

***Amicus Curiae* Brief**

New Hampshire Program of the American Friends Service Committee

N.H. Supreme Court No. 2004-0601

USA Springs and Trade Policy

Introduction

USA Springs, based in Pelham, New Hampshire, wants to build a water bottling plant in Nottingham, New Hampshire. It has received a permit to pump 307,000 gallons of water a day from an aquifer that underlies Nottingham, Barrington, and other towns in 3 watersheds. The amount is sufficient to fill one million 20 oz. bottles every 24 hours.

The State claims the right to determine whether a large groundwater withdrawal such as the USA Springs proposal would harm other groundwater users. If the State grants a permit to withdraw a certain amount, it reserves the right to change the amount at a later date.

USA Springs May be Involved with International Trade

- USA Springs has said it plans to sell the bottled water in Europe.
- The company is incorporated in New Hampshire, but the public does not know who owns the company.
- The largest bottled water company in the world, Nestle, is thought to be seeking to establish new bottling plants and sources of spring water in New Hampshire and Maine.

International Trade Rules Could be Applied to Disputes between the State and USA Springs

The United States is a member of the World Trade Organization (WTO), which administers several over-lapping sets of trade rules which may affect the authority of state and local government.

In a letter to US Rep. (now Senator) John E. Sununu, US Trade Representative Robert Zoellick said that “nothing in the WTO agreement requires local authorities to permit bulk extractions of water that would be contrary to sound resource management and conservation or that would create hazards to human health. Of course, *once local authorities decide to permit bulk water to be extracted from an aquifer, bottled, and sold as an article of commerce, WTO rules would likely apply to the sale of that article of commerce.*” [emphasis added]

In addition, the United States is also a party to several other bi-lateral and multi-lateral trade agreements, including the North American Free Trade Agreement (NAFTA). Under NAFTA, disputes based on state law have been filed and resolved in accordance with the agreement’s dispute resolution process. A new trade agreement with the Dominican Republic and the five nations of Central America is completed and awaiting

ratification by the U.S. Congress. Moreover, the United States is currently negotiating several other agreements¹, the details of which are classified.

Specific Trade Rules which Could be Invoked

1. GATT – The DES permit to USA Springs includes a quantitative limit to the amount of water the company is allowed to withdraw. Under the WTO General Agreement on Tariffs and Trade (GATT), quantitative restrictions affecting exports are prohibited. While exceptions can be made for conservation of “exhaustible natural resources,” [GATT Article XX], groundwater may be considered a renewable resource rather than an exhaustible one.

In addition, the GATT exception would only apply if similar restrictions were made to apply to “domestic production and consumption.” [GATT Article XX] However, the DES does not have authority under New Hampshire law to restrict water usage below the level of 57,600 gallons per day.

If the State were to determine at some future point that USA Springs’ license should be altered to permit a smaller amount of water to be withdrawn – a measure which is clearly allowed under DES rules – the company could be in a position to initiate an international trade dispute if the State did not also order a proportional reduction in consumption by all other consumers of water from the same source, including domestic well owners.

2. GATS -- Under the WTO General Agreement on Trade in Services (GATS), there are no exemptions for natural resource conservation. And under the GATS section on domestic regulations, which applies to service sectors that each WTO member places on its own “schedule of commitments,” any domestic regulations considered “more burdensome than necessary to assure quality of service” are considered unfair barriers to trade, even if they are applied in a non-discriminatory manner. Like GATT, GATS also includes an absolute prohibition on quantitative restrictions of services, if they are on the schedule of commitments.

Some of the services that would be involved in a bottling operation, and which could provide grounds for a trade dispute include: wholesale services, retail services, and freight transportation are already on the United States schedule of commitments. Negotiations are now underway to expand the list of services subject to GATS rules. The European Union is known to have requested the inclusion of additional services related to water collection and distribution.

3. Investment Rules -- Under NAFTA [NAFTA Chapter XI], foreign investors can sue if they believe government action has taken place which is “tantamount to expropriation” of their property, i.e. if government regulation or law harms its ability to profit from its investment. If the investor wins, the government must compensate it for its anticipated losses. Unlike other trade disputes, which are initiated by governments on behalf of

¹ The Free Trade Area of the Americas, which includes 34 countries; the Andean FTA with Ecuador, Peru, and Colombia; the South African Customs Union FTA with S. Africa, Botswana, Swaziland, Namibia, and Lesotho; and the US-Panama FTA.

commercial entities based within their jurisdictions, disputes under NAFTA's investor rules can be filed directly by the investor, in what is called "Investor-State Dispute Resolution."

CAFTA, which is now pending before Congress, has similar provisions. Other agreements now under negotiation may have Investor Rights chapters based on the NAFTA model.

Investor rules could be applied to the USA Springs case if the company has investors in a country which is party to one of these agreements. For example, a Canada-based subsidiary would be able to use the Investor-State Dispute Resolution mechanism under NAFTA.

Scenarios Which Could Trigger a Trade Dispute

- USA Springs transfers ownership to a Canadian subsidiary, which uses NAFTA rules to contest adverse regulatory decisions.
- USA Springs is sold to Nestle or another foreign corporation, which uses WTO rules to pressure the state to remove quantitative limits on pumping.
- USA Springs turns out to have foreign investors, which uses NAFTA-type investment rules to challenge state decisions.
- In a period of drought or population growth, the DES reduces the USA Springs pumping limit. Foreign firms which import USA Springs products persuade their governments to file trade disputes under GATT or GATS.

Questions to Pursue Should Appeal be Granted

1. Who are the investors in USA Springs? Where do they reside? What are their nationalities?
2. What is the company's marketing plan? Does it involve water export?
3. Would the current owners of USA Springs consider sale of the company to foreign investors or consider transfer of ownership to a foreign subsidiary?

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