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SOMETHING OLD, SOMETHING NEW: APPLYING THE PUBLIC TRUST DOCTRINE TO SNOWMAKING

Alethea O'Donnell*

"By the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea.”

I. INTRODUCTION

Skiing in America is big business. Many ski resorts are finding that because of tough competition from neighboring operations, they must expand their resorts with more trails, more lifts, and consequently, more snow. This increased competition, coupled with a decreased natural snowfall, has made ski resorts extremely dependent on snowmaking for their survival. Ski resorts have become so dependent on snowmaking, in fact, that without snowmaking, a ski resort in today’s market probably would go out of business.

Environmental groups allege that harmful environmental consequences accompany the making of snow. In order to create a sufficient amount of snow to cover the ski slopes, a resort must draw water from some water source, such as a stream, pond, or lake. Environmental-
ists allege that these water withdrawals adversely affect the habitats of fish and other aquatic life in the water, habitats that traditionally are protected by the public trust doctrine. Environmentalists are attempting to halt these effects upon aquatic habitats by filing lawsuits to limit the amount of water that a resort can withdraw for snowmaking.

Environmentalists have used a number of legal theories to challenge snowmaking. For example, the Loon Mountain resort case deals with the New Hampshire ski area’s increased use of nearby Loon Pond for snowmaking. The Loon Mountain case involves allegations of Clean Water Act (CWA) and National Environmental Policy Act (NEPA) violations. Environmentalists also filed two complaints in Vermont, dealing with the Okemo Mountain resort and the Sugarbush Ski Resort, under state statutes. The plaintiffs in Okemo, the Conservation Law Foundation and the Connecticut River Watershed Council, alleged that the resort had violated various Vermont statutes pertaining to streams, shorelines, wildlife habitats, and developments affecting public investments. In the Sugarbush case, the Vermont Natural Resources Council and the Sierra Club appealed the granting of a permit for water withdrawal for snowmaking from the Mad River to the Sugarbush resort by the Vermont Agency of Natural Resources.

These New England cases reached different results. Okemo generally is regarded as a success for environmentalists because the Vermont Environmental Board weighed the impact of the withdrawals on the fish population against the impact of less water on the ski resort. The board ultimately struck a balance between the two in-
Environmentalists consider the result in the Sugarbush case to be less successful, however, because the Vermont Water Resources Board allowed the resort to withdraw water in quantities far exceeding those which environmentalists felt were necessary to preserve aquatic habitats. Finally, the result in the Loon Mountain case, where the judge disregarded all of the plaintiff's environmental claims, likewise proved disappointing for environmental groups.

Courts and administrative agencies have used differing approaches to resolve the conflicts between environmentalists, who seek protection for natural habitats, and ski resort owners and developers, who desire to maintain large and economically prosperous ski resorts. One theory that New England courts have not yet reviewed or endorsed, but that provides a more flexible approach, is the public trust doctrine. The public trust doctrine is premised on the public's right to protection of its natural resources. The doctrine is versatile in application because it theorizes simply that any natural resource that is held for the "free use of the general public" deserves to be allocated fairly and with an eye towards ultimate perpetuation of the resource. Because of its flexible nature, the public trust doctrine is a possible solution for environmentalists who seek to halt the continuing development of lands for ski resorts.

The most successful snowmaking suit to date, Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Board, was premised on the public trust doctrine. In Aspen, the Colorado Supreme Court found for the plaintiff because the defendant Colorado Water Conservation Board, by allowing water withdrawals of Snowmass Creek for snowmaking, had breached its "fiduciary duty" to the people of Colorado as trustees of the creek. Although the majority opinion never used the term "public trust doctrine," the idea of a state holding its

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18 See id.
19 See id.
20 See Dubeis, supra note 10, at *59.
21 See McLean, supra note 17, at 244.
23 Rodgers, supra note 8, at 171.
24 Id. at 172.
25 See id.
27 See id.
resources in trust under a fiduciary duty to its citizens implicates this doctrine.\textsuperscript{28} Aspen appears to be a gateway to the use of the public trust doctrine in New England.\textsuperscript{29} This Comment explores potential applications of the public trust doctrine to New England snowmaking cases filed by environmental groups trying to prevent further development in areas such as the Green Mountain National Forest in Vermont and the White Mountain National Forest in New Hampshire. Section II explains the environmental and economic issues involved in snowmaking. Section III explores the history of snowmaking cases in New England. Section IV presents the history of the public trust doctrine and the Aspen case, which successfully utilized the public trust doctrine to halt increased water withdrawals for snowmaking. Finally, Section V considers the application of the public trust doctrine to the New England cases and to legislative decisionmaking on the issues of snowmaking and ski resort development.

II. SNOWMAKING'S IMPACT ON AQUATIC LIFE

A. Modern Snowmaking

In modern ski resorts, snowmaking machines dot the landscape.\textsuperscript{30} The large, rounded machines divert water from a river or lake, through underground pipes buried beneath the mountain.\textsuperscript{31} After the diverted water is mixed with compressed air, the mixture splits into small particles that freeze into crystals.\textsuperscript{32} The snowmaking machines, through a gun attached to a hydrant, then blow these crystals onto the slopes and this covers the mountain with man-made "snow."\textsuperscript{33}

Most thriving resorts now utilize snowmaking to a great extent.\textsuperscript{34} Since 1985, there has been less and less natural snow falling on Northeastern ski slopes.\textsuperscript{35} Although 1995–96 and 1993–94 stand as record-

\textsuperscript{28} See id.
\textsuperscript{29} See id.
\textsuperscript{30} See Chamberlain, supra note 5, at 56.
\textsuperscript{31} Laidler, supra note 3, at A5.
\textsuperscript{32} Id.
\textsuperscript{33} Id. According to ski resort owners and developers, man-made snow is also more durable than natural snow. As Joe Parkinson, executive director of the Vermont Ski Areas Association, said, "[e]ven if we had the snow years we did in the '70s . . . the way people ski today, it wouldn't be enough. You'd still need the manmade snow. It just lasts and lasts." Chamberlain, supra note 5, at 56.
\textsuperscript{34} See Chamberlain, supra note 5, at 56.
\textsuperscript{35} See id.
breaking New England snowfall years, the overall weather pattern in the last decade has been uneven, with some years experiencing very little natural snowfall.\textsuperscript{36} Because of the decrease in natural snow, resorts increasingly rely upon snowmaking, as illustrated by the fact that more than seventy percent of the snow on Vermont's ski slopes is manmade.\textsuperscript{37} The Sugarbush Resort in Warren, Vermont, whose snowmaking battle is one of the cases studied in this Comment, uses approximately 380 million gallons of water each year in order to make sufficient snow to cover its slopes.\textsuperscript{38} Other large resorts in Vermont, including Stratton, Mt. Snow, Okemo, and Killington, have close to ninety percent coverage with manmade snow.\textsuperscript{39}

Ski resort owners and developers enunciate persuasive economic arguments in favor of continuing vast water withdrawals in order to keep ski resorts alive.\textsuperscript{40} Ski resorts generally are very lucrative for a state. For example, in 1992, skiing in Vermont generated approximately 280 million dollars of in-state spending.\textsuperscript{41} Analysts estimate that the skiing industry is Vermont's second largest.\textsuperscript{42} The overall travel industry in Vermont in 1990 generated fifty-five million dollars in tax revenues.\textsuperscript{43}

In order to maintain these profits, ski resort developers argue that expansion and the accompanying increased snowmaking machinery are necessary.\textsuperscript{44} Developers generally believe if a ski area does not

\textsuperscript{36} David Arnold, Record Snows Bring a Shrug, BOSTON GLOBE, Mar. 9, 1996, at 13; see also Chamberlain, supra note 5, at 56.
\textsuperscript{37} Laidler, supra note 3, at A5; see also Kenneth Wapner, Turning Rivers into Snow: Environmental Impact of Snow Machines, BACKPACKER, Feb. 1994, at 10.
\textsuperscript{38} Laurie Peach, Ski Areas Have a Big Thirst, CHRISTIAN SCIENCE MONITOR, Apr. 2, 1992, at 10.
\textsuperscript{39} Chamberlain, supra note 5, at 56.
\textsuperscript{40} Laidler, supra note 3, at A5.
\textsuperscript{41} Id.; see also Art Edelstein, Travel Industry Still Big Business, VT. Bus. MAG., Jan. 1992, at 34 (estimating that Mount Snow brings approximately $47 million annually to town of Stowe, Vermont).
\textsuperscript{42} Edelstein, supra note 41, at 34.
\textsuperscript{43} Id.
\textsuperscript{44} See id. On the issue of resorts' authority to expand, it is important to note that many New England ski resorts are located on National Forest Service lands. See C. Wayne McKinzie, Note, Ski Area Development After the National Forest Ski Area Permit Act of 1986: Still an Uphill Battle, 12 VA. ENVTL. L.J. 299, 299 n.6 (1993). The National Forest Ski Area Permit Act of 1986 governs developers who desire to build or expand resorts on these lands. 16 U.S.C. § 497b (1985 and Supp. 1996). This act gives the United States Secretary of Agriculture the power to grant a permit to developers for use of "suitable" lands within the National Forest System. Id. § 497b(b). Additionally, in language that nods at public trust principles, the Secretary may cancel the permit if the Secretary determines that the area is "needed for higher public purposes." Id.
have snowmaking equipment, it eventually will be forced to go out of business. Resort owners argue that without increased snowmaking capabilities they will be forced into bankruptcy due to competition from other neighboring mountain developments that profit from better access to water and thus easier snowmaking. Developers believe that snowmaking machines are essential to the survival of the skiing industry in New England.

B. Snowmaking’s Effects

In recent years expanded snowmaking and accompanying resort development have increasingly come under criticism from environmentalists. Criticism generally focuses on the effect of the withdrawal of water from surrounding lakes and streams upon fish and other aquatic life in those bodies of water. An initial issue is the sheer amount of water needed: generally, snowmaking systems divert 150,000 gallons of water to cover just one acre with a foot of snow. Resort owners argue that this figure is unimportant, because during the spring thaw the melted snow all returns to the streams or lakes from which the resorts originally took the water. Environmental groups, however, argue that the time during which resorts remove the most water from streams, the winter, is actually the most critical time for fish. November, for example, is when brown trout spawn. November is also a month when resorts often make large amounts of snow. These increased water withdrawals may cause low waterflow

§ 497b(b)(5). The Act also reaffirms that the Secretary has a duty to act according to the guidelines of the National Environmental Policy Act, or the Forest and Rangelands Renewable Resources Planning Act, including the duty to “involve the public in his decisionmaking and planning for the national forests.” Id. § 497b(d).

45 Edelstein, supra note 41, at 34; see also Tom Knudson, Ski Resort Makes Snow—And Wins Friends, SACRAMENTO BEE, Dec. 15, 1993, at A16 (quoting Stan Hansen, vice president of a western ski resort, as saying: “Snowmaking is our life. We can’t sustain our operation without snowmaking.”).

46 Chamberlain, supra note 5, at 56.

47 Urso, supra note 2, at 13.

48 See Laidler, supra note 3, at A5.

49 Bellinson, supra note 7, at 26; see also McLean, supra note 17, at 196–203 (fully describing specific effects of increased water withdrawals upon aquatic life); Plaintiff’s Memorandum, supra note 22, at 2–7 (describing effects of reduced streamflows on fisheries in Vermont).

50 Laidler, supra note 3, at A5.

51 See Peach, supra note 38, at 10.

52 See id.

53 Wapner, supra note 37, at 10.

54 Id.
over streambeds, making it difficult for trout to reproduce.\textsuperscript{55} During January and February stream flows are at their lowest, and removing water from already low streams can cause ice buildups.\textsuperscript{56} In turn, these ice buildups can freeze trout and their incubating eggs, as well as other aquatic life.\textsuperscript{57} Additionally, the speed of a stream's flow generally decreases as a result of water withdrawals.\textsuperscript{58} This decreased speed may create additional problems in the winter when eggs are incubating and need a specific amount of oxygen to survive, because low levels of slowly-moving water may not carry sufficient quantities of oxygen.\textsuperscript{59} Snowmaking effects are not limited to fish: insects are harmed as well.\textsuperscript{60} In April, insect eggs in the water need steady streamflows in order to hatch; this spring hatch then creates an insect population upon which other lifeforms feed.\textsuperscript{61} The lack of steady streams harms the hatching processes of these insects.\textsuperscript{62} Environmentalists argue that these effects upon streams eventually will reach birds and mammals, such as beaver and elk, who live in the surrounding area and feed from the streams.\textsuperscript{63} Environmentalists fear that ultimately the entire ecosystem will feel the effect of the water withdrawals.\textsuperscript{64}

Conflicts therefore arise between ski resort owners and environmental groups.\textsuperscript{65} As discussed previously, resort developers generally believe that they must withdraw water to cover their slopes to continue to operate profitably, bringing needed revenue to New England states.\textsuperscript{66} On the other hand, environmental groups oppose increased water withdrawals, fearing species depletion from streams and lakes.\textsuperscript{67} The snowmaking litigation in the United States arises from this clash of perspectives.

\textsuperscript{55} Id.
\textsuperscript{56} Peach, \textit{supra} note 38, at 10.
\textsuperscript{57} Id.
\textsuperscript{58} Beilinson, \textit{supra} note 7, at 26.
\textsuperscript{59} Id.
\textsuperscript{60} Wapner, \textit{supra} note 37, at 10.
\textsuperscript{61} Id.
\textsuperscript{62} See id.
\textsuperscript{63} Hugh Dellios, \textit{Artificial Snowmaking Puts Ski Resorts on a Slippery Slope; Colorado Court to Rule on Claims of Damage to Wildlife}, CHI. TRIB., Jan. 8, 1995, at 6.
\textsuperscript{64} See Wapner, \textit{supra} note 37, at 26.
\textsuperscript{65} See Chamberlain, \textit{supra} note 5, at 56.
\textsuperscript{66} Id.
\textsuperscript{67} See Thomas A. Lepisto, \textit{The Downhill Debate: Whether to Build or Expand Alpine Ski Facilities}, WILDERNESS, Mar. 22, 1994, at 23 ("Much of the movement for reform is coming not only from national conservation organizations like The Wilderness Society and the Sierra Club..."
III. THE NEW ENGLAND SNOWMAKING CASES

Environmental groups have filed cases attempting to address the environmental and economic issues associated with snowmaking in both New England and Colorado, before both adjudicative agencies and courts of law, and under different legal theories. 68 No New England courts have recognized the public trust doctrine in the snowmaking area. 69 In order to analyze the potential effectiveness of applying the public trust doctrine to the snowmaking issue in New England, it is necessary to review briefly the facts of each of the New England cases, and the theories involved.

A. The Loon Mountain Case

The most recently decided of the New England snowmaking cases is Dubois v. United States Department of Agriculture, which involves the Loon Mountain ski resort. 70 This case, in which the District Court judge granted summary judgment for the defendants on November 2, 1995, represents the environmentalists' least successful outcome. 71 However, the plaintiff, Roland Dubois, has appealed the decision to the United States Court of Appeals for the First Circuit, and thus the outcome of the decision is not yet final. 72

The Loon Mountain case involves the Loon Mountain ski area in Lincoln, New Hampshire, in the White Mountain National Forest. 73 In 1986, Loon Mountain resort asked the Forest Service for an amendment to its special use permit to allow the resort to expand. 74 The resort asked to expand with an additional 930 acres of the forest land, to add a number of lifts, trails, and a lodge, and to construct an expanded snowmaking system that would utilize water drawn primarily from nearby Loon Pond. 75 The Forest Service in 1988 decided that because of the large scope of the project, NEPA required an
Environmental Impact Statement (EIS). After issuing a Draft EIS (DEIS) in February, 1989, the Forest Service issued a supplement to the DEIS in November, 1989 because of concerns regarding observations of unusually low water levels in the East Branch of the Pemigewasset River which discharges into the pond. In January, 1991, the Forest Service issued a Revised DEIS (RDEIS), in which it listed an additional five options for the ski resort expansion. Finally, in November, 1992, the Forest Service issued a Final EIS (FEIS) that proposed a sixth option allowing Loon to improve its existing facilities, expand onto 581 acres of Forest Service land, widen existing trails, add new trails and one new lift, improve existing lifts and restaurants, and allow significant expansion of the resort’s snowmaking system through the installation of new pipes and the extension of snowmaking to all trails in both the old and new permit areas. The proposal designated Loon Pond as the primary water source for this expansion, and allowed the resort to draw down the pond’s water level by as much as fifteen feet for snowmaking. The town of Lincoln, which uses the pond as a source for drinking water, could also draw down the pond’s water level by an additional five feet. The Forest Service issued a Record of Decision (ROD) approving the proposal on March 1, 1993.

After exhausting all of his administrative remedies, plaintiff Dubois filed a lawsuit against the United States Department of Agriculture.

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76 Id. at *3.
77 Id. at *4.
78 Id. at *4 (alternatives given were: no action; Loon’s initial proposal; scaled-down development which implemented first phase of Loon’s initial proposal; limited development with permit area of only 320 acres; and limited development within Loon’s existing permit area). Id. at *5.
79 Id. at *5–6.
80 Dubois, supra note 10, at *6. As a mitigation measure, Loon resort is required to refill the pond by May first of each year with water pumped from the East Branch of the Pemigewasset River. Id.
81 Id. at *6.
82 Id.
83 Id. at *1, *6–7. Plaintiff Dubois sued as an individual citizen. Id. at *1. RESTORE: The North Woods, an environmental group, also joined the suit as an intervenor. Id. The court denied the defendant’s Motion to Dismiss for lack of standing, holding that because some of RESTORE’s members lived and worked in the area near the ski resort, and would allegedly be harmed by the expansion, the group had standing to pursue the claim. Id. at *2 n.1. The court did not, therefore, reach the issue of whether or not a suit by Dubois alone would have standing, because it held that the case could progress as long as one of the plaintiffs had standing. Id. Individual citizens may raise this type of lawsuit against a government agency, however, by seeking review under § 10 of the Administrative Procedure Act. 5 U.S.C. § 702 (1977 & Supp. 1996); see also Sierra Club v. Morton, 405 U.S. 727, 731–32 (1972) (in order to maintain a lawsuit,
In attempting to halt the proposed increased water withdrawals, the plaintiff charged that the ROD violated the CWA because it allowed Loon Mountain to discharge water from the East Branch into Loon Pond without a National Pollutant Discharge Elimination System permit.\(^{84}\) The plaintiff also alleged that the use of Loon Pond violated state water quality standards enacted pursuant to the CWA, and that the Forest Service violated NEPA in its inadequate preparation of the EIS.\(^{85}\)

In granting the Forest Service’s Motion for Summary Judgment, the United States District Court for the District of New Hampshire rejected all of Dubois’s claims. On the issue of the CWA claim, the District Court said that because the East Branch of the Pemigewasset River and Loon Pond were the same body of navigable water, it was theoretically impossible for one body of water to add pollutants to itself.\(^{86}\) The court also rejected the plaintiff’s state water quality standards claim.\(^{87}\) The plaintiff argued that the certification that the Forest Service had obtained from the State of New Hampshire, which stated that the proposed activity did not violate state water quality standards, was granted improperly.\(^{88}\) The court rejected this argument on the ground that it was a state claim outside federal court jurisdiction.\(^{89}\)

parties must have “a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy”). However, in order for a plaintiff to establish a right to relief, the plaintiff must show that he or she has been affected by some “agency action” and that the plaintiff has been “adversely affected or aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702. The injury complained of must therefore be an injury in fact, and fall within the “zone of interests” protected by the relevant statute. Lujan v. National Wildlife Fed’n, 497 U.S. 871, 883 (1990); see also Sierra Club v. Block, 622 F. Supp. 842, 848 (D. Colo. 1985) (plaintiff’s claim that government officials’ failure to assert reserved water rights for wilderness areas harmed the “aesthetic, conservational, and recreational” values of the wilderness area the agencies were intended to protect was a sufficient “injury in fact” to maintain standing).

\(^{84}\) Dubois, supra note 10, at *2.

\(^{85}\) Id. at *2.

\(^{86}\) See id. at *23. The Court also rejected the plaintiff’s contention that water drawn into a snowmaking system loses its status as “navigable waters,” reasoning that commercially exploited water does not mean that the same water cannot be navigable, and that because the resort added no pollutants to the water, there was no need for a discharge permit. Id. at *20–21.

\(^{87}\) Id. at *25–26.

\(^{88}\) Id. at *24.

\(^{89}\) Dubois, supra note 10, at *25. The Court refused to review this argument because the CWA expressly delegates to each individual state the duty to determine whether an activity will violate state water quality standards. Id. The court stated that because the First Circuit has determined that federal courts do not have the authority to review requirements under state law certification programs, the plaintiff should have exhausted his state administrative remedies and then filed suit in a state court. Id. at *25–26.
Finally, the court rejected the plaintiff’s NEPA claim, the heart of the plaintiff’s snowmaking case, which argued that the Forest Service’s FEIS had not identified adequately and discussed alternatives, described the affected environment, or considered generally the action’s environmental impact. In reviewing this claim, the court discussed each of the Forest Service’s duties in preparing its EIS, including presenting and evaluating alternatives, identifying preferred alternatives, and including appropriate mitigation measures. On the issue of possible alternatives to snowmaking, the court said that the Forest Service had reviewed adequately and rejected the proposed alternatives, which consisted of either constructing an artificial pond to mitigate Loon Pond demand, or using water storage tanks. The court held that the Forest Service’s rejection of the alternatives was appropriate because storage tanks were too large, and their construction would have adverse environmental impacts, and because construction of an artificial pond was not feasible due to “size and problems with water collection and use.”

The court also rejected Dubois’s claim that the Forest Service had not gathered sufficient data regarding the environmental impacts of increased withdrawals from Loon Pond. The plaintiff alleged that the Forest Service should have evaluated the plants and animals in the pond, tested the waters for a prolonged period, inventoried plant species, determined the effect of the drawdowns of the pond, documented the pond’s limnological cycles, and determined what birds and animals were using the pond. The court decided that the Forest Service had done sufficient investigation into the state of the pond through its survey of aquatic plants, invertebrates, and tadpoles. The court upheld the Forest Service’s decision that the low pH of the pond would never sustain a fish population. The court also rejected a “worst-case scenario” letter from a Forest Service scientist stating that the proposed drawdown and refill of the pond would destroy all plants and animals in the littoral zone of the pond, increase the pond’s turbidity and acidity, and destroy any of Loon Pond’s fisheries potential.

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90 Id. at *26–27, *60.
91 Id. at *27–60.
92 Id. at *33–34.
93 Id. at *35–36.
94 Dubois, supra note 10, at *41.
95 Id. at *36.
96 Id. at *41.
97 Id. at *38.
98 Id. at *39 n.11.
The court admitted that further studies of Loon Pond might have been beneficial, but nonetheless decided that the Forest Service studies performed were adequate. The court ultimately disregarded all of the plaintiff's arguments in favor of weighing the benefits and burdens of increased snowmaking on the state's environment and its economy. Instead, the court simply agreed with the Forest Service that "snowmaking has become a necessity in eastern skiing," and found that the court need only review alternatives to increased snowmaking, rather than questioning the propriety of snowmaking altogether.

The outcome of the Loon resort case reflects the fact that certain courts give great deference to administrative decisions, and are unwilling to consider the benefits of extended research of the effects of water withdrawals. Because of this refusal, the case is disappointing for environmental groups.

B. The Sugarbush Resort Case

Unlike the Loon Mountain case, the Sugarbush case was adjudicated before a state agency: Vermont's Water Resources Board (WRB). Like the Loon Mountain decision, however, the environmental groups who were the plaintiffs in the Sugarbush appeal achieved less than they had hoped, and ski resorts generally consider the decision by the WRB a victory.

The Sugarbush case involved an appeal by various environmental groups, including the Vermont Natural Resources Council, Trout Unlimited, and the Sierra Club (collectively, VNRC), to a permit granted to the developers of the Sugarbush Resort to construct an impoundment. This impoundment consisted of a facility for water withdrawal from the Mad River, and an off-stream pond for containment of that water so that the resort could expand its operations and

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99 Dubois, supra note 10, at *41. The court also rejected the plaintiff's arguments regarding public comments concerning the effect of low dissolved oxygen levels in the pond, inadequate evaluation of the town's drinking needs, the cumulative effects of the expansion, and increased local traffic. Id. at *42–50.

100 Id. at *53.

101 Id. at *53–55 (emphasis in original).

102 See id. at *55.


104 See McLean, supra note 17, at 244.

105 Vermont Natural Resources Council, Nos. 92–02 and 92–05, at 1.
snowmaking capabilities.106 The plaintiffs appealed on two grounds, the first as to the propriety of the WRB's granting a permit allowing the dam.107 The plaintiffs' other appeal was regarding the propriety of the Vermont Agency of Natural Resources, Department of Environmental Conservation (ANR), granting a Water Quality Certification to the Sugarbush developers after the agency found that the snowmaking pond would not violate Vermont water quality standards.108 The WRB granted the plaintiffs party status under both appeals.109

The WRB reviewed the background of the project and the proposed increase in withdrawals of water from the Mad River.110 Sugarbush proposed to build a 9.6 acre pond, attached by pipes to the river, which would withdraw water only when the river was flowing at a level of .50 cubic feet per second per square mile (csm) or more.111 The snowmaking system would include safety mechanisms that would not allow withdrawals when the rate of the river was .50 csm or less, and Sugarbush planned to maintain a daily record of flow measurements.112 Sugarbush also included as part of its proposal a "habitat restoration and enhancement management plan" in order to mitigate effects from the withdrawal.113

In deciding to allow the project to proceed, the WRB recognized that under Vermont environmental law the development would have to serve the "public good," for the "greatest benefit of the people of the state."114 To apply this standard, the Board looked at thirteen elements under Title 10, Section 1086 of the Vermont Statutes regarding the environmental effects of the proposed developments.115 The

106 Id.
107 Id.
108 Id.
109 Id. at 2.
110 Vermont Natural Resources Council, Nos. 92-02 and 92-05, at 3–9.
111 Id. at 4–5.
112 Id. at 5–6.
113 Id. at 23–24.
114 Id. at 7 (citing VT. STAT. ANN. tit. 10 § 1086 (1984)).
115 Vermont Natural Resources Council, Nos. 92-02 and 92-05, at 7 n.4 ("[T]he thirteen elements to be considered are: (1) quantity, kind and extent of cultivated agricultural land that may be rendered unfit for use by the project, including both the immediate and long range agricultural land use impacts; (2) scenic and recreational values; (3) fish and wildlife; (4) forests and forest programs; (5) the need for a minimum water discharge flow rate schedule to protect the natural rate of flow and water quality of the affected waters; (6) the existing uses of the water by the public for boating, fishing, swimming and other recreational uses; (7) the creation of any hazard to navigation, fishing, swimming or other public uses; (8) the need for cutting clean and removal of all timber or tree growth from all or part of the flowage area; (9) the creation of any public benefits; (10) the classification, if any, of the affected waters under ch. 47
WRB then reviewed each element in turn to decide whether the pond and the increased withdrawals would benefit the public good.\textsuperscript{116}

The WRB gave special consideration to particular enumerated elements. The WRB went into great depth on the third element, which required that the WRB consider the development's effect on "fish and wildlife."\textsuperscript{117} The WRB recognized the presence of an excellent trout habitat in the Mad River, including brook, brown, and rainbow, as well as other non-game fish species.\textsuperscript{118} The WRB found, however, that the best fish habitat was upstream of the proposed development, and that the fish population near the water withdrawal project was actually substantially smaller than the population in other Vermont rivers.\textsuperscript{119}

The WRB also reviewed the study that the Sugarbush developers had prepared on the effects of water withdrawals on the Mad River.\textsuperscript{120} Despite the fact that the study seemed unreliable because of unpredictable ice buildup, the WRB nonetheless supported the ANR's review of the study and subsequent decision to grant permits to Sugarbush.\textsuperscript{121} Additionally, the WRB said that despite the fact that the United States Fish and Wildlife Service had prepared a flow policy for New England streams, Vermont was not bound by this policy.\textsuperscript{122} The WRB noted that .50 csm flows might occur naturally in some parts of the river and agreed with the resort's study, which said that a reduced flow of .50 csm "would have no significant effect on egg mortality beyond that which occurs naturally in the Mad River."\textsuperscript{123} Therefore, the WRB held that the resort's proposal was acceptable and met the Fish and Wildlife Service's alternative as biologically justified.\textsuperscript{124}

The WRB also carefully analyzed the element requiring "the creation of any public benefits," and in this element the WRB's policy decision regarding the economic benefits of ski resorts to the state is clear.\textsuperscript{125} The WRB found that Sugarbush's share of the Vermont area

\textsuperscript{116} Id. at 7, 8.
\textsuperscript{117} Id. at 11–22.
\textsuperscript{118} Id. at 11.
\textsuperscript{119} Id. at 11, 12. One might ask whether the existing difference in population which the WRB found in its review was actually due to previous levels of withdrawal, which had possibly already affected the nearby trout population. Id. at 12.
\textsuperscript{120} Vermont Natural Resources Council, Nos. 92–02 and 92–05, at 13–14.
\textsuperscript{121} Id. at 13–14.
\textsuperscript{122} Id. at 15.
\textsuperscript{123} Id. at 20.
\textsuperscript{124} Id. at 21.
\textsuperscript{125} Vermont Natural Resources Council, Nos. 92–02 and 92–05, at 25–26.
ski industry had declined over twenty-nine percent from 1986 to 1991. The WRB compared Sugarbush’s revenues to those of other resorts, finding that while Sugarbush had been losing “skier days” in the same time period, other resorts that made more than eighty percent of their own snow had been attracting more skiers on more days throughout the season. The WRB found that Sugarbush’s economic decline was creating an impact that was “substantial[ly] and adversely affect[ing] the economy of several towns in the Mad River valley.” Further, the WRB found that if Sugarbush were allowed to expand, the expansion would allow the resort to recapture its historical share of the skiing market, would allow the state to receive additional taxes from sales, rooms, and meals, would stabilize property values in the area, and would create not only temporary construction jobs, but might also create jobs that would increase the Sugarbush labor force with an additional five to twelve permanent employees and forty to seventy seasonal employees. The WRB evidently believed that these economic factors created a “public benefit” justifying the expansion.

Later in the decision, the WRB reiterated its conclusion with policy language based on economics. The WRB decided that the adverse environmental effects that would result from the increased withdrawals were less important than the adverse economic and social impacts on the people of the state that would result if the WRB enforced higher streamflow standards. Further, the WRB found that because Vermont had adopted no specific policy as to minimum streamflow, Sugarbush had met its burden by demonstrating the public benefits that would derive from expanded snowmaking and development.

Finally, although the plaintiffs argued that the public trust doctrine protected the Mad River, the WRB refused to adjudicate the doctrine on its merits. The VNRC argued that the public trust doctrine was applicable because it prohibits the use of public waters for private purposes. In rejecting this argument, the WRB found that the state’s judiciary or legislature should define the breadth of the public

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126 Id. at 25.
127 Id.
128 Id.
129 Id. at 25.
131 Id. at 36.
132 Id.
133 See id. at 37, 38.
134 Id. at 40.
135 Vermont Natural Resources Council, Nos. 92–02 and 92–05, at 39.
trust doctrine. However, despite this lack of definition, the WRB decided that it should not delay review of the proposal pending public trust or constitutional challenges because to do so would thwart the Vermont legislature’s intention of encouraging permits for water use. Finally, the WRB decided that water quality management “presumes a balancing between the goals of, on the one hand protecting and enhancing water quality, and on the other allowing environmentally sound development,” and that the ANR had analyzed and balanced these goals properly.

Ultimately, the WRB’s final order allowed Sugarbush to proceed with the development and affirmed the previous granting of the permits. The WRB made only minor modifications in stream flow, allowing for a “step-down” policy over time of flows between the rates of .79 csm and .50 csm. Although the plaintiffs filed a Motion to Alter or Reconsider the Decision, the WRB denied this motion on March 1, 1993.

This decision, which allows for water withdrawals at a much lower rate than the environmentalist plaintiffs had hoped for, is similar to the Loon resort case in its pro-development outcome. The case involving the Okemo Mountain resort, however, demonstrates a better balancing of interests between economic and environmental concerns.

C. The Okemo Mountain Case

The Environmental Board of the State of Vermont decided the case of Okemo Mountain in July, 1992. This case involved an appeal to a state agency by the Conservation Law Foundation (CLF) and the

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136 Id. at 40.
137 Id. at 41.
138 Id.
139 See id. at 41.
140 Vermont Natural Resources Council, Nos. 92–02 and 92–05, at 41.
141 Id. at 42. The WRB held that for the first year the resort could not reduce the Mad River’s minimum flow rate below .79 csm; for the next five subsequent years the minimum flow could not go below .61 csm; and after the sixth year the rate could not go below .61 csm unless the storage pond was storing less than fifty percent of its capacity, in which case the rate of the river could be reduced to .50 csm. Id.
143 See McLean, supra note 17, at 244.
144 See id.
Connecticut River Watershed Council (CRWC). In Okemo, the Board initially granted the ski resort a Land Use Permit in 1988 to withdraw water from the Black River for snowmaking, provided that the resort maintain a minimum flow of 1.0 csm in the river. The resort asked, at that time, for increased withdrawals to reduce the streamflow to .50 csm. The resort's request was denied, however, because, unlike the Sugarbush case, the Commission believed that the Okemo resort did not provide evidence that such a low flow would protect fish in the Black River. Having commissioned its own study of the streamflow, the Okemo resort then appealed to the Commission for an amendment allowing "Step-Down' Water Withdrawal Mitigation Measures," which would allow for varying withdrawals between .75 csm and .50 csm. The District #2 Environmental Commission initially denied the resort's request in January, 1990. The ski area then appealed the denial to the state Environmental Board (the Board), adding to its step-down proposal various other remedies for environmental protection, including planting vegetation, placing instream structures into the river for fish protection, and stabilizing stream banks. After the Okemo resort filed its appeal, the Board granted CLF and CRWC party status on several resource protection issues.

In its July, 1992 decision, the Board ultimately granted portions of the ski area's Motion to Alter. The Board's opinion carefully considered the various factors at issue in the controversy. The opinion noted that in 1991 the resort employed nearly 700 people, generated approximately $700,000 in tax revenues for the state, and paid the state an annual lease payment of $238,000. The Board also noted, however, the vast amounts of water that the resort relied on in order to make snow and stay competitive: in 1991 the ski area used 280 million gallons of water for snowmaking, 180 million gallons of which were pumped directly from the Black River. Moreover, the resort

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146 Id. at *1.
147 Id. at *2.
148 Id. at *1.
149 Id. at *2.
150 Okemo, 1992 WL 186658, at *2.
151 Id. at *1.
152 Id. at *2.
153 Id. at *1.
154 See id. at *1.
156 Id. at *3.
157 Id.
hoped to increase its Black River withdrawals to 447 million gallons annually.\textsuperscript{158} The Board also found that the Black River supports populations of brown, brook, and rainbow trout, and that brown trout was the principal sport fishing species in the river that might be affected by the withdrawals.\textsuperscript{159}

The Board carefully reviewed the ski area's study of the river, which stated that the "optimal" flow rate for brown trout spawning was 1.1 csm.\textsuperscript{160} Despite the study's attention to the brown trout, the Board criticized the resort's study for not analyzing those insects, non-game fish, amphibians, reptiles, birds, mammals, and plant life that the increased withdrawals also would affect.\textsuperscript{161} The Board further criticized the study for not analyzing the pools in the river—which trout need to survive—the actual size of the brown trout population, or the effects on the trout of river ice, that results from decreased stream flow.\textsuperscript{162}

Noting that the United States Fish and Wildlife Service had developed a minimum winter streamflow for New England of 1.0 csm, the Board decided that allowing the ski area to withdraw the river down to .50 csm was too extreme.\textsuperscript{163} The Board decided that a streamflow of .50 csm violated the state's stream statutes—statutes that prohibit the granting of a permit unless the proponents demonstrate that their development will maintain the stream's natural condition.\textsuperscript{164} The Board reasoned that the proposed withdrawal to .50 csm would not have maintained the natural condition of the river, and that a maximum loss of 8.1% of the brown trout's spawning and incubation habitat was too significant to allow.\textsuperscript{165} The Board also found that the resort

\begin{itemize}
  \item \textsuperscript{158} \textit{Id.}
  \item \textsuperscript{159} \textit{Id.} at *4.
  \item \textsuperscript{160} \textit{Okemo}, 1992 WL 186658, at *5.
  \item \textsuperscript{161} \textit{Id.}
  \item \textsuperscript{162} \textit{Id.} at *6. As the Board said:
    River ice can harm the habitat of fish and their food chain. Freezing of the river substrate affects invertebrates, deposited eggs, and certain fish species which overwinter in the gravels. Fluctuating water levels caused by ice formation and ice breakup can disturb the river banks, cause substrate scouring, and drive fish into areas not normally used; when the water level drops, the fish can become stranded. Extensive river ice accumulations can drive fish from limited overwintering areas to other less desirable locations. These are all natural processes; the degree of impact from stream flow modifications is difficult to assess without extensive observations.
  \item \textsuperscript{163} \textit{Id.} at *8.
  \item \textsuperscript{164} \textit{Id.} at *10.
  \item \textsuperscript{165} \textit{Okemo}, 1992 WL 186658, at *10.
\end{itemize}
had not explored fully alternatives to increased Black River withdrawals. However, the Board did find that allowing the resort to decrease the flow to .78 csm was acceptable.

In reaching its conclusion that the .50 csm rate was too low, the Board decided that the proposed withdrawal would violate the state's shorelines statute because the proposed withdrawals would not maintain the Black River in its natural condition. The Board decided that the resort's need to increase snowmaking was not outweighed by the loss of habitat for the brown trout, and that the resort had not investigated sufficiently other alternatives.

Moreover, in reviewing the issue of the loss of natural habitats the Board decided that a .50 csm withdrawal would both “destroy and significantly imperil the necessary wildlife habitat for trout in the section of the Black River affected by the water withdrawal.” The Board expressed concern not only about the effect on trout, but the possible effects on other species populations in the area as well. In language that evokes the public trust doctrine in its balancing of burdens and benefits, the Board decided that the harm that would result from the increased water withdrawals outweighed the profit from skiing:

[T]he Board is mindful of the testimony that established that the ski industry in general and Okemo in particular contribute to the economy and the recreational industry of Vermont and that snowmaking is of increasing importance to the ski industry in Vermont . . . . However, the Board concludes that neither Okemo nor any other party has adequately demonstrated the public benefit that would specifically accrue from the Step-Down Proposal as opposed to the general benefits of snowmaking and Okemo's operations.

The Board thus found that the loss of aquatic habitat outweighed the benefit of dramatically increased withdrawals merely for the purpose of snowmaking.

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166 Id.
167 Id. at *8.
168 Id. at *11. Note that the plaintiffs in the Sugarbush case did not file their appeal under the state streams or shorelines statutes, which perhaps, in part, explains the success of the Vermont Natural Resources Council in Okemo. See supra notes 103-42 and accompanying text.
169 Id. at *12.
171 Id. at *13.
172 Id.
173 Id.
Finally, in reviewing the issue of the developments affecting public investments, which the Board would not allow without demonstration that public or quasi-public investments would not be endangered, the Board held in favor of a .78 csm streamflow rather than the resort’s proposed rate of .50 csm.\textsuperscript{174} The Board reasoned that because the general public fishes in the river, the streamflow should be considered a “public investment,” and the ski area, through its proposed withdrawals of .50 csm, would destroy particular habitats and would violate Vermont environmental law.\textsuperscript{175}

The snowmaking cases in New England thus far have reached differing results.\textsuperscript{176} Okemo appears to have balanced best the competing interests of environmentalism and economic development, while the Sugarbush and Loon Mountain cases were decided based on the perceived value of ski resorts to New England economies.\textsuperscript{177} Arguably, New England courts have not yet considered adequately the impact of increased water withdrawals upon aquatic habitats and the rights of each state’s citizens in preserving their water supplies.\textsuperscript{178}

IV. THE PUBLIC TRUST DOCTRINE

A. History of the Doctrine

Given the difficulty New England courts and administrative agencies have had in deciding water withdrawal issues, the application of different theories, such as the public trust doctrine, might provide guidance in weighing the various factors involved in snowmaking. Although scholars have debated the scope of the public trust doctrine, its use in the snowmaking cases could provide a needed balancing of social, economic and environmental concerns.\textsuperscript{179} The basic principle of the public trust doctrine is that the government holds certain natural resources in trust for the people of the state.\textsuperscript{180} Historically, the public

\textsuperscript{174} Id. at *14–15.
\textsuperscript{175} See Okemo, 1992 WL 186658, at *14–15.
\textsuperscript{176} See McLean, supra note 17, at 244.
\textsuperscript{177} See id.; see also Dubois, supra note 10, at *53–55.
\textsuperscript{178} See McLean, supra note 17, at 244.
\textsuperscript{180} Rodgers, supra note 8, at 171.
trust doctrine has been applied most often to water rights. In its early formation in Roman and English law, the doctrine dealt with individual persons' property rights in the ocean, lakes, and rivers. The early public trust doctrine generally held that the earth's waters belonged to no one person, but rather that the general public had "undefined rights of use and enjoyment" of the earth's waters for navigation, commerce, and fishing.

Since its adoption in America, the scope of the public trust doctrine has grown. Generally, legal scholars now agree that public trust property must be held available by the government for the use of the public, that trust property must never be sold, and that the government must maintain the property for particular public uses. Although the doctrine in the United States was, at its inception, conceived of as particularly applicable to navigation and commercial uses of water, the doctrine since has expanded to include the rights to use and enjoy water for recreational purposes. Additionally, courts have held that the doctrine now protects parklands, marshlands, and even wildlife. Finally, the doctrine also has been applied to lands held solely for conservation purposes; as the California Supreme Court said in *Marks v. Whitney*, one of the purposes of the trust is the "preservation of . . . lands in their natural state, so that they may serve as ecological units for scientific study, for open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area."

The first case in United States history to recognize the public trust doctrine was *Illinois Central Railroad Co. v. Illinois*. In *Illinois Central*, the United States and the state of Illinois wished to construct a railroad, and the state gave the Illinois Central Railroad Company

181 See Sax, supra note 179, at 475.
182 See Rodgers, supra note 8, at 172-73. Note that originally the public trust doctrine only applied to waters that "ebbed and flowed" but now includes "streams of any consequence." Id. at 172.
183 See Sax, supra note 179, at 475 (quoting R. Lee, The Elements of Roman Law 109-10 (4th ed. 1956)).
184 See id. at 476, 556-57.
185 Id. at 477.
186 Rodgers, supra note 8, at 174.
The state gave the railroad the Illinois land on the route between Chicago and Dubuque, Iowa, in a grant, which, in essence, gave the railroad ownership over part of Lake Michigan. The railroad proceeded to fill in part of the lake so as to lay its tracks. Under the Lake Front Act, which governed the contract, the railroad planned to pay the state at least seven percent of its gross earnings annually in exchange for the grant of the lake beds. However, on July 1, 1873, the Illinois legislature repealed the Lake Front Act. Chicago then sued to regain its ownership in fee of the land and riparian rights. In its first opinion to enunciate the parameters of the public trust doctrine, the United States Supreme Court held that the state of Illinois was the owner in fee of the submerged bed of Lake Michigan, but that the state held title to the submerged lands in trust for the people of Illinois. The Court based its decision on historical water law, which holds that the ownership of lands covered by tide waters belongs to the state within which the water lies. Although prior to this case the public trust doctrine had applied only to bodies of water which had tides, and therefore ebbed and flowed, the Supreme Court nonetheless held that state ownership of water applied to the Great Lakes. The crucial distinction to the Court was not whether the water ebbed and flowed, but rather whether the state used the body of water for commerce. The Court reasoned that if commerce were carried out upon a body of water, then this fact alone was sufficient to establish the state's rights in the water.

On the issue of the land and water being held in public trust, the Court said that title was "held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." The Court went further to say that granting water and land in fee, as the State previously had done,

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190 Id. at 398.
191 See id.
192 Id. at 403.
193 Id. at 406 n.1.
194 Illinois Central, 146 U.S. at 410-11.
195 Id. at 412-14.
196 Id. at 452.
197 Id. at 435.
198 Id. at 436-37.
199 Illinois Central, 146 U.S. at 436.
200 Id.
201 Id. at 452.
was inconsistent with the exercise of the trust. Finally, the Court said that the trust is a governmental property that cannot be alienated, which "follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested."  

Some commentators, in reviewing the *Illinois Central* case, have argued that the case provides background for recognizing that the public trust doctrine is quasi-constitutional in nature. As writer Harrison C. Dunning recognized, the *Illinois Central* case is the first in a line of decisions that recognize the public trust doctrine as an implied state constitutional doctrine requiring governments to protect public access to natural resources.

In response to interpretation of the doctrine as impliedly constitutional, however, commentator James L. Huffman believes that courts are using this argument in an attempt to "circumvent the constitutional protections of private property" and, in reality, are manufacturing new rights. Further, Huffman argues that "there is no evidence that the Supreme Court viewed the public trust or the navigation servitude as quid pro quo for a generous grant of lands to new states." Finally, Huffman fears that the public trust doctrine is being abused by states today in order to limit private landowners’ water rights and access to water resources.

Since the *Illinois Central* case, courts have expanded upon the public trust doctrine. According to Professor Joseph L. Sax, courts have developed the doctrine to the extent that:

> When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to

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202 Id. at 453.
203 Id. at 456.
205 Id. at 522–23.
207 See id. at 553.
208 See id. at 548–49; see also Alison Reiser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 HARV. ENVTL. L. REV. 393, 415–16 (1991) (discussing Professor Huffman’s fears that greater use of public trust doctrine will expand power of counter-majoritarian courts and limit powers of state legislatures, which by their natures are more democratic).
reallocating that resource to more restricted uses or to subject public uses to the self-interest of private parties . . . 209

The case of Gould v. Greylock Reservation Commission demonstrates the skepticism which Professor Sax notes.210 In this 1966 case, the Massachusetts Supreme Judicial Court utilized the public trust doctrine to prevent a private corporation, in conjunction with the state Greylock Reservation Authority, from developing a ski resort in a state park.211 In Greylock, local citizens who lived near Mount Greylock sought a declaratory judgment from the court that a 1964 development agreement between the Authority and the management corporation was invalid.212 The plaintiffs filed their suit out of concern for Mount Greylock's preservation as an unspoiled natural forest, a use that the plaintiffs believed the Authority and management company's agreement threatened.213

The court held that the agreement was not authorized and that the proposed tramway, chairlifts, ski trails, and other facilities would interfere with the natural state and appearance of the reservation.214 The court held that the management agreement was a complete delegation of the duties of the Authority to the management company, a delegation which the state could not sanction.215 Given the Authority's limited funds, the court feared that the Authority would be unable to "exert any practical or effective supervision over the Resort."216 Finally, implicitly relying upon the public trust doctrine, the court could find no express grant of power to the Authority to allow the use of public lands and funds for a private commercial venture.217

The public trust doctrine has been applied in the past to situations involving water and ski resorts, situations similar to the snowmaking cases.218 Additionally, courts have applied the doctrine to pure conservation interests, as in the 1983 case involving Mono Lake entitled National Audubon Society v. Superior Court of Alpine County.219 The

209 Sax, supra note 179, at 490 (emphasis in original).
211 See id. at 426.
212 Id. at 411.
213 Id. at 411–12.
214 See id. at 421.
215 Greylock, 350 Mass. at 423.
216 Id.
217 See id. at 426.
218 See Illinois Central, 146 U.S. at 452; Greylock, 350 Mass. at 426.
Mono Lake case is important not only because it recognizes so emphatically the importance of preservation of ecology, but also because of its application of the public trust to instream uses of water.220

In the Mono Lake case, the National Audubon Society filed suit to enjoin the Department of Water and Power (DWP) from diverting water from tributaries to Mono Lake for use as drinking water for the people of Los Angeles.221 Mono Lake, the second largest lake in the state, contained no fish but was home to a large population of shrimp and vast numbers of birds.222 Additionally, the lake was a site of geological and tourist interest.223

Since 1940 the DWP had been diverting the water because of a 1921 amendment to the state’s Water Commission Act which said that drinking water was the “highest use of water.”224 Due to the water withdrawals, however, the level of the lake was dropping dramatically.225 Gulls were abandoning islands that lay within the lake because of coyote intrusion, and the withdrawals were adversely affecting the overall scenic beauty and ecological value of the lake.226

The National Audubon Society filed its complaint under the public trust doctrine.227 The California Supreme Court responded with a strong opinion in favor of the plaintiffs, stressing the importance of the public trust doctrine in conserving natural resources.228 The court held that the state must consider the public trust doctrine whenever it makes water resource decisions, and that the state was obligated to protect the public trust whenever possible.229 The court recognized that the viability of the state does, in part, rest upon its access to water, but that considerations of prosperity and habitability could not preclude an evaluation of the effects of the water withdrawals upon the lake.230

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220 See Jan S. Stevens, The Public Trust and In-Stream Uses, 19 ENVTL. L. 605, 612–13 (1989) (discussing various California cases which support the proposition that it is “entirely reasonable to apply the public trust to protect fish in navigable waters”).
221 National Audubon Soc’y, 658 P.2d at 712.
222 Id. at 711.
223 Id.
224 Id. at 713.
225 Id. at 711.
227 Id. at 717.
228 See id. at 719.
229 Id. at 728.
230 Id. at 719–24. The court noted that state courts have concurrent original jurisdiction in water rights controversies; however, in cases involving water use, if a state water board's
In reaching its decision, the court considered three aspects of the public trust doctrine: its purpose, its scope, and the powers and duties of the state as trustees of the public trust.\textsuperscript{231} Although the court recognized that public trust easements generally were used to protect the public's right to fish, hunt, bathe, swim, and boat in the navigable waters of the state, the court also affirmed the idea that the purpose of the trust included protection of lands in their natural state.\textsuperscript{232} In terms of Mono Lake, the court agreed that the scenic views of the lake, pure air, and the lake's use as a nesting and feeding spot for birds were values that the public trust doctrine protected.\textsuperscript{233} The court further stated that the streams, lakes, marshlands, and tidelands of the state were part of the people's common heritage, and that the state could surrender the use of this heritage only when such an act was consistent with the purposes of the trust.\textsuperscript{234} Finally, in balancing the state's need for water against public trust protection, the court said that:

\begin{quote}
[A]s a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust and to preserve, so far as consistent with the public interest, the uses protected by the trust.\textsuperscript{235}
\end{quote}

The Mono Lake decision thus demonstrates one court's willingness to weigh not only economic factors, but also social and ecological factors, when deciding water rights issues.\textsuperscript{236}

The Mono Lake decision also demonstrates a court's progressive use of the public trust doctrine in a situation involving preservationist concerns.\textsuperscript{237} In protecting the ecology of the California lake, the court went beyond the traditional application of the doctrine to commercial rights, such as fishing and navigation, and instead recognized the importance of the doctrine solely to preserve ecology.\textsuperscript{238}

experience or expert knowledge is useful, courts should ask for the water board's assistance. See id. at 731–32.

\textsuperscript{231} National Audubon Soc'y, 658 P.2d at 719.

\textsuperscript{232} Id.

\textsuperscript{233} Id.

\textsuperscript{234} Id. at 724.

\textsuperscript{235} Id. at 728.

\textsuperscript{236} See National Audubon Soc'y, 658 P.2d at 729.

\textsuperscript{237} See id.

\textsuperscript{238} See id.
tors, including Professor Joseph Sax, have advocated for use of the doctrine in more atypical situations such as the Mono Lake scenario. As Professor Sax said, the doctrine should apply to all situations in which "diffuse public interests need protection against tightly organized groups with clear and immediate goals."

Furthermore, other writers have suggested use of the Mono Lake case as a gateway to applying the public trust doctrine to streamflows. Writer and lawyer Ralph W. Johnson first endorsed the idea of utilizing the public trust doctrine in streamflow-related cases, arguing that the public trust doctrine is useful in the Western states because the doctrine serves as a method of solving problems involving vast water withdrawals that threaten navigation, fishing, and wildlife. He believes that because courts previously have applied the doctrine to situations where landfills destroy navigation and other uses, "it should equally apply to constrain the extraction of water that destroys navigation and other public interests." Because the priorities of the people of the nation have moved from consumption to conservation, Johnson argues, the public trust doctrine should be used to reflect this fundamental change.

In opposition to the position favoring public trust protection of streamflows, however, are other arguments which allege that the doctrine is an inappropriate remedy for the problem of dwindling rivers and streams. For example, commentator Roderick E. Walston argues that the public trust doctrine should not be used to protect streamflows, at least in the Western states. Walston theorizes that the public trust doctrine is inapplicable to Western water rights issues because the West adheres to a prior appropriation system, which provides that a landowner has the right to divert and use the water which flows next to the owner's land so long as the water is put to reasonable and beneficial use. Walston fears that the use

239 See Sax, supra note 179, at 556.
240 Id.
242 See id. at 233-34; see also Stevens, supra note 220, at 605-06.
243 See Johnson, supra note 241, at 257-58 (emphasis in original).
244 See id. at 265.
245 See Walston, supra note 179, at 80-81. Note that Walston's article was written before the Supreme Court of California decided the Mono Lake case.
246 Id. at 63-65.
247 Id. at 72-73. The obvious response to Walston's argument, at least from a New England perspective, is that Eastern states follow a riparian water rights system and thus this argument
of the public trust doctrine could jeopardize long-standing water rights in the West because the doctrine provides no clear guidelines for balancing community water rights with protection of streamflows.\textsuperscript{248} Further, Walston fears that use of the doctrine will halt diversions of water that Westerners require in order to sustain continued economic growth.\textsuperscript{249} Ultimately, Walston believes that a balancing between ecological and urban or agricultural uses of water is beyond the scope of the doctrine, and that use of the public trust doctrine will not provide the proper answer to Western water rights concerns.\textsuperscript{250}

B. The Aspen Wilderness Workshop Case: Applying the Public Trust Doctrine to Snowmaking

The only snowmaking case in which a plaintiff has successfully employed public trust ideas is one from the West, \textit{Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Board}.\textsuperscript{251} The Aspen case, which the Colorado Supreme Court decided on June 19, 1995, is the only example yet of an environmental group successfully blocking increased withdrawals of water from streams for snowmaking based on a public trust doctrine theory.\textsuperscript{252}

In January, 1976, defendant Colorado Water Conservation Board (CWCB) determined that in Snowmass Creek continuous flows of a minimum of twelve cubic feet of water per second (cfs) were needed throughout the year to meet the state statute's standard of "preserving the natural environment to a reasonable degree."\textsuperscript{253} The state Water Court issued a decree to this effect in June, 1980.\textsuperscript{254} By 1991, however, the Aspen area was increasingly developing, and county officials, including those of the Aspen/Pitkin Planning Office, began to question the 1980 decree.\textsuperscript{255} Because of this questioning, the Division

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\item \textsuperscript{248} Walston, \textit{supra} note 179, at 79.
\item \textsuperscript{249} \textit{Id.} at 80.
\item \textsuperscript{250} \textit{See id.} at 92–93.
\item \textsuperscript{251} 901 P.2d 1251 (Colo. 1995), \textit{reh'g denied}, 1995 Colo. LEXIS 321 (Sept. 11, 1995).
\item \textsuperscript{252} \textit{See id.} at 1260–61.
\item \textsuperscript{253} \textit{Id.} at 1253. Note that the measurement used by the Colorado Supreme Court, cubic feet of water per second, is different from the measurement New Englanders generally have used in the streamflow cases decided, which is cubic feet per second per square mile. See, \textit{e.g.}, Okemo Mountain, Inc., Application No. 2S0351–12A–EB, 1992 WL 186658, at *1 (Vt. Envtl. Bd. July 23, 1992).
\item \textsuperscript{254} \textit{Aspen}, 901 P.2d at 1254.
\item \textsuperscript{255} \textit{Id.}
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of Wildlife's instream flow coordinator began an investigation of the creek. After conducting the investigation, the coordinator decided that twelve cfs was both too high during certain times of the year, and too low during others, suggesting to the investigators that a computational error had been made in the earlier assessment.

In March, 1992, the CWCB decided that it should re-examine the creek's instream water flows. The CWCB held meetings and received public comments regarding streamflow. On September 15, 1992, the CWCB adopted a recommendation that called for a plan for streamflows in three different parts of the Creek during the summer and winter. The CWCB also decided to initiate proceedings before the Water Court in order to secure a decree allowing the CWCB to increase its appropriations. The opinion states in a footnote, as a possible explanation for the CWCB's decision to allow increased appropriation, that the Aspen Skiing Co., the corporation responsible for the Aspen Ski Resort area, desired to increase its snowmaking on Snowmass Mountain. Therefore, the corporation would obviously be able to expand if the CWCB increased the resort's twelve cfs winter appropriation from the Creek.

On September 16, 1992, the plaintiff Aspen Wilderness Workshop, a non-profit environmental group, filed its lawsuit, arguing that the CWCB's decision not to enforce the full twelve cfs instream flow, and to allow the ski resort to increase its appropriations, was a "permanent relinquishment of a public instream flow right." The plaintiff further alleged that the streamflow decision should have been made through a formal hearing at the Water Court rather than by an informal administrative body. The complaint alleged that the CWCB had exceeded its authority and that the CWCB's action infringed upon the authority of the Water Court. Further, the plaintiff argued that because the CWCB's action "constituted a donation of a public resource to a private company [the Aspen Skiing Company which

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256 Id.
257 Id.
258 Id.
259 Aspen, 901 P.2d at 1255.
260 Id.
261 Id.
262 Id.
263 Id. at 1255 n.9.
264 Aspen, 901 P.2d at 1255.
265 Id.
266 Id.
planned to divert the excess water during the winter for snowmaking],” the CWCB had breached its fiduciary duty to the public.\textsuperscript{267}

The Colorado Supreme Court found for the plaintiff.\textsuperscript{268} The court decided that under the state Water Rights Determination and Administration Act of 1969, the CWCB has a statutory duty to appropriate the minimum stream-flow necessary to preserve the natural environment.\textsuperscript{269} The court held that the CWCB had to implement the twelve cfs limit under the 1980 decree unless the decree was reviewed and then modified by the Water Court.\textsuperscript{270}

In finding for the plaintiff, the court based its decision upon the notion of a “fiduciary duty” owed by the CWCB to the state.\textsuperscript{271} The court acknowledged that the duties of the CWCB were to appropriate, according to the state’s constitution, “such waters of natural streams and lakes as the board determines may be required for minimum stream-flows or for natural surface water levels or volumes for natural lakes to preserve the natural environment to a reasonable degree.”\textsuperscript{272} However, the court interpreted this role not as a plenary grant of authority allowing private landowners the right to use any and all of the state’s water, but rather as subject to the CWCB’s fiduciary duty to the people of the State of Colorado.\textsuperscript{273} Further, the CWCB’s power was subject to decisions by the state Water Court.\textsuperscript{274} The Colorado Supreme Court held that once the Water Court had made a decision as to what streamflow was necessary to protect the environment of the state, the CWCB was bound by the Water Court’s decision.\textsuperscript{275} The court held that the CWCB must “fulfill its duty to the people of this state, other appropriators of water as well as those without water rights, by appropriating only so much water as is necessary to preserve the environment . . . .”\textsuperscript{276}

Therefore, although the majority in \textit{Aspen} never used explicitly the phrase “public trust doctrine,” its language concerning “fiduciary duty” and its reasoning constituted a de facto use of the public trust doctrine.\textsuperscript{277} This case’s discussion of the public trust principles inher-

\textsuperscript{267} Id.
\textsuperscript{268} Id. at 1256.
\textsuperscript{269} \textit{Aspen}, 901 P.2d at 1260.
\textsuperscript{270} Id.
\textsuperscript{271} Id.
\textsuperscript{272} Id. at 1256.
\textsuperscript{273} Id. at 1256–57.
\textsuperscript{274} \textit{Aspen}, 901 P.2d at 1261.
\textsuperscript{275} Id. at 1260.
\textsuperscript{276} Id. at 1259–60.
\textsuperscript{277} See id. at 1260–61.
ent in the snowmaking controversy provides a bridge to the use of
the doctrine in New England.

V. APPLICATION OF THE PUBLIC TRUST DOCTRINE
TO THE NEW ENGLAND CASES

Given the difficulty faced by environmental plaintiffs in cases like
that of Loon Mountain and Sugarbush, and the elasticity displayed
by the public trust doctrine during its history, it may be possible to
apply the public trust doctrine to the New England snowmaking
setting. New England courts and environmentalists will benefit from
applying the flexible doctrine used in the Aspen, Greylock, and Mono
Lake decisions to approach snowmaking and ski resort development
issues.

A. The Public Trust Doctrine in Colorado

In terms of environmentalist goals of balancing ecology and eco-
nomics, the most successful of the snowmaking cases has been Aspen,
in which the plaintiff used a quasi-public trust theory to halt increased
withdrawals of water for snowmaking. Aspen is interesting because
the majority based its decision on a "fiduciary duty" rather than
expressly upon the "public trust." Despite different terminology,
however, these ideas are arguably identical because both focus on the
need to protect the public's interest in a natural resource.

The language used in Aspen is notable because without stating the
term public trust, the court's reasoning is nonetheless apparently
based upon this doctrine. Aspen involved the traditional public trust
problem of a state agency overstepping its boundaries and effectively
donating a public resource to a private institution. In order to
remedy this problem, the Colorado Supreme Court said that the
CWCB, a state administrative agency, had a "unique statutory
fiduciary duty" to the people of the state, and must "protect the

278 See supra Section III.A, III.B.
279 See supra Section IV.
280 See Aspen, 901 P.2d at 1259–61; National Audubon Soc'y v. Superior Ct. of Alpine County,
658 P.2d 709, 728 (Cal.), cert. denied, 464 U.S. 977 (1983); Gould v. Greylock Reservation Comm'n,
282 Id. at 1260.
283 See id.; see also Greylock, 350 Mass. at 426.
285 See id. at 1255; see also Sax, supra note 179, at 490.
public” and “preserve the natural environment.” Therefore, the Court held, the state agency needed to reevaluate its planned allocation of Snowmass Creek in light of its duty to the citizens of Colorado.

Although the two decisions are different both factually and in terms of a thirty-year time span between the dates of their decision, Aspen is nonetheless remarkably similar in its reasoning to Greylock. The Colorado Supreme Court’s reasoning in Aspen evokes that of Greylock, in which the Massachusetts Supreme Judicial Court held that the private management corporation, that wished to build a ski resort upon Mount Greylock, could not be delegated such a vast amount of authority by a state agency. The Massachusetts court held for the plaintiffs because it feared the use of the unspoiled public lands for commercial profit.

A similar fear of private exploitation of public resources seems to lie behind the decision of the Colorado Supreme Court in Aspen. This fear is demonstrated by the Colorado court’s recognition that the Aspen ski resort desired to utilize the extra water that the CWCB

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286 Aspen, 901 P.2d at 1260. Note that the Colorado Supreme Court in its opinion holds that once a state Water Court makes a judicial determination as to “what ‘minimum stream flow’ is necessary to protect the environment, the Conservation Board is obligated to abide by that judicial determination and thereby to fulfill its duty to the people of this state, other appropriators of water as well as those without water rights, by appropriating only so much water as is necessary to preserve the environment.” Id. at 1259-60. The notion of “appropriation” refers to the historical system of Western water rights, which is known as the prior appropriation doctrine. See Walston, supra note 179, at 73. According to Roderick Walston, the appropriation doctrine “authorizes the diversion and use of water, if it is put to reasonable and beneficial use. Priority to the use of water depends on the chronological sequence of competing appropriations; to be ‘first in time’ is to be ‘first in right.’” Id. (footnote omitted). Further, Walston notes that “[in] Colorado, the appropriation doctrine . . . provides the exclusive basis for acquiring a water right.” Id. The appropriation doctrine is different from the riparian doctrine, to which most Eastern states adhere, which provides that “a landowner has the right to use water appurtenant to his land, subject to the right of downstream landowners to the continued natural flow.” Id. at 72. Therefore, the Colorado Supreme Court’s holding in Aspen, providing that the state owes a fiduciary duty to appropriators of water as well as non-appropriators, perhaps explains why the Colorado Supreme Court did not want to adhere explicitly to the public trust doctrine, since under the prior appropriation doctrine the state, in a sense, does not really own the natural resource. See Aspen, 901 P.2d at 1259-61. Rather, the appropriators almost own the resource, and the state merely apportions it; while in the East, landowners use the water, and there is no real sense of ownership beyond that of the state. See Walston, supra note 179, at 72-73.

287 See Aspen, 901 P.2d at 1253.
288 See id. at 1259-61; Greylock, 350 Mass. at 426.
289 Greylock, 350 Mass. at 425.
290 See id. at 426.
291 See id.; see also Aspen, 901 P.2d at 1259-61.
had planned to allow for more snowmaking. In the modern context, therefore, the CWCB can be analogized to the state-run Greylock Reservation Authority, which desired but was prevented from handing over control of the state park to the private corporation. Like the Authority, the CWCB was not allowed to exceed the power given to it by the state, and therefore the state prevented a private corporation from profiting from excessive resource use.

B. What Has Gone Wrong in New England?

The New England snowmaking cases adverse to environmental concerns, specifically the Loon Mountain and Sugarbush cases, are notable for their failure to balance environmental and economic issues. The decisions are in no way activist, but rather almost complacent, accepting the current reality of vast snowmaking without concern for environmental impacts. Perhaps these decisions spring from a desire that snowmaking policy be made by the legislature rather than by courts or administrative boards.

The Loon Mountain decision, in granting summary judgment for the defendants and disregarding all of the plaintiff's claims, demonstrated most clearly a lack of any consideration of environmental issues. Unlike Greylock, the Loon Mountain decision refused to consider thoughtfully the possible impacts of increased ski resort development. Rather, in the Loon Mountain case, Judge Barbadoro decided to believe that snowmaking is a way of life in New England, and therefore considered only the detrimental economic impacts on the state of New Hampshire which limited snowmaking would create. As the judge wrote:

[T]o properly set the scope of practicable alternatives, it is important to remember that Loon is presently using water from Loon Pond for snowmaking under its existing permit and Lincoln

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292 See Aspen, 901 P.2d at 1255 n.9.
293 See Greylock, 350 Mass. at 425.
295 See Dubois, supra note 10, at *53–55; McLean, supra note 17, at 244.
296 See Dubois, supra note 10, at *53–55; McLean, supra note 17, at 244.
298 See Dubois, supra note 10, at *53.
299 See id.; Greylock, 350 Mass. at 421.
300 See Dubois, supra note 10, at *51–53.
uses the pond as a primary municipal water source. The Forest Service considered but rejected a suggested alternative of no snowmaking because "snowmaking has become a necessity in eastern skiing to assure a reasonable opening date and to provide skiing during low natural snow years." Thus, the relevant question is whether the Forest Service considered the existence of practicable alternatives and mitigation measures for the increased use of Loon Pond. The Forest Service concluded that snowmaking was a necessary component of skiing at Loon and that using Loon Pond as the water source with limitations on withdrawals was the best alternative.

In accepting the Forest Service's finding that "snowmaking has become a necessity," and that the use of Loon Pond for snowmaking must be increased, the judge implicitly based his decision upon his perception of the economic value of skiing to the state of New Hampshire. Although the judge conceded that Loon Pond might have benefitted from more environmental study, he dismissed this concern by giving great deference to the decisions made by the Forest Service.

Judge Barbadoro's holding, which included no real weighing of the environmental factors involved, was directly adverse to the goals of the public trust doctrine. Although the economic impacts of decreased snowmaking are certainly important in the balance of factors, considering the vast amounts of revenue which skiing brings to a community, the public trust doctrine demands that other factors be considered as well. As the Supreme Court of California understood, issues of cost and the difficulty of obtaining water from other water sources are relevant; nonetheless, they are only some of the factors to be considered along with those concerning ecology and natural resource preservation. By refusing to insist upon a more critical analysis of the situation involving Loon Pond, Judge Barbardoro violated the very basis of the public trust doctrine.

Perhaps, had Judge Barbadoro properly evaluated the factors discussed in the Mono Lake decision, he might have decided the case the

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301 Id. at *53–54 (emphasis in original).
302 Id. at *55.
303 See id. at *41.
305 See id. at 729.
306 Id.
307 See Dubois, supra note 10, at *55.
The resort did already have a permit from the town to withdraw water, and so, in effect, the resort already had been granted use of Loon Pond's water for the resort. More importantly, unlike the withdrawals in the Sugarbush and Okemo cases, which directly threatened thriving trout populations, no fish currently lived in Loon Pond, and so there was no threat of destruction of a species. Instead, the fear at Loon Pond was that of decreased fisheries potential, and of the general degradation of Loon Pond's current animal and plant life. The fact that the pond lacked a current fish population, combined with the great revenue and tax benefit generated by the resort, might have led the Judge to the same result. However, it is the method of analysis which is key to the public trust doctrine, the method of weighing all of the important factors, and it is this method which the Judge disregarded.

In addition to the Loon Mountain decision, the Vermont Water Resources Board in deciding the Sugarbush case seemed skeptical of environmental concerns and expressly rejected the plaintiff's public trust doctrine argument. Although the plaintiffs argued that the WRB lacked jurisdiction to decide the plaintiffs' public trust arguments, and that the Vermont state Legislature needed to make an express determination that snowmaking was consistent with the public trust doctrine, the WRB nonetheless reviewed the case. The WRB believed that the legislature had delegated sufficient supervisory power to the ANR to decide these issues, and therefore the WRB was within its right of review.

However, despite the WRB's decision, which favored the ski resort by allowing significant drawdowns of the Mad River, the WRB none-
the existence of the public trust doctrine.

The WRB stated that the "work of determining the implications of the common law public trust doctrine as reflected in the Vermont Constitution is best left to the judicial and legislative branches." This statement demonstrates that although the WRB did review and decide the Sugarbush case, it nonetheless implicitly recognized the value of the public trust doctrine in snowmaking. Moreover, the WRB argued that it was improper for an administrative body to make policy decisions involving the public trust doctrine.

C. Applying a Public Trust Approach to New England Snowmaking

An analysis of both the Sugarbush and Loon Mountain cases suggests that another legal approach to reviewing snowmaking issues may be beneficial. Moreover, the use of the public trust doctrine in other jurisdictions further suggests that this doctrine is particularly suited to snowmaking and provides a vehicle for courts to require that states consider important environmental values before allowing increased ski resort development and its attendant environmental impacts.

The public trust doctrine is key to the snowmaking issue because of the interests involved: preservation of the public's right to maintain its water supply, and also use of this supply for fishing and boating. As the evidence indicates, increased water withdrawals not only threaten to dry up rivers, but also create the danger of destruction of fish habitats. Destruction of fish and other habitats, which are public resources, by ski resorts, which are private organizations, clearly violates the essence of the public trust doctrine.

Additionally, environmentalists may argue that New England states, by effectively donating vast amounts of publicly-owned water

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317 Id. at *39-41.
318 Id. at *40.
319 Vermont Natural Resources Council, Nos. 92-02 and 92-05, at *40.
320 Id.
321 See supra Section V.B.
324 See Laidler, supra note 3, at A5; see also Plaintiff's Memorandum, supra note 22, at 3-5 (discussing numerous scientific studies documenting degradation of aquatic habitats due to water withdrawals).
325 See Illinois Central, 146 U.S. at 452; Plaintiff's Memorandum, supra note 22, at 17-19.
to private ski resorts, are also violating another element of the public trust doctrine, which holds that states cannot grant public resources to private interests. As the *Illinois Central* case noted, a state's waters are "held in trust for the people of the State that they may enjoy [them] . . . freed from the obstruction or interference of private parties." Likewise in New England, a state holds its waters, including its rivers, streams and ponds, for public use and enjoyment. Granting these waters to a private organization, such as a ski area, violates a state's obligation to preserve the waters for its citizens.

Furthermore, the Mono Lake case describes the importance of states preserving the public interest while making resource use decisions. In that decision, the California Supreme Court decided that when making policy decisions as to water use, the state's Division of Water and Power must consider the public's interest and rights in the state's water. Beyond mere consideration of the trust, however, the court held that the state was obligated to protect that trust whenever possible.

Environmental groups can anticipate an argument by ski resorts that the public ultimately does use the water, which has been turned to snow, because it is the public which skis at these resorts. Resorts will probably argue that the private resort's function is solely to convert the water into snow, while the public remains the ultimate consumer, as well as the source of the demand. Therefore, resorts will most likely claim that the public trust has not been violated. Again, however, the Mono Lake case provides a counter-argument. In the Mono Lake decision, water was being drained for use by the Los Angeles public for drinking and bathing; nonetheless, the public trust doctrine still operated. A New England court therefore should review a snowmaking case, wherein the public uses the frozen water upon which to ski, in the same way as the Supreme Court of California reviewed the Mono Lake case, in which the public used the lake's water to drink and bathe. Regardless of the use at issue, the public

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326 See Plaintiff's Memorandum, supra note 22, at 17.
327 *Illinois Central*, 146 U.S. at 452.
328 See Plaintiff's Memorandum, supra note 22, at 23.
329 See id. at 24–25.
331 See id.
332 See id.
333 Id. at 713–14.
334 See id. at 719.
trust protects a state's natural resources.\textsuperscript{335} It is a court's job to
determine all of the relevant factors bearing upon a particular water
source's use, and to then decide how the resource may be utilized best
and yet also preserved in accordance with the public interest.\textsuperscript{336}

Additionally, the Mono Lake decision's preservationist concerns are
similar to issues in the New England snowmaking cases. The plaintiff
National Audubon Society in the Mono Lake decision was concerned
about the effect of the water withdrawals at Mono Lake upon the
scenic and ecological values of the lake and its surrounding area.\textsuperscript{337}
Similarly, New England environmentalists worry about the effect of
the stream, river and pond drawdowns on fish and other habitats.\textsuperscript{338}
Because the concerns are comparable, courts in New England should
likewise require that their state's administrative agencies consider
and protect public trust values when making decisions regarding
streamflows.\textsuperscript{339}

Moreover, New England environmentalists have a strong argument
if a court is to consider the issue of the use of diverted waters. In the
Mono Lake decision, the state's Division of Water and Power was
diverting water from the tributaries to Mono Lake for domestic use
by the people of the city of Los Angeles.\textsuperscript{340} The court recognized the
importance of the fact that California had decided that drinking water
was the highest use of the state's water, and that this legislative
decision had to be balanced with the public's interest in protecting the
scenic and environmental values of the lake.\textsuperscript{341} Interestingly, however,
in New England, the water is being diverted for recreational use.\textsuperscript{342}
Again, use for recreational purposes seems intuitively to be lower on
the scale of importance than use for drinking or bathing.\textsuperscript{343} Ultimately,
New England state legislatures must address as a policy matter
whether or not snowmaking is one of the most beneficial uses of the
states' water.\textsuperscript{344}

\textsuperscript{335} See National Audubon Soc'y, 658 P.2d at 719.
\textsuperscript{336} Id. at 727–28.
\textsuperscript{337} Id. at 711.
\textsuperscript{338} See Wapner, supra note 37, at 10.
\textsuperscript{339} See National Audubon Soc'y, 658 P.2d at 728.
\textsuperscript{340} See id. at 711.
\textsuperscript{341} Id. at 713–14.
\textsuperscript{342} See Wapner, supra note 37, at 10.
\textsuperscript{343} See National Audubon Soc'y, 658 P.2d at 713.
\textsuperscript{344} Professor Johnson argues that in certain cases, legislatures are better suited to making
resource use decisions because they are a better forum for addressing all involved factors. See
Johnson, supra note 241, at 266. However, a criticism of Johnson's proposal might be that giving
state legislatures full reign over resource use decisions, without the involvement of the courts
Finally, New England courts must also consider the public’s rights when balancing water uses.345 The California Supreme Court expressed this concern for the public in the Mono Lake case, when it stated,

We recognize the substantial concerns voiced by Los Angeles—the city’s need for water . . . the cost both in terms of money and environmental impact of obtaining water elsewhere . . . . We hold only that [these concerns] do not preclude a reconsideration and reallocation which also takes into account the impact of water diversion on the Mono Lake environment.346

New England courts should likewise balance competing financial and ecological concerns, while keeping in mind the ultimate goals of the public trust in protecting natural resources.347 Courts may, like the New Hampshire court in the Loon Mountain case, recognize that economic concerns are at stake when making decisions as to snowmaking.348 However, they should also take their cue from the California Supreme Court and realize that economic concerns are not the only ones involved.349 New England courts must recognize that the public trust doctrine mandates that states consider the trust and
to safeguard allocations, might place the public trust in danger. For example, a theoretically activist legislature that cared about ski resort profits much more than it cared about resource protection, and defined resort expansion as a greater “public interest,” might conceivably grant away all public trust rights to a private group. Although this seems farfetched, in actuality it is a possibility, because many courts view the public trust doctrine as a rebuttable presumption: courts presume that the legislature did not intend to grant away public trust lands, but if the legislature evidences a clear and express intention to have done so, then the grant must be allowed. See Gould v. Mount Greylock, 350 Mass. 410, 419 (1966) (“The Greylock reservation, as rural park land, is not to ‘be diverted to another inconsistent public use without plain and explicit legislation to that end.’”); see also Gwathmey v. North Carolina, 342 N.C. 287, 304 (1995) (“[t]he General Assembly has the power to convey such lands [underlying navigable waters], but under the public trust doctrine it will be presumed not to have done so. That presumption is rebutted by a special grant of the General Assembly conveying the lands in question free of all public trust rights, but only if the special grant does so in the clearest and most express terms.”). As Gwathmey indicates, it is possible that a court might give deference to a clear and express grant of normally public-trust-protected land by the state legislature to a private party. See Gwathmey, 342 N.C. at 304. In the case of snowmaking, a legislature need only define tax revenues and general economic gain as in the public interest of the state; having done so, the state can then argue that it has diverted its water for another consistent public use, and a court arguably could not invalidate this. See also Appleby v. City of New York, 271 U.S. 364, 389 (1926) (in granting fees for the erection of wharves and docks to private individuals, New York City made its grants “not . . . solely or primarily for the benefit of the grantee, but primarily for the benefit of the city in pursuance of a policy for improving its harbor and furnishing its treasury.”).

346 Id. at 729.
347 See id.
348 Dubois, supra note 10, at *53-55.
349 See National Audubon Soc’y, 658 P.2d. at 729.
long-term environmental effects when making resource use decisions.\(^{350}\)

VI. Conclusion

Although ski resort owners argue that snowmaking in New England has become a necessity in order for resorts to stay economically viable, environmentalists argue that the cost to New England streams and rivers is too great.\(^{351}\) Despite the fact that snowmaking allows increased coverage, particularly during winters when snow is less than plentiful, this increased coverage comes at a price.\(^{352}\) Beyond the immediate economic gain which a state receives from ski resorts, however, are long-term resource use issues which are in need of thoughtful consideration.\(^{353}\) Increased expansion brings increased snowmaking; although the state receives greater amounts of revenue, both through direct receipts and taxes, from larger resorts, there are conservation and ecological protection values which the state is obligated to protect.\(^{354}\) The public trust doctrine stands as one theory which will allow this balancing of economics and ecology, and therefore the public trust doctrine should be applied to the New England snowmaking issue.\(^{355}\)

\(^{350}\) See id.

\(^{351}\) See supra notes 40–67 (regarding debates between environmentalists and ski resort developers as to the costs and benefits of snowmaking).

\(^{352}\) See id.

\(^{353}\) See Dellios, supra note 63, at 6.


\(^{355}\) National Audubon Soc'y, 658 P.2d at 728.