailed in this case at trial and was awarded a judgment declaring it to be the owner of the submerged riverbed property. The trial court also awarded the State a judgment for over \$40 million in back rents from the utility company defendant that had built dams on the State's riverbed property some years prior to the lawsuit.

Following an appeal of the trial court's decision by the utility company defendant, the Montana Supreme Court affirmed the trial court's decision. The case is now before the United States Supreme Court, which recently issued a writ of certiorari in the case.

I would not favor this type of legal challenge to the ownership of riverbed property in this State where the federally licensed hydropower operator is a North Carolina public utility because



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utilities are statutorily charged with operating in the public interest and are heavily regulated by the Utilities Commission. In fact, I am considering introducing legislation that would grant an easement to North Carolina public utilities that are federally licensed hydropower operators, so that they could operate their hydropower projects without fear that the State might ever assert a claim against them based on their use of riverbed lands that do or might belong to the State.

That said, I note that Alcoa Power Generating, Inc. ("APGI"), the federally licensed operator of the Yadkin Hydroelectric Project, is not a public utility of this or any other State and that it is not regulated by the North Carolina Utilities Commission. Indeed, insofar as I can determine, APGI is not regulated in any meaningful way by any State agency and it appears to sell the electricity that it generates from its use of the Yadkin River largely on the open market outside this State, and it apparently remits the bulk of the profits it makes from its use of the Yadkin River to its parent corporation, Alcoa Corporation, in Pittsburgh, Pennsylvania.

In short, I and others do not see how APGI's or Alcoa Corporation's use of the State's second largest river system results in any meaningful benefit to the State or its people.

With this backdrop in mind, I would like to know the opinion of the Attorney General of the State on the following issues:

1. Under the Public Trust Doctrine as enunciated by the North Carolina Supreme Court and any applicable federal law relating to the definition of "navigable waters," does the State of North Carolina own the bed beneath the 'navigable waters' in the state?
2. Does the state own the riverbed underneath the 38-mile stretch of the Yadkin River that makes up the Yadkin Hydroelectric Project?
3. If so, has the State ever effectively conveyed this riverbed property to APGI, Alcoa Corporation or anyone else?
4. Does the federal doctrine of preemption or any other federal doctrine or law prevent the State from being able to successfully sue APGI and/or Alcoa Corporation for a declaratory judgment holding that the State is the legal owner of the bed of the Yadkin River along the 38-mile stretch of that river that makes up the Yadkin Hydroelectric Project?

The answers to these questions will be most helpful to me and other members of the General Assembly in our deliberations over whether to introduce proposed legislation concerning the bed of the Yadkin River in the area of the Yadkin Hydroelectric Project.

Should you or any member of your staff have any questions concerning this letter or the questions set forth above, please do not hesitate to let me know.

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Thank you for your assistance in this matter.

Sincerely yours,

Fletcher L. Hartsell, Jr.
Senator, 36th Senatorial District