State of New Hampshire
Supreme Court

NO. 2004-0601

2005 TERM

JUNE SESSION

APPEAL OF SAVE OUR GROUNDWATER

APPEAL OF TOWN OF NOTTINGHAM

APPEAL OF TOWN OF BARRINGTON

APPEAL BY PETITION PURSUANT TO RSA 541 AND SUPREME COURT RULE 10

BRIEF OF SAVE OUR GROUNDWATER

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QUESTIONS PRESENTED

1. Did DES err in granting to USA Springs, Inc. a permit to extract the public's groundwater for private profit, in violation of the State's constitutional, statutory, and traditional role as holder and protector of the public trust?

2. Is the permitting of USA Springs, Inc.'s large groundwater withdrawals a violation of traditional riparian rights, and a taking of private property rights in violation of the New Hampshire and Federal Constitutions?

3. Did DES's err in granting a permit without an adequate showing of "need"?

4. Did DES err in failing to hold an adjudicative hearing process in violation of SOG's federal and state constitutional rights?

PICTORIAL EXAMPLE OF AQUIFERS AND WELLS

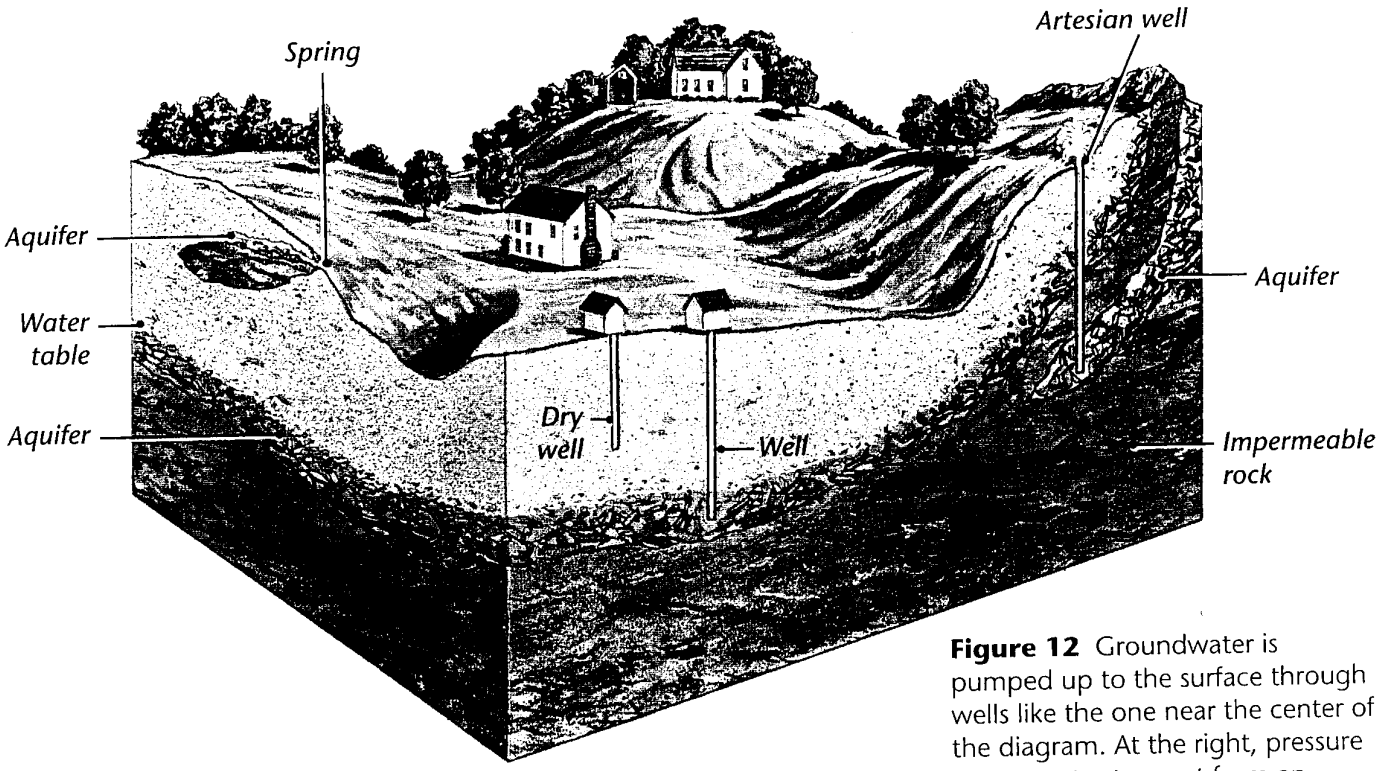

Figure 12 Groundwater is pumped up to the surface through wells like the one near the center of the diagram. At the right, pressure causes water to spurt from an artesian well. Where an aquifer meets the ground surface, at the left, a spring may form.
Interpreting Diagrams *Why does the dry well not contain any water?*

Prentice Hall, EARTH SCIENCE (2001) (5th grade textbook) at 381

SUMMARY OF ARGUMENT

Save Our Groundwater (SOG) first discusses the public trust doctrine and shows that it applies to groundwater resources both legally and hydro-geologically. SOG then notes New Hampshire's tort law which allows a landowner to use groundwater on the land so long as there is no harm to neighbors, but sets a higher standard for a landowner who wishes to transport groundwater elsewhere. Applying these standard principles of tort to the public trust, SOG concludes that the permit the State issued to USA Springs, Inc. must be revoked.

SOG then notes that groundwater belongs to the people of the State of New Hampshire, and that it cannot be constitutionally taken from them unless for a public use. SOG also notes that if there is a public use, the taking must nonetheless be compensated. SOG points out that the permit issued to USA Springs, Inc. is an unconstitutional taking because it foreseeably depletes the wells of its neighbors. SOG argues that because there no public purpose involved, and because the State has no intention of providing compensation to those from whom the groundwater is appropriated, the taking is unconstitutional.

For the purpose of both the public trust doctrine and constitutional takings analysis, SOG uses newspaper articles from the last several years to establish the importance of groundwater to New Hampshire's citizens, and the interest they have in it. SOG also notes that USA Springs, Inc. has expressed no countervailing "need" that outweighs the public's interest in the water.

SOG then points out that even though the mining of New Hampshire's groundwater is a matter of significant public interest, the State unlawfully failed to hold a formal hearing at which witnesses could be sworn and subjected to cross-examination, and the matter could be adjudicated.

ARGUMENT

Save Our Groundwater (SOG) hereby incorporates the Statements of Facts and of the Case appearing in the briefs of the Towns of Nottingham and Barrington, and also incorporates all issues raised and arguments made by those parties as if made by SOG herein.

I. Public Trust Doctrine + Reasonable Use = No Permit

The public trust doctrine provides that the State holds certain resources – including groundwater – in trust for its citizens. Standard principles of New Hampshire tort law provide that landowners may not unreasonably interfere with groundwater rights of their neighbors, especially when the interference involves taking the water off-site. Those principles apply to groundwater protected by the State's trust as well as groundwater enjoyed by a neighbor. Thus existing law requires revocation of the permit issued to USA Springs, Inc., which licenses the company to unreasonably interfere with the public's groundwater.

A. Establishment of Public Trust Doctrine in New Hampshire

The Public Trust Doctrine has its roots in England going back to 1215 or even as far back as the second century. In England, attempts by the Crown to transfer possession of the seabed to favourite Lords were nullified by the Magna Carta because they violated rights of ordinary citizens to fish and navigate. The situation was resolved by recognizing that the Crown had title to public resources such as waterways and the seashore, but the property right of the Crown was subject to the people's common right to use the public trust lands and their resources for traditional purposes necessary to individual survival and livelihood, including navigation, commerce, and fishing. Even though the title to the land could be transferred to a private person, neither the Crown nor an individual could subordinate or interfere with public rights. *See* Matthew Graff, *The New Hampshire Public Trust Doctrine: As Old as the Tides (And Showing its Age?)*, 37 N.H. BAR J. 27 (Sept. 1996).

This "public trust" was recognized in the United States by the Supreme Court in 1842. In *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842), Martin was fishing in waters off Perth Amboy, New Jersey. Waddell, who had been granted property rights in those waters by charter from Charles II and the Duke of York, sought to eject Martin from oystering there. The Supreme Court held that after the Revolution the land that lay beneath the tidal waters of the Raritan River and bay belonged to the State of New Jersey, held in "public trust" for its citizens. *See also Opinion of the Justices (Public Use of Coastal Beaches)*, 139 N.H. 82 (1994).

The modern doctrine was enunciated in *Illinois Central Railway Co. v. Illinois*, 146 U.S. 387 (1892), in which the Supreme Court recognized that the public trust extended to fresh waters. *See also, Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). Since then, courts have considered many types of resources as covered by the doctrine. *See e.g., Hardin v. Jordan*, 140 U.S. 371 (1891) (great ponds); *New Hampshire v. Atomic Energy Commission*, 406 F.2d 170 (1st Cir. 1969), *cert. denied*, 395 U.S. 962 (rivers); *Gould v. Greylock Reservation Commission*, 215 N.E.2d 114 (Mass. 1966) (public parks).

> There are three general criteria as to what constitutes a resource in the public trust. [First,] that certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs. [Second,] that certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace. [Third,] that certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate.

Joseph Sax, *The Public Trust Doctrine in Natural Resource Law*, 68 MICH. L. REV. 471, 484-85 (1970).

Grown from its applicability to just navigable waters, the public trust doctrine therefore has a wholistic environmental focus, including "health and safety," and "ecological and aesthetic values." *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 435, 658 P.2d 709, 719,

189 Cal.Rptr. 346, 356 (Cal. 1983) ("scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds [are] among the purposes of the public trust").

The public trust doctrine has been held to apply to groundwater. "[T]he public trust doctrine applies to all water resources, unlimited by any surface-ground distinction." *In re Water Use Permit Applications*, 9 P.3d 409, 447 (Haw. 2000); *see also*, Erik Swenson, *Public Trust Doctrine and Groundwater Rights*, 53 U. MIAMI L. REV. 363 (1999)

Whether the doctrine extends to groundwater in New Hampshire has been answered by statute:

> The general court declares and determines that the *water of New Hampshire* whether *located above or below ground* constitutes a limited and, therefore, precious and invaluable public resource which should be *protected, conserved and managed in the interest of present and future generations.* The state as *trustee* of this resource for the *public* benefit declares that it has the authority and responsibility to provide careful stewardship over all the waters lying within its boundaries. The *maximum public benefit shall be sought*, including the assurance of *health and safety*, the enhancement of *ecological and aesthetic values*, and the overall *economic, recreational and social well-being* of the people of the state. All levels of government within the state, all departments, agencies, boards and commissions, and all other entities, public or private, having authority over the use, disposition or diversion of water resources, or over the use of the land overlying, or adjacent to, the water resources of the state, shall comply with this policy and with the state's comprehensive plan and program for water resources management and protection.

RSA 481:1; *see also* RSA 485-C:1; *Coakley v. Maine Bonding and Cas. Co.*, 136 N.H. 402, 412 (1992).

B. New Hampshire's Law of Reasonable Use of Groundwater Prohibits USA Springs, Inc. From Mining Water and Selling it Offsite

Groundwater law began with a "bow to ignorance." Mark Squillace, *A Brief Guide to U.S. Groundwater Law*, U. TOLEDO C.L LAKE LINKS, (Fall/Winter 2003). An 1843 English case

was the basis of early American law:

> [I]n the case of a well sunk by a proprietor in his own land, the water which feeds it [flows] through the hidden veins of the earth beneath its surface; no man can tell what changes these underground sources have undergone in the progress of time.

Acton v. Blundell, 152 Eng. Rep. 1223, 1233 (Ex. Ch. 1843); *see also Western Maryland R. Co. v. Martin*, 73 A. 267 (Md.1909) ("[T]he secret, changeable, and uncontrollable character of underground water in its operation is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules, as is done in the case of surface streams.") (quotations omitted).

The lack of knowledge about hydrology, groundwater flows, and "that groundwater constitutes an integral part of the hydrologic cycle and that the protection of groundwater quality is necessary to preserve the integrity of surface water," RSA 485-C:1 (1996), led the English court to adopt a "rule of capture" in which groundwater was considered incident to land ownership. Landowners could take water from beneath their property and use as much of it as could be profitably taken, regardless of the injury it caused. American courts initially adopted the rule. *See e.g., Houston & T.C. Ry. Co. v. East*, 81 S.W. 279, 280 (Tex. 1904) ("That the person who owns the surface may dig therein and apply all that is there found to his own purposes, at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from the underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of damnum absque injuria, which cannot become the ground of an action.") (quoting *Acton v. Blundell*).

Generally the English rule of capture did not cause significant conflicts among water users so long as the devices to extract it were hand pumps and windmills. With the invention of

the centrifugal pump, however, larger quantities of groundwater could be collected and thus disputes arose. This is because the rule of capture "defies hydrologic reality and impairs the security and reliability of [water uses] that depend on an interconnected ground and surface water system." *Board of County Com'rs of County of Park v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693, 702 (Colo. 2002).

Though some jurisdictions looked for other ways to regulate water use, several eastern states still employ the old English misconception, including in New England, Maine, *Chesley v. King*, 74 Me. 164 (Me. 1882), Massachusetts, *Gamer v. Town of Milton*, 195 N.E.2d 65 (Mass. 1964), and Vermont. *Drinkwine v. State*, 300 A.2d 616 (Vt. 1973). Rhode Island has recently abandoned the rule, *Splendorio v. Bilray Demolition Co., Inc.*, 682 A.2d 461 (R.I. 1996), *abrogating Rose v. Socony-Vacuum Corp.*, 173 A. 627 (R.I. 1934), while Maine has recently re-affirmed it. *Maddocks v. Giles*, 728 A.2d 150 (Me.1999).

Many states have concluded that the potential for mischief under the rule of capture was too great and substituted the "American Rule" of "reasonable use," or "correlative rights," which was pioneered by the New Hampshire Supreme Court in 1862. *Bassett v. Salisbury Mfg. Co.*, 43 N.H. 569 (1862); *see e.g., Houston & T.C. Ry. Co. v. East*, 81 S.W. 279, 280 (Tex. 1904) (rule of capture "recognized and followed in the courts of England, and probably by all the courts of last resort in this country before which the question has come, except the Supreme Court of New Hampshire").

Like the rule of capture, the American Rule allows landowners to extract water from under their property and use it on the surface without regard to injuries of others. Unlike the rule of capture, however, the American Rule limits extractors to using that water only *on the surface of their own land*, unless sufficient water is available to use elsewhere without causing harm to

others. Thus the American Rule offers a kind of rough equity by limiting the potential for groundwater use to the tract of land owned by the extractor.

> To give the land owner the absolute and unqualified right of disposing of such water would, in many instances, be productive of great mischief to his neighbors, and lead to interminable struggles between them; for the same power to deal with such water would exist in each land owner when it was on his land.

Swett v. Cutts, 50 N.H. 439 (1870). The American Rule is the law in many eastern states including New Hampshire and New York, *Forbell v. City of New York*, 58 N.E. 644 (N.Y. 1900), as well as Connecticut, *Wadsworth v. Tillotson*, 15 Conn. 366 (Conn. 1843), Illinois, *Behrens v. Scharringhausen*, 161 N.E.2d 44 (Ill.App. 1959), Pennsylvania, *Hatfield Tp. v. Lansdale, Municipal Authority*, 168 A.2d 333 (Pa. 1961), Michigan, *Hart v. D'Agostini*, 151 N.W.2d 826 (Mich.App. 1967), Tennessee, *Nashville, C. & St. L. Ry. v. Rickert*, 89 S.W.2d 889 (Tenn.App. 1935), West Virginia, *Pence v. Carney*, 52 S.E. 702 (W.Va. 1905), and Wisconsin. *State v. Michels Pipeline Const., Inc.*, 217 N.W.2d 339 (Wis. 1974).

Under the New Hampshire rule, an extractor may not ship water off-site unless it can be done without causing harm to other owners' supply. In *Forbell v. City of New York*, 58 N.E. 644 (N.Y. 1900), for example, the plaintiff grew crops in Kings County. To make "merchandise" of the water, however, the City of Brooklyn constructed a pumping station nearby resulting in the lowering of the underground water table on the farmer's land, making it unfit for cultivation of celery and water cresses. The court wrote:

> It is not unreasonable, so far as it is now apparent to us, that [the defendant/City] should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the

> plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired.

Forbell v. City of New York, 58 N.E. at 646. The New York court thus affirmed an injunction against the pumping, and approved damages.

The American Rule generally works until one landowner uses more than its share of the resource. In *Henderson v. Wade Sand and Gravel Co., Inc.*, 388 So.2d 900 (Ala., 1980), plaintiffs were homeowners whose houses were sinking and who were dismayed at large sinkholes in their yards. The defendant periodically pumped water from the bottom of its nearby quarries, but made no effort to take it off-site.

> This resulted in ground water being leeched from under plaintiffs' land, leaving large underground cavities. Heavy rains then caused water to flow through the empty cavities at an accelerated rate, destroying the structure of the land beneath plaintiffs' homes, and carrying away much subsoil and surface soil.

Henderson v. Wade, 388 So.2d at 900. The Alabama Court, which had previously employed the American Rule pioneered in New Hampshire, progressed beyond it, writing:

> While the [American] rule may have been acceptable, even beneficial, in an earlier era of lower population density and more primitive technology, it could produce disastrous results today. Carried to its logical extension, it would allow a quarry owner to willfully sink the City of Birmingham with impunity, provided that it was done in furtherance of a legitimate enterprise and that due care was exercised in the pumping. A rule which provides no check on a landowner's ability to utilize his land to the detriment of society cannot be tolerated.

Henderson v. Wade, 388 So.2d at 903.

Hence courts have developed the "correlative rights doctrine" or "California Rule," articulated by the California Supreme Court in 1903. *Katz v. Walkinshaw*, 141 Cal. 116, 74 P. 766 (Cal. 1903). Under this rule landowners can be liable for any interference with groundwater – regardless of where the water is used – which deprives another of their equitable share of it.

As long as there is sufficient groundwater available for all landowners, it is shared just like common-law riparian rights for surface water resources. With perhaps the exception of Utah, the California Rule has not been widely followed. *See Evans v. Seattle*, 47 P.2d 984, 987 (Wash. 1935).

Similar is the Restatement Rule. RESTATEMENT (SECOND) OF TORTS § 858. It allows landowners to extract groundwater from under their property and use it anywhere they please, subject to liability to other landowners if the withdrawal causes unreasonable harm to neighboring land because of lowering the water table or reducing artesian pressure, exceeds the landowner's reasonable share, or causes a direct and substantial impact on a watercourse and unreasonable harm to a person entitled to use it.

The chief objection to the Restatement rule is that it requires a showing of harm before it can be invoked. As a result the person wanting to use the groundwater may incur expense to drill the well only to discover they cannot use it because it causes unreasonable harm to their neighbors. Several states follow the Restatement rule.

Still other states have enacted permitting systems whereby a management authority grants permission to extract depending upon factors such as the number of users and the nature and importance of their uses, the nature and size of the water resource, pollution in the water resource and any abatement necessary, detriment to other resources, and other considerations. *See e.g.*, N.C. GEN. STAT. § 143-215.11 *et seq.* (2001).

Finally, some western states follow the "prior appropriation" doctrine, a sort of first-come-first-served rule, developed for surface waters. It has many problems, including the tendency to allow for groundwater mining, which results when more water is taken from an aquifer than it receives from recharge sources. This eventually results in the depletion and loss

of the aquifer.

The rule of capture, the Restatement rule, the correlative rights doctrine, the prior appropriation doctrine, and permitting schemes, are here only a matter of historical and intellectual interest. New Hampshire pioneered and continues to employ the American "reasonable use" Rule. As exemplified by *Forbell v. City of New York,* 58 N.E. 644 (N.Y. 1900), under the New Hampshire rule, one who depletes groundwater by selling it offsite will soon be enjoined, *see Rothrauff v. Sinking Spring Water Co.*, 14 A.2d 87 (Pa. 1940), and liable for damages. *See Coakley v. Maine Bonding and Cas. Co.*, 136 N.H. 402, 412 (1992).

C. Public Trust Doctrine is Implemented by the Reasonable Use Rule

DES issued a permit to USA Springs, Inc. to mine New Hampshire's underground water without any demonstration of need or sustainability of the resource; without any demonstration that the mining will benefit the public's interest or contribute to the wholesomeness, usefulness, or beauty of New Hampshire's waters and the human, plant, and animal communities that depend on it; and without any demonstration that the mining fulfills the public trust. And there is no evidence in the record on which this Court might base fulfilment of the public trust. Because the permit was granted in violation of the public trust established both by common law and by statute, it was unlawfully or improvidently granted and must be revoked.

The public trust doctrine as enunciated by various courts is admittedly lacking in clear standards for its application. In the celebrated public trust cases – for example *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 435, 658 P.2d 709, 719, 189 Cal.Rptr. 346, 356 (Cal.1983), in which the California Supreme Court saved Mono Lake, a unique and enormous oasis on the edge of a desert, from extensive development; or *Gould v. Greylock Reservation Commission*, 215 N.E.2d 114 (Mass. 1966), in which the Massachusetts Supreme

Court saved Mt. Greylock, one of the prominent features of the Berkshires from development – the courts generally recite the history of the public trust doctrine, profess awe with the beauty or value of the resource they are protecting, conclude that the resource is imbued with the public trust, and enjoin the development that will undoubtedly destroy the beauty or value.

As shown at length above, the law of groundwater – from the English rule of capture to the California rule of sharing – has generally been developed in New Hampshire and elsewhere through tort law. *See e.g., Bassett v. Salisbury Mfg. Co.*, 43 N.H. 569 (1862); *Swett v. Cutts*, 50 N.H. 439 (1870); *Forbell v. City of New York*, 58 N.E. 644 (N.Y. 1900) (nuisance); *see also*, *Liability for obstruction or diversion of subterranean waters in use of land*, 29 A.L.R.2d 1354; *Liability for pollution of subterranean waters*, 38 ALR2D 1265. But the law applies regardless of the category of the cause of action. *See e.g., Smith v. Town of Stoughton*, 70 N.E. 195 (Mass. 1904) (contract); *Coakley v. Maine Bonding and Cas. Co.*, 136 N.H. 402, 412 (1992) (administrative enforcement and declaratory judgment). In any event, groundwater law apportions liability among private users, and has developed a set of standards to determine how the groundwater may be equitably shared.

Those standards, though susceptible of criticism, have been sufficiently workable to settle New Hampshire's private groundwater disputes for nearly 150 years. This case arises neither in tort nor in assumpsit; rather it is essentially a dispute between the public (whether represented by Towns or non-profit organizations) and a proposed private user. The standards which have evolved for private disputes can apply equally well here.

Said differently, New Hampshire's reasonable use rule provides guidelines for application of the public trust doctrine. The doctrine establishes the public's right to the resource; *Bassett* and *Swett* establish the standard by which the public's and USA Springs, Inc.'s

claims to it can be resolved.

USA Springs, Inc. intends to use the water from its land off-site – its stated intention is to bottle the water and sell it in Europe. As noted above, New Hampshire's reasonable use law allows an extractor to use groundwater on the surface of their own land, unless sufficient water is available to use remotely without causing harm to others. Here, remote use will cause harm, as already demonstrated by the company's well pump testing. Though this case is procedurally different, the essentials of the dispute – on-the-land use by landowners versus off-the-land remote consumption planed by an abutter – is identical to that decided using New Hampshire's rule of reasonable use in *Forbell v. City of New York,* 58 N.E. 644 (N.Y. 1900).

Based on existing law, the water percolating beneath the ground in Nottingham and Barrington belongs to the public, and USA Springs, Inc.'s proposed remote use will cause damage to the availability of the water to the public. Consequently, the permit issued by DES to USA Springs, Inc. is a violation of the public trust as measured by the reasonable use rule. Accordingly, this Court should revoke the permit as improvidently or unlawfully granted.

II. The Large Groundwater Mining Permit Issued to USA Springs, Inc. by DES is an Unconstitutional Taking of Property Without Just Compensation

A taking is easily defined. It is "a law that takes property from A. and gives it to B." *Calder v. Bull*, 3 U.S. 386, 388 (1798). Our constitutions' takings clauses are "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

> The substantive issue raised in this case involves a principle that lies at the very foundation of civilized society as we know it. The principle that no man's property may be taken from him without just compensation reaches at least as far back as 1215, when on "the meadow which is called Runnymede" the Barons of England exacted from King John the Magna Carta, which contains at least three references to this fundamental truth. . . . Our own constitution provides that "no part of a man's property shall be taken from him, or applied to public uses, without his consent."

Appeal of PSNH, 122 N.H. 1062, 1070 (1982), *quoting Burrows v. City of Keene*, 121 N.H. 590, 595-96 (1981).

The New Hampshire and federal constitutions prohibit taking private property without payment for it. N.H. CONST., pt. I, art. 2; N.H. CONST., pt. I, art. 12; U.S. CONST., amd. 5; U.S. CONST., amd. 14. When there is a taking without payment, it also violates federal and state constitutional due process. *Missouri Pac. Ry v. Nebraska*, 164 U.S. 403, 417 (1896); *Eyers Woolen Co. v. Gilsum*, 84 N.H. 1 (1929).

A. Takings Require a Public Purpose

In order for the government to take private property, there has to be a public purpose for the taking. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984); *Thompson v. Consol. Gas Utilities Corp.*, 300 U.S. 55, 80 (1937), ("one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though

compensation be paid"). New Hampshire's constitution is more protective of property rights than the federal constitution. *L. Grossman & Sons, Inc. v. Town of Gilford*, 118 N.H. 480, 482 (1978).

The alleged public purpose used to justify a taking must directly benefit the public. In *Merrill v. City of Manchester*, 127 N.H. 234 (1985), the government attempted to condemn land that had been put in a conservation easement for the purpose of an industrial park. This Court said that the state may condemn the land "only if it is to be put to use which ***directly*** benefits the public, such as for a school, a playground, or a utility line." *Merrill*, 127 N.H. at 237 (emphasis added). *See also Concord Railroad v. Greely*, 17 N.H. 47 (1845).

"[T]o justify public aid to a private enterprise serving a public purpose, there must be some obligation to the public assumed by the enterprise in consideration for the aid." *Opinion of the Justices*, 88 N.H. 484, 487 (1937). The New Hampshire constitution contains a specific ban on using government grants to benefit private parties. N.H. CONST., pt. I, art. 10 ("Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men.").

Although a transfer might have spillover benefits to the public, a taking to primarily benefit a private party is not constitutional, even if the taking is compensated. *Hawaii Housing*, 467 U.S. at 245; *Merrill v. City of Manchester*, 127 N.H. at 237 (no public purpose when condemnation "has only an incidental public benefit, such as for [a] private industrial park"). *Appeal of Meserve*, 120 N.H. 461 (1980) (PUC order that railroad pay for underpass so delivery trucks could access a Manchester laundry company unconstitutional because its benefit was primarily private); *Exeter & Hampton Electric Co. v. Harding*, 105 N.H. 317 (1964) (condemnation for electric transmission lines constitutional because even though immediate

purpose was to serve private industrial plant, was part of master plan to loop city with high voltage lines to serve public).

The constitution allows public money to be given to private parties, but only if the purposes are public. Secondary benefits, such as the economic well-being of the community, do not transform a private benefit into a public purpose. In *Eyers Woolen Co. v. Gilsum*, 84 N.H. 1 (1929), for example, the town of Gilsum proposed a tax benefit to build a mill. This Court held that "[a]iding a private manufacturing corporation is not a public purpose." *Eyers*, 84 N.H. at 16. The Court wrote:

> "The nature of the business undertaken is in no sense public. It is a private undertaking for private business and profit. The use of it to the public is secondary to that, and tributary to that; the benefit to the public is remote and consequential. . . . Any such enterprise tends indirectly to the benefit of every citizen by the increase of general business activity, the greater facility of obtaining employment, the consequent increase of population, the enhancement in value of real estate and its readier sale, and the multiplication of conveniences. But these are not the direct and immediate public uses and purpose to which money taken by tax may be directed."

Eyers, 84 N.H. at 12 (quotations and citations omitted). *See also, Concord Railroad v. Greely*, 17 N.H. 47 (1845) ("the twelfth article in the bill of rights prohibits the legislature from taking the property of a citizen from him against his consent, and applying it to any other than public uses); *Southwestern Ill. Dev. Auth. v. National City Envtl. L.L.C.*, 710 N.E.2d 896 (Ill. App. 1999) (government agency cannot condemn based on its view of who would put property to more productive use); *Lansing v. Edward Rose Realty, Inc.*, 481 N.W.2d 795 (Mich. App. 1992) (taking of easement for a television cable company not a public use); *Brannen v. Bulloch County*, 387 S.E.2d 395 (Ga. App. 1990) (no public use to build a road for convenience of lumber company); *Denver West Metro. Dist. v. Geudner*, 786 P.2d 434, 436 (Colo.App. 1989) (existence of incidental pubic benefit not prevent court from invalidating a condemnation

decision made to advance private interests); *Center of Center Line v. Chmelko*, 416 N.W.2d 401 (Mich. app. 1987) (taking to facilitate private parking not a public use); *Cantu v. Pacific Gas & Electric Co.*, 234 Cal.Rptr. 365 (Cal. App. 1987) (gas and electric line extension to serve a private party not for a public use).

B. Takings Must Be Compensated

Even if a taking is for an allowable public purpose, the constitutions demand it be compensated.

As noted, the takings clauses are intended to prevent the government from singling out some people to bear burdens that should be borne by the community. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The principle has no want of authority. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (*Kennedy*, J., dissenting) ("at the heart of the [takings] Clause lies a concern . . . with providing compensation for legitimate government action that takes 'private property' to serve the 'public good'"); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987); *Pennsylvania Coal Co. V. Mahon*, 260 U.S. 393 (1922); *Transmission Access Policy Study Group v. Federal Energy Regulatory Comm'n*, 225 F.3d 667, 690 (D.C. Cir. 2000) (upholding FERC's wholesale electric deregulation plan against attack by utilities: "When the action of the federal government effects a 'taking' for Fifth Amendment purposes, there is no inherent constitutional defect, provided just compensation is available."); *Purdie v. Attorney General*, 143 N.H. 661 (1999); *Opinion of the Justices (Public Use of Coastal Beaches)*, 139 N.H. 82 (1994); *Burrows v. City of Keene*, 121 N.H. 590, 597 (1981) (because the constitution prohibits any taking of private property by whatever means without compensation, the just compensation requirement applies whenever the exercise of the so-called police power results in a "taking of property"); *Robbins Auto Parts, Inc., v. City of Laconia*, 117 N.H. 235 (1977); *Ash*

v. Cummings, 50 N.H. 591 (1872); *Great Falls Manu. Co. v. Fernald*, 47 N.H. 444 (1867); *Crosby v. Hanover*, 36 N.H. 404 (1858); *Petition of Mount Washington Road Co.*, 35 N.H. 134 (1857); *Piscataqua Bridge v. New Hampshire Bridge*, 7 N.H. 35 (1834)-

During the construction of the Seabrook nuclear power plant, when the Public Utilities Commission placed conditions on the issuance of securities by PSNH because of its poor financial condition, PSNH claimed that the conditions were a taking of its property, and it appealed. This court there found the conditions unconstitutional and wrote: "Because the constitution prohibits any taking of private property by whatever means without compensation, the just compensation requirement applies whenever the exercise of the so-called police power results in a taking of property." *Appeal of PSNH*, 122 N.H. 1062, 1070 (1982) (quotations omitted)

Compensation must be paid regardless of the method by which the property is taken. *First English Evangelical Luth. Church v. Los Angeles County*, 482 U.S. 304, 316 n.9 (1987) (fifth amendment self-executing); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981) (owner may recover for diminution in value caused by down-zoning, even though no formal condemnation proceeding); *United States v. Clarke*, 445 U.S. 253 (1980) (owner may recover even though no formal condemnation proceeding).

C. Pollution or Diminution of Drinking Water is an Unconstitutional Taking

Pollution or diminution of one's drinking water is an unconstitutional taking. *See Moden v. United States*, 404 F.3d 1335, (Fed.Cir. 2005); *Hansen v. United States*, 65 Fed.Cl. 76 (2005); *Jones v. East Lansing-Meridian Water and Sewer Authority*, 296 N.W.2d 202 (Mich.App. 1980) (regional water authority liable for constitutional takings after its pumping drew down aquifer thereby effecting viability of plaintiffs' wells). This is because landowners have a property right

in subterranean water flows. *Bassett v. Salisbury Mfg. Co.*, 43 N.H. 569 (1862) (landowner who altered land such that neighbor's subterranean waterways interrupted liable if alterations are beyond reasonable use of land).

D. Groundwater Mining by USA Springs, Inc. Diminishes and Pollutes Neighboring Wells, Making the Permit Issued by DES an Unconstitutional Taking of Property Without Just Compensation

In SOG's case, the hydro-geological reality is that the mining of water by USA Springs, Inc. will (and during pump testing already did) decrease the level of water in homeowners' wells, require deepening of wells or new wells to maintain water availability, decrease well pressure, cause early wear on homeowner's pumping equipment, and result in the contamination of water in their wells.

Because there is no public purpose in the permit granting USA Springs, Inc. permission to take neighbors' water, the permit is an unconstitutional taking on its face, regardless of whether there is compensation. If this Court can find a legitimate public purpose, the granting of the permit is nonetheless unconstitutional without just compensation. The State intends no compensation. In this case it is believed that the State has no funds available to indemnify landowners whose wells might go dry as a result of the USA Springs, Inc.'s withdrawals. *See* Jody Record, *Public Outcry Against Nottingham Bottling Plant*, UNION LEADER, Feb. 7, 2004. Because there has been no finding of a public purpose, and no compensation, the permit granted by DES is a state action which works an unconstitutional taking and must therefore be revoked.

III. The Looming Water Problem

Water is necessary for all life, but it is a finite resource. Most of the world's water supply is saltwater stored in the oceans. Only three percent of the world's water is freshwater, and two-thirds of that is frozen, forming the polar ice caps, glaciers, and icebergs. The remaining one percent of the total world water supply is freshwater available as either surface water or groundwater. Groundwater accounts for two-thirds of this amount. *See* <http://www.epa.gov/seahome/groundwater/src/supply.htm#supply>. Moreover, some of the available freshwater has been polluted. The great majority of people in New Hampshire get their daily water supply from groundwater. National Environmental Trust, FEDERAL REGULATION AND NEW HAMPSHIRE'S ENVIRONMENT, at 31 (2004). As the earth does not distribute water evenly, there are water shortages in many parts of the world, including the United States. *See generally*, Robert Glennon, WATER FOLLIES: GROUNDWATER PUMPING AND THE FATE OF AMERICA'S FRESH WATERS (2002); Maude Barlow, Tony Clarke, BLUE GOLD: THE FIGHT TO STOP THE CORPORATE THEFT OF THE WORLD'S WATER (2002). For these reasons, many in the field have suggested that water will soon become a global commodity bought and sold by cartels similar to oil. *Id.* at ch. 6.

For the purposes substantiating the public's interest in New Hampshire's groundwater under both the takings and public trust doctrines described above, this Court might want to be apprized of the condition of groundwater in New Hampshire.

Coming now just after a snowy winter and a rainy spring, and in view of New Hampshire's obvious largess of ponds and lakes, it is hard to recognize that New Hampshire has significant water issues – in both quantity and quality. *Experts Say NH Not Immune to Global Water Problem*, N.H. SUNDAY NEWS, April 24, 2005.

A. Water Quantity is an Issue in New Hampshire

New Hampshire experiences periodic water shortages. For example, in 1980 due to low water in Penacook Lake, Concord's drinking water source, the city forbade watering lawns and washing cars. *The Fight Over Water; Increasing State Involvement Seen as Visionary or Invasive*, UNION LEADER, Feb. 9, 1993. In 1995, towns across the state established water restrictions. *State Mulls Drought-Fighting Steps*, UNION LEADER, July 13, 1995. In 1999 Salem rationed water. *Limits Lifted*, UNION LEADER, Sept. 22, 1999.

In 2002, because many New Hampshire rivers could not maintain water flows adequate for demands on them, DES determined that seven – the Lamprey, Piscataquog, Souhegan, Contoocook, Ashuelot, Exeter, and the lower Merrimack – were stressed to the point that they needed immediate water management plans. Roger Talbot, *River Protection Stagnant Despite Deep Drought*, N.H. SUNDAY NEWS, Feb. 10, 2002. The shortages prompted the Legislature to consider regional water-sharing plans. *House Considers State Water-sharing Plan*, UNION LEADER, Apr. 3, 2002.

From 2001 to 2003 the entire state, except Coos County, was under a "level 3 emergency" in a four-tier drought alert system. Paula Tracy, *Drought Lifted for Most of State*, UNION LEADER, Apr. 19, 2003. The designation triggered mandatory water conservation in many communities. Roger Talbot, *Drought in NH Getting a Wet Farewell*?, N.H. SUNDAY NEWS, Apr. 13, 2003. The programs helped towns such as Merrimack where, if there were no water management control, the demand would have exceeded the amount of water in its system. Dan McLean, *Learn to Save Water Saturday in Merrimack*, UNION LEADER, Sept. 19, 2003. The problems are not likely to go away. Dale Vincent, *State Drought Hasn't Ended*, UNION LEADER, May 15, 2002.

Some towns have persistent rationing. Salem faces the possibility of shortages nearly every summer when the level of Canobie Lake, where its drinking water comes from, gets low. Janine Gilbertson, *Residents Concerned about Canobie Plan*, UNION LEADER, Mar. 26, 2002; Janine Gilbertson & Robert Amsden, *Low Water Levels Have Salem Officials Scrambling for Answers*, N.H. SUNDAY NEWS, Mar. 31, 2002. Wolfeboro residents have been rationing water for many summers. Wells in a portion of Hooksett ran dry every summer for 30 years. Tom West, *Hooksett To Vote On Water System For 'Misery Hill,'* UNION LEADER, Apr. 30, 1996. Carol Carter, *Lakes Region Looks at Water Supply, Quality*, UNION LEADER, Jan. 3, 2005. At this writing Newmarket is under a water ban for the second summer in a row, meaning residents will not be able to use town water to irrigate lawns, wash cars, fill swimming pools or use sprinklers. *In Brief*, UNION LEADER, Apr. 21, 2005. Also at this writing, the State limited Seabrook from issuing building permits because its water system cannot handle more consumers. Susan Morse, *Blackwater Tapped for Desalinization*, PORTSMOUTH HERALD, June 12, 2005.

These problems are spurred largely by population growth. "[T]he queue to sip from the water in New Hampshire's finite cup is getting longer. . . . The queue is especially long in the urbanized southern counties." Roger Talbot, *Watching out for Safe Water*, N.H. SUNDAY NEWS, Aug. 22, 1999. "Of the 82 million gallons a day, nearly half were drawn in Hillsborough County (21 million) and Rockingham County (19 million); each of the state's other eight counties accounted for less than 10 million gallons a day." *Id.*

B. Water Quality is an Issue in New Hampshire

Just like water quantity, water quality – of both surface and groundwater – is an issue in New Hampshire.

According to DES, "many of the health threats to our drinking water come from dispersed sources: underground storage tanks for petroleum products, pesticides, run-off from pavement and development, landfills, improperly stored or used household, commercial or

industrial chemicals, transportation spills, etc." Paula Tracy, *State Seeks To Save Land Around Water Supplies*, UNION LEADER, Oct. 21, 1998.

Many of New Hampshire's surface waters – lakes, ponds, rivers, and streams – have some contamination. For example, lakes in southern New Hampshire contain excessive amounts of mercury. Tom Fahey *Report Says Southern NH Mercury 'Hot Spot,'* UNION LEADER, Sept. 20, 2000. Canobie Lake in Salem contains a number of pollutants. Joseph McCool, *Canobie Lake Pollution Study Set in Salem*, UNION LEADER, July 7, 1994. Granite Lake in Nelson got silted from road construction nearby. Joseph McCool, *State Plans Massive Dredging Project To Remove Silt From Granite Lake*, UNION LEADER, July 7, 1994.

New Hampshire's groundwater has become polluted as well. MtBE, a gasoline additive, has leaked into groundwater in many places in New Hampshire. Portsmouth had to close one of its wells due to MtBE. Jody Record, *Portsmouth to Keep Tainted Well Closed*, UNION LEADER, May 7, 2002. MtBE appears often in wells, regardless of the depth to which they are drilled. *MtBE Shows up Often in Wells*, UNION LEADER, Oct. 26, 2004. At least eleven municipal water systems have MtBE contamination; the costs associated with its cleanup may be as much as $26 million. Roger Talbot, *Watching out for Safe Water*, N.H. SUNDAY NEWS, Aug. 22, 1999.

Road salt is another common groundwater contaminant. *More Towns Choose to Limit Road Salt*, UNION LEADER, Nov. 17, 1997; Mark Hayward, *Salt May Put I-93 Planners in Pinch*, UNION LEADER, June 1, 2004.

Landfills and junkyards are common sources of groundwater pollution, David Lazar, *Judge to Decide Fate of Junkyard*, UNION LEADER, Oct. 3, 2002 (junkyard causing groundwater contamination in Londonderry); Stephen Seitz, *Troy to Get $960,000 for Polluted Site*, UNION LEADER, Oct. 11, 2002 (EPA cleaning landfill causing groundwater contamination in Troy). Old

industrial sites are also common sources. Robin Morgasen, *Milford Seeks Guidance on Well. Officials Confused Over Whether To Buy Back Contaminated Aquifer,* UNION LEADER, Oct. 17, 1989. Emily Zimmerman, *Group to Oppose Landfill Plan: EPA Plans to Cap and Treat Dover's Superfund Site,* FOSTERS DAILY DEMOCRAT, Aug. 6, 2004 (old landfill containing old industrial waste leaking into groundwater in Dover). The state doesn't know what to do about the looming problem of septage waste given the growth in the number of private septic systems. Beverley Wang, *Septic Tank Boom a Quandary,* UNION LEADER, Jan. 29, 2005.

Terrorism is also a water issue, and it has already occurred. Roger Talbot, *The Case of the Poisoned Well; State Investigates 'Obvious Sabotage' of Promising Water Source in Woodstock,* N.H. SUNDAY NEWS, Jan. 18, 1998; Roger Talbot, *Woodstock Well Lost Despite Cleanup Attempts,* N.H. SUNDAY NEWS, Nov. 7, 1999 (no leads in criminal investigation).

Groundwater pollution has caused demonstrable harm in New Hampshire. Contamination from paint stored at an old highway shed forced the State to pay for moving a small private school in Concord. Tom Fahey, *Pollution Forces Concord School to Move,* UNION LEADER, Jan. 14, 2003. MtBE made a family's well water un-potable in Webster. *Webster Family Battles with State for Uncontaminated Well Water,* UNION LEADER, Feb. 19, 2002.

The fact that there is wide-spread pollution of groundwater in New Hampshire matters to many because that is where most of our drinking water comes from. "Groundwater accounts for 95 percent of the water that New Hampshire households tap independently for domestic use, 67 percent of the water used by offices, restaurants and hotels, 36 percent of the water serving the 3,000 public water systems in the state." Roger Talbot, *Watching out for Safe Water,* N.H. SUNDAY NEWS, Aug. 22, 1999. Seventy-five percent of residents get their drinking water from groundwater. *MtBE Shows up Often in Wells,* UNION LEADER, Oct. 26, 2004.

C. Conflicting Users Compete for Water in New Hampshire

There are competing uses for every water resource, even the ocean. *See e.g., Opinion of the Justices (Public Use of Coastal Beaches)*, 139 N.H. 82 (1994); <http://www.coastalclear.org/> (study to determine seacoast sewage options including ocean dumping). New Hampshire has periodic disputes with its neighbors about water. Adam Groff, *Cross-Border Water Issue Rises Again in Newton*, UNION LEADER, May 16, 2005 (towns on border of New Hampshire and Massachusetts contest groundwater supplies). It took Loon Mountain 15 years to expand due to concerns about sources of water for snow-making. Paula Tracy, *Loon Expansion Ok'd after 15-year Fight*, UNION LEADER, Mar. 5, 2002. And water is worth lots of money to the State. N.H. Lakes Asso., *Estimates of Select Economic Values of New Hampshire Lakes, Rivers, Streams and Ponds* (June 2003) (sales generated by recreational uses – boating, fishing, swimming – of New Hampshire's freshwaters, and by public drinking water supplies, total $1.5 billion annually).

An example illustrates the intense competition for water in New Hampshire.

Since 1990 the State has been working on rules to guide what are adequate flows on New Hampshire rivers that have been legislatively designated for protection – the Ashuelot, Cold, Connecticut, Contoocook, Exeter, Lamprey, upper and lower Merrimack, Pemigewasset, Piscataquog, Saco and Swift. Without rules, anybody can take however much water they want out of the rivers; the rules seek to balance the competing uses. As of a few years ago, large water-consuming facilities sited on the rivers included:

- 28 hydro-electric generating plants operated by public utilities and private industries;
- many public water suppliers, including the cities of Concord, Franklin and Keene, and the towns of Bennington, Boscawen, Charlestown and Hinsdale, Pennichuck Water Works wells in Raymond, Milford Water Works, and the University of New Hampshire in Durham;

- Attitash Bear Peak in Bartlett;
- numerous industries, including Monadnock Paper (Bennington) Pike Industries, Harris Construction and Columbia Sand & Gravel, in their mining operations, Persons Concrete (Columbia & Campton), Jones Chemicals (Merrimack) Paper Service Ltd. (Hinsdale), American Tissue Mill (Winchester), Wheelabrator incinerator (Concord), and Bio-energy Corp. (Hopkinton);
- many farms and nursery operations, including Wilson Farm (Litchfield), Brochu nurseries (Concord), Gold Star Sod Farms (Canterbury & Concord);
- several golf courses, including Green Meadow (Hudson), Passaconaway Country Club (Litchfield), Angus Lea (Hillsborough), and Hanover Country Club;
- innumerable citizens who want to use the rivers to walk, fish, raft, boat, and swim.

Roger Talbot, *Profit: A River Runs Through it*, N.H. SUNDAY NEWS, Aug. 29, 1999; Roger Talbot, *Water Conservation Funding Already in Trouble*, N.H. SUNDAY NEWS, Dec. 3, 2000. *See e.g.*, Theodore Steinberg, NATURE INCORPORATED: INDUSTRIALIZATION AND THE WATERS OF NEW ENGLAND (1991) (history of Lake Winnipesaukee and its watershed, which includes the Merrimack River and its multitude of contradictory demands).

During the writing of this brief the Governor of Michigan, which "is blessed to be surrounded by 20 percent of the world's fresh water supply," imposed a moratorium on bottled water permits. Governor Jennifer M. Granholm, *Press Release* (May 27, 2005) <http://www.michigan.gov/gov/0,1607,7-168-23442-119000--,00.html>.

D. Water Mining by USA Springs, Inc. has a Regional Impact

USA Springs, Inc.'s mining of more than 400,000 gallons per day of New Hampshire's groundwater in Barrington and Nottingham has a regional impact, and does not just effect a few abutting residents. *See* United States Geological Survey, *Assessment of Ground-Water Supply Potential of Bedrock in New Hampshire*, Factsheet No. 95-002 (1995).

USA Springs, Inc.'s wells will be sunk into a "fractured bedrock aquifer," which consists of

large and small cracks and fissures in bedrock which are often interconnected. When a well is pumped, water is drawn from the bottom of the well, resulting in an up-side-down cone-shaped area in the aquifer that is at a pressure lower than the rest of the aquifer. Because of the lower pressure, whatever else is in the aquifer – water from near and far, contamination from natural and human sources – is drawn toward the bottom of the well. Thus, large groundwater extractions tend to draw water away from other places and can lower the water table for a considerable distance. John Bredehoeft, *Safe Yield and the Water Budget Myth*, 35 GROUNDWATER 929 (1997).

But fractured bedrock aquifers are poorly understood – without significant amounts of study on a particular aquifer, it is difficult for hydro-geologists to predict how fast the aquifer is being recharged, whether the water in the aquifer is from recent rains or whether it has been trapped for millennia, and from how far away the pumping is drawing water. Alan Shapiro, United States Geological Survey, *Fractured-Rock Aquifers: Understanding an Increasingly Important Source of Water*: FactSheet No. 112-02 (2002) <http://water.usgs.gov/nrp/proj.bib/Publications/FS-112-02.pdf>.

Groundwater and surface water are intimately attached. The fissures that form aquifers are the sources of water for wetlands, streams, ponds, and wells. For example, many of the groundwater sources feeding Great Bay on the Seacoast have been mapped with aerial infrared photography. Robert M. Roseen, *Quantifying Groundwater Discharge Using Thermal Imagery and Conventional Groundwater Exploration Techniques for Estimating the Nitrogen Loading to a Meso-Scale Inland Estuary* (2002) (unpublished Ph.D. dissertation, University of New Hampshire) (on file with University of New Hampshire library).

The land on which USA Springs, Inc. wants to drill its wells is in the watersheds of three New Hampshire rivers – the Lamprey (federally designated as a wild and scenic river), Oyster, and Bellamy – on whose water thousands of Seacoast drinkers depend. <http://www.state.nh.

us/municipal/>. The same aquifer is the source for many wetlands, including the prime wetlands in Barrington. It can thus be expected that the mining in this case will effect a large area, a great number of people, and some important ecosystems.

E. Save Our Groundwater

Against this background, in 2001 USA Springs, Inc. petitioned the DES to mine more than 400,000 gallons per day of New Hampshire's groundwater, bottle it, and sell it overseas. It was the largest groundwater permit application DES had ever received since New Hampshire enacted its Groundwater Protection Act in 1991. Almost immediately, a diverse group of people from all walks of life – grandparents, retirees, professionals, parents, farmers, students, small business people, and others – formed Save Our Groundwater (SOG) as a nonpartisan nonprofit organization enjoying wide support from local businesses, municipal officials, and state legislators, with the purpose to protect water in the public trust. SOG members have worked for four years with local and state officials to address the unsustainable, profit-driven water-mining taking place in New Hampshire's rural communities. It holds monthly meetings, hosts guest speakers, sponsors rallies at the USA Springs Inc. site, attends public hearings on water legislation, and conducts education and outreach programs in the community.

IV. USA Springs, Inc. Has Not Demonstrated a "Need" for the Groundwater that Belongs to the Citizens of the State of New Hampshire

Because it is apparent that the citizens of New Hampshire have a great interest in the State's groundwater, our statute requires that someone who wishes to remove significant quantities must prove a countervailing "need" for it. An applicant for a large groundwater withdrawal permit must submit plans "which demonstrate the need for the proposed withdrawals." RSA 485-C:4(b). The rules promulgated pursuant to the statute likewise require the applicant to "[d]emonstrate the need for the withdrawal," ENV-WS 388.04(c)(1), by submitting a "description of need to demonstrate the . . . need for [] the proposed withdrawal." ENV-WS 388.05(a).

"[T]he words 'necessities' and 'needs' . . . are rather relative terms having no fixed or rigid meaning. However they do not cover that which is merely desirable and not reasonably essential." *Amoskeag Trust Co. v. Wentworth*, 99 N.H. 346, 348 (1955).

At most USA Springs, Inc. has indicated that it wishes to bottle water and sell it in Europe. No known document in the record even attempts to demonstrate anything more than simply this desire. There has been no demonstration of anything approaching "reasonably essential" to overcome the interest of the citizens of the State of New Hampshire in their communities' groundwater which their government holds in trust for them.

Having failed to demonstrate "need," USA Springs, Inc. has not met its burden under either the statute or the administrative rules. The permit therefore having been unlawfully granted, it must be revoked.

V. The Public has a Right to a Formal Hearing Before the State can Give Away its Groundwater

A. Right to a Hearing Based on Requirements of Due Process

"Where issues of fact are presented for resolution by an administrative agency due process requires a meaningful opportunity to be heard." *Society for Protection of New Hampshire Forests v. Site Evaluation Committee*, 115 N.H. 163, 168 (1975). The public informational sessions held by DES did not constitute a hearing, despite DES's responsibility in this case to resolve issues of fact.

Because there is a constitutional takings issue present here, due process also requires a hearing on whether the taking is for a public use, the amount of the landowners' losses, and the amount they should be compensated for it. *City of Manchester v. Airpark Business Center Condominum Unit Owners' Ass'n*, 148 N.H. 471 (2002) (owner of condemned property entitled to damages based on difference between property's fair market value before and after taking); *Petition of Mount Washington Road Co.*, 35 N.H. 134 (1857).

B. Right to a Hearing Based on Right of Cross Examination

During its consideration of a permit to mine water, DES held a number of public information sessions during which it heard USA Springs, Inc. present its plan, and heard from a great number of concerned neighbors, laypersons concerned about a variety of issues connected to groundwater extraction, and professional geologists and hydrologists. The overwhelming majority of speakers at these sessions opposed the permit (which was nevertheless eventually granted) on a variety of grounds – unsustainable geology, presence of hazardous waste nearby, and burgeoning population in the vicinity and its commensurate pressure on water resources.

Most of the speakers, however, were unidentified. None were placed under oath and none were cross-examined. There was no formal discovery process. No proponents of a groundwater

extraction permit were ever subject to sustained questioning under oath. Hence there is basic information about USA Springs, Inc. that remains hidden from public view. Moreover, because of the informality, what constitutes the record is ambiguous, making compliance with rules of this Court problematic.

For example, a number of World Trade Organization (WTO) international trade agreements the United States has signed with a variety of countries provide that those countries can sue the United States for damages if local regulations hinder their ability to conduct business in the United States. *See* World Trade Organization, GENERAL AGREEMENT ON TRADE IN SERVICES (GATS), arts. XXVII(c) & XXIII, 3, <http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#ArticleI>. Those agreements only apply, however, if the regulated company is owned in some part by foreign investors. *Id.* Thus, if USA Springs, Inc. is a foreign company, or is sold to one, and if at some point either the State or the Towns restricts, for instance, the amount of water (a product) that can be extracted, or the number of trucks (a service) that can enter the facility, the company may have standing to sue in international courts created by the agreements.

USA Springs, Inc. is a closely-held corporation, and SOG is not privy to the identity of its investors. While SOG suspects there is foreign ownership – SOG believes USA Springs, Inc. has or had business links to a Luxembourg-based individual whose three corporations own 55 abutting parcels totaling 1,487 acres – the fact cannot be established. SOG has diligently tried to establish this information, but without formal discovery and cross-examination, USA Springs, Inc. has successfully hidden the identity and the complex structure of its ownership. (The company has nonetheless made clear its intent to sell New Hampshire's water to foreign consumers.)

The "crucible of cross-examination" is the only reliable way to establish a witness's truth-telling. *Crawford v. Washington*, 541 U.S. 36, 61 (2004); U.S. CONST., amd. 6; N.H. CONST. pt I,

art. 15. An adjudicative hearing, at which witnesses are sworn and subject to cross-examination, is the only way SOG can hope to establish crucial facts which are necessary to apprize decision-makers whether they are granting a permit to a local company over which they retain regulatory control, or to a foreign-owned company which will be quick to sue in international court if the Town or State dare later regulate local matters.

C. Large Groundwater Withdrawal Permits Should Be Recognized as Adjudications of Significant Social Issues

At various times in New Hampshire's history administrative agencies that once were merely permitting agencies have suddenly grown into forums for vigorously contested social issues.

For example, cases such as *Public Service Co. of New Hampshire v. Lovejoy Granite Co.*, 114 N.H. 630 (1974) where the Public Utilities Commission (PUC) established the cost of an electric wire easement, and *Browning-Ferris Industries of New Hampshire, Inc. v. State*, 115 N.H. 190 (1975) where the PUC denied a permit to haul rubbish in Hooksett, can be compared with cases such as *Society for Protection of New Hampshire Forests v. Site Evaluation Committee*, 115 N.H. 163 (1975) and *Society for Protection of New Hampshire Forests v. Water Supply and Pollution Control Commission*, 115 N.H. 192 (1975) in which several public interest organizations objected to siting a nuclear power plant in Seabrook. In a short space of time the New Hampshire PUC was transformed from a relatively unknown agency into one that occupied an international spotlight. With the prodding of this court it stopped behaving as a mere permitting agency and recognized that it was a forum in which substantial public rights are decided. The PUC now routinely provides notice of proceedings to parties it thinks might be interested, and offers parties formal hearings even when it arguably need not.

The DES might be at that critical juncture. It operates well as a permitting agency allowing

for residential septic systems, wells, and driveway culverts that warrant little public involvement. Until recently, however, it has not generally been a forum for adjudication of significant social issues.

It simply is not reasonable, nor does it comport with federal and state constitutional due process and statutory requirements, for the DES to adjudicate the removal of millions of gallons of the public's groundwater without even a formal hearing. As this Court has before helped other agencies recognize their role in significant social issues, it should now also prod the DES.

CONCLUSION

> All the rivers run into the sea;
> yet the sea is not full;
> unto the place from whence the rivers come,
> thither they return again.
>
> ECCLESIASTES 1:7 (King James).

In light of the forgoing, Save Our Groundwater respectfully requests this Honorable Court to:

A. find on both procedural and substantive grounds that the New Hampshire Department of Environmental Services improvidently or unlawfully issued to USA Springs, Inc. a large groundwater extraction permit;

B. issue orders in accordance with that finding;

C. revoke or vacate the permit;

D. remand to the DES with appropriate instructions, including a requirement that it hold a formal adjudicative hearing; and

E. take other action in accord with the remedies suggested by the Towns of Barrington and Nottingham and with law and equity.

Respectfully submitted,

Save Our Groundwater
By its Attorney,

Law Office of Joshua L. Gordon

Dated: June 23, 2005

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Save Our Groundwater requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on June 26, 2005, copies of the foregoing will be forwarded to Save Our Groundwater, % Denise Hart, PO Box 182, Barrington, NH 03825; Steven B. Conklin, 80 Al Wood Dr., Barrington, NH 03825; James H. Page, Jr., Robin Marshall, & Thomas Marshall, PO Box 1254, Dover, NH 03821; Ed Mosca, Esq., Soltani & Mosca, PLLC, P.O. Box 457, Epsom, NH 03234 (for USA Springs, Inc.); Mark E. Beliveau, Esq., Pierce Atwood, 1 New Hampshire Ave., Suite 350, Portsmouth, NH 03801 (for Town of Barrington); E. Tupper Kinder, Esq., Nelson, Kinder, Mosseau and Saturley, PC, 99 Middle Street, Manchester, NH 03101 (for Town of Nottingham); and to Richard Head, Assistant Attorney General, Office of the Attorney General, 33 Capitol St., Concord, N.H. 03301.

Dated: June 23, 2005

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