

KNOWN UNKNOWNNS: ANCIENT ROADS IN NORTHERN NEW ENGLAND

The conundrum of known unknown roads brings to mind one of former Secretary of Defense Donald Rumsfeld's famous existential musings: "As we know, there are known knowns. There are things we know we know. We also know there are known unknowns. That is to say we know there are some things we do not know. But there are also unknown unknowns, the ones we don't know we don't know."¹

INTRODUCTION

Kathy and James Peterson live in Chittenden, Vermont. In 2003, they wanted to build an addition on their home,² but they were surprised to discover that the home they had owned since 1997,³ and which they presumed to be free of encumbrances, actually encroached on the so-called "Green Road," a mail route laid out in 1793 but not maintained by the town since the 1820s or 1830s.⁴ The Town of Chittenden therefore denied the Petersons a permit to build the addition⁵ to their 2500-square-foot white colonial⁶ and took the issue a step further. On a Saturday morning in May 2004, "two members of the town select board, accompanied by the town historian and others, showed up with chain saws," intending to clear the town's forgotten right-of-way, which had grown back into forest.⁷ The town officials "began by taking down trees on the adjacent property and were moving toward the Petersons' plot when the state police intervened."⁸

Whether the town had a claim to the right-of-way across the Petersons' property depended, in part, on whether it constituted an "ancient road" to which the town had a legally cognizable interest. To the layperson, an

1. *McAdams v. Town of Barnard*, 2007 VT 61, ¶ 13 n.5, 182 Vt. 259, 267 n.5, 936 A.2d 1310, 1315 n.5 (quoting Demetri Sevastopulo, *Bush's Poet-in-Residence Rides Away to Find Montana*, FIN. TIMES (London), Nov. 11, 2006, at 3).

2. Statement of Undisputed Facts at 2, *Peterson v. Town of Chittenden*, No. 375-6-04 Rdcv (Rutland Sup. Ct. Aug. 31, 2007) [hereinafter *Peterson Statement of Undisputed Facts*]. See also Abby Goodnough, *Vermont Towns Try to Find Their Roads Less Traveled*, N.Y. TIMES, Apr. 11, 2008, at A16, available at 2008 WLNR 6800973 (describing the *Peterson* case); Ernest Sander, *Roads Not Taken Still Play a Part In Vermont Life—You Can't Always See Them, But They Do Exist, And They Do Cause Trouble*, WALL ST. J., Feb. 15, 2007, at A1, available at 2007 WLNR 3046268 (describing ancient roads generally and the *Peterson* case in particular).

3. *Peterson Statement of Undisputed Facts*, *supra* note 2, at 3.

4. *Id.* at 7–9.

5. *Id.* at 2.

6. Sander, *supra* note 2, at A1.

7. *Id.*

8. *Id.*

ancient road might be an old woods road, often bordered by stone walls, perhaps with old cellar holes and remnants of long-abandoned farms scattered off to the sides. It may be passable by four-wheel-drive vehicles; it may be used exclusively by hunters, dog-walkers, horseback-riders, and other nonmotorized recreational users; it may be largely obscured by erosion and vegetation; or it may fall somewhere in between these categories. Regardless, these are *not* ancient roads in the legal sense. Vermont law says that ancient roads (officially known as “unidentified corridors”) are town highways that:

- (i) have been laid out as highways by proper authority through the process provided by law at the time they were created or by dedication and acceptance; and
- (ii) do not, as of July 1, 2009, appear on the town highway map prepared pursuant to section 305 of this title; and
- (iii) *are not otherwise clearly observable by physical evidence of their use as a highway or trail*; and
- (iv) are not legal trails.⁹

Vermont law does not define “clearly observable.” Ancient roads have been referred to, however, as “paper streets” because they exist only on paper.¹⁰

In the Petersons’ case, the court had to resolve these ambiguities to determine whether the Green Road had ever been discontinued, or “thrown up” in the parlance of Vermont municipal government.¹¹ In the end, the Petersons and the town stipulated to a judgment by consent, in which the town retained a permanent easement by reclassifying the Green Road as a legal trail and paying the Petersons \$32,000 as compensation for the easement.¹² The town also agreed that “there shall be no [other] Public Roads or rights-of-way that cross or abut the Peterson property.”¹³ Illustrating the complexity of resolving ancient-roads disputes, the court urged the town to “take all reasonable steps within its power to complete

9. VT. STAT. ANN. tit. 19, § 302(a)(6) (2007) (emphasis added).

10. Paul J. Alfano, *Roads Revisited: Creation and Termination of Highways in New Hampshire—An Update*, 46 N.H. B. J., Autumn 2005, at 56 (referring to New Hampshire’s equivalent of “ancient roads” as “paper streets”).

11. Peterson Statement of Undisputed Facts, *supra* note 2, at 8 (using the term “thrown up” to describe a discontinued road).

12. Judgment by Consent at ¶¶ 2, 5, *Peterson v. Town of Chittenden*, No. 583-9-04 Rdcv (Rutland Sup. Ct. Feb. 28, 2008) [hereinafter *Peterson Judgment*]. Under Vermont law, a trail is defined as “a public right-of-way which is not a highway and which. . . previously was a designated town highway,” and for which “town[s] shall not be responsible for any maintenance including culverts and bridges.” VT. STAT. ANN. tit 19, §§ 301(8)(A), 302(5) (2007).

13. *Peterson Judgment*, *supra* note 12, at ¶ 1.

the reclassification process as soon as reasonably possible,” especially since the Green Road continued into two other towns that would also have to reclassify the road as a legal trail.¹⁴

This case illustrates a major problem with Vermont’s common law. Since Vermont does not have a presumption of abandonment for non-use of deeded public or private easements,¹⁵ town roads mapped in the eighteenth century are still valid town rights-of-way, even if, like the Green Road, the town has not maintained them for a century or more.¹⁶ Moreover, in many cases, these roads were never actually built, so for a prospective home buyer inspecting a property, there may be absolutely no evidence on the ground that the town ever had an interest in the property. The common-law doctrine of nonabandonment, coupled with the lack of physical evidence to give notice to property owners, and the fact that a standard 40-year title search may not reveal a 200-year-old right-of-way cloud titles and create uncertainty.¹⁷

Enough cases of these ancient roads wreaking havoc with private property rights signaled to realtors, title insurers, and real estate attorneys that the legislature needed to do something to quiet title and provide assurance to Vermont’s important real-estate industry.¹⁸ These groups convinced the Vermont legislature to pass Act 178, which gives towns the option of researching their ancient roads, holding public hearings, and adding them to the town highway maps by 2009.¹⁹ Any ancient road not added to the town highway map by 2009 becomes an “unidentified corridor,” and on July 1, 2015, all unidentified corridors are automatically

14. *Id.* at ¶ 2.

15. *Lague v. Royea*, 152 Vt. 499, 503, 568 A.2d 357, 359 (1989). The *Lague* court, clarifying Vermont’s previously inconsistent rules on abandonment of easements, wrote:

The burden on the party claiming an abandonment of an easement is a heavy one: Such an abandonment may be established only by “acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence.”

Id. (quoting *Nelson v. Bacon*, 113 Vt. 161, 165, 32 A.2d 140, 146 (1943)).

16. Nor can the roads be de facto discontinued by adverse possession, since individuals normally cannot adversely possess against the government. 3 AM. JUR. 2D *Adverse Possession* § 268 (2002).

17. VT. STAT. ANN. tit. 27, § 601 (2008) (“Any person who holds an unbroken chain of title of record to any interest in real estate for 40 years, shall at the end of that period be deemed to have a marketable record title to the interest . . .”). “A Title Search covering a period to an instrument recorded at least 40 years is sufficient . . .” VERMONT TITLE STANDARDS, PERIOD OF SEARCH § 2.1, http://www.vermontattorneytitle.com/filemanager/filedownload/php8j3cV2/2008_titlestandards_final.pdf (2008).

18. H.334, 2005–2006 Leg., Reg. Sess. § 1 (Vt. 2006).

19. 2006 Vt. Acts & Resolves 354 (establishing unidentified corridors as a new type of town highway and providing for their automatic discontinuation if they are not reclassified by a certain date).

discontinued, with the right-of-way vesting in fee simple to the adjoining property owner.²⁰ Between 2009 and 2015, towns may reclassify an unidentified corridor as a highway or trail, but must do so according to the current process for reclassifying a town highway²¹—a more arduous process than simply adding an ancient road to the town highway map.²² Under Act 178, towns essentially have two options regarding their ancient roads: map them or lose them.

Act 178 will eventually quiet title to all Vermont properties affected by ancient roads. Yet, like most legislative solutions, the Act is imperfect, and the various interest groups involved believe they made significant concessions in reaching a compromise.²³ Specifically, motorized recreation groups like the Vermont Association of Snow Travelers (VAST) feared that they could lose access to their snowmobile, all-terrain vehicle (ATV), and jeep trails.²⁴ Towns worried that by giving up their rights to these corridors, they could hamper future efforts to create new neighborhoods, build recreation trails, and provide municipal services.²⁵ Realtors, title-insurance companies, and real-estate attorneys liked that Act 178 quieted title and discontinued roads, but felt its time frame was too long and would lead to nine years of litigation, as towns scurried to uncover as many ancient roads as possible before 2015.²⁶ Numerous other groups, including town historical societies, surveyors, sportsmen's groups, and mountain-bike clubs all had their own concerns, too.²⁷ Representative Margaret Flory, who introduced H.334 (the bill that led to Act 178), summed up the legislative process:

20. *Id.*

21. *Id.* at 355 (“On or by July 1, 2015 . . . an unidentified corridor may be reclassified as a class 1, 2, 3 or 4 highway or as a trail.”).

22. *See infra* pp. 7–8 (describing Vermont’s reclassification process).

23. Telephone Interview with Margaret Flory, Representative for Rutland-6, Vt. House of Representatives, in Pittsford, Vt. (Nov. 17, 2007) [hereinafter Interview with Margaret Flory].

24. Telephone Interview with Bryant Wilson, Executive Dir., Vt. Ass’n of Snow Travelers (VAST), in Barre, Vt. (Nov. 19, 2007) [hereinafter Interview with Bryant Wilson]. VAST is the umbrella organization for 138 local snowmobile clubs with 35,000 members in Vermont. Vt. Ass’n of Snow Travelers, About VAST, <http://www.vtvast.org/About-VAST.html> (last visited Dec. 3, 2008).

25. Telephone Interview with Trevor Lashua, Senior Assoc., Advocacy and Info., Vt. League of Cities and Towns, in Montpelier, Vt. (Nov. 19, 2007) [hereinafter Interview with Trevor Lashua].

26. Telephone Interview with Richard Higgerson, Realtor, Lang McLaughry Spera Real Estate, in Norwich, Vt. (Nov. 21, 2007) [hereinafter Interview with Richard Higgerson]; Telephone Interview with Andrew D. Mikell, State Manager, Vt. Attorneys Title Corp., in Burlington, Vt. (Nov. 19, 2007) [hereinafter Interview with Andrew Mikell]; Telephone Interview with Pike Porter, Realtor, Century 21 Jack Assocs., in Burlington, Vt. (Nov. 13, 2007) [hereinafter Interview with Pike Porter].

27. *See, e.g.*, Crown Point Road Assoc., Ancient Roads, *in* Recent News, <http://www.crown-point-road.org/newsletter.htm> (last visited Dec. 4, 2008) (expressing interest in keeping ancient roads open to hikers); Vt. Traditions Coal., Accomplishments, http://www.vermonttraditions.org/vtc_accomplishments.htm (last visited Dec. 4, 2008) (advocating for public access to ancient roads).

“All sides are probably equally unhappy [with Act 178], which is probably a sign that it’s a fair bill.”²⁸

This Note explores the saga of ancient roads in Vermont, and to a lesser extent, in New Hampshire and Maine. Part I details how roads were planned and laid out in northern New England. It also explains how each of these three states adopted different laws that either allowed ancient roads to exist indefinitely or extinguished towns’ rights-of-way after a statutory period of time. Part II traces the recent history of ancient roads in Vermont; the litigation over ancient roads clouding title to private property; the various factions and special-interest groups that lobbied the legislature to make their agenda known; the legislative history as the bill wound its way through the State House; and the “final product,” Act 178. Part III analyzes Act 178’s effectiveness in quieting title and reducing litigation. It also explores whether the language of the Act favors some special interest groups over others. Finally, it proposes reforms to Act 178, with a specific focus on ways towns can transform ancient roads into recreational trails. This Note concludes by reinforcing the generally positive effects of Act 178 while also suggesting improvements.

I. BACKGROUND: HISTORY OF ANCIENT ROADS IN NORTHERN NEW ENGLAND

A. Vermont and New Hampshire: No Extinction of Easements

When the first white settlers arrived in Vermont in the mid-eighteenth century, the land was already delineated by travel routes. People traveled “to a neighbor’s dwelling, or the river or pond, or a neighboring village in another town, and they traveled over routes that were established before they arrived, by Native Americans, pioneers, and wanderers. Paths became trails; trails were widened and became roads.”²⁹ In 1781, the Vermont legislature passed a highways act stating: “[A]ll roads heretofore laid out that are not surveyed by the compass within two years from the passing [of] this act, shall not be deemed lawful.”³⁰ The language of the highways act applied not only to roads that had been *built*, but to any road that had been *laid out*. This language foreshadowed the problems we face today—namely that some roads were surveyed and made official but never actually built, leaving no physical evidence of their existence.

28. Interview with Margaret Flory, *supra* note 23.

29. Paul Gillies, *Ruminations: Sleeping Roads*, 30 VT. B.J., Spring 2004, at 14.

30. An Act to Settle and Establish All Highways that Are Laid Out in This State, in VERMONT STATE PAPERS 422, 423 (William Slade ed., Middlebury 1823).

Furthermore, “[m]any towns began compiling road records in a Road Survey Book. Other towns just threaded road layouts into the land records or town meeting minute books, often without a sense of continuity or regard for future researchers.”³¹ As a result of this haphazard road recordation, today not only will a standard forty-year title search not reveal ancient roads on a property, but even finding the roads in the town records may be “impossible.”³² Andrew Mikell, an attorney and the State Manager of Vermont Attorneys Title Corporation, said that given the state of towns’ ancient-roads records, real estate attorneys “cannot reasonably uncover roads from the 1700s” by searching title because in many cases the roads are not recorded in the deed books.³³ The Vermont Supreme Court agrees with Mr. Mikell: “The difficulty in determining whether abandoned roads still legally exist stems from inconsistent, and sometimes incomprehensible, town records dating back two centuries or more.”³⁴

This road-recording chaos would not cause problems today if Vermont had a presumption of abandonment following a statutory period of nonuse similar to that of other states, including Maine.³⁵ Ancient roads that were never laid out or that fell into disuse would long ago have been presumed to be abandoned and discontinued. Vermont, however, follows the common law³⁶ and keeps its ancient roads alive.³⁷ The Vermont Supreme Court has made clear that “an easement acquired by deed cannot be extinguished by nonuse alone, no matter how long it continues.”³⁸ This combination of inadequate record keeping and the common-law doctrine, which keeps easements intact indefinitely, has simmered in town clerks’ offices in Vermont for centuries, just waiting for the right moment to boil over.³⁹

31. Gillies, *supra* note 29, at 14.

32. Interview with Margaret Flory, *supra* note 23. Aside from serving as a Representative, she is also an attorney in Rutland with an active real estate practice. *Id.*

33. Interview with Andrew Mikell, *supra* note 26.

34. *McAdams v. Town of Barnard*, 2007 VT 61, ¶ 13, 182 Vt. 259, 266, 936 A.2d 1310, 1315.

35. *See infra* Part I.B (explaining Maine’s ancient-roads law).

36. “Party claiming abandonment of easement must prove that the acts claimed to constitute the abandonment are of a character so decisive and conclusive as to indicate a clear intent to abandon the easement . . . [M]ere nonuse will not suffice to establish an abandonment.” 25 AM. JUR. 2D *Easements and Licenses* § 98 (2008).

37. *Capital Candy Co. v. Savard*, 135 Vt. 14, 16, 369 A.2d 1363, 1365–66 (1976) (holding that “public use of a highway is discontinued only when certain statutory procedures are followed”). *See also* *Town of Barton v. Town of Sutton*, 93 Vt. 102, 103 n.1, 106 A. 583, 584 n.1 (1919) (“The procedure to be followed in laying out or discontinuing a highway is wholly statutory and the method prescribed must be substantially complied with or the proceedings will be void.”).

38. *Lague v. Royea*, 152 Vt. 499, 501, 568 A.2d 357, 358 (1989).

39. *See infra* Part II.A (discussing prominent cases from roughly 2001 to 2003 leading to legislative reform).

New Hampshire follows the same common-law doctrine of continued use. In New Hampshire, “[o]nce established, a highway is presumed to exist until discontinued. Only a formal discontinuance by town meeting vote can legally terminate the public’s right to travel on any public way.”⁴⁰ New Hampshire’s discontinuance provisions are slightly different from Vermont’s. When a Vermont town discontinues a road, it may be “discontinued as a trail.”⁴¹ This means that the town retains a right-of-way of the same width as the previous highway,⁴² but is no longer responsible for any maintenance.⁴³ The town may also discontinue a road absolutely, in which case it retains no interest. The land then returns to the “lots to which it originally belonged” or to the owners on each side of the discontinued highway.⁴⁴ In some cases the adjoining landowner may retain a private right-of-way.⁴⁵ New Hampshire towns can either discontinue a road absolutely⁴⁶ or “subject to gates and bars,”⁴⁷ which means the road is “still a public highway, but the municipality is not responsible for its maintenance.”⁴⁸ Since you cannot drive a vehicle over a road blocked with gates and bars, this denomination is the functional equivalent of Vermont’s legal trails.

Other than this subtle distinction, Vermont and New Hampshire’s discontinuation statutes are very similar. In Vermont, five percent of a town’s voters can petition the selectboard to discontinue a town highway, or the board can make this motion on its own.⁴⁹ Under Act 178, a landowner with an unidentified corridor crossing his property can petition the selectboard on his own.⁵⁰ Upon receiving a petition, the selectboard must then provide thirty days’ notice to adjoining landowners of both a hearing and a site inspection.⁵¹ They must also:

40. Alfano, *supra* note 10, at 63. *See also* Davenhall v. Cameron, 336 A.2d 499, 500 (N.H. 1976) (“Once a highway is established, it is presumed to exist until discontinued, and discontinuance is not favored in the law.”).

41. VT. STAT. ANN. tit. 19, § 305(j) (Supp. 2006).

42. *Id.* § 702.

43. *Id.* § 302(a)(5).

44. *Id.* § 775.

45. *Id.* *See also* Thompson v. Ryan, No. 06-286, slip op. at 1 (Vt. May 5, 2007) (unreported mem.), available at <http://www.vermontjudiciary.org/upeo/eo06-286.pdf> (holding that an interior landowner’s right to access his land via a discontinued public road is limited to “what was reasonable and convenient, as evidenced by [the landowner’s] use during his lifetime”).

46. N.H. REV. STAT. ANN. § 231:43 (1993 & Supp. 2008).

47. *Id.* § 231:45 (1993).

48. Alfano, *supra* note 10, at 63.

49. VT. STAT. ANN. tit. 19, § 708(a) (Supp. 2006).

50. 2006 Vt. Acts & Resolves 358.

51. VT. STAT. ANN. tit. 19, § 709 (2006).

give notice to any municipal planning commission in the town, post a copy of the notice in the office of the town clerk, and cause a notice to be published in a local newspaper of general circulation in the area not less than ten days before the time set for the hearing.⁵²

Following the hearing and inspection, if in the board's opinion the "public good, necessity and convenience of the inhabitants of the municipality require the highway" to be discontinued, the highway must be properly surveyed.⁵³ Finally, if the board decides to discontinue the highway, it must do so "in writing[,] setting forth a completed description of the highway."⁵⁴ The title to the underlying land then reverts to the adjoining property owners, as described above.⁵⁵

By comparison, New Hampshire appears to give property owners slightly less due process. Class IV, V, and VI highways⁵⁶ "may be discontinued by vote of a town," provided abutting property owners are given fourteen days' notice.⁵⁷ The only other step is approval by vote of the town's legislative body.⁵⁸

This examination of the common and statutory laws of Vermont and New Hampshire shows close similarities between the states. Both require affirmative acts by town government to discontinue roads. Furthermore, the lack of a presumption of abandonment means that highways laid out in post-colonial days may still exist, if only on yellowing paper in the moldy basements of town or county clerks' offices. Yet, only Vermont has seen a spate of litigation involving ancient roads. A number of reasons explain this discrepancy.

52. *Id.*

53. *Id.* § 710 (2006).

54. *Id.*

55. *Id.* § 775 (2006).

56. New Hampshire classifies highways on a continuum from Class I ("the primary state highway system," including major roads and interstates) through Class IV ("consist[ing] of all highways within the compact sections of cities and towns"), Class V ("consist[ing] of all other traveled highways which the town has the duty to maintain regularly and shall be known as town roads"), and Class VI ("consist[ing] of all other existing public ways, and shall include all highways discontinued as open highways and made subject to gates and bars . . . and all highways which have not been maintained and repaired by the town in suitable condition for travel thereon for 5 successive years or more"). N.H. REV. STAT. ANN. § 229:5 (1993 & Supp. 2008). Vermont, by contrast, has only four categories of roads, of which the most relevant to the ancient roads issue is Class 4, defined as "all town highways that are not class 1, 2, or 3 town highways or unidentified corridors." VT. STAT. ANN. tit. 19, § 302(a)(4) (Supp. 2006). *See also supra* note 9 and accompanying text (defining "unidentified corridors").

57. N.H. REV. STAT. ANN. § 231:43(I) (1993 & Supp. 2008).

58. *Id.* § 231:43(II) (1993).

First, Vermont's ancient-roads litigation is concentrated in three "hot" towns: Chittenden (in Rutland County), Bethel, and Barnard (both in Windsor County).⁵⁹ This concentration has resulted in significant litigation and media attention, which in turn alerted other towns and special-interest groups to the ancient-roads issue. While ancient-road litigation has also been sprinkled amongst other towns,⁶⁰ these three towns contain the bulk of the known conflicts and have also grabbed the most headlines.⁶¹ A domino effect occurred wherein local-history research revealed an ancient road and caused trouble for one property owner, and then nervous town officials and residents beefed up their defenses in anticipation of problems.⁶² No comparable situation has ever occurred in New Hampshire.

Second, New Hampshire's surveying and recording systems have been more sophisticated than Vermont's since the earliest settlement. Phillip Carrigain, a Dartmouth graduate who served as State Surveyor and then Secretary of State at the turn of the nineteenth century, surveyed and mapped much of New Hampshire, providing a consistent basis for later mapping.⁶³ Later, in the early twentieth century, a fungus called blister rust afflicted New Hampshire's white pine stands. As a result, the state began a decades-long program of creating detailed maps, mostly south of the White Mountains, to guide fungus-eradication crews.⁶⁴ These maps are still used by New Hampshire attorneys to evaluate land disputes, and to determine whether ancient roads were ever created or discontinued.⁶⁵ By contrast, no Vermont directive called for extensive, state-wide surveying in the early days of statehood, so there is less of a record on which to base ancient-roads claims. Furthermore, whereas New Hampshire land records are kept at the

59. Interview with Andrew Mikell, *supra* note 26. See *infra* Appendix (map of Vermont with counties and "hot" towns).

60. See, e.g., *Capital Candy Co. v. Savard*, 135 Vt. 14, 15, 369 A.2d 1363, 1364–65 (1976) (concerning ancient-roads litigation in Barre).

61. See Sam Hemingway, *Battle of Barnard Exposes Land-Use Tiff*, BURLINGTON FREE PRESS, Mar. 26, 2006, at 1A (examining the *McAdams* case in Barnard); Matt Sutkoski, *Towns Take Stock of Old Roads*, BURLINGTON FREE PRESS, Dec. 11, 2006, at 2B (reporting an ancient-road dispute in Chittenden).

62. In Barnard, for example, John Dutton, "who, though not a licensed surveyor, has a considerable amount of surveying experience and expertise acquired before surveyors were required to be licensed," and who has been researching and mapping town roads, brought the ancient-roads issue to light. Findings of Fact, Conclusions of Law, & Declaration at 1, 4, *Muller v. Town of Barnard*, No. 272-5-02 Wrcv (Windsor Sup. Ct. Feb. 2, 2004) [hereinafter *Muller Findings of Fact*].

63. CHARLES EDWARD BEALS, JR., *PASSACONAWAY IN THE WHITE MOUNTAINS* 167–68 (1916); 3 EVERETT S. STACKPOLE, *HISTORY OF NEW HAMPSHIRE* 67 (1916).

64. STATE OF NEW HAMPSHIRE, *BIENNIAL REPORT OF THE FORESTRY COMMISSION* 99–100, 109–10 (1932) (on file with *Vermont Law Review*).

65. Interview with Bradford T. Atwood, Attorney, Clauson, Atwood & Spaneas, in Hanover, N.H. (Dec. 4, 2007).

county level,⁶⁶ Vermont records are kept at the town level.⁶⁷ Vermont has 255 towns, cities, gores, and other unincorporated political units,⁶⁸ and New Hampshire has just ten counties.⁶⁹ Thus, there are far fewer variables.

Third, New Hampshire permits the creation of highways by prescription, which hinders the reestablishment of ancient roads. New Hampshire law allows “roads which have been used as such for public travel . . . for 20 years prior to January 1, 1968” to become public highways under certain circumstances.⁷⁰ “To establish a highway by prescription, the proponent must prove by a ‘balance of the probabilities’ that the general public used the way in question continuously, without interruption and under a claim of right for 20 years without the permission of the owner.”⁷¹ Although the language of the statute appears simple, in fact “the courts have required proof of some additional elements. The person claiming the existence of a highway has the burden of proof”⁷² in showing: uninterrupted use (“[p]ublic use during the 20-year period must have been ‘continuous’”);⁷³ definite line of travel (“the *route* of public travel [must have] a well-established consistency”);⁷⁴ and adversity (members of “the public who used the roadway claimed or believed that they had a *right* to do so”).⁷⁵ The burden of producing evidence from 200 years ago to meet the requirements of establishing a highway by prescription could therefore be very difficult and discourage ancient-roads proponents.

New Hampshire has generally had better record keeping and more consistency in recording chains of title. This increased precision is one reason why New Hampshire has not seen the same kind of ancient-roads litigation as Vermont. It is also possibly a simple matter of luck that there has not been an effort to research or catalog old town highways. Perhaps New Hampshire’s town historical societies are not as well staffed as Vermont’s, or the county records not as accessible, or the local snowmobile

66. N.H. REV. STAT. ANN. § 477:3-a (Supp. 2007).

67. VT. STAT. ANN. tit. 27, § 341(a) (Supp. 2006).

68. Vt. Geographic Alliance, St. Michael’s College, Vermont’s Boundaries and Political Divisions, http://academics.smcvt.edu/vtgeographic/textbook/borders/vermont_borders.htm (last visited Dec. 4, 2008).

69. N.H. REV. STAT. ANN. § 22:1 (2000).

70. N.H. REV. STAT. ANN. § 229:1 (1993).

71. Alfano, *supra* note 10, at 62 (quoting *Catalano v. Town of Windham*, 578 A.2d 858, 861 (N.H. 1990)). See also LOCAL GOV’T CTR., N.H. MUN. ASSOC., A HARD ROAD TO TRAVEL: NEW HAMPSHIRE LAW OF LOCAL HIGHWAYS, STREETS AND TRAILS 38–40 (2004 ed.) (explaining the requirements of each element of creating highways by prescription).

72. LOCAL GOV’T CTR., *supra* note 71, at 38.

73. *Id.* at 38–39.

74. *Id.* at 39 (emphasis added).

75. *Id.* (emphasis added).

clubs not as well organized or worried about trail access. Although Vermonters consider themselves to be a non-litigious people, it could be that New Hampshire residents are even less so. Regardless of the actual reasons for New Hampshire's lack of ancient-roads litigation, the state's statutes and common laws are sufficiently similar to Vermont's that should certain groups want to bring long-abandoned roads back to life, they could create similar chaos and headaches for towns, title insurers, and real-estate attorneys.

B. Maine: Use It or Lose It

Maine's ancient-roads laws differ drastically from Vermont and New Hampshire's. A town may discontinue a road in much the same statutory manner as in New Hampshire or Vermont,⁷⁶ but the town retains an easement for "public utility facilities necessary to provide service"⁷⁷ even after the road is discontinued. Furthermore, Maine provides another avenue for discontinuation, and this is the crucial factor that separates Maine from New Hampshire and Vermont. "It is prima facie evidence that a town or county way not kept passable for the use of motor vehicles at the expense of the municipality or county for a period of 30 or more consecutive years has been *discontinued by abandonment*."⁷⁸ This Maine statute codifies the state's common-law doctrine of abandonment: "[A] presumption of a public intent to abandon a road may be raised by evidence of nonuse for twenty years or more . . ."⁷⁹ The "presumption of abandonment may be rebutted by evidence that manifests a clear intent by the municipality or county and the public to consider or use the way as if it were a public way,"⁸⁰ similar to New Hampshire's prescriptive-easement statute.⁸¹

76. ME. REV. STAT. ANN. tit. 23, § 3026(1) (1992).

A municipality may discontinue a town way or public easement after the municipal officers have given best practicable notice to all abutting property owners and the municipal planning board or office and have filed an order of discontinuance with the municipal clerk that specifies the location of the way, the names of abutting property owners and the amount of damages, if any, determined by the municipal officers to be paid to each abutter.

Id.

77. *Id.*

78. *Id.* § 3028(1) (emphasis added).

79. *Lamb v. Town of New Sharon*, 606 A.2d 1042, 1046 (Me. 1992).

80. ME. REV. STAT. ANN. tit. 23, § 3028(1) (1992).

81. *See supra* text accompanying notes 70–75 (examining the requirements to establish highways by prescription in New Hampshire). *See also* *Davenhall v. Cameron*, 366 A.2d 499, 500 (N.H. 1976) (citing *Thompson v. Major*, 58 N.H. 242, 243 (1878)) ("[A]bandonment by the public for twenty years does not constitute discontinuance of a highway . . .").

One important aspect of Maine's statute is that town roads discontinued by abandonment are subject to a vote by the town's legislative body to reserve an easement for recreational purposes.⁸² This was one of the crucial issues in Vermont's ancient-roads debate because snowmobile groups and other recreational users were afraid of losing their access to ancient roads if they were discontinued.⁸³ However, although a landowner with an ancient road over his property may be happy that the town can never redevelop it into a blacktopped highway, his title will still be subject to a town recreation easement.⁸⁴ Even though this encumbrance may not cloud title or render the property unmarketable any more than a public utility easement across a property, it could certainly affect the property's value. For example, a snowmobiling homeowner may be thrilled to discover a snowmobile trail on a public recreation easement across his land, whereas a meditation retreat may not share the same enthusiasm. To be clear, Maine's presumption of abandonment statute is not a cure-all fix that would solve Vermont's problems. "[I]t is important to emphasize that not all public rights may be extinguished. In some cases, discontinuance or abandonment simply may indicate that the character or intensity of public use has changed without an actual denial of the public use, and the public easement remains."⁸⁵ So, although Maine is certainly ahead of Vermont and New Hampshire in protecting private-property owners from ancient roads, it is not a perfect situation.

Moreover, Maine's presumption of abandonment has not stopped litigation on the issue. In one recent case, a landowner named Shadan began using an ancient road to access his property.⁸⁶ The ancient road ran adjacent to his property and over his neighbor's land.⁸⁷ When the neighbors erected a barrier to prevent him from accessing the road, Shadan sought a judicial remedy to give him access to the ancient road.⁸⁸ He raised a variety of theories: that the road was a town highway, a public easement, or an easement by necessity.⁸⁹ He failed on all accounts, because even though the road appeared to have been properly laid out,⁹⁰ the town ceased

82. ME. REV. STAT. ANN. tit. 23, § 3028(1) (1992).

83. See *infra* Part II.B (discussing the various interest groups that participated in the ancient-roads debate).

84. See Knud E. Hermansen & Donald R. Richards, *Maine Roads and Easements*, 48 ME. L. REV. 197, 211 (1996) ("[T]he discontinuance of a town highway usually leaves a public easement for access.").

85. *Id.* at 273.

86. *Shadan v. Town of Skowhegan*, 700 A.2d 245, 246 (Me. 1997).

87. *Id.*

88. *Id.*

89. *Id.*

90. There was ambiguity as to whether the town had ever formally accepted the road, but that point is moot as the plaintiff would have lost on other grounds anyway. *Id.* at 246 n.2. Regardless, the

maintenance in 1950.⁹¹ By 1970 the road was abandoned and thus discontinued.⁹² It is important to note a distinction between the “ancient road” in this case and the legal definition of “ancient road” or “unidentified corridor” in Vermont. Recall that in order to label a town highway in Vermont an “unidentified corridor” and subject it to Act 178’s “map it or lose it” provisions, the road cannot be “clearly observable by physical evidence of [its] use as a highway or trail.”⁹³ In *Shadan*, the plaintiff was driving on the ancient road, so it must have been “clearly observable.” Were this road located in Vermont, it would not be subject to Act 178, and would not be at risk of losing its status as a town highway.

In another case, a landowner who used a town road to access the interior of a large parcel of land for logging and other purposes repeatedly petitioned the town and county to make repairs to the road.⁹⁴ When the town and county refused, the landowner filed a complaint “requesting an injunction to force the County to repair the road.”⁹⁵ Although the Maine abandonment statute provides an opportunity for rebuttal of evidence proving the presumption of abandonment, this appears to be a high burden. The landowner presented evidence that a specific former road commissioner, along with other men, had rebuilt a bridge in 1965 or 1966; the town presented testimony from a selectman from that era who said he had no knowledge of the repairs, and the town records did not indicate repairs.⁹⁶ The trial court sided with the town, which alleged abandonment by thirty years of nonmaintenance from 1960 to 1990, and the Supreme Judicial Court affirmed.⁹⁷ Once again, this town highway would not qualify as an unidentified corridor under Vermont law because it was clearly observable.

These and other Maine cases demonstrate that although a presumption of abandonment may appear to cause significant litigation, the roads being litigated are clearly visible roads that were maintained in the recent past and may even be passable by vehicle today. Ancient rights-of-way that have not been maintained for centuries are *not* being litigated. These ancient roads have all been abandoned in Maine and pose no threats to property owners or title companies. Act 178 now provides a thirty-year presumption of

case is instructive in its application of the common-law doctrine of abandonment.

91. *Id.* at 247.

92. *Id.*

93. VT. STAT. ANN. tit. 19, § 302(a)(6)(A)(iii) (2007).

94. *Lamb v. Town of New Sharon*, 606 A.2d 1042, 1043–44 (Me. 1992).

95. *Id.* at 1044–45.

96. *Id.* at 1045, 1047.

97. *Id.* at 1047.

abandonment in Vermont, but only following a town's final determination to discontinue the road.⁹⁸

II. LITIGATION IN VERMONT LEADS TO ACT 178

A. *The Prominent Cases*

Three prominent cases arose between 2001 and 2003 that captured the headlines and set the legislature on its path towards enacting Act 178. The first case was that of the Petersons, told in the introduction to this Note. The second was that of Stanley and Lynn Spencer. The Spencers held title to a parcel of land on Town Highway 14 in Barnard, and had contracted to sell the parcel to David Muller.⁹⁹ Prior to 2002, the town highway maps showed Highway 14 as a “dead end road, ending at a point in the interior of the Plaintiffs’ land,” and for decades, the town maintained the road up to that point.¹⁰⁰ However, the town launched a project, “largely through the work of John Dutton, to research and map town roads, as town maps did not completely and accurately depict all town roads of record.”¹⁰¹ In other words, Dutton began researching the town’s ancient roads. The town published a new highway map in 2002 that showed, “for the first time, an unnumbered road beginning at the end of Town Highway 14 on the Spencer/Muller property and running south and east, intersecting with the Royalton Turnpike.”¹⁰² This “new” ancient road, which the landowners did not know burdened their land, precipitated a lawsuit in which the landowners sought a “declaration that the newly depicted road [did] not join Town Highway 14, and furthermore that it [did] not cross the Spencer/Muller property at any [time].”¹⁰³ Surveyors and experts hired by both the plaintiff and defendant were unable to reconcile the old maps, surveys, and deeds with physical evidence on the ground.¹⁰⁴ The trial court declared that the newly discovered town road did not intersect with Town Highway 14 on the plaintiffs’ property, but found that the plaintiffs did not prove by a preponderance of the evidence that the “disputed highway [did] not cross or encumber their land at any point.”¹⁰⁵

98. VT. STAT. ANN. tit. 19, § 717(b) (2007).

99. Muller Findings of Fact, *supra* note 62, at 1.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 2, 4.

105. *Id.* at 11.

The third and most recent case (and the only one so far to advance to the Vermont Supreme Court) was *McAdams v. Town of Barnard*. Herbert Hall McAdams III, a “wealthy businessman” living in Texas, and his wife, sought to make improvements to the property they bought in 1999 for \$800,000.¹⁰⁶ “As part of this process, [the McAdamses] requested that the Town discontinue an abandoned, dead-end road . . . that crossed the property. The Town conducted a discontinuance hearing . . . and discontinued the portion of [the road] crossing the property.”¹⁰⁷ However, when the town produced the new set of maps that caused problems for the Spencers and Muller, two more ancient roads appeared on the McAdams’ property.¹⁰⁸ Protracted litigation resulted. The McAdamses filed a federal SLAPP (Strategic Litigation Against Public Participation)¹⁰⁹ lawsuit against the town residents that had opposed their building permit, “claiming that the residents had acted in concert with state actors to deprive [the McAdamses] of the permit in violation of their constitutional rights to due process and equal protection.”¹¹⁰

Eventually a series of mediation agreements resulted in a stipulation that the town would discontinue the three known ancient roads and “admit that it was not aware of any other roads or rights-of-way and that it claimed no interest in any roads or rights-of-way on the property,”¹¹¹ and all parties would drop their claims for damages.¹¹² Eventually the McAdamses filed a declaratory judgment action to quiet title, and the case ended up in the Vermont Supreme Court.¹¹³ The court held that “[t]he difficulty in determining whether abandoned roads still legally exist stems from inconsistent, and sometimes incomprehensible, town records dating back two centuries or more. . . . [T]hese difficulties should not preclude judgment in landowners’ favor where the *burden was on the Town* to prove any right it had to the property.”¹¹⁴ The court thus gave property owners substantial rights in holding that the burden is now on the towns to prove the existence of ancient roads on a landowner’s property. The opinion did emphasize that:

106. Hemingway, *supra* note 61, at 1A.

107. *McAdams v. Town of Barnard*, 2007 VT 61, ¶ 2, 182 Vt. 259, 260, 936 A.2d 1310, 1311.

108. *Id.* ¶ 3, 182 Vt. at 261, 936 A.2d at 1312.

109. A SLAPP suit “is a meritless suit filed primarily to chill the defendant’s exercise of First Amendment rights.” 1 AM. JUR. 2D *Actions* § 38 (2008).

110. *McAdams*, 2007 VT 61, ¶ 2, 182 Vt. at 261, 936 A.2d at 1312.

111. *Id.* ¶ 4, 182 Vt. at 261, 936 A.2d at 1312.

112. *Id.* ¶ 5, 182 Vt. at 262, 936 A.2d at 1312.

113. *Id.* ¶ 9, 182 Vt. at 264, 936 A.2d at 1314.

114. *Id.* ¶ 13, 182 Vt. at 266, 936 A.2d at 1315–16 (emphasis added).

[L]andowners may attain the remedy sought in this case only because abandoned, but legally existing, roads had been identified by the Town and still existed at the time suit was filed. These circumstances gave rise to a threat of actual defect in title from both identified and unidentified dormant roads and, thus, a justiciable case or controversy.¹¹⁵

Therefore, even as the court seemed to signal its approval of the increased private property rights established by Act 178, it appeared reluctant to apply this ruling outside of this narrow context.

These three cases symbolized the problems created by ancient roads, and attracted the attention of the media, legislators, and various groups, all of whom influenced the legislation that became Act 178.

B. The Various Factions: Realtors, Attorneys, Recreational Trail Users, Title Insurers, Municipalities, & Other Special Interest Groups

Members of Vermont's real estate community, including realtors, title-insurance companies, and real-estate attorneys, were understandably concerned about their livelihoods and exposure to liability resulting from ancient roads running across their clients' properties. According to one realtor, showing a property to a client when the realtor has no idea whether there are ancient roads on the property is a "frightening proposition."¹¹⁶ The realtor loses credibility if a deal falls through based on something like an ancient road that he didn't know about. At the same time, realtors recognize that recreational opportunities are one of the reasons why towns like Barnard are popular with second-home owners, retirees, and transplants. An extensive trail network within the town for walking, mountain biking, and horseback riding is a major selling point.¹¹⁷ The issue for homeowners is the degree and nature of usage. Some homeowners would be pleased to have limited, non-motorized recreational trails on their land, but unhappy with having a major VAST¹¹⁸ corridor next to their house. On the other hand, eighty percent of VAST's 6000 miles of trails are on private property, suggesting that they are generally welcomed by landowners.¹¹⁹

115. *Id.* ¶ 14, 182 Vt. at 267, 936 A.2d at 1316.

116. Interview with Richard Higgerson, *supra* note 26.

117. See Interview with Pike Porter, *supra* note 26 (stating that he personally encourages towns and cities to build bike paths and trails, but believes that there are better ways to accomplish this goal than using ancient rights-of-way).

118. Vt. Ass'n of Snow Travelers, About VAST, <http://www.vtvast.org/About-VAST.html> (last visited Dec. 4, 2008).

119. *Id.*; Vt. Ass'n of Snow Travelers, Trails, <http://www.vtvast.org/Trail-General.html> (last visited Dec. 4, 2008).

Again, this issue is largely moot, because any old road, whether public or not, that is visible enough to be used as a trail is outside of the definition of “unidentified corridor” set forth in Act 178. But in the early days of the ancient-roads issue, there was considerable confusion about what exactly an ancient road was, and many believed that visible, usable Class 4 town highways would be considered ancient roads.¹²⁰ In the end, that was not the case, so most, if not all, of the VAST trails located on town highways are safe from discontinuance under Act 178.¹²¹

Perhaps the group with the most to lose in the ancient-roads debate is title-insurance companies. Andrew Mikell of the Vermont Attorneys Title Corporation (VATC) has been actively involved in the issue from its inception. Early in the debate, Mikell went to the Vermont Department of Banking, Insurance, Securities & Health Care Administration (BISHCA) and explained that the fundamental problem facing title insurers is that prior to issuing a title policy, a title search is required, but an attorney doing a standard forty-year title search “cannot reasonably uncover roads from the 1700s.”¹²² Title policies are not designed to insure this risk, so VATC wanted to except ancient roads from their policies to reduce their exposure to liability resulting from ancient roads that may encumber their titleholders’ properties.¹²³ BISHCA denied VATC’s request, saying that it was a matter that should be taken up by the legislature.¹²⁴

VATC also explored the option of not insuring properties in the three hot towns, but BISHCA again denied VATC’s request.¹²⁵ Furthermore, some attorneys for title-insurance companies were drafting title-insurance policies with explicit exceptions for ancient roads.¹²⁶ BISHCA clarified that attorneys may not draft title insurance policies with explicit exceptions for ancient roads unless the attorney has a good faith belief that there is an ancient road on the property.¹²⁷ To ensure that policy buyers are aware of their assumptions of the ancient-roads risks, the exception has to be written in eighteen-point, bold-faced font on the policy.¹²⁸ Title insurance is more

120. Interview with Margaret Flory, *supra* note 23.

121. *Id.*

122. Interview with Andrew Mikell, *supra* note 26.

123. *Id.*

124. *Id.* See also Sean D. Clarkson, Note, *Following the Curse of the Phantom Roads in Vermont*, 6 VT. J. ENVTL. L., at n.202 (2004–2005), available at <http://www.vjel.org/journal/VJEL10020.html> (“[S]tate insurance authorities have informed [Mikell] that his company may not include in its policies a generic exception for such early state roads.”).

125. Interview with Andrew Mikell, *supra* note 26. Despite rumors that title insurers stopped issuing policies in the hot towns, this did not occur. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

expensive for every buyer in the state because title-insurance companies cannot exempt ancient roads from title-insurance policies.¹²⁹

VAST is the most vocal group in support of keeping ancient roads intact, and has drawn the ire of real-estate-industry professionals and private-property-rights advocates.¹³⁰ The majority of VAST trails are on private land, and many follow Class 4 highways and other town rights-of-way.¹³¹ VAST was nervous that every old road in the state would be at risk of reverting to the abutting landowners, thereby potentially limiting their ability to keep and maintain their trails.¹³² It is certainly easy to see why VAST was nervous. The initial ancient-roads bill introduced in the Vermont House of Representatives, H.334, defined “ancient highway[s]” only as those roads which were properly established, never discontinued, and not presently on a town’s highway map.¹³³ There was no indication that the bill would only apply to those roads not “clearly observable.” That language was added at a later date.

VAST and other trail users were understandably concerned that the countless woods roads that crisscross the Vermont landscape—not passable by ordinary passenger vehicles but usable by snowmobiles, ATV’s, mountain bikes, or pedestrians—would be lost to public use. The Vermont Traditions Coalition¹³⁴ saw the ancient-roads bill as potentially discontinuing “old public right-of-ways [sic] such as class 4 roads that aren’t plowed in the winter.”¹³⁵ While the end result of Act 178 does not affect any clearly observable existing road (VAST’s trail network is largely comprised of clearly observable existing roads), the initial language of H.334 posed a real threat to Vermont’s vital outdoor-recreation industry, both motorized and non-motorized, so VAST and other trail groups were well advised to find a seat at the legislative table.

129. *Id.*

130. Pike Porter, Burlington Realtor, Vermont Real Estate and Ancient Roads, <http://www.startinghome.com/AncientRoads.htm> (last visited Dec. 4, 2008) (“Many roads in Vermont were established up to two-hundred years ago Unfortunately, snowmobile- and ATV-users now claim that these forgotten roads are still public rights-of way [sic] and are thus still usable for public purposes, including, it just so happens, recreational purposes.”).

131. Vt. Ass’n of Snow Travelers, About VAST, <http://www.vtvast.org/About-VAST.html> (last visited Dec. 4, 2008).

132. Interview with Bryant Wilson, *supra* note 24.

133. H.334, 2005–2006 Leg., Reg. Sess. § 3 (Vt. 2005).

134. The Vermont Traditions Coalition is “a group of traditional land use organizations” dedicated to “supporting and providing representation to the sporting, farming, maple sugaring and forest products industries.” Vt. Traditions Coal., What is VTC?, http://www.vermonttraditions.org/about_VTC.htm (last visited Dec. 4, 2008).

135. Vt. Traditions Coal., Accomplishments, http://www.vermonttraditions.org/vtc_accomplishments.htm (last visited Dec. 4, 2008).

Although VAST and other sporting groups were concerned primarily about their rights to use town roads for private recreational purposes, municipalities were concerned about losing public assets. Even though a town may not know about ancient roads within its borders, it is conceivable that at some point in the future, those roads could be used for residential or commercial development, utilities, recreational trails, or uses not yet imagined. The Vermont League of Cities and Towns (VLCT)¹³⁶ stepped into the ancient-roads debate to advocate for local control of the process. They felt that the short time frame provided by Act 178 for towns to map their roads, as well as the limited state funding to do so, put many towns in a very difficult position.¹³⁷ Since towns usually do not know their ancient-roads inventory, it can also prove very difficult—if not impossible—to accurately research the location of these roads. This is especially true given that towns had only a year under H.334 to find these roads and put them on their highway maps or lose their centuries-old rights forever.¹³⁸ VLCT wanted to give towns time to make their decisions consciously and deliberately.¹³⁹ A year was simply not enough time.¹⁴⁰

Every town has different objectives and demographics, and VLCT has observed that the towns with groups or individuals interested in the issue have uncovered the most ancient roads.¹⁴¹ The limited size of town governments in Vermont means that the burden for fulfilling the requirements of Act 178 rests largely on the shoulders of volunteers. John Dutton, for example, whose research made the *Muller* and *McAdams* litigation possible, has extensively researched and mapped roads in Barnard.¹⁴² “[M]any [towns] have recruited teams to comb through old documents, make lists of whatever roads they find evidence of, plot them on maps and set out to locate them.”¹⁴³

These various groups all had important reasons to love or hate ancient roads. As litigation increased and pressure mounted, the legislature took up the cause. Some of the factions represented important sectors of Vermont’s economy which allowed them to bring their political power to the bargaining table.

136. “Vermont League of Cities and Towns (VLCT) is a nonprofit, nonpartisan organization that serves Vermont’s municipal officials.” Vt. League of Cities & Towns, Overview, <http://www.vlct.org/aboutvlct/> (last visited Dec. 4, 2008).

137. Interview with Trevor Lashua, *supra* note 25.

138. H.334 § 3.

139. Interview with Trevor Lashua, *supra* note 25.

140. *Id.*

141. *Id.*

142. Muller Findings of Fact at 1, *supra* note 62.

143. Goodnough, *supra* note 2, at A16.

C. Legislative History: Compromises & Concessions

The legislature responded in the form of a bill, H.334, introduced by Margaret Flory of Pittsford, a real estate attorney, former chair of the town selectboard, and state representative for the Rutland-6 district.¹⁴⁴ She was situated at the nexus of the various groups and factions and was able to see the issue from all sides. The bill's stated purpose was to "facilitate commerce within the state This act furthers that purpose by establishing a uniform system which defines and addresses the status of 'ancient roads.'"¹⁴⁵ Had the bill passed with this language, the biggest winners would have been the members of the real-estate industry.

The bill's goal would have been met by altering Vermont's highway statutes to define 'ancient roads' as roads that were properly established under Vermont statute, never discontinued, and not on the town's highway map as of January 1, 2005.¹⁴⁶ Towns would then have had until July 1, 2006 to add ancient roads to the highway map, but only if these roads had previously been included on a town highway map on or after January 1, 1931.¹⁴⁷ Any road added would no longer have been an ancient road, and on July 1, 2006, all ancient roads would have been discontinued, with "[t]itle to the right-of-way . . . merg[ing] into the title of the owner of the fee simple interest in the land over which the ancient highway traversed."¹⁴⁸ The key language in H.334 was that only roads appearing on a town highway map after 1931 could have been added to the current maps. There was no provision to add an ancient road that had never been laid out or that had been abandoned in the nineteenth century, as it is unlikely any of these roads would have appeared on a highway map after 1931. The scope of the bill was therefore quite narrow in its definition of ancient roads, and the time frame was compressed.

Indeed, Flory intended to provide a very short time frame because she was afraid that a long gestation period and the resulting publicity would have caused problems in the real-estate industry.¹⁴⁹ The bill expressed this concern:

144. Interview with Margaret Flory, *supra* note 23; Vt. Sec'y of State, Biography of Representative Margaret K. Flory, <http://vermont-elections.org/2007-2008BioBook/h-rut6.htm> (last visited Dec. 2, 2008).

145. H.334 § 1.

146. *Id.* § 3.

147. *Id.* See also Interview with Trevor Lashua, *supra* note 25 (explaining that after the Flood of 1927 washed out many Vermont roads and bridges, the state, as part of the rebuilding effort, began requiring towns to create highway maps in order to receive state highway dollars).

148. H.334 § 4.

149. Interview with Margaret Flory, *supra* note 23.

Continued uncertainty regarding the existence, status, and location of ancient roads creates problems for: landowners trying to buy and sell homes, businesses, farms, and other types of real estate or determine permissible uses of their private property; mortgage lenders who may suffer loss of value in property used as collateral after foreclosure; municipalities trying to make appropriate decisions relative to granting or denying permits authorizing development and use of the burdened property; and title insurance companies doing business in Vermont who cannot accurately assess the risks associated with insuring title to real estate.¹⁵⁰

The idea was to give towns enough time to add any roads that had been used in recent history (since 1931) but for whatever reason had fallen off the map. No consideration was given to the interests of VAST or other sporting groups, for good reason. Since the ancient-road litigation focused on truly old roads with no clearly observable evidence of their existence, the towns generally had no idea these roads even existed. If the towns did not know the roads existed, they could not give VAST permission in the first place. Moreover, if no obvious trails or paths on the ground exist, then these rights-of-way could not be traveled by snowmobiles, let alone the large snowcats with heavy drags used by VAST clubs to groom trails. VAST's interests, therefore, were not in conflict with the goals of H.334.

The confusion over the exact definition of "ancient road," however, coupled with the ensuing publicity feared by Flory, alarmed the sportsmen's groups that their interests were at stake. As the bill moved into committee, opposition mounted. VAST, VLTC, and the Vermont Trails and Greenways Council (VTGC)¹⁵¹ argued "that [t]owns should be given a period of seven years to research, survey and map those historic/ancient roads that they feel are essential to the public good of all town residents."¹⁵² They also argued that landowners who suddenly discover they have ancient roads on their properties should be compensated, just as they would be if the town decided to build a new road.¹⁵³

The various groups with interests riding on H.334 were largely unhappy with the bill.¹⁵⁴ Towns wanted more time to research and map their roads, title insurers wanted an immediate declaration of discontinuance,

150. H.334, § 1.

151. VTGC "seeks to ensure that people will always have access to adequate land and water-based trails and greenways." Vt. Trails & Greenways Council, <http://www.vermonttrailsandgreenways.org> (last visited Dec. 4, 2008).

152. Vt. Ass'n of Snow Travelers (on file with *Vermont Law Review*).

153. *Id.*

154. Interview with Margaret Flory, *supra* note 23.

property owners wanted more protection from a potential taking, and sportsmen were concerned about future access.¹⁵⁵ As the bill wound its way through the House Commerce and Transportation Committees, and public hearings,¹⁵⁶ a very different law emerged.

D. The Final Product: Act 178

As previously explained, Act 178 provides towns with several options for dealing with ancient roads.¹⁵⁷ By July 1, 2009, towns may either reclassify their ancient roads as class 1, 2, 3, or 4 highways, or as trails, and add the roads or trails to the highway map.¹⁵⁸ Otherwise, the ancient roads automatically become unidentified corridors.¹⁵⁹ Presumably most newly discovered ancient roads would automatically be regarded as class 4, because class 4 highways are “all town highways that are not class 1, 2, or 3 town highways or unidentified corridors,”¹⁶⁰ and unidentified corridors technically exist only after July 1, 2009.¹⁶¹ The town’s interest in the road is preserved after it adds the road to the town highway map. However, if the town chooses to reclassify the ancient road from class 4 to any other class or a trail, it would need to go through the statutory reclassification process.¹⁶² Therefore, on July 1, 2009, all ancient roads in Vermont will either be legal highways or trails and included on the highway map, or unidentified corridors at risk of extinction.

A town may add an unidentified corridor to its highway map after July 1, 2009, so long as it follows the reclassification process.¹⁶³ After July 1, 2015, unidentified corridors will be discontinued and the “right-of-way shall belong to the owner of the adjoining land.”¹⁶⁴ At that point, the ancient-roads debate should finally come to an end. The town’s legislative body also has the option of simply discontinuing all town highways at any time prior to July 1, 2009.¹⁶⁵ The selectboard need only hold a public information hearing (with sufficient prior notice), after which the board may vote to discontinue all unidentified corridors in town.¹⁶⁶ The board

155. *Id.*

156. Vt. Ass’n of Snow Travelers, *supra* note 152 (on file with *Vermont Law Review*).

157. *See supra* text accompanying notes 19–28 (describing the details of Act 178).

158. *Id.*

159. VT. STAT. ANN. tit. 19, § 302(a)(7) (2007).

160. *Id.* § 302(a)(4).

161. *Id.* § 302(a)(6)(A)(ii).

162. *See supra* text accompanying notes 41–55 (describing Vermont’s reclassification process).

163. *Id.*

164. VT. STAT. ANN. tit. 19, § 302(a)(6)(G) (2007).

165. *Id.* § 305(h).

166. *Id.* § 305(i).

may vote to discontinue absolutely, with title to the rights-of-way reverting to the abutting land owners, or they may designate certain roads or portions thereof as trails, in which case the town retains the rights-of-way.¹⁶⁷ As a check on the selectboard's power, Act 178 also gives the town's voters the option of vetoing their selectboard in the event that the board chooses to discontinue all unidentified corridors.¹⁶⁸

Vermont also took a cue from Maine in crafting Act 178, with the inclusion of a less-forceful presumption-of-discontinuance clause:

A town or county highway that has not been kept passable for use by the general public for motorized travel at the expense of the municipality for a period of 30 or more consecutive years following a final determination to discontinue the highway shall be presumed to have been effectively discontinued.¹⁶⁹

Recall that Maine's statute allows for a presumption of abandonment after thirty years regardless of any town action on its status,¹⁷⁰ whereas Act 178 includes only highways that have already been formally discontinued. Assume a town voted to discontinue a road, but the public still used it as if it were a town highway—Act 178 prevents the application of prescriptive easements to a road that may have been formally discontinued but remained usable and popular with local residents.¹⁷¹ Absent landowner permission, use of the road would constitute trespassing.

Finally, Act 178 appropriates funds “to be used exclusively for grants to municipalities to research and map town highways, trails, and unidentified corridors.”¹⁷² The municipal- and regional-planning fund received a lump sum of \$100,000 in fiscal year 2007 earmarked for ancient-roads research.¹⁷³ Excess property tax revenues, not to exceed \$400,000, were deposited in the fund at the close of fiscal year 2006.¹⁷⁴ Towns can receive a maximum of \$5000 each, which is obviously not enough to cover the costs of researchers and surveyors.¹⁷⁵ In sum, Act 178 went well beyond the scope of H.334, and clearly represents the input of the various special interests during the committee process.

167. *Id.* § 305(j).

168. *Id.* §§ 305(k)–(n).

169. *Id.* § 717(b) (emphasis added).

170. See *supra* Part I.B (discussing Maine's ancient-roads statute).

171. *Id.*

172. 2006 Vt. Acts & Resolves 360.

173. *Id.*

174. *Id.*

175. Interview with Trevor Lashua, *supra* note 25.

III. ANALYSIS OF ACT 178

A. *Did Certain Groups Prevail in the Legislative Process?*

As Representative Flory said, it's a fair bill if all sides are equally unhappy,¹⁷⁶ and in the case of Act 178, most parties involved in the legislation have serious reservations. Title insurers, realtors, and real-estate attorneys are certainly less happy with Act 178 than they would have been had H.334 been enacted in its original form. Since H.334 provided for discontinuance of all ancient roads on July 1, 2006,¹⁷⁷ this entire issue would now be history. Instead, VATC and other title companies must wait until July 1, 2015—nearly ten years after the bill was first introduced—before putting ancient roads to rest. According to VATC, this is simply too long a period for title to be in limbo.¹⁷⁸ Moreover, since the first grants to towns to map their roads were issued at the end of fiscal year 2006, “the worst is yet to come,” as towns have not started inventorying their ancient roads in great numbers.¹⁷⁹ Furthermore, a bill currently in the house delays the entire process by two years, so that ancient roads become unidentified corridors in 2011, with discontinuance in 2017.¹⁸⁰ The bill also appropriates an additional \$400,000 for town grants to research their roads.¹⁸¹ Andrew Mikell of VATC is concerned that political pressure from towns, sporting groups, and others opposed to Act 178 will either push back the deadlines further or simply force the Act's repeal.¹⁸² Meanwhile, VATC keeps receiving insurance claims.¹⁸³

On the other side of the issue, VLCT, municipalities, and VAST and the other sportsmen's groups may not be totally satisfied with the language of Act 178, but they clearly played their cards right with the committees, and scored numerous victories. Trevor Lashua of VLCT described the three-year legislative process as “many proposed solutions of varying quality, [involving much] gnashing of teeth and pulling of hair.”¹⁸⁴ He believed it was an “exercise in compromise,” as the

176. Interview with Margaret Flory, *supra* note 23.

177. H.334, 2005–2006 Leg., Reg. Sess. §§ 3–4 (Vt. 2005).

178. Interview with Andrew Mikell, *supra* note 26.

179. *Id.*

180. H.111, 2007–2008 Leg., Reg. Sess. (Vt. 2007).

181. *Id.*

182. Interview with Andrew Mikell, *supra* note 26.

183. *Id.*

184. Trevor Lashua, *Long and Winding Ancient Roads Discussion Comes to End: Important Deadlines Loom in Future Years*, VLCT NEWS, July 2006, available at http://resources.vlct.org/u/ga_06_07.pdf.

provisions of Act 178 do not allow enough time or money for towns to complete the research process.¹⁸⁵

VAST's Bryant Wilson called Act 178 a "workable solution," and said that although it is not exactly what VAST would want in a perfect world, he believes the Act is as good as it is going to get.¹⁸⁶ VAST is now focused on educating its member clubs about the Act and the process of researching ancient roads so that its clubs can delve into their towns' records to learn if any of their trails are at risk.¹⁸⁷ Again, it is unlikely that any trails are at risk because presumably if a trail is in good enough shape to carry snowmobiles and groomers, it is "clearly observable" and thus not an unidentified corridor.¹⁸⁸ In reality, the only language in the Act that is of direct concern to VAST is the "clearly observable" language. If their concern is preserving their existing trail network, the current language of the bill offers them excellent protection. Of course, if their goal is to uncover unidentified corridors and have them added to the highway maps in hopes of one day clearing them for use as trails, then the deadlines are of utmost importance. Indeed, Wilson recalls having walked roads in the woods in his youth that are now virtually invisible,¹⁸⁹ so planning for the future, especially in a state with rapid development, is a worthy goal.

Although all sides express at least some displeasure with Act 178, on balance, the title industry has the most to lose, both financially and in terms of stress and time spent dealing with ancient-roads claims. If any group can claim victory in the legislative process, it is the municipalities, sportsmen, and proponents of keeping ancient roads intact. They will lose the roads eventually, but they have nearly a decade to add roads to town highway maps. Moreover, if H.111 is successful in delaying the deadlines two years and appropriating more money for research, the balance shifts even further in their favor.

B. Balancing Private Property Rights and Public Access

The arguments presented by the real-estate industry as to why all ancient roads should be discontinued—preferably immediately—are compelling. After all, it simply is not fair to place the burden of defending a lawsuit over a 200-year-old unused road on either the homeowners or title companies when they had no way of discovering that the road even existed.

185. Interview with Trevor Lashua, *supra* note 25.

186. Interview with Bryant Wilson, *supra* note 24.

187. *Id.*

188. VT. STAT. ANN. tit. 19, § 302(a)(6) (2007).

189. Interview with Bryant Wilson, *supra* note 24.

Clouded titles drive up the cost of title insurance for everyone in the state, and can have severe personal finance implications if a homeowner needs to sell but cannot because an ancient road encumbers the property.¹⁹⁰ Moreover, because of the uncertainty involved, homebuyers—particularly in the “hot towns”—might have second thoughts. Also, clouded titles can negatively affect the real-estate market in towns where few other industries exist.¹⁹¹ In short, no reasonable Vermonter could evaluate the situation from the perspective of clouded titles alone and conclude that ancient roads are fine as they are.

However, outdoor recreation is a vital component of Vermont’s culture and economy, and such recreation often takes place on town rights-of-way or municipal, state, or federal land. Whether for riding a snowmobile, a horse, or a mountain bike, recreational trails provide one of the main sources of entertainment and recreation for rural Vermonters, and many of these recreational trails would be in jeopardy were they to be discontinued.¹⁹² Prospective homebuyers often look for nearby recreational opportunities, and extensive trail networks nearby can be major selling points for some buyers.¹⁹³

Beyond recreation, towns giving up their rights-of-way could restrict their future ability to run utility lines, build water supplies, control or shape development, and deal with many other key municipal functions.¹⁹⁴ The real-estate industry may argue that towns did not even know they had these rights-of-way so the towns lose nothing if they are discontinued. However, now that ancient roads have been brought to light, towns can take advantage of previously dormant rights. Towns can take the initiative to create town-wide trail networks, install underground broadband networks, entice natural-gas companies to expand their distribution, or build a public drinking-water supply to protect against drought and lowering water tables. Towns can also work with developers to create low-income housing or mixed-use “new urbanism” projects that cluster development and preserve open land. In short, towns can leverage these newly discovered rights-of-way to build long-overdue projects or dream up new ones to make the town a progressive leader and a desirable place to live.

190. Interview with Andrew Mikell, *supra* note 26.

191. Interview with Richard Higgerson, *supra* note 26.

192. Returning to the language of Act 178, these trails are not currently in danger since they are “clearly observable,” but this is not a purely academic question, as future generations could revive ancient roads for use. 2006 Vt. Acts & Resolves 354.

193. Interview with Richard Higgerson, *supra* note 26.

194. Interview with Trevor Lashua, *supra* note 25.

The question, then, is how to balance property rights with recreational and public-interest uses. What kinds of trails are appropriate for newly discovered ancient roads? Some owners would be happy to have pedestrians or even horses or mountain bikes crossing their property, but have no interest in ATVs or snowmobiles. Others may be more inclined to follow the traditional New England philosophy of opening their private land for public use, and would welcome motorized recreation.¹⁹⁵ Issues of elitism and natives-versus-newcomers also come into play, and there are few ways to polarize a town faster than stirring up a debate that pits long-time residents against flatlanders.

There are simply no answers to these questions. Act 178 makes no attempt at addressing these issues, as even in a small state like Vermont, towns vary too widely in demographics to accept a one-size-fits-all approach. Instead, each town must take a close look at its past, present, and future, evaluate its resources and needs, and determine how to arrive at a fair solution that may preserve some rights for the future while ensuring its residents do not go broke fighting legal battles over ancient roads. Common sense and open communication within each town can lead to an acceptable resolution using the framework of Act 178.

C. Reforms of Act 178

To help resolve some of the unanswered questions, Act 178 could be amended in three ways. First, encourage trail creation over absolute discontinuance. Second, require the showing of a public need. Third, abolish the graduated deadlines and immediately discontinue all ancient roads at a certain date in the near future.

Act 178 allows unidentified corridors to be discontinued as trails, “in which case the right-of-way shall be continued at the width”¹⁹⁶ of three rods (49.5 feet).¹⁹⁷ As trails do not receive maintenance from the town,¹⁹⁸ there are no hidden costs to the town, and landowners need not worry about vehicular traffic across their land. Since the rights-of-way are not clearly

195. Private land in Vermont is presumed to be open to the public for recreational uses unless posted to the contrary. *See* VT. STAT. ANN. tit 10, § 5201(a) (2007) (requiring landowners to affirmatively post signs on their land to prohibit hunting, fishing, and trapping). *See also* Goodnough, *supra* note 2, at A16 (explaining that an increase in posted land, often held by out-of-state landowners, has caused towns to pay more attention to their landholdings and interests to ensure public access to recreational lands).

196. VT. STAT. ANN. tit. 19, § 305(j) (Supp. 2006).

197. *Id.* § 702.

198. *See id.* § 302(a)(5) (setting forth that trails are not highways and therefore the town is not responsible for any maintenance, including culverts and bridges).

observable anyway, the town would need to carve a trail out of the woods. They can therefore be deliberate in their planning and open the trail only to uses approved by the landowners, at a town meeting, or by some other formal process. If the right-of-way passes through deep woods far from houses, perhaps a more permissive trail that allows for motorized recreation is appropriate, whereas a right-of-way that weaves through houses and farms might be open to foot traffic only.

The Town of Norwich, Vermont converted more than two miles of its class 4 roads to trails in 2003,¹⁹⁹ “prohibit[ing] motorized vehicular traffic, with the exception of farm equipment (where necessary for access to farm lands) and snowmobiles. The Selectboard may issue permits, however, for motor vehicle use by particular individuals on specific trails (e.g., for the handicapped).”²⁰⁰ These class 4 roads were clearly observable and no landowners were caught unaware, so even though this example is not directly analogous to ancient-roads scenarios, it is sufficiently similar that it provides guidance to towns that wish to encourage trail creation. Although ancient roads are not currently usable as trails, by preserving their rights, towns can ensure that at some point in the future, they can create a network of trails to encourage health, build community, and provide recreational opportunities.²⁰¹ Until that time, the rights remain dormant and covered in trees.²⁰²

However, this option still leaves landowners open to the possibility of title problems, since trails could still cloud title. This option also leaves the exact status of the ancient-roads-turned-trails in limbo for too long. Moreover, certain types of trails could adversely impact property values. A better solution is a provision that requires the proponent of an ancient road to show a public need. If, for example, a town wants to build a drinking-water reservoir, it would have the burden of proving that groundwater supplies are limited, that a reservoir is the best remedy, and that this particular ancient road is the best access to the site. It need not be limited to public-utility use. If a snowmobile club needs to reroute a major corridor used by thousands of snowmobilers each winter (if, for example, a beaver

199. Town of Norwich (Vt.) Selectboard, Record of Decision in the Matter of the Reclassification Of a Section of Cossingham Road, Joshua Road, Powers Road, Upper Loveland Road and Heyl Trail 6 (Jan. 14, 2003) (on file with *Vermont Law Review*) [hereinafter Norwich Record of Decision].

200. Town of Norwich (Vt.), Final Report of the Committee to Identify Specific Class 4 Roads for Possible Reclassification as Trails 1 (Sept. 2002) (on file with *Vermont Law Review*).

201. See Norwich Record of Decision, *supra* note 199, at 5 (explaining the recreation, public utility, and development value to the Norwich community of Class 4 roads and trails).

202. See Vt. Trails & Greenways Council, Position of the Vermont Trails and Greenways Council Regarding Ancient and Historic Highways 1 (n.d.), <http://www.vermonttrailsandgreenways.org/highwaypos.pdf> (last visited Dec. 4, 2008) (opposing ancient-roads legislation generally and urging towns to “convert unused roads to legal trails status rather than to discontinue or extinguish them”).

dam ruined the existing trail), and they discover that an ancient road runs where they want to build the new trail, the town can use a balancing test to determine if that is an appropriate and justified public need.

The heavy usage by local residents could outweigh the negative effects of noise pollution, particularly if there are no homes nearby. The trail could be determined to be a public need, and the right-of-way could be added to the town highway maps. To make this idea work, Act 178's deadlines must be scrapped and the legislature should declare that all ancient roads are now unidentified corridors. That is, towns retain their rights-of-way in a semi-dormant state wherein the public cannot exercise their rights of use unless and until a public need is proven. Mountain bike groups cannot cut new trails over the rights-of-way, developers cannot use them as access to new projects, and the town cannot use them to build utilities. If any of these groups wants to activate a right-of-way, they must show a public need, before the right-of-way can be reconstituted into whatever form is required, be it a legal town trail, a Class 4 road, or a blacktopped highway.

These proposed solutions are sure to further agitate the real-estate industry, and as previously stated, it simply is not fair to homeowners who have discovered ancient roads on their properties to leave their title in limbo and require them to defend lawsuits. At the same time, some Vermont towns risk losing important rights simply because they do not happen to have the time, resources, or individuals needed to research and map their ancient roads. Act 178 in this regard is itself elitist, as it favors the wealthier, more progressive towns where more residents have the luxury of volunteering for this type of project. Smaller, poorer towns may still receive a few thousand dollars in grant money, but that is unlikely to be enough to make a significant difference. The proposed reforms can reduce the delays and ensure Act 178 is fairly and equitably applied.

It should also be noted that legislative action has already changed one of the deadlines prescribed by Act 178. In 2008, the Legislature passed Act 158, which extends to July 1, 2010 the deadline for towns to either reclassify their ancient roads and add them to the highway map, or risk losing their rights-of-way.²⁰³ The Act also clarified that the Legislature's intent in passing Act 178 was to include only "town highways that are not otherwise clearly observable by physical evidence of their use as a highway or trail[.]" and not just any roads that were not on the town highway map.²⁰⁴ So, if a road is not on the highway map but is clearly observable by evidence of use as a road or trail, that road is not subject to discontinuance

203. 2008-3 Vt. Adv. Legis. Serv. 199 (LexisNexis).

204. *Id.* (codified in VT. STAT. ANN. tit. 19, § 305(h)).

under Act 178. With continued pressure on the Legislature, more deadline amendments are possible in coming years.

D. Suggestions for New Hampshire

Maine has the presumption-of-abandonment rule that quiets title to ancient roads after a statutory period. Vermont now has Act 178, which should lay ancient roads to rest in 2015. New Hampshire, however, has largely the same common and statutory law as Vermont, yet has not seen the litigation that led Vermont to adopt Act 178. As previously discussed, this may be due largely to better record-keeping in the Granite State, but it also may be partially circumstantial. Should these circumstances change, New Hampshire could be primed for some of the same problems currently affecting Vermont real estate. Fortunately, New Hampshire can look westward and learn from Vermont's mistakes.

It is too soon, however, to predict how Act 178 will work in Vermont. As noted, efforts in the State House to push back deadlines under Act 178 are gaining momentum, and title companies see no end in sight to their concerns about clouded titles. Vermont simply is not yet in a position to offer instructive advice to its neighbor. Moreover, New Hampshire's tradition of limited government suggests that "if it ain't broke, don't fix it." If New Hampshire is not seeing ancient-roads problems at the moment, there is no reason to stir the pot, bring awareness of the issue to the surface, and risk it boiling over.

CONCLUSION

This Note began by tracing the outlandish story of the Petersons of Chittenden who looked out their window to see the town selectmen with chainsaws attempting to clear an old town right-of-way through their property.²⁰⁶ Much of the rest of the Note focused on the statutes and common law in Vermont that allow these ancient roads to thrive. In some ways it is easy to view the law in the abstract and forget its real-life application, but in the case of ancient roads, that means allowing landowners to suffer through years of legal fees, uncertainty, and, often, the inability to sell their homes. Act 178 certainly takes steps to address the problem, but falls short of fully satisfying any group except recreational trail users. Moreover, efforts to delay Act 178 deadlines only increase the uncertainty about when title to ancient roads will finally quiet.

206. See *supra* pp.1-3 (describing the Peterson litigation).

Still, under the Act's current framework, Vermont towns can make the best of the situation by preserving roads that they deem necessary, turning others into trails, and avoid creating hassles for landowners and the real-estate industry. Using common sense is the best way to ensure a fair conclusion, absent further intervention by the state. Vermont is well-known for its decentralized, town-meeting decision-making process. By recognizing competing interests and rights, neighbors can work together to preserve the crucial rights-of-way while discontinuing the less important ones. However, if problems continue to arise, it would appear that a complete and instant discontinuance is the only way to resolve the issue. If it comes to that, the ancient-roads proponents should not be too upset, though—after all, most ancient roads have been laying there dormant for 200 years. We have never used them and often did not even know about them. Surely we will not sacrifice much by losing them.

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APPENDIX

Map of the State of Vermont

