

State of New Hampshire
Supreme Court

2004 TERM

SEPTEMBER SESSION

NO. _____

APPEAL OF SAVE OUR GROUNDWATER
(NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES)

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

PETITION FOR APPEAL

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APPEAL BY PETITION FROM ORDERS OF THE
NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES

Save Our Groundwater hereby appeals to the New Hampshire Supreme Court from an order of the New Hampshire Department of Environmental Services (DES) which granted a permit to USA Springs, Inc. to draw 307,528 gallons of water per day, or 113 million gallons per year, from wells on a parcel of land located in the towns of Barrington and Nottingham.

a. PARTIES

Save Our Groundwater (SOG) is a non-profit public interest organization concerned with the quality and management of groundwater resources in New Hampshire. It maintains its headquarters at PO Box 182, Barrington, NH 03825. It is represented in this appeal by Joshua L. Gordon, Esq., 26 S. Main St., #175, Concord, N.H. 03301, (603) 226-4225, www.AppealsLawyer.net.

USA Springs, Inc. is a privately-held business seeking to drill wells, mine water, and build a water bottling facility in Barrington and Nottingham. At times, both in corporate documents filed with the New Hampshire Secretary of State and on applications with DES, the company has referred to itself as “United Springs of America, Inc.” Whatever its name, however, there are no springs associated with the proposed large groundwater withdrawal. It is headquartered at 9 Regis Drive, Pelham, NH 03076, (603) 894-6942. It has been represented at various times in this proceeding by Armand Hyatt, Esq., Hyatt & Flynn, 110 Main Street, Salem, NH 03079, (603) 893-8069, by Tony Soltani, Esq., Soltani Law Office, P.O. Box 457 Epsom, NH 03234, (603) 736-3320, and by Gregory Smith, Esq., McLane, Graf, Raulerson & Middleton, 15 N. Main St., Concord, NH 03301, (603) 226-0400.

Garrison Place Real Estate Investment Trust (GP-REIT) owns the land in Barrington and Nottingham on which USA Springs, Inc. seeks to install its water extraction and bottling facilities. As there are no public records for the trust, and it has been represented by the same attorneys as USA Springs, Inc., it is believed that its contact information is the same as for USA Springs, Inc., above.

The town of Barrington is the location of about 20 percent of the land on which USA Springs, Inc. seeks to install its facility. Its address is Carol Reilly, Town Administrator, Town of Barrington, 41 Province Ln., Barrington, NH 03825, (603) 664-9007. It has been represented in this proceeding by Mark E. Beliveau, Esq., Pierce Atwood, 1 New Hampshire Ave., Suite 350, Portsmouth, NH 03801, (603) 433-6300.

The Town of Nottingham is the location of about 80 percent of the land on which USA Springs, Inc. seeks to install its facility, and in which the wells are located. Its address is Charles Brown, Town Administrator, Town of Nottingham, 139 Stage Rd., PO Box 114, Nottingham, NH 03290 (603) 679-5022. It has been represented in this proceeding by E. Tupper Kinder, Esq., Nelson, Kinder, Mosseau and Saturley, PC, 99 Middle Street, Manchester, NH 03101, (603) 647-1800.

The large groundwater permit to draw water pursuant to RSA 485-C was granted by the New Hampshire Department of Environmental Services (DES), Michael Nolin, Commissioner, 29 Hazen Dr. PO Box 95, Concord, NH 03302, (603) 271-3503.

The State may be involved in this matter. It is represented by Richard Head, Assistant Attorney General, Attorney General, 33 Capitol St., Concord, N.H. 03301, (603) 271-3650.

b. DECISIONS AND ORDERS SUBJECT TO APPEAL

- New Hampshire Department of Environmental Services, *Large Groundwater Withdrawal Permit No. LGWP-2004-0003* (July 1, 2004), <http://www.des.state.nh.us/dwspp/USASprings_LGWP.pdf>. A copy is appended hereto.
- New Hampshire Department of Environmental Services, *Decision and Findings, USA Springs, Inc. Application for a Large Groundwater Withdrawal Permit Dated December 29, 2004, Permit No. 2004-0003*, (July 1, 2004), <http://www.des.state.nh.us/dwspp/usadecision_findings_07012004.pdf>. A copy is appended hereto.
- SOG's *Motion for Rehearing Under RSA 485-C:21, VI and RSA 541* (July 30, 2004). A copy is appended hereto.
- SOG's *Motion for Adjudicative Hearing Under RSA 541-A:31* (July 30, 2004). A copy is appended hereto.
- Town of Barrington's *Motion for Rehearing* (July 30, 2004). A copy is appended hereto.
- Town of Nottingham's *Request for Rehearing* (July 30, 2004). A copy is appended hereto.
- Town of Nottingham's *Motion for Adjudicative Hearing Under RSA 541-A:31* (July 20, 2004). A copy is appended hereto.
- New Hampshire Department of Environmental Services, *Application of USA Springs Motions for Rehearing [denial of parties' motions for rehearing]* (Aug. 9, 2004), <http://www.des.state.nh.us/dwspp/USASpringsAug904_1.pdf>. A copy is appended hereto.
- New Hampshire Department of Environmental Services, *Application of USA Springs Motions for Adjudicative Hearing [denial]* (Aug. 9, 2004), <http://www.des.state.nh.us/dwspp/USASpringsAug904_2.pdf>. A copy is appended hereto.

c. QUESTIONS PRESENTED FOR REVIEW

1. New Hampshire's Groundwater Protection Act of 1998 and the rules promulgated pursuant to it require that before DES may permit large groundwater withdrawals there must be a showing of "need." DES has construed need to mean merely the efficient use of water, rather than the plain meaning of the term. Did DES err in its construction and finding of need?
2. DES held many *ex parte* communications with USA Springs, Inc. during the permitting process. Even though this is a highly contested issue, DES justifies the communications on the basis that "a permit application is a non-adjudicative process" and that therefore *ex parte* communications are allowable in the normal course of business. Did DES's *ex parte* communications taint the permitting process so as to render it unlawful and unconstitutional?
3. At many times during the legal proceedings concerning USA Springs, Inc.'s application to mine water, DES decision-makers conferred privately with the applicant. At these times, as many as 10 towns had expressed interest in the proceedings, as had several town conservation commissions, the regional planning commission, several State Senators and State Representatives, and a half-dozen organizations including SOG. Did DES violate the Right-to-Know act and the New Hampshire constitution by failing to maintain transparency in its workings and decision-making processes?
4. DES has acknowledged that the large groundwater withdrawals permitted here have several untoward effects on neighboring properties: *e.g.*, a drop in water levels of private and public wells, a drop in water quality of private and public wells, limitations on use of property within the declared wellhead area, and authorization for government officials to enter land of those within the area without a warrant. Such matters affect property rights and land values. 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?
5. The statute requiring permits for large groundwater withdrawals, RSA 485-C:21, IV, states that appeals from such proceedings shall be in accordance with RSA 541. Yet RSA 21-O:7 states that appeals shall be to the Water Council, which SOG has pursued in addition to this appeal. What is the proper appeals channel for decisions of the DES regarding large groundwater withdrawal permits?

6. DES held informal informational sessions to take public comment on USA Springs' application for a large groundwater withdrawal. These sessions had no sworn testimony, no cross-examination, and were not recorded in a manner generally considered adequate for legal proceedings and not consistent with Supreme Court Rule 13(2) which requires an appellant to furnish a record for appeal. Did DES err in failing to hold an adjudicative process more suited to the magnitude and nature of USA Springs, Inc.'s application to withdraw 113 million gallons per year of New Hampshire's groundwater, in violation of SOG's federal and state due process rights?
7. New Hampshire law provides that agencies must hold an adjudicative proceeding if a matter has reached a stage at which it is considered a contested case, and in other circumstances. Considering the vastness of USA Spring, Inc.'s plans to extract and sell the public's groundwater, and the amount of legal action surrounding it, an adjudicative proceeding is necessary to determine the rights of parties. Did DES err in failing to hold an adjudicative proceeding in violation of SOG's constitutional and statutory rights?
8. The DES's rules, ENV-Ws 388.23(f), provide that an adjudicative process is required only when an applicant's permit is denied. SOG is a public interest organization whose members have been affected by DES's granting of a permit to USA Springs, Inc. Did DES violate SOG's federal and state equal protection rights by failing to hold an adjudicative hearing at which SOG could have entered sworn and expert testimony, at which SOG could have had an opportunity to cross-examine USA Springs' witnesses, and of which an adequate record could have been made?
9. Both the groundwater statute and the rules promulgated pursuant to it provide that in considering large groundwater withdrawals DES must take into account current and future regional use of water. There is enormous growth taking place in the region in which USA Springs, Inc. seeks to locate its water-extracting facility, including dozens of businesses and hundreds of new homes within a 1.5 mile radius. Did DES err in not recognizing the impact of large groundwater withdrawals on the current and future viability of the region for residences and business, all of whom use water?
10. The Lamprey River is a federally designated as a Wild and Scenic river. DES has acknowledged that the river will be affected by the USA Springs, Inc. facility because it will take water from its aquifer thereby reducing the amount of water in the Lamprey River basin and altering its natural flows. Did the DES err in not considering the cumulative impact on the Lamprey River basin by the region's development and USA Springs, Inc.'s water extraction facility, and in ignoring the concerns raised by the Lamprey River Advisory Committee, the United States Department of the Interior, and the National Park Service?

11. The New Hampshire Legislature, as well as the State's common law, provides that groundwater is a public trust. The public trust doctrine provides that water resources are to be used for public ends in a manner consistent with public, and not private, interests. Did DES err in granting to USA Springs, Inc. a permit to extract 113 million gallons of water a year for private profit, in violation of its constitutional, statutory, and traditional role as holder and protector of the public trust?
12. USA Springs, Inc. admits that it intends to extract quantities of water from New Hampshire and sell it internationally. A number of international trade treaties prohibit reduction of quantitative limits on exportable commodities, thus possibly limiting any future restrictions that DES may impose on USA Springs, Inc.'s permit. Did DES err in failing to adequately consider these treaties when it granted USA Springs, Inc. a permit to extract over 100 million gallons of New Hampshire's water per year for sale on the international market?
13. DES is responsible by statute and regulation for monitoring the environmental impacts of large groundwater withdrawals. It has already found significant violations of New Hampshire environmental laws by USA Springs, Inc., and DES admits that its budget is not sufficient to adequately monitor the environmental effects of such large extraction facilities and that USA Springs, Inc. will self-monitor. Did DES err by granting a permit to USA Springs, Inc. without having the capacity to provide adequate environmental oversight and thus fail to safeguard New Hampshire's freshwater supply?
14. In 2003 DES denied USA Springs, Inc.'s first application for a large groundwater withdrawal permit for a variety of valid reasons. USA Springs, Inc. has never filed a second application – rather it wrote a letter to DES alleging that the letter was a second “preliminary application” – making it impossible for the public to know what permit application has now been granted. Did DES err in granting a permit when no permit application has been filed?
15. DES recognizes and USA Springs, Inc. admits that its extraction facility will have a significant effect on wetlands. Yet there was no assessment of the functions and values of the wetlands impacted, nor a prime wetland hearing, as required by statute and regulation. Did DES err in failing to consider the wetlands impacts of USA Springs, Inc.'s extraction facility?

16. New Hampshire law provides that DES cannot issue a permit for large groundwater withdrawal unless there is a showing that it will not result in adverse impacts that cannot or will not be mitigated, that the withdrawals are sustainable, and that these showings must be made by complete and accurate information. DES recognizes that there will be immediate and irreversible adverse impacts, that contamination is likely but that mitigation is not, that the proposed withdrawals are not sustainable, and that USA Springs, Inc.'s attempts to meet the standard contained gaps in data. Did DES err in granting a permit with these and other deficiencies?
17. New Hampshire law prohibits the interbasin transfer of water. USA Springs, Inc.'s proposal would transfer groundwater from the Lamprey River basin. Did DES err in not taking into account the New Hampshire Rivers Management and Protection Act, and by granting a permit to USA Springs, Inc. in violation of the Act?
18. New Hampshire law provides that an applicant for a large groundwater withdrawal bears the burden of proof with regard to sustainability, public benefit, need, and other matters. DES made particularized findings on these issues, specifically noting USA Springs, Inc.'s failure to sustain its burden, its failure to provide complete data to sustain its burden, and conceding a lack of adequate information to determine whether the burden has been met. Did DES err in nonetheless granting a groundwater withdrawal permit?
19. New Hampshire law requires the DES make adequate written findings. In its decision, however, it failed to provide findings with respect to protecting the public interest, sustainability, reasonable withdrawal levels, and other matters. Did DES err in granting a permit while failing to make written findings?
20. DES regulations specify numerous details regarding the testing of wells and other matters for applicants for large groundwater withdrawal permits. DES conceded that USA Springs, Inc. did not comply with some of these regulations, and ignored others. Did DES err in nonetheless granting a permit to USA Springs, Inc.?

d. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR REGULATIONS IN ISSUE

- U.S. CONST. amds. 5 & 14
- N.H. CONST. pt. I, arts. 2, 8, 10, 12, 14, 19
- RSA 485-C, 91-A, 481, 541-A:31
- ENV-Ws 387, 388, & 389
- ENV-Wc 200

e. OTHER DOCUMENTS

- No other documents are necessary for the consideration of this notice of appeal.

f. STATEMENT OF THE CASE

In May 2001 USA Springs, Inc. filed an application for a large groundwater withdrawal permit pursuant to RSA 485-C:21, to pump 439,200 gallons of water per day from the aquifer underlying a 100-acre parcel located in the towns of Barrington and Nottingham to be bottled for sale domestically and internationally.

This action prompted the formation of Save Our Groundwater (SOG), a citizens organization dedicated to advocating for water in the public trust. Numerous broad-based civic actions, public hearings and educational events expanded and continued the public discourse about the sustainability of New Hampshire's groundwater resources that are legislatively declared held in the public trust. Legislation was proposed to strengthen the existing law and discussion of the case became a regular event in newspapers, among public officials, at town meetings and in classrooms.

The company's application was denied by the New Hampshire Department of Environmental Services (DES) in August 2003 for 27 independent reasons based on science and adverse impacts, including the drop in water levels of neighboring wells, and the company's pump

tests had drawn contaminants (volatile organic compounds) further into the aquifer from an adjacent site. On December 11, 2003, DES denied the company's administrative appeal.

Thereafter, a company called MyKroWaters wrote a letter to DES on behalf of USA Springs, Inc., alleging that the letter was a preliminary second application. USA Springs, Inc., has never, however, filed a second application. After several public informational meetings, the permit was nonetheless granted on July 1, 2004 allowing the company to withdraw 307,528 gallons of water per day, or about 113 million gallons per year. On July 30, 2004, SOG filed a motion to reconsider the granting of the permit, and also filed a motion for an adjudicative hearing. Both were denied on August 9, 2004.

The statute requiring permits for large groundwater withdrawals, RSA 485-C:21, IV, provides that appeals from such proceedings shall be in accordance with RSA 541. Yet RSA 21-O:7 provides that appeals shall be to the Water Council. Because of this statutory ambiguity, SOG is filing this appeal, but has also appealed to the Water Council. Depending upon the outcome of that proceeding, SOG may later seek to have issues decided there added to this appeal.

g. JURISDICTIONAL BASIS FOR APPEAL

- RSA 541:6
- Supreme Court Rule 10(1)(a) and 10(1)(c)
- *Petition of Hoyt*, 143 N.H. 533 (1999)

h. REASONS WHY THIS APPEAL SHOULD BE ACCEPTED

“When the Well’s dry, we know the Worth of Water.” Benjamin Franklin, *Poor Richard’s Almanack* (1746). More modern and local, a good primer on groundwater is contained in the New Hampshire Groundwater Protection Act, RSA 485-C:1 (1998):

The legislature recognizes the fundamental importance of the groundwater resource. . . . [It] intends to provide for consistent, protective management and remediation of groundwater The natural quality of the groundwater resource shall be preserved and protected in order that groundwater may be used for drinking water supply. Ambient groundwater quality standards shall meet drinking water standards, and the classification of groundwater shall provide opportunity for protecting groundwater of high value as a drinking water supply. The legislature recognizes 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. . . . The state, which has general responsibility for groundwater management in the public trust and interest, should develop groundwater protection programs . . . when such programs are not developed by a local entity.

DES has treated this matter procedurally as though it were something like a simple residential permit with minimal impact on the environment and the community. But it is more than that. Its magnitude, potential for environmental degradation, impact on public and private rights, and international trade implications, make it different in kind. Moreover, large groundwater withdrawals are the subject of separate legislation. USA Springs, Inc. seeks to appropriate more than 100 million gallons a year of a public resource and turn it into a private profit. This Court should accept this case to determine that procedures adequate to grant *de minimus* permits are not sufficient here.

DES is charged with implementing the public trust doctrine with respect to groundwater, and cannot grant a large groundwater withdrawal permit without appropriate finding. Applicants should be required to show more than merely a desire to profit by bottling water and selling it.

New Hampshire's Groundwater Protection Act has not heretofore been considered by this Court, and this case should be reviewed to determine what standards govern when a private party wishes to sell vast quantities of the public's groundwater.

i. PRESERVATION

Counsel for SOG hereby certifies that every issue specifically raised has been presented to the administrative agency and has been properly preserved for appellate review by a properly filed pleading. Part of this appeal, however, references SOG's objection to DES's refusal to hold an adjudicative proceeding at which a complete record could be developed.

For the reasons stated, SOG prays that this Court accept this appeal, issue an appropriate order of notice to the New Hampshire Department of Environment, and direct the submittal of briefs and the scheduling of oral argument in the ordinary course of Supreme Court business.

Respectfully submitted,
Save Our Groundwater,
By its Attorney,

Dated: September 8, 2004

Joshua L. Gordon, Esq.
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(603) 226-4225

CERTIFICATION

I hereby certify that, in accordance with Supreme Court Rules 10(8) and 26(2), copies of this Appeal by Petition have been served on all parties noted in section a. of this Petition.

Dated: September 8, 2004

Joshua L. Gordon, Esq.

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