Finding the Common Good
Sugarbush Water Withdrawal
By: John H. Fitzhugh and Daniel P. Dozier

Copyright, 1996

When snow skiing first became popular in Vermont in the 1930s, sportsmen and visionaries like Perry Merrill and Sepp Ruschp whacked out trails on mountainsides, herring-boned to the top on wooden skis with skins, waxed their skis and came down on unpacked trails while trying to avoid hitting a tree or breaking a leg. It was crude but exhilarating. No one gave much thought to grooming the slope or improving the snow; in fact, conquering the mountain without machines and dealing with the vicissitudes of the weather was part of the challenge. Over the years, skiing has changed considerably in Vermont. It's now become big business. Each year, Vermont attracts four million skiers to its 29 ski resorts. Millions of dollars have been invested in ski lifts, lodge facilities, nearby condominiums, grooming equipment, and skilled personnel. The fate of towns like Waitsfield, Stowe, and Sherburne is dependant upon the numbers attracted during the ski season. If snow hasn't fallen in Vermont by Thanksgiving, even the Governor gets worried.

Until perhaps the late sixties and early seventies, Eastern ski resorts had a lock on the big Eastern ski market. But with the expansion of the Western ski resorts, the publicity given to Western skiing by the 1964 winter Olympics at Squaw Valley, and increased accessibility via air to these Alpine-like resorts, the ski market began to change. Stories of light powder runs out West crept into discussions between Eastern ski enthusiasts returning from a "packed powder" (a/k/a ice) ski trip to New England on a gray, overcast winter weekend. Eastern ski resorts responded to this competitive threat from the west by installing snow making. The first snow making jets were installed in Vermont at Killington in the early 1960s. Major snow making investments were later made by Mt. Snow, Stratton, and Stowe. Today in Vermont, of all the major ski areas, only Mad River Glen lacks any snowmaking capability.

Early Vermont Snowmaking

Early snow making ventures in Vermont took water wherever they could find it. The Killington Ski Resort tapped into the Roaring Brook, pumped water up the mountain in steel/iron pipes, and made snow by jetting a combination of water and air onto mountain slopes during cold winter days or, more commonly, during cold winter nights. No one in authority seemed to care too much where the water came from or the impact of its withdrawal. Vermont is, after all, the Green Mountain State, and it gets that appellation as a result of its forty inch-per-year precipitation. For the most part, Vermonters worry about water only when they have too much of it, like the day after the 1927 flood.

Occasionally, you'd read of some dispute regarding water withdrawal. A newspaper article in the early 1980s suggesting that treated sewage water be used for snow making led to an infamous newspaper cartoon in Vermont showing a couple of plumbers with their plumbers' helpers about to disembark from a chair-lift at Killington. The caption to the cartoon read, "Where the Effluent meets the Affluent." For a while bumper stickers repeating the caption appeared around the state. Killington filed a lawsuit over the cartoon (it was later dismissed).

Public concern regarding the source of water for snow making and the environmental consequences of piping Vermont's ski resorts for snow appears to coincide with environmental groups emphasizing economy in the use of natural resources as a solution to environmental problems. The Conservation Law Foundation (CLF), a Boston-based environmental organization, opened a Vermont office in 1988, staffed by a resident attorney, Lewis Milford. Ski areas became an immediate target for CLF's efforts.

Prior to the controversy surrounding water withdrawal plans for Sugarbush, the Vermont Natural Resources Council, a local Vermont environmental group, and the CLF had prodded regulators on snow making plans at Okemo Mountain in Southern Vermont. It wasn't, however, until the Sugarbush controversy came to a head in 1991 that the issue gained momentum in a major way.

Sugarbush Ski Resort

The Sugarbush ski area is located in Warren, Vermont, in a picturesque valley just south of Waterbury and approximately one hour's drive from Burlington, Vermont's biggest city. Sugarbush today is the combination of two previous ski areas, Sugarbush and Glen Ellen. The latter ski area, located on Mt. Ellen just north of Sugarbush, was acquired by Sugarbush in the mid-1970s. In 1995, the two areas were linked by a nearly level chair-lift to accommodate the movement of skiers between both mountains.

Sugarbush itself was founded in 1958. Until recently, it has lacked the prestige and marketing savvy of two other Vermont ski areas, Killington and Stowe. Stowe, the oldest major ski area in the East, is located along the same Route 100 as Sugarbush, about as far north of Interstate 89 as Sugarbush is south.

Unlike the Town of Stowe, which has developed considerably over the years as a result of the ski resort and the influx of Canadian money, the Town of Warren and its neighbor Waitsfield remain, to a large extent, classic Vermont small towns. Development is discreet and, for the most part, hidden in the surrounding forest. Nevertheless, because of the small size of these communities, a greater proportion of the residents of the Valley (as the area around Sugarbush is known) is dependent upon the Sugarbush ski area than is true in Stowe, which has a more diversified economy.

During the 1980s, Sugarbush passed through a series of corporate owners. It always seemed to be struggling and undercapitalized. That began to change in 1986, when Sugarbush (including Glen Ellen) were acquired by Claneil, Inc. The new owners recognized the critical need to increase snow making capability, particularly at the original Sugarbush site which had almost no snow making. Heading the effort for Sugarbush were Bob Berrey, a former NFL lineman serving as Sugarbush president, and Robert Apple, Sugarbush's director of planning and development and a former planning director for Central Vermont Regional Planning Commission.

Permitting Process

Vermont prides itself on its environmental regulation. This regulation, and the amount of energy put into enforcing it, has increased over the past twenty-five years as tourism has become the State's growth industry. Every major developmental project in the State requires a series of permits from state, regional and local authorities. A major expansion of snow making capacity is no exception.

In 1990, Sugarbush filed its first permit applications for construction of expanded snow making with plans to draw water from the Mad River. (It had previously obtained approval to draw water from a nearby upland stream, Clay Brook. Clay Brook water, however, was only used for domestic consumption, not snowmaking.) The Mad River, which runs through the Valley, flows into the Winooski River in Waterbury, and there upon into Lake Champlain. All told, it appeared that Sugarbush required at least 6 major permits to proceed with this project: a regional, so-called Act 250 permit from the District Environmental Commission; State dam and stream alteration permits from the State Agency of Natural Resources; a local zoning permit from the Town of Warren; permission from the federal Army Corps of Engineers; and a permit based on an Environmental Impact Statement from the U.S. Forest Service because some of the involved land is part of the Green Mountain National Forest and is leased to Sugarbush as part of its ski operations.

These permits involved different parties and constituencies. Regional environmental permits, known as Act 250 permits in Vermont, address the project's compliance with ten environmental criteria. Parties to the proceeding include the applicant, the involved Towns, the State Land Use Administrator, and others whom the Commission feels may contribute. Environmental groups frequently ask, and are granted, party status in major Act 250 permit applications. The permits themselves are granted by a three-person, citizen commission advised by a professional staff. Major Act 250 cases can take months to complete and the decision by a District Commission can be appealed to a statewide, citizen-dominated Environmental Board. It's been said that one reason Vermont banks survived the banking crisis of the late 1980s is major projects required such lengthy environmental permit proceedings, and that banks would

lend only to financially strong developers who had the money to survive lengthy environmental appeals.

Permits granted by the State Agency of Natural Resources are not as public as Act 250 or local zoning decisions. The only party to these proceedings is the applicant. Nevertheless, these permit applications can involve much technical data and lead to contests between experts provided by the applicant and experts working for or retained by the State. In addition, these permits can sometimes give rise to conflicts between the technical staff of the Agency and the gubernatorial appointees who run the Agency.

Appeals from decisions by the Agency of Natural Resources can be taken directly to the courts or, in the case of water-related issues, to the Water Resources Board, a citizen body charged with applying public policy to competing demands for water resources in Vermont. The Water Resources Board is also advised by State employees.

At the local zoning level, Vermont has, like other states, local zoning boards and planning commissions which administer the local zoning ordinance with respect to site plan review, conformity with town plans, and the like.

Finally, in the case of Sugarbush, there were various federal permit hoops the ski area was required to go through to satisfy the U.S. Army Corps of Engineers (because the Mad River is a navigable waterway) and the U.S. Forest Service (on whose land some of the project would be located). In a small state like Vermont, negotiations with such federal agencies can frequently involve the State's Congressional delegation. Early on in this case, lawyers for Sugarbush were informed that their water withdrawal plans most likely would not require the preparation of a formal Environmental Impact Statement (EIS) by the Forest Service.

Concerns About Water Use

As mentioned earlier, the Sugarbush application came at a time of rising concern regarding public use and public access to the waters of the State. In the late 1980s, the Central Vermont Railway, which owned forty acres of unused rail yard along the waterfront in

Burlington, sought to sell that land for development purposes in order to generate income for its railroad operations. Some of the land had been created by filling in portions of Lake Champlain. The then Socialist Mayor of Burlington, Bernard Sanders, who is now Vermont's lone Congressman, challenged this sale as being a violation of the public trust doctrine. Under this doctrine, the waters of the State are forever owned by the people of the State, and are to be held in trust by its representatives. The City argued that the State had never granted the railroad permission to fill in portions of Lake Champlain, except for the purpose of operating a railroad, and that therefore the land was properly owned by the State and not the railroad.

As a result of this controversy, which went to the Vermont Supreme Court, the public trust doctrine was upheld and today a municipal park occupies much of the land that was to be sold for development by the railway. In 1991, a year prior to the Sugarbush controversy, legislation was introduced by the Agency of Natural Resource in the Vermont General Assembly attempting to codify the public trust doctrine. The effort was unsuccessful. Droves of citizens arrived at the State House complaining that the legislation was a power grab by the State over resources which traditionally had been considered appurtenant to private property. During the course of the debate over the public trust doctrine in the legislature, environmental groups argued that the doctrine was not limited to major lakes and streams, but extended all the way to the upper-most reaches of mountain brooks and rivulets.

At the same time the public trust doctrine was being debated, environmental groups were expressing concern about water quality and water flow in the renewal of licenses by the Federal Energy Regulatory Commission of hydro-electric dams located on Vermont's rivers and streams. Many of these structures were initially built with forty-year licenses, which by historical circumstance were beginning to expire in the early 1990s. As a result of weakness in New England's economy, the availability of vast power reserves from Hydro Quebec, and the shift of Vermont's economy towards tourism, the public at the time was looking at rivers more from an aesthetic and recreational perspective than for power generation. Recognizing this shift, environmental groups were concerned that a poor precedent involving Sugarbush water withdrawal might have a negative impact on those upcoming hydro-electric relicensing hearings.

Sugarbush Begins Process

Sugarbush began its snowmaking permit process in 1990 with application for a local zoning permit and a regional Act 250 permit. Sugarbush was given permission to reduce stream flow of the Mad River below the "February median flow" in the Act 250 permit process. The applications were not opposed and permits were granted by both the Town and the District Commission as acceptable to Sugarbush[1].

The next step in this process was to obtain a Dam Permit from the Agency of Natural Resources (ANR or Agency) in connection with an application for a permit from the U.S. Army Corps of Engineers. The Agency granted Sugarbush a permit (along the lines approved by the District Commission in the Act 250 case) but in May 1992, the Vermont Natural Resources Council (VNRC) appealed the Agency's decision to the State Water Resources Board. VNRC felt the stream should never be reduced below February median flow. The Board handed down a decision February 8, 1993 in which it made substantially more findings, and imposed different and more stringent conditions than the Agency had required. Sugarbush was willing to live with the decision, as the stream flows granted by the Water Resources Board allowed withdrawals below the February median flow. Neither the State nor the VNRC were satisfied. The VNRC was unhappy because the Board had approved the Sugarbush project; the Agency was unhappy because of the Board's reasoning and its possible application in future cases.

The VNRC and two other associated groups (Trout Unlimited and the Sierra Club) threatened to appeal the Board's decision to the Vermont Superior Court. Even though the likelihood of VNRC being successful in court was questionable, it was unlikely the court would be able to address the matter for more than a year. That delay and the risk of losing in court was too much for Sugarbush, which began publicly stating that it might have to close, causing the lay-off, directly or indirectly, of some 3,000 people. Three hundred people (a sizeable crowd by Vermont standards!) protested in front of the State Capital.

[1] The "February median flow" is the median volume of water flowing down the river in the driest winter month, February.

State Response

As a result of the protest and Sugarbush's threat to close, Vermont's Governor, Howard Dean, was thrust into the controversy. The potential economic impact on a state the size of Vermont was very large. Until the parties began negotiating there had been years of dispute and public name calling between the parties, but no resolution of the problems. The issues on the table, from the State's viewpoint, were the jobs; the economic impact of a decision by Sugarbush to close; and the long-term effects of any decision on the State's water withdrawal policy.

When the State looked at the issues and the involved parties, the Governor and his Secretary of the Agency for Natural Resources, Chuck Clarke, decided to try and bring the parties to the table to see if they could negotiate their differences.

Dissatisfaction with the decision by the Water Resources Board granting the dam permit led to the need for negotiation. As mentioned, neither the ANR nor the environmental groups felt they could live with the Board's precedent regarding the state flow policy. The Agency felt that the process of setting state water flow policy was better done by the Agency, with its technical expertise and responsibility for state environmental policy, than by a Board which only responds to and decides disputed cases. Secretary Clarke felt caught in the middle between the Board's decision and an earlier Environmental Board decision on Okemo (another ski area) which took an opposite tact regarding the issue of water flow. Clarke was also concerned about divisions within his own agency. The ANR professional staff seemed to favor the environmental groups, even though his Agency's position before the Water Resources Board supported lower flows.

Clarke had numerous meetings and discussions with the Sugarbush representatives and with representatives from the VNRC. The VNRC had emerged as the major spokesman for many (but surely not all) in the environmental and conservation communities.[2] Clarke believed that there was room for negotiations and possible agreement, even though there were major

[2] The Conservation Law Foundation refused to participate in the ensuing mediation, but in the end did not oppose the settlement.

differences about some of the technical aspects of the debate, and some room for movement by the Agency.

Major Issues in Mediation

The major issues seemed to be whether it was possible to identify additional water storage options for low-water flow periods; the assumptions utilized by the parties to calculate water demand; the possibility of additional water sources and the calculations regarding the volume of those sources; the methods by which the snow making would be managed; and whether the need for water could be reduced by different demand-side decisions.

The environmental community was willing to consider a negotiated settlement for a number of reasons. The publicity and pressure from the Governor were significant, and the environmental groups did not want to be publicly blamed for closing Sugarbush without at least being able to say that they had tried to respond to Sugarbush and to the Governor. In addition, while the environmental groups believed that their legal position was strong, they had to consider the risk of an adverse court decision and the potential effect an adverse decision would have on future cases. Finally, the environmental groups were not sure whether Sugarbush was bluffing about closing; negotiations would enable them to see Sugarbush and its case at close range.

Sugarbush also had incentive to come to the table. The prospect of more time-consuming litigation before it could use one additional drop of water was daunting. Sugarbush felt it could not continue to operate competitively without more snow making capacity. Without new water for snow making, Sugarbush stated, it would die. So the company felt driven to find a solution which would enable it to survive. Litigation did not seem to provide the necessary solution. The company felt that negotiations, at least, offered the possibility of a solution. Sugarbush had also stated publicly that it was ready to use any vehicle, and to meet with anyone, to resolve the issue.

To quote Clarke, "there was a lot of self-interest around the table and self-interest in this instance is what I think allowed us to drive towards a resolution of this issue." (Page 14 of unpublished transcript of Vermont Law School seminar on the Sugarbush dispute, July 16, 1993, hereinafter "VLS transcript.")

The cost of the mediation was an issue for the State. Because the State had an interest in settling the matter, it agreed, before the mediator was selected, to pay for the costs of the mediation. All parties agreed to this. The cost of the mediator was a factor, as was the cost in time and effort spent on the case by Secretary Clarke, who later estimated that he spent about 75% of his time for 8 or 9 weeks on this one case. (This kind of high-level attention, obviously, is a rare commodity.)

Further, since many of the issues involved rather technical questions regarding water flow calculations, the State's water engineers spent a good deal of time addressing the different water flow models prepared by Sugarbush and comparing them to the State's own models. These water flow model discussions were, in and of themselves, a different level of mediation. That is expensive, both in terms of the mediator's time, and more importantly because of the time demands placed on both the State's technical and policy level people.

So while the issues, from the State's perspective, required resolution, the costs were also high. Mediation of such a case is, again to quote Clarke, "not one you enter lightly unless you really believe that there is an opportunity to resolve it in the end." (VLS transcript, p. 15) In fact, Clarke said he ultimately decided to encourage mediation only when he had convinced himself of the unacceptable consequences of not mediating.

State's Role in Mediation

When the State decided to invite the parties into mediation, two important questions were whether the State would be a party to the negotiations and whether it would be a signatory to any agreement. These questions were discussed during the negotiations. The State participated in many of the discussions and State water flow models were utilized in determining flow.

The parties addressed the role of the State most directly at the beginning of the process, when they agreed to come to the table at the request of the State and when they agreed that the State would pay for the mediator, and, at the end of the negotiations, when the parties and the State discussed the question of whether the State should sign the Agreement.

The Agency questioned whether it should sign the Agreement because all of the permit decisions were going to be made by the State, and those permit decisions could not be made without public hearings and other public processes. So, from the Agency's viewpoint, signing the Agreement might have pre-committed it to a result on a permit decision prior to the public hearings. The parties (both Sugarbush and the VNRC) agreed with this view and wanted the State to have the ability to issue the permit only after considering any additional information from the public hearings process. There was agreement between the State, Sugarbush and the VNRC that while the negotiations would be conducted with the support and participation of the Agency, any agreement would be strictly between the private parties.

The negotiations began with two preliminary meetings with the Agency, Sugarbush and the VNRC to discuss whether to engage in negotiations and if so, whether to bring in a mediator. According to Clarke, "after two meetings it was decided to move forward and see about getting a mediator . . . .(W)e thought it might be better because we all had personal interests, that we get someone from the outside. And I agreed with that." (VLS transcript, p. 18)

The Agency obtained a list of mediators, and called two or three people on the list. An Agency representative spoke to the first person who was available.

That person was Dan Dozier. The Agency staffer asked Dozier for some references and whether he would be available immediately. As it happened, the day Dozier received the call from the Agency, he was moving boxes of material from his previous employer to his new office at TLI Systems, and he was available. The Agency was provided with references from Dozier and they checked out.

Dozier spoke to the ANR staff regarding the issues in dispute the following Monday, and was given the names and phone numbers of the parties' representatives. He spoke to each of the parties regarding the case, introducing himself, asking if they had any questions about who he was. He provided references and a copy of his resume. He told the parties that he would get back with them in a day or two after they had a chance to check him out and see if, after having

vetted his background, they still were willing to proceed with him as a possible mediator, should they agree to negotiate.

Substantive Discussions Begin

When Dozier called the parties back they began to discuss the substance of the dispute. Each of the parties indicated that they were willing to enter into negotiations with Dozier as the mediator. The discussions also touched on the issues the parties wished to put on the table and the results, should the negotiations be successful, that each party would like to see.

The parties agreed to meet and discussed who would be attending the meeting. Before each meeting the parties discussed the procedural issues, such as who would represent each of the parties, who would be the public spokesperson for each party, and who from the ANR staff, if anyone, could participate in various discussions.

Meetings were generally scheduled to be two days long, with about three weeks between meetings. After the first meeting, it became clear that there was not a lot of trust between the parties. So, right from the beginning, Dozier broke the parties into separate caucuses and met privately with each party for some time to attempt to understand the major issues and interests. Then the parties would meet jointly according to an agenda defined by the mediator to discuss a specific issue.

The individuals involved in the mediation were quite diverse. Representing Sugarbush were its president, Bob Berrey, a former Boy Scout and professional football player, and his company's Director of Planning, Rob Apple. As time went on, they were accompanied increasingly by their lawyer, Steve Crampton. All three agreed to the mediation but were skeptical.

The environmental and conservation groups were represented by Ned Farquahr and his lawyer, Chris Kilian. Farquahr has been described as "patrician" and Kilian as "tenacious." Finally, on behalf of the State, there was Clarke, a long-time public employee who realized that

his job and future were on the line in resolving this dispute,[3] Gina Campoli from the ANR Planning Division and, on technical issues, Jeff Cueto, the State water resources staffer.

From time to time, technical consultants for both Sugarbush and the State contributed their analysis. "It became a battle of Jeffs," says Dozier, referring to the State's Jeff Cueto and Sugarbush's Jeff Nelson, a water resources consultant working for Sugarbush. In fact, the ability of the technical experts to develop better, trustworthy data was essential to the parties in reaching new positions they could be comfortable with.

This issue-by-issue process continued throughout the negotiations, and was described by the participants as an effective way for the issues to be discussed. By spending a fair amount of time reviewing the issues, some trust began to develop between the parties. As Bob Berrey of Sugarbush, put it:

> I discovered that Ned [VNR's executive director] was a business man -- he had to run a business every day -- and he discovered that I was an environmentalist and used to be a Boy Scout, a thing he didn't think was possible. I found out that Chuck [Clarke] really cared about the environment as opposed to what was in the file cabinet. As we got together and had these conversations, and this went on for six weeks, we got to know each other very well. The trust issue is what I believe evolved from it. (VLS transcript, p. 20)

When Dozier began to discuss the issues with the parties, he simply asked questions like: who are you, what do you want and so on. Both Sugarbush and the VNRC stated that they had very clear goals they wished to see from the negotiations. Sugarbush said, `Water is critical to us. We need enough water to make snow during the dry times in the winter.' The VNRC said, `We are very concerned about the policy implications. We cannot live with a result that allows water to be taken from the river in such amounts and times that it will result in the flow levels being drawn below the February median flow levels of the river.'

[3] Following resolution of this dispute, Clarke was named Administrator of Region 9 (Seattle) of the U.S. Environmental Protection Agency.

The Principal Issue

The principal issue was how much water could Sugarbush take from the Mad River to make snow. In order to accomplish their snow-making goals, Sugarbush needed a certain volume of water (measured in acre-feet, as snow making for a ski area requires a lot of water). The VNRC was concerned that giving Sugarbush a permit to withdraw too much water - defined by VNRC as withdrawals reducing the river flow to below the median flow of the river during the driest winter month, February - would have an adverse effect on the river environment, on the fish eggs, and on other aquatic biota.

Snow making requires an enormous amount of water - at the time it is needed. It does the ski area no good if there is plenty of water in the river (as river levels fluctuate a great deal depending on the weather) at a time when it is either too warm to make snow or artificial snow is not necessary. Unfortunately, the time when artificial snow is needed is often the same time when stream flows are low.

The first step in the negotiations was to understand the assumptions each of the parties brought to the table regarding the water flow calculations. So the parties went through a rather involved technical discussion about how the water flow calculations were made, what the assumptions were, and what the demand assumptions were regarding snow making. They also discussed in detail the storage alternatives, both the pond already approved, and possible additional storage possibilities. This detailed work was absolutely necessary before the parties could even begin to discuss settlement options.

This approach, to attend to the technical details, was a fundamental key to the negotiations. It became clear during those discussions that the ANR professional staff had felt ignored. Their professional opinions had not been given respect during the permitting process before the State Act 250 Board or by the Water Resources Board. Further, the State staff had major differences with the professional water resources consultant retained by Sugarbush.

Once the technical issues were on the table, it was possible to review carefully the different assumptions and understand why the ANR staff and the consultant were so far apart.

Working with Secretary Clarke, one of the first goals of the mediation was to narrow and define those differences. As a result of those efforts, the technical experts began to realize that they might be able to address some of the problems each party had. Sugarbush began to reconsider the "coverage", that is the amount of snow and the number of days snow would be made to see if it was possible to reduce the total volume of water they considered necessary. The VNRC began to assist in the effort undertaken by Sugarbush and the ANR staff to identify additional storage options as well as identify additional sources of water.

It was clear during this process that each party began to realize that there were options available which might allow them to keep their objective and still settle the case. As in many disputes, the lack of trust between the parties was one of the major obstacles. From the neutral's perspective, it was clear that the parties had a long history in their relationship. A major point of the mediation was to help the parties understand the assumptions each party used to calculate water flows. In addition, throughout the negotiations, both Dozier and Clarke reminded everyone of the negative consequences of not reaching an agreement. Would Sugarbush close? Who would be held responsible if it did? Could the State or VNRC live with the Resources Board precedent?

Since the issues, in part, related to flow rather than absolute water volume, storage was a major method of generating "additional" water. This is possible because during high water flow it is quite simple to divert some of that flow into a storage area. Storage of the volume necessary to insure the snow coverage Sugarbush needed, however, was so large as to become impractical. The storage itself posed possible environmental problems. The parties spent a good deal of time attempting to identify additional storage options which would work environmentally, practically and economically.

A second major issue the parties considered was whether there were other sources of water. Sugarbush already had a withdrawal permit from a mountain side stream (Clay Brook) for domestic water supply use. Sugarbush's assumptions regarding the volume of available water from that stream were carefully examined. The ANR professional staff pointed out that if the outtake from the mountain side stream was moved downstream a bit a larger volume of water

would be available. That additional water supply, it turned out, was enough to enable the parties to believe for the first time that they might be able to agree.

The fact that the State and the VNRC were willing to try to find more water for Sugarbush obviously increased the level of trust. The manner in which the parties structured the withdrawal from the upland stream gave greater stream protection than the permit Sugarbush already had (which allowed the ski area to withdraw well below the February median flow). By moving the Clay Brook intake downstream, a greater volume of water could be withdrawn while remaining in compliance with the existing permit. The further downstream the intake was placed, the larger the brook based on a larger drainage area. The VNRC and the state got, in essence, better environmental protections for the stream than was provided in the existing permit and Sugarbush got more water for snow making. This was almost a classic case of a "win-win" situation.

Culmination of Mediation

The culmination of the mediation was a thirteen page agreement signed by Sugarbush and the environmental groups and announced by the Agency of Natural Resources and Governor Dean. The agreement outlined a method for obtaining new permits for increased water storage but also for limiting water withdrawal to no less than the February median flow. Significantly, the agreement also committed all parties to request a decision from the Superior Court invalidating the Water Resources Board decision. The environmental groups were adamant that they did not ever wish the Board's decision to be precedential in the future.

The agreement did not solve all issues for Sugarbush. Going into the mediation, Sugarbush had recognized that non-participants, might create problems in the future. Nevertheless, the company felt that momentum would shift its way through a successful mediation, and that objections of non-participants could be addressed later.

That is exactly what happened. The terms of the ultimate agreement were helpful in convincing the Court (and others) that the Water Resources Board decision should not be precedential. (Since the project was substantially revised after the mediation, the decision really

became moot.) Second, the agreement was helpful in defeating an attempt in Federal Court by two individuals to stop the project on the basis that a federal permit was required for the Clay Brook modification. Finally, to a very large extent the success of the mediation with VNRC mooted the criticism Conservation Law Foundation sought to raise.

Long-term, the results of the Sugarbush mediation in Vermont have been remarkable. Since the agreement was struck, there has been no major litigation between Vermont ski areas and the environmental community. There is an acceptance of snow-making and water withdrawal, and the February median flow standard. There appears to be a new recognition of the symbiosis between ski areas and the environmental lobbying groups. It's not just coincidence that Sugarbush is now part of the American Skiing Company, owners of Killington, Pico Peak, Waterville Valley, Sunday River and Mt. Snow and probably the largest skiing company in the world.

Mediation, at least in the case of the Sugarbush negotiations, is a lot of questions. What do you want? Why are you here? What is going on now? What do you think about the other party's viewpoint? What do you want me to tell the other side? Question and question, push and push. Mediation is not parties sitting together and compromising on fundamental issues. It is not cutting the baby in half. It is about generating new options, pushing and probing, about not accepting answers at face value, and about pointing out areas of agreement or the consequences of no agreement.