

RESOLVING DISPUTES IN THE NORTHERN FOREST: LESSONS FROM THE CONNECTICUT AND MOOSEHEAD LAKES

INTRODUCTION

The Northern Forest is a contiguous stretch of forestland extending from upstate New York through northern Maine, covering over 26,000,000 acres of forest.¹ With the exception of logging, historic uses and land ownership in the Northern Forest differs substantially from forestland in the western part of the country. Among major differences between the Northern Forest and western forests are differences in: ecologic diversity, historical use for recreation, access to humans, and most significant of all, property ownership.² The Northern Forest is almost entirely privately owned.³

A long history of recreation, public access to private land, and traditional use by private landowners has created long-lasting and passionate stakeholders who are often suspicious of new landowners.⁴ Recently, changes in land ownership in the Northern Forest have occurred at unprecedented levels. More importantly, these changes are substantively different than those of the past, requiring stakeholders to confront new challenges resulting from land sales by paper and pulp companies to development and timberland investment management organizations (TIMOs).⁵

Probably the largest and most controversial of these land changes occurred when Plum Creek Timber Company, Inc. (Plum Creek), the largest landowner in the country, purchased over 900,000 acres of land in Maine in the late 1990s. Plum Creek later planned to rezone over 400,000 acres of its land holdings around the largest lake in Maine: Moosehead Lake.⁶ Plum Creek submitted the plan to Maine's Land Use Regulation

1. Stephen D. Blackmer, *Of Wilderness and Commerce: A Historical Overview of the Northern Forest*, 19 VT. L. REV. 263, 263 (1995).

2. See James L. Huffman, *Managing the Northern Forests: Lessons From the West*, 19 VT. L. REV. 477, 477 (1995) ("From an institutional perspective, the most significant difference between the Northern Forest and western forests is ownership.") (citation omitted).

3. *Id.*

4. E-mail from Bruce Kidman, Director of External Affairs, The Nature Conservancy, Me. Chapter, to author (Apr. 20, 2010, 14:44 EST) (on file with author).

5. See Blackmer, *supra* note 1, at 273 (referring to the Diamond International sale as a "wake-up call" to the threats of "forest fragmentation, deforestation, subdivision, and development"). TIMOs are different than traditional forest products companies in that they view forestland primarily as an investment, which only sometimes means that they will harvest their own property. RICK WEYHAEUSER, AN INTRODUCTION TO TIMBERLAND INVESTMENT 2 (2005).

6. OPEN SPACE INSTITUTE ET AL., ANALYSIS OF CONSERVATION COMMITMENTS IN PLUM

Commission (LURC), which included retirement communities, marinas, golf courses, and over 900 new residential homes on or near Moosehead Lake.⁷ This plan spurred five years of contentious rhetoric and a costly public battle over how to proceed.⁸ In the end, LURC approved a plan that looks much different than the initial proposal submitted by Plum Creek.⁹ In the meantime, objections were filed, stakeholders engaged in small informal negotiations, and Maine was engulfed in a public conflict over what kinds of restrictions should be placed on private property in the Northern Forest.¹⁰

Another major land transaction occurred in the Northern Forest in the early 2000s, when International Paper sold an option agreement to the Trust for Public Land—a not-for-profit conservation organization—for over 171,000 acres of timberland in the Connecticut Lakes region in northern New Hampshire.¹¹ The Trust for Public Land set up a formalized task force and committee that brought together stakeholders to come up with a plan on how the land should be owned and managed.¹² This process resulted in a relatively timely compromise—negotiated in less than five months—and a plan for ownership and management of the property. Most of the stakeholders praised the process and outcome.¹³

This Note examines the two examples of how stakeholders chose to settle two different land use disputes in the Northern Forest.¹⁴ It then provides concrete recommendations to land use regulatory bodies, private developers, and other stakeholders in the Northern Forest for using a collaborative process that satisfies the most stakeholders and reduces the likelihood of future polarizing disputes.

Part I of this Note examines basic theories of dispute resolution and explores the role of collaborative decision-making in major land use and

CREEK'S MOOSEHEAD LAKE CONCEPT PLAN 2 (2007).

7. LAND USE REGULATION COMM'N, MAINE DEP'T OF CONSERVATION, COMMISSION DECISION IN THE MATTER OF ZONING PETITION ZP 707 5-6 (Sept. 23, 2009), *available at* www.maine.gov/doc/lurc/reference/resourceplans/moosehead/2009-09-23_decision.pdf [hereinafter LURC ZONING APPROVAL].

8. *See infra* Part III-B.

9. LURC ZONING APPROVAL, *supra* note 7, at 9.

10. *See infra* pp. 17-23.

11. Telephone Interview with Dave Houghton, former Dir. of Trust for Public Land, N.H. (Nov. 24, 2009); E-mail from Charles Levesque, President, Innovative Natural Resource Solutions, LLC, to author (Dec. 1, 2009, 13:57 EST) (on file with author).

12. *Id.*

13. *Id.*

14. Although most would not qualify the Connecticut Lakes issue as a “dispute,” speaking in terms used in dispute resolution, the stakeholder negotiation is classic “dispute resolution” in that parties came together to reconcile disagreement concerning a matter of policy. In this instance, a disagreement over how the land should be managed and owned. DICTIONARY OF CONFLICT RESOLUTION 152, 154 (Douglas H. Yarn ed., Jossey-Bass 1999).

environmental disputes. This Part argues that the best way to reduce overall costs and increase the quality and legitimacy of the outcome is to implement a process that is likely to reconcile disparate interests represented in these conflicts. Part II studies historical human connections—and the development of stakeholder interests—in the Northern Forest. This includes recreational access, cultural identity, development, commercial uses, and conservation. Part III of this Note examines the process of dispute resolution used during both the Connecticut Lakes Headwaters sale in northern New Hampshire and the Plum Creek development proposal. In addition, it analyzes the benefits and shortcomings of each process. Part IV of this Note outlines the basic elements needed for collaborative interest-based dispute resolution in the Northern Forest. Furthermore, this section argues that a collaborative decision-making process can be used to supplement the required regulatory process, when applicable, and should be supported by the regulatory agency as a means of producing a more satisfactory decision and more satisfied stakeholders.

I. DISPUTE RESOLUTION: WHAT IS IT AND HOW DOES IT WORK IN MAJOR LAND USE DISPUTES?

As this Note will explain, both the Connecticut Lakes Headwaters Partnership Task Force process and the LURC regulatory process resolved disputes between parties. Yet neither of these efforts resolved the conflict at the heart of these disputes. Conflict is an overarching issue that exists over an extended period of time and may never manifest itself in any direct action.¹⁵ Sometimes, conflict is never acted upon and is never recognized because no dispute arises. A dispute, on the other hand, is an actual event that brings the conflict to life.¹⁶ For example, a conflict continues to exist in the Northern Forest between the interests of real-estate development and land conservation. Until one party, either a land conservationist or a real-estate developer, acts on its interest, the conflict is of no real significance. Once acted upon, the conflict manifests itself as a dispute, such as a dispute over a particular real-estate development in an otherwise forested landscape. While conflicts can exist for centuries and may never be resolved, disputes within a conflict can be and are resolved regularly. When

15. Cf. DICTIONARY OF CONFLICT RESOLUTION, *supra* note 14, at 114–15 (“A dispute is an articulation of the conflict, a symptom, so to speak, rather than the conflict itself. A conflict can exist without a dispute, but a dispute cannot exist without a conflict.”).

16. *Id.*

it comes to resolving disputes, participants have three main choices: (1) to reconcile the disputants' underlying interests through collaboration; (2) to "determine who is right;" and (3) to "determine who is more powerful."¹⁷

A process that seeks to reconcile the disputants' underlying interests is commonly achieved through collaboration.¹⁸ "Interests are needs, desires, concerns, fears—the things one cares about or wants."¹⁹ Interests underlie the positions that people take on issues.²⁰ For example, if an electric utility wants to build a dam on a river for hydro-power, the utility's position on a permit for the dam would be to build the dam. Its underlying interest in the dam, however, is probably the increased electricity it could generate from the dam. A farmer downstream may hold the position that there should be no dam. The farmer's underlying interest, however, is the need for a consistent and reliable source of water for his farm. When it comes to land use disputes, parties can look to collaborative negotiation to come to a result that reflects all of the parties' underlying interests.²¹ An example might include allowing a dam to be built but only if it is built in a way that ensures that farmers downstream still get a consistent, reliable supply of water. Parties involved in land disputes can use collaborative negotiation to get past positions and satisfy their underlying interests. Collaboration is defined as "the pooling of appreciations and/or tangible resources . . . by two or more stakeholders . . . to solve a set of problems which neither can solve individually."²² A collaborative approach encourages each side to explore each others' interests and work together toward a creative solution that addresses the underlying interests of each party.

A process that determines who is right in a dispute is one of the most often relied-upon methods of dispute resolution.²³ This process usually involves a third party, who, after hearing arguments by each side, applies an objective standard and declares a winner.²⁴ A dispute that is resolved by

17. WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 4–5 (1988).

18. *See id.* at 6 (using negotiation and mediation as examples of collaboration methods employed to reconcile parties' interests).

19. *Id.* at 5.

20. *Id.*

21. *See generally*, Sean F. Nolon, *The Lawyer as Process Advocate: Encouraging Collaborative Approaches to Controversial Development Decisions*, 27 PACE ENVTL. L. REV. 103 (2009) (providing examples of successful uses of collaborative negotiation in land use disputes).

22. JULIA M. WONDOLLECK & STEVEN L. YAFFEE, MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN NATURAL RESOURCE MANAGEMENT xiii (Island Press 2000) (quoting Barbara Gray, *Conditions Facilitating Interorganizational Collaboration*, HUMAN RELATIONS, Vol. 38, Dec. 1985, at 911).

23. URY ET AL., *supra* note 17, at 7.

24. *Id.*

determining who is right is often associated with an adjudication or trial.²⁵ This is the standard method of dispute resolution in our legal system.²⁶

A process that determines who is more powerful is a method of dispute resolution in which a party exercises its power, either through threats or imposing costs, in order to coerce or force “someone to do something he would not otherwise do.”²⁷ Examples of power-based dispute resolution usually come in “two common forms: [1] acts of aggression . . . and [2] withholding the benefits that derive from a relationship.”²⁸ A physical fight between two parties is a standard example of aggression, and a strike is a standard example of withholding benefits of a relationship.²⁹

Parties seeking to resolve a dispute first have to determine which dispute resolution system is the most cost effective. To do so, a party should carefully evaluate how each method will affect four types of costs: (1) transaction costs, (2) satisfaction with outcomes, (3) effect on relationships, and (4) recurrence of disputes.³⁰ Generally, “reconciling interests costs less and yields more satisfactory results than determining who is right, which in turn costs less . . . than determining who is most powerful.”³¹

Applying these factors to land disputes, reconciling interests through collaboration reveals significant cost benefits. First, transaction costs related to collaborative processes (time, travel expenses, etc.) are considerably lower—though they come earlier in the process—compared to a trial-like process (lawyers fees, agency time, etc.), and power disputes (ecoterrorism, strikes, retaliation, etc.). This is especially true in cases where disputes that are taken to the court system last years or decades. Second, collaborative dispute systems, including those in the Northern Forest, result in high satisfaction for the parties involved. Every participant in the Connecticut Lakes dispute³² that the author interviewed was very satisfied with the process *and* outcome.³³ Conversely, a dispute resolution system that determines who is right generally chooses a winner and a loser, eliminating the possibility that all parties can be satisfied with the outcome.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 8.

29. *Id.*

30. *Id.* at 11–12.

31. *Id.* at 4. For a general discussion on how collaborative interest-based disputes are more cost-effective in relation to the four factors, see *id.* at 13–15.

32. Discussed *infra* Part III-A.

33. See, e.g., Telephone Interview with Gene Chandler, original member of the Task Force and the Speaker of the House of Representatives (Nov. 30, 2009).

Third, collaborative processes that seek to reconcile underlying interests have a positive effect on the relationships of the stakeholders and increase parties' ability to work together throughout the process and in the future.³⁴ Finally, a collaborative process reduces a recurrence of the dispute because an outcome is reached collaboratively and because parties narrow the interests in dispute through an interest-reconciliation process.³⁵

Although common sense suggests that these four cost factors are interrelated, a high cost associated with one of these factors can indeed affect the costs associated with all other factors. For example, a losing party in a rights-based process may have a desire to appeal. This would increase transaction costs, create bitter feelings between the disputants, and could ultimately affect the disputants' ability to work together in the future.

A collaborative approach is not always advisable or possible for parties dealing with a dispute. Sometimes, parties to a dispute will realize that they will never be able to reconcile deeply-held, opposite interests.³⁶ For example, during consensus-based negotiations in the Yukon over wolf management, the negotiation team recognized that there were animal rights groups involved that would never agree to any negotiated settlement because they were *morally* opposed to killing wolves.³⁷ As a means of quickly determining an outcome, a traditional rights-based approach can and should be used when the issue is not particularly controversial or complex.

While collaboration is generally the preferred method for satisfying a party's underlying intrinsic and instrumental interests in land use disputes, whether a collaborative approach is desirable in the context of land use disputes in the Northern Forest has yet to be fully studied. In order to reach a conclusion, one must first examine the evolution of stakeholders' interests in the Northern Forest.

34. See URY ET AL., *supra* note 17, at 12 (“[M]arital counseling in which the disputing partners learn to focus on interests in order to resolve disputes may strengthen a marriage.”). *But see* Nolon, *supra* note 21, at 105 (“[E]ven if a development could benefit all parties involved, a process that stokes hostility and promotes mistrust will eliminate any opportunities to capture that benefit.”).

35. URY ET AL., *supra* note 17, at 11–13.

36. *Id.* at 16.

37. Susan Todd, *Building Consensus on Divisive Issues: a Case Study of the Yukon Wolf Management Team*, 22 ENVTL. IMPACT ASSESSMENT REV. 655, 678 (2002).

II. A BRIEF HISTORY OF LAND USE AND COLLABORATION IN THE NORTHERN FOREST: THE RISE OF STAKEHOLDER INTERESTS

A. A Historical Perspective: The Northern Forest from 1800–1960

Forestland of the Northern Forest grew for approximately 12,000 years with limited intrusion by human activity.³⁸ Prior to the mid-1800s, most human interaction with natural resources was concentrated in southern New England and the southern portions of Northern Forest states.³⁹ It was not until the mid-to-late 1800s that the Northern Forest saw considerable human interaction in the forms of both industry and recreation.⁴⁰ As industry realized the immense potential for raw natural resources in the Northern Forest, cities and towns began to appear almost overnight.⁴¹ Cities such as Berlin, New Hampshire and Millinocket, Maine served as major processing sites for raw timber extracted from the surrounding forests.⁴² “Bangor, Maine and Burlington, Vermont competed for the title of lumber capital of the world.”⁴³ In the late 1800s, the timber holdings began to consolidate in a way that put most of the private timberland in the hands of fewer and fewer owners.⁴⁴ In New Hampshire, the New Hampshire Land Company, which was actually organized in Connecticut, began to purchase large tracts of land from the state.⁴⁵ It then turned around and sold the land to large “timber barons” at a profit, while denying sale to smaller owners.⁴⁶ Meanwhile, in upstate New York, seventeen pulp and paper companies

38. Thoreau referred to the Northern Forest in Maine as “a damp and intricate wilderness.” LLOYD IRLAND, *WILDLANDS AND WOODLOTS: THE STORY OF NEW ENGLAND’S FORESTS* 27 (1982).

39. See generally DIANA MUIR, *REFLECTIONS IN BULLOUGH’S POND, ECONOMY AND ECOSYSTEM IN NEW ENGLAND* (2000) (discussing the history of human interaction with the ecology of New England).

40. N. FOREST CTR. & N. COUNTRY COUNCIL, INC., *A STRATEGY FOR REGIONAL ECONOMIC RESURGENCE: RECOMMENDATIONS OF THE NORTHERN FOREST SUSTAINABLE ECONOMY INITIATIVE* 8 (Joe Short ed., 2008) [hereinafter N. FOREST CTR.].

41. E.g., C. FRANCIS BELCHER, *LOGGING RAILROADS OF THE WHITE MOUNTAINS* (1980).

42. N. FOREST CTR., *supra* note 40, at 8.

43. *Id.*

44. Blackmer, *supra* note 1, at 266.

45. Martha Carlson & Richard Ober, *The Weeks Act: How the White Mountain National Forest Came to Be*, in *THE SOC’Y FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS, PEOPLE AND PLACE* 4 (Rosemary G. Conroy & Richard Ober eds., 2001) [hereinafter SPNHF].

46. *Id.*

merged in 1898 to form what is now the largest pulp and paper company in the world: International Paper.⁴⁷

The development of environmental consciousness followed the development of the timber industry. Beginning in the 1830s with Henry David Thoreau's trip to the Maine Woods,⁴⁸ the public began to recognize the opportunities for retreat and recreation in the Northern Forests. It was during this time that the public began to recognize the tensions between wildlands and commerce.⁴⁹ In New Hampshire, for example, public outrage over the timber practices in northern New Hampshire sparked the creation of the Society for the Protection of New Hampshire Forests (SPNHF).⁵⁰ SPNHF lobbied hard with other organizations, such as the Appalachian Mountain Club (AMC), to pass the Weeks Act in 1911,⁵¹ which allowed the federal government to purchase private property to create National Forests; this ultimately led to the creation of the White Mountain National Forest in New Hampshire.⁵² By 1911, however, many of the old logging barons had already moved out of the Northern Forest to take advantage of new logging opportunities in the upper Midwest.⁵³ The large logging companies continued to be replaced by large pulp and paper companies, who could use the smaller trees that the logging barons could not.⁵⁴ This pattern of land tenure in the Northern Forest remained relatively unaltered through the middle of the twentieth century.⁵⁵

B. The Northern Forest in Transition: 1960 to 1990s

Beginning in the 1960s, a series of events put new pressures on the traditional economy and way of life in the Northern Forest. The budworm outbreak, growing log trade from Quebec, and public concern over forest management (i.e. environmentalism) all put financial and social pressures

47. N. FOREST CTR., *supra* note 40, at 8.

48. HENRY DAVID THOREAU, *THE MAINE WOODS* (Joseph J. Moldenhauer ed., Princeton Univ. Press 2d ed. 1973) (1864).

49. Blackmer, *supra* note 1, at 267.

50. SPNHF, *supra* note 45, at 6.

51. Weeks Act of 1911, ch. 186, 36 Stat. 961 (1911). The Weeks Act was greatly expanded in 1924 by the Clarke–McNary Act, which gave the federal government more power to purchase land for National Forests. Clarke–McNary Act, ch. 348, 43 Stat. 653 (1924).

52. SPNHF, *supra* note 45, at 3–9.

53. See Blackmer, *supra* note 1 (providing a historical overview of the Northern Forest).

54. These companies included, but were not limited to: International Paper, Great Northern, and St. Regis. SPNHF, *supra* note 45, at 3–9.

55. Blackmer, *supra* note 1, at 268–69.

on the traditional economy of the Northern Forest.⁵⁶ Where traditional forest product jobs were a major source of manufacturing jobs in the Northern Forests in the early 1970s,⁵⁷ new pulp companies⁵⁸ came to the Northern Forest despite the recent outbreak of the budworm, an invasive insect that devastated many softwood stands relied on by the pulp industry.⁵⁹ In the 1970s and 1980s, specifically, three major shifts led to new land management in the Northern Forest: (1) increased demand for land development, (2) the emergence of the global pulp and paper economy, especially in South America, and (3) a change in attitudes on Wall Street.⁶⁰

First, new convenient forms of travel and access greatly influenced land development demand. The expansion of new logging roads allowed for easy access to recreational opportunities in remote parts of the Northern Forest, introducing new recreationists from the major cities and southern portions of the states.⁶¹ The interstate highway system directly connected cities to the Northern Forest, allowing for much easier access to the Northern Forest along the Interstate 93 and 89 corridors, for example.⁶² The ease of access to the Northern Forest not only contributed to an increase in tourism, but also increased its appeal for retirement and second home development.⁶³ Second, the forest products industry was strained by new competition from land developers, cheap lumber produced in Canada,⁶⁴ and considerable competition from pulp and paper industries from South America, which exported paper to the United States, often for a lower

56. See IRLAND, *supra* note 38, at 48 (citing the budworm, new machines, a burst of mill shutdowns, growing log trade to Quebec, and public concern over management as major factors in a shift away from some traditional forest products jobs).

57. *Id.* at 59.

58. Both Diamond International and Georgia Pacific moved into the Northern Forest during this period. *Id.* at 29.

59. NATURAL RES. CAN., CAN. FOREST SERV., *Spruce Budworm*, <http://cfs.nrcan.gc.ca/news/455> (last visited Sept. 24, 2010).

60. Blackmer, *supra* note 1, at 271; E-mail from Charles Levesque to author, *supra* note 11.

61. Blackmer, *supra* note 1, at 271 (citing PERRY HAGENSTEIN, *A CHALLENGE FOR NEW ENGLAND: CHANGES IN LARGE FOREST LAND HOLDINGS 2* (1987)).

62. *Id.*

63. *See id.* at 271–72 (“Better access, in turn, has brought about the most important force for changing forest ownership in northern New England—the growing spread between the value of forest land for producing timber, its historic use, and its value for recreational development.”) (quoting PERRY HAGENSTEIN, *A CHALLENGE FOR NEW ENGLAND: CHANGES IN LARGE FOREST LAND HOLDINGS 2* (1987)).

64. *See generally* Benjamin M. Leoni, *Cooperation and Dispute: Comparing Realist and Neoliberal Explanations of 25 Years of Dispute over the Softwood Lumber Trade Between the United States and Canada* (Apr. 15, 2005) (unpublished B.A. Thesis, Bates College) (on file with the author) (providing a detailed analysis of the U.S.–Canadian Softwood Lumber Trade Dispute).

price.⁶⁵ Finally, “investors put intense pressure on forest products corporations to sell ‘non-performing assets’ such as land that had higher value for short-term development than for long-term timber management.”⁶⁶

As a result of these pressures, many timber companies began to propose selling portions of their timberland for development purposes in the 1980s or began to plan for development themselves.⁶⁷ Meanwhile, environmental consciousness increased during the 1970s, putting new restrictions on logging and development. Proposed resort and residential development of timberlands directly led to some of the strongest and most sweeping land use laws in the nation. One such example was International Paper’s proposal for a massive ski resort development in Vermont.⁶⁸ Public reaction against the development was so strong that it sparked Vermont’s groundbreaking Act 250 land use law.⁶⁹

The environmental movement and pressures from investors also led to changes in logging practices themselves. Investors began to question the economics of river drives—which sent logs down-river to a processing plant—because of the high rate of “breakage, scraped wood, and ‘sinkers.’”⁷⁰ The drive approach transitioned to more road building for ground transport of wood and new modern wood logging equipment in the 1960s and 1970s.⁷¹ The increase in recreation in the Northern Forest also led to legal changes to the river drives themselves.⁷² River drives pushed aside potential for recreational uses, damaged fish spawning grounds, and had other environmental consequences.⁷³ Environmentalists worked hard to end the drives, and in 1976, Maine passed a “law outlawing river drives.”⁷⁴

As pressures favoring development increased, environmentalists and the timber and pulp industries found themselves on the same side of an effort to curb residential development. In 1988, Diamond International Company, one of the largest pulp companies in the Northern Forest, put nearly one million acres of its land on the market.⁷⁵ Professor Halper summarized the reaction by both sides:

65. Blackmer, *supra* note 1, at 272.

66. *Id.* (internal citation omitted).

67. Telephone Interview with Charles Levesque, Exec. Dir., Innovative Natural Resource Solutions, LLC. (Dec. 1, 2009); E-mail from Charles Levesque to author, *supra* note 11.

68. IRLAND, *supra* note 38, at 36 (internal quotations omitted).

69. *Id.*

70. *Id.* at 30.

71. E-mail from Charles Levesque to author, *supra* note 11.

72. IRLAND, *supra* note 38, at 31.

73. *Id.*

74. *Id.*

75. Blackmer, *supra* note 1, at 272.

For one moment, in 1988, both sides of the quarrel united against a new enemy—recreational development for the upper-middle-class able to afford vacation houses and in search of leisure within a day's drive. The immediate threat provoking the creation of the National Forest Lands Study ("NFLS") was the fear that the North Woods of Maine, New Hampshire, Vermont, and New York could be lost forever if land held by wood products companies . . . were to be sold to real estate developers.⁷⁶

Land speculators seeking a quick profit swiftly purchased much of the land in New York, Vermont, and New Hampshire for development, whereas in Maine, only some of the land was sold for development.⁷⁷ In Maine, forest products companies purchased most of the land, however, much of this land has since been resold.⁷⁸ The Diamond International land sale served as a wake-up call to those concerned with maintaining the "wild character" of the Northern Forest,⁷⁹ and was the start of a dramatic and contentious shift in land ownership in the Northern Forest that continues today.

C. A Changing Landscape and Challenging Future: 1990–Present

After the Diamond International land sale, conservation groups and the forest industry engaged in new collaborative efforts, created in part by a sense of urgency to preserve the remaining wild character of the Northern Forest. In response to noticeable changes in land ownership patterns in the Northern Forest,⁸⁰ state government, private landowners, conservation groups, and other stakeholders convened to study the changes and to propose action for the economic and natural well-being of the Northern Forest.

76. Louise A. Halper, *The Adirondack Park and the Northern Forest: An Essay on Preservation and Conservation*, 19 VT. L. REV. 335, 336 (1995).

77. Blackmer, *supra* note 1, at 272–73.

78. *Id.* at 273 n.33.

79. *Id.*

80. The largest and most substantial report was published by the U.S. Forest Service. STEPHEN HARPER ET AL., U.S. DEP'T OF AGRIC., THE NORTHERN FOREST LANDS STUDY OF NEW ENGLAND AND NEW YORK: A REPORT TO THE CONGRESS OF THE UNITED STATES ON THE RECENT CHANGES IN LANDOWNERSHIP AND LAND USE IN THE NORTHERN FOREST OF MAINE, NEW HAMPSHIRE, NEW YORK AND VERMONT (1990). This report warns of the future of the Northern Forest if change remains unchecked. "If any place is unusually attractive, folks will be attracted there. . . . The place will grow until its attractiveness has been reduced by crowded highways, or unemployment, or scarce housing, or pollution, or just plain visual blight When the place is no more attractive than anywhere else, then and only then will it stop growing." *Id.* at 8 (alteration in original) (citation omitted).

In 1990, state leaders and the U.S. Forest Service formed the Northern Forest Lands Council to encourage the “reinforce[ment of] the traditional patterns of land ownership and uses of large forest areas in the Northern Forest.”⁸¹ This included enhancing quality of economic life, encouraging the production of a sustainable yield of forest products, and protecting recreational, wildlife, scenic, and wildland resources.⁸² Furthermore, thirty stakeholders consisting of conservation, recreation, community, and forestry groups interested in preserving these resources formed the Northern Forest Alliance, a not-for-profit organization dedicated to protecting the Northern Forest’s “beauty and the resources it provides to support a long-standing way of life.”⁸³ Mission statements like this demonstrate that recreation and conservation are key components worth significant consideration. Since the early 1990s, recreation and conservation groups have sought to ally themselves with local communities that rely on the forest products industry for their livelihood by “praising Northern Forest traditions in its publications.”⁸⁴

The willingness of stakeholders to engage in a collaborative effort, at least at the macro level, is notable considering the changes in land ownership in the Northern Forest and the challenges it faces. Indeed, the title of the report released by the Northern Forest Lands Council is “Finding Common Ground.”⁸⁵ While not signifying the first time that stakeholders have come together in the Northern Forest to make important decisions, the 1990s marked a period where the parties used and accepted collaborative decision-making to advance common interests in the Northern Forest. Recommendations by both the Northern Forest Lands Council⁸⁶ and the contemporary Northern Forest Sustainable Economy Initiative⁸⁷ point out

81. N. FOREST LANDS COUNCIL, FINDING COMMON GROUND: CONSERVING THE NORTHERN FOREST, MISSION STATEMENT (1994) [hereinafter NFLC].

82. Stephen C. Trombulak, *Ecological Health and the Northern Forest*, 19 VT. L. REV. 283, 284 (1995).

83. THE N. FOREST ALLIANCE, WILDLANDS: A CONSERVATION STRATEGY FOR THE NORTHERN FOREST I (1997).

84. Lee P. Breckenridge, *Reweaving the Landscape: The Institutional Challenges of Ecosystem Management for Lands in Private Ownership*, 19 VT. L. REV. 361, 395 (1995) (citation omitted).

85. NFLC, *supra* note 81.

86. *See id.* at 93 (“The Council’s consensus-building process can serve as a model for this collaboration.”).

87. *See* JOE SHORT, N. FOREST SUSTAINABLE ECONOMY INITIATIVE, A STRATEGY FOR REGIONAL ECONOMIC RESURGENCE 7 (2008) (“Increase the capacity of the region’s individuals and institutions to anticipate and adapt to change, and implement new initiatives by working and coordinating as a region to understand and advocate for regional interests and priorities.”). The Northern Forest Sustainable Economy Initiative began in 2006 and was created by “the governors of Maine, New Hampshire, Vermont, and New York in partnership with the Northern Forest Center and the North Country Council of New Hampshire.” *Id.* at 6.

the need for consensus-building collaborative and coordinated approaches to address changes in the region. Recent events, including the organization Connecticut Lakes Headwaters Partnership Task Force and the development of Moosehead Lake in Maine discussed in Part III of this Note, point out the challenges and benefits of such a process. Yet the importance of making a collaborative approach, the preferred method of finding solutions to major land disputes in the Northern Forest, cannot be overstated.

There are two critically important aspects to these aforementioned collaborative efforts that will directly affect future efforts for collaboration when it comes to site-specific issues. The first important aspect to these collaborative efforts is that they occurred at the macro level: they represent coordinated efforts at the regional level between states that have a mutual stake and interest in the Northern Forest.⁸⁸ The second important aspect of these collaborative efforts is that companies, local government, and conservation groups came together because of a perceived threat to the traditional way of life posed by new development. The fact that these groups came together due to a threat of development has direct and indirect effects on dispute resolution when individual tracts of lands in the Northern Forest are purchased by the perceived “bad guys”: the land developers. Once land developers do purchase property, a collaborative process needs to include them, not continue to isolate them.

III. MICRO-LEVEL CHALLENGES: LESSONS FROM NEW HAMPSHIRE’S CONNECTICUT LAKES HEADWATERS PARTNERSHIP TASK FORCE AND THE PLANNED DEVELOPMENT OF MAINE’S MOOSEHEAD LAKES REGION

In the two decades since the earliest collaborative efforts related to development in the Northern Forest, two major land transactions took place that challenged the stakeholders to substantively confront the land development opportunities that they had spent the previous decade identifying and preparing for. In the early 2000s, International Paper announced its plan to sell 171,500 acres of property in northern New Hampshire around the Connecticut Lakes, constituting 3.6% of the state’s total land area and comprising one of the largest privately-owned tracts of forestland in the state.⁸⁹ Conservation groups and state leaders took action,

88. *See id.*; NFLC, *supra* note 81, at 93 (promoting collaboration and communication among citizens, businesses, and institutions of the Northern Forest).

89. *Connecticut Headwaters Campaign (NH)*, THE TRUST FOR PUBLIC LAND, http://www.tpl.org/tier3_cd.cfm?content_item_id=7140&folder_id=258 (last visited Dec. 1, 2009) [hereinafter TPL].

reaching consensus on a plan that allowed for a sale of most of the property to a timber investment company, under restrictions of a conservation easement held by the state.⁹⁰ In Maine, in 1998, Plum Creek Timber Company bought 900,000 acres of forestland in the Northern Forest, “saying it was only interested in doing sustainable forestry in the Pine Tree state.”⁹¹ By mid-December of 2004, “Plum Creek announced its plans for the largest subdivision in Maine’s history—approximately 1,000 house lots, two resorts and other enterprises—on an array of high quality lakes and ponds. All of the proposed development would be sited in the Moosehead Lake area.”⁹²

Although Plum Creek’s plan for the development was eventually approved by Maine’s Land Use Regulation Commission after five years of dispute,⁹³ the decision continues to be mired in litigation and appeals.⁹⁴ This section will look at each dispute separately and identify the issues presented, the stakeholders involved, and most importantly, the process involved.

A. The Connecticut Lakes Headwaters Partnership Task Force

In 2001, after International Paper announced its plans to sell 171,000 acres in northern New Hampshire, the Trust for Public Land (TPL) agreed to buy an option agreement from International Paper.⁹⁵ The Connecticut Lakes are located in northern New Hampshire.⁹⁶ The 171,000-acre tract up for sale is located in the towns of Pittsburg, Clarksville, and Stewartstown.⁹⁷ By signing an option agreement, TPL had time to organize the Connecticut Lakes Headwaters Partnership Task Force (Task Force).⁹⁸ TPL had no intention of keeping the lands but signed the option contract simply to

90. *Id.*

91. Phyllis Austin, *Plum Creek’s Big Plan*, ME. ENVTL. NEWS, Feb. 10, 2005, <http://www.meepi.org/files05/pa021005.htm>.

92. *Id.*

93. LURC ZONING APPROVAL, *supra* note 7.

94. *E.g.*, Natural Resources Council of Maine, *NRCM Appeals Plum Creek Decision*, http://www.nrcm.org/news_detail.asp?news=3318 (last visited Dec. 1, 2009).

95. Telephone Interview with Dave Houghton, *supra* note 11.

96. WHERE THE GREAT RIVER RISES: AN ATLAS OF THE CONNECTICUT RIVER WATERSHED IN VERMONT AND NEW HAMPSHIRE 7 (Rebecca A. Brown ed., 2009).

97. Open Space Institute, 171,000-acre Connecticut Lakes Headwaters Property Permanently Conserved (Oct. 10, 2003), *available at* http://osi.convio.net/site/PageServer?pagename=news_pressID_85.

98. *Id.*

provide time for a collaborative approach to figure out how to conserve the land and keep it from being developed.⁹⁹

According to TPL, the goal of the Task Force is “conserving the natural resources of the Connecticut Headwaters property, guaranteeing public access, and maintaining the land’s central role in the culture and economy of the region.”¹⁰⁰ The property includes 840 miles of streams and lakes that feed the Connecticut River and is “one of the largest undeveloped landscapes in New England.”¹⁰¹

The Task Force convened in the summer of 2001 and held its first meeting on August 9th.¹⁰² The Task Force was split up into two main bodies: the Steering Committee and the Technical Committee.¹⁰³ The Technical Committee was charged with conducting scientific studies of the forestland and determining the areas with the most ecological significance, the areas best suited for timber management, and the areas with a history of recreational use.¹⁰⁴ The Technical Committee then reported its findings to the Steering Committee, which made the decisions on where to draw the lines of more restrictive easements and less restrictive easements.¹⁰⁵ Senator Judd Gregg (R-N.H.) and New Hampshire Governor Jeanne Shaheen (D) chaired the Steering Committee.¹⁰⁶ The Task Force included a diverse group of stakeholders, such as national environmental groups, local communities, and state and national political leaders.¹⁰⁷ Along with Senator Gregg and Governor Shaheen, TPL and its consultant, Innovative Natural Resources Solutions, LLC, ultimately selected the stakeholders.¹⁰⁸ Any group or individual who wished to participate in the meetings could do so, even if not a formal party to the Task Force, by making comments at the Task Force’s public meetings.¹⁰⁹

99. Telephone Interview with Dave Houghton, *supra* note 11. Generally speaking, TPL purchases properties with the intent to sell it as soon as it is protected and preserved for public use. *Id.*

100. TPL, *supra* note 89.

101. *Id.*

102. Telephone Interview with Charles Levesque, *supra* note 67. Charles had worked as a consultant for TPL since 1994 and was tasked with organizing and mediating the Task Force negotiations. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. See CONNECTICUT LAKES HEADWATERS PARTNERSHIP TASK FORCE, FINAL REPORT 6–7 (Dec. 7, 2001) [hereinafter TASK FORCE] (listing the various members).

108. Telephone Interview with Charles Levesque, *supra* note 67.

109. *Id.*

Once the Task Force convened for the first time, the designated facilitator—Charles Levesque, of Innovative Natural Resources Solutions, LLC, who happened to have been the executive director of the former Northern Forest Lands Council—began by asking all parties involved to identify their interests and desired goals for the Connecticut Lakes Headwaters.¹¹⁰ After the Task Force created a list of interests, no party objected to any of the major interests or broad goals of the Task Force.¹¹¹ The Task Force dealt with conserving natural resources, guaranteeing public access, maintaining a working forest, and creating a “forest reserve” in ecologically-sensitive areas, where certain activities such as logging were not allowed.¹¹²

The most challenging issues presented during the course of the Task Force negotiations were: how much of the land was going to be placed in a reserve, what kinds of activities were going to be allowed on the land, and who would purchase the land. As the facilitator put it, “the devil was in the details.”¹¹³ Some of the larger environmental groups wanted a very large amount of land put into a forest reserve where there would be no logging, while some participants preferred to see very little of the land go into a reserve, but supported a working forest easement that restricted development.¹¹⁴ However, negotiating the size of the forest reserve was the most difficult issue and required significant behind-the-scenes work from the facilitator and TPL staff, including late-night phone calls and many private meetings with stakeholders to flush out true interests.¹¹⁵

Furthermore, the members of the Task Force were very aware of the sensitivity of the issue, which required the participants to be conscious of their rhetoric during negotiations so as not to provoke hostility between stakeholders. According to Gene Chandler, a leading member of the Task Force and then Speaker of the New Hampshire House of Representatives, “we had one fellow come in who wanted a large forest reserve and told us what a great opportunity this would be to change the lives of the folks in the North Country for the better. I was worried the locals were going to string him up.”¹¹⁶ This example outlines the sensitivity of dealing with the issue as well as the early tensions between stakeholders.

110. *Id.*

111. *Id.*

112. Telephone Interview with Dave Houghton, *supra* note 11.

113. Telephone Interview with Charles Levesque, *supra* note 67.

114. Telephone Interview with Dave Houghton, *supra* note 11.

115. *Id.*

116. Telephone Interview with Gene Chandler, *supra* note 33.

The Task Force met several times over the next five months, under pressure to complete a plan by December so that Senator Gregg could push for federal funding for the project when he returned to Washington, D.C. in January.¹¹⁷ The Task Force made an agreement by the final meeting on December 7, 2001.¹¹⁸ The agreement established a state-owned forest reserve of 25,000 acres and approved a sale of a conservation easement on the reserve to the Nature Conservancy.¹¹⁹ The remaining 146,400 acres would be sold to a private timber company,¹²⁰ subject to a conservation easement that would be purchased by the state.¹²¹ The majority of the 146,400 acres would continue to be harvested at sustainable rates.¹²²

A public-private partnership provided funds for the project. The funding included contributions by private organizations (\$8,000,000), the State of New Hampshire (\$10,000,000), and the federal government (\$3,600,000 in the 2002 federal budget and \$8,000,000 in 2003).¹²³ The final closing ceremony for the deal took place in October of 2003.¹²⁴

Stakeholders credit the success of the process to several facts. First, everyone shared at least a broad interest in protecting the property from development. Second, New Hampshire has a political climate of a collaborative and representative process.¹²⁵ Next, the groups knew that they would have to give up a small part of their personal goals to achieve the overall goal of preserving the land.¹²⁶ Perhaps most importantly of all, stakeholders credit the outcome to a well-structured process and the skills of the hired facilitator, who made last-minute phone calls and called private meetings to ensure that interests were evenly balanced.¹²⁷

117. Telephone Interview with Charles Levesque, *supra* note 67.

118. *Id.*

119. *The Nature Conservancy and State Complete Transaction on 25,000-Acre Natural Area to be Managed by Fish and Game*, NEW HAMPSHIRE FISH AND GAME DEPARTMENT, http://wildlife.state.nh.us/NewRoom/News_2002/News_2002_July_to_Dec/Natural_Area_complete_123002.htm (last visited Dec. 1, 2009).

120. Lyme Timber Company. Telephone Interview with Charles Levesque, *supra* note 67.

121. TPL, *supra* note 89.

122. *Id.*

123. *Id.*; Press Release, Sen. Judd Gregg, \$10.65 Million for NH Conservation Efforts Gets Final Congressional Approval: Senator Gregg includes \$8 Million for former IP lands and support for WMNF land acquisitions (Feb. 23, 2003).

124. Telephone Interview with Charles Levesque, *supra* note 67.

125. David Houghton credits a strong culture of “listening to the people” as directly related to New Hampshire’s mistrust of King George during the colonial period—still evident today as New Hampshire has the largest state House of Representatives in the country and the third largest democratically-elected body in the English speaking world. Telephone Interview with Dave Houghton, *supra* note 11.

126. Telephone Interview with Gene Chandler, *supra* note 33.

127. *Id.*; Telephone Interview with Dave Houghton, *supra* note 11; Telephone Interview with Jane Difley, President and Forester for the Soc’y for the Protection of New Hampshire Forests (Nov. 29, 2009).

B. Plum Creek's Concept Plan to Rezone and Develop 400,000 Acres in the Moosehead Lake Region

The Connecticut Lakes Headwaters project was one of the largest land deals struck in New Hampshire in recent history. But the success of that deal was quickly overshadowed in 2004, when Plum Creek submitted a Concept Plan to Maine's Land Use Regulation Commission¹²⁸ to rezone nearly 400,000 acres of land in the Moosehead Lake region and develop roughly 1,000 housing lots, resorts, and commercial establishments.¹²⁹ Even though the actual development only encompassed 14,000 acres of the land, it was located "on or near . . . an iconic landscape."¹³⁰

Before Plum Creek went forward with their planned development, the company submitted its Concept Plan to LURC, the agency authorized to review all development proposals and zoning appeals within Maine's unincorporated lands.¹³¹ LURC has its own procedures for approving a rezoning Concept Plan for development, which resembles a mix of courtroom fact-finding, public hearings, and notice and comment periods similar to those found in agency rulemaking around the country.¹³² The Plum Creek Concept Plan, however, provided LURC with new challenges. "Plum Creek's proposal for Concept Plan rezoning was unprecedented in its scale and complexity, and in the level of interest in and attention to the proposal"¹³³ and has "overwhelm[ed] the overseers" to an extent that LURC has never dealt with in the past.¹³⁴ Initially, LURC openly questioned "whether it even has the resources to consider the merits of so gigantic a

128. Land Use Regulation Commission, *About Us*, MAINE.GOV, <http://www.maine.gov/doc/lurc/about.html> (last visited Dec. 1, 2009)[hereinafter LURC, *About Us*]. Land Use Regulation Commission's primary function is to serve as a zoning and planning agency for Maine's unorganized territory. *Id.*

129. Austin, *supra* note 91.

130. Peter Howell, Open Space Institute, Remarks at Conservation Finance Forum: Lessons from Moosehead Lake (Dec. 8, 2009) (recording on file with author).

131. ME. REV. STAT. tit. 12, § 683 (2008).

132. See LURC ZONING APPROVAL, *supra* note 7, at 37 ("[T]he Commission reviews the evidence in the vast administrative record by way of representative example, sets forth findings of fact based on the evidence, and applies governing review criteria to the factual record to reach legal conclusions [O]ver the course of this proceeding, the Commission listened to four full days of public oral testimony, accepted more than 3,800 individual letters and e-mails, and received over a dozen petitions containing more than 28,000 signatures from members of the public alone.").

133. *Id.* at 4.

134. Austin, *supra* note 91.

proposal,¹³⁵ although the legislature later specifically authorized additional resources and staff to deal with the proposal, alleviating these concerns.¹³⁶

After five years of permit applications, hearings, and petitions, LURC granted final approval of a modified version of Plum Creek's amended Concept Plan on September 23, 2009.¹³⁷ The process, discussed below, included multiple zoning petitions, public hearings, and filed objections.¹³⁸ This process was exhaustive; the administrative record alone takes up over twenty pages of the final report itself.¹³⁹

Before Plum Creek could break ground on their development plan for Moosehead Lake, the Concept Plan had to be approved by LURC. LURC defines a Concept Plan as:

[L]andowner-created, long-range plans for the development and conservation of a large area. These plans are a clarification of long-term landowner intent that indicate, in a general way, the areas where development is to be focused, the relative density of proposed development, and the means by which significant natural and recreational resources are to be protected.¹⁴⁰

Although the decision to submit a concept plan is completely voluntary, "once approved by the Commission, they are binding."¹⁴¹ To be approved, the Commission must find that "the plan strikes a reasonable and publicly beneficial balance between development and conservation of lake and other resources . . . at least as protective of the natural environment" as the surrounding area it affects.¹⁴² The "balance" required under LURC's Comprehensive Land Use Plan (CLUP) is left to the discretion of LURC Commissioners. This "balancing of conservation and development at large scale is not science, but an art."¹⁴³ It is up to LURC to weigh the interest of

135. Jamison Colburn, *Bioregional Conservation May Mean Taking Habitat*, 37 ENVTL. L. 249, 288 (2007) (citation omitted).

136. E-mail from Aga Pinette, LURC Staff, to author (Apr. 12, 2010, 16:42 EST) (on file with author).

137. LURC ZONING APPROVAL, *supra* note 7.

138. *E.g.*, *Concept Plan for the Moosehead Lake Region*, MAINE.GOV (Sept. 7, 2010) <http://www.maine.gov/doc/lurc/reference/resourceplans/moosehead.html>.

139. LURC ZONING APPROVAL, *supra* note 7, at 4–24.

140. *Concept Plan for the Moosehead Lake Region*, *supra* note 138.

141. LAND USE REGULATION COMMISSION, ME. DEP'T OF CONSERVATION, COMPREHENSIVE LAND USE PLAN, app. C-8 (2010), available at <http://www.maine.gov/doc/lurc/reference/resourceplans/moosehead.html> [hereinafter CLUP].

142. *Id.* at C-8–9.

143. Howell, *supra* note 130.

the public as well as stakeholders and private landowners, to come up with a balance.¹⁴⁴

Plum Creek first approached LURC toward the end of 2003 to discuss a contemplated proposal for rezoning 600,000 acres of their land.¹⁴⁵ These discussions focused solely on process and did not include any substantive terms of the proposal.¹⁴⁶ The discussions focused on the procedural steps that LURC required for concept plans as well as an anticipated time table for concept plan review.¹⁴⁷ Although LURC did suggest that Plum Creek meet with stakeholders before it submitted its Concept Plan, LURC did not have the authority to *require* them to do so.¹⁴⁸ As soon as Plum Creek filed its 2005 proposal, LURC realized the deficiency of Plum Creek's early outreach efforts.¹⁴⁹

On April 5, 2005, Plum Creek submitted Zoning Petition 707 (Concept Plan) to LURC, to rezone approximately 400,000 acres of land it owned around Moosehead Lake.¹⁵⁰ The highlights of the plan include 975 residential lots on eighteen water bodies,¹⁵¹ as well as the "right to develop two vacation resorts in the area."¹⁵² The proposal constituted the "largest single development [proposal] in Maine's history."¹⁵³

In April 2006, while LURC was busy evaluating Plum Creek's Concept Plan, and was conducting public "scoping sessions,"¹⁵⁴ Plum Creek submitted an amended Concept Plan. During LURC's "scoping sessions," it became very apparent that there was "real public dissatisfaction with the conservation approach" of the original Concept Plan.¹⁵⁵ In response to the public dissatisfaction, Plum Creek amended their Concept Plan and included mention of a privately-negotiated conservation plan between Plum Creek, The Nature Conservancy of Maine, the Appalachian Mountain Club, and the Forest Society of Maine, which the parties referred to as the

144. See CLUP, *supra* note 141 ("In order to approve a concept plan, the Commission must find that the proposed plan conforms with the Commission's lake policies and lake program guidelines . . . is feasible, and is compatible with other public and private interests.")

145. Telephone Interview with Aga Pinette, LURC Staff (Dec. 7, 2009).

146. *Id.*

147. *Id.*

148. E-mail from Aga Pinette to author, *supra* note 136.

149. *Id.*

150. LURC ZONING APPROVAL, *supra* note 7, at 5.

151. *Id.*

152. Jim Levitt, Moderator, Remarks at Conservation Finance Forum: Lessons from Moosehead Lake (Dec. 8, 2009) (recording on file with author).

153. *Id.*

154. LURC ZONING APPROVAL, *supra* note 7, at 8.

155. Telephone Interview with Aga Pinette, *supra* note 145.

“Conservation Framework.”¹⁵⁶ While the finished product of this plan is not as important to this discussion as the process it represented, it is important to note that this privately-negotiated agreement provided The Nature Conservancy with the option to purchase a conservation easement on over 266,000 acres, as well as a purchase in fee of approximately 75,500 acres of Plum Creek’s land included in the Concept Plan.¹⁵⁷

In terms of process, the Conservation Framework represents a private, interest-based, collaborative effort between conservation groups and Plum Creek to come up with a suitable conservation plan to satisfy the interests of conservation groups and the “balance” requirement of LURC’s concept plan.¹⁵⁸ One of the main issues with this proposal, however, is that this collaborative effort was neither public nor endorsed or suggested by LURC.¹⁵⁹ The Conservation Framework negotiations represented a dispute resolution scheme that reconciled parties’ underlying interests—through private negotiations—completely outside of LURC’s required process. The result of this negotiation was then injected into the rights-based adversarial dispute process used by LURC to determine whether to approve Plum Creek’s Concept Plan. At the time the amended Concept Plan was released, with respect to the Conservation Framework, it seemed as though the public only got a “finished product through a press release, but no detail about what that involved or what that entailed.”¹⁶⁰

Many groups objected to Plum Creek’s inclusion of the Conservation Framework deal in its amended Concept Plan and filed formal objections.¹⁶¹ Many stakeholders were concerned that LURC would violate its own procedures by considering a privately-negotiated land agreement that was outside of the LURC regulatory process.¹⁶² Other stakeholders were concerned that LURC’s judgment on the merits of the development half of

156. *Id.*

157. Press Release, The Nature Conservancy, The Nature Conservancy and Plum Creek Sign Agreement to Permanently Conserve Nearly 345,000 Acres in Northern Maine (Oct. 24, 2006).

158. Telephone Interview with Bruce Kidman, The Nature Conservancy (Feb. 18, 2010).

159. Telephone Interview with Aga Pinette, *supra* note 145.

160. *Id.* The Nature Conservancy did not consider the Conservation Framework to be a finished product at all, but rather a flexible plan that could be worked with and ultimately was worked with, over time. Kidman, *supra* note 158.

161. E-mail from Aga Pinette to author, *supra* note 136. See Letter from Catherine Carroll, Dir., Me. Land Use Regulation Comm’n, to Virginia E. Davis, Esq., Reference to the Conservation Framework within Plum Creek’s 2006 petition for rezoning (June 26, 2006) (stating that three environmental groups “have requested that LURC require Plum Creek to remove any reference to the Conservation Framework from its application materials”).

162. Telephone Interview with Cathy Johnson, Staff Attorney, Natural Res. Council of Me. (Feb. 16, 2010).

LURC's "balance" analysis would be clouded by the fact that private negotiations had already achieved a preliminary agreement on the conservation half of the "balance."¹⁶³

Between April 2006 and April 2008, LURC held public hearings regarding the inclusion of the Conservation Framework and the Concept Plan generally, which Plum Creek amended for a final time in April and October 2007.¹⁶⁴ At this point, some stakeholders believed that procedural law required LURC to make a decision either approving or denying Plum Creek's Concept Plan in an up or down vote.¹⁶⁵ Instead, on May 7, 2008, LURC decided to consult with its own staff and provide a "write-up of the Commission's determinations on these core issues," meaning the core issues related to approving or rejecting the Concept Plan.¹⁶⁶ "Based on that write-up, the Commission would then determine whether it wished to continue with the process by directing staff and consultants to draft actual Concept Plan amendment[s] . . . or alternatively to terminate the process and proceed to an up-or-down vote on the Concept Plan as filed."¹⁶⁷

LURC decided to make "Commission-Generated Amendments" to the Concept Plan and began to identify areas of needed amendment in May 2008.¹⁶⁸ Several organizations filed formal objections, stating "that the Commission was without authority to consider any amendments to a proposed Concept Plan, and that its only lawful options were to approve or deny such a plan as filed by a petitioner."¹⁶⁹ LURC denied the objection, stating that the parties still had the option of public comment on any amendments, which cured any prejudice.¹⁷⁰ LURC approved the amended Concept Plan on September 23, 2009, after more than a year of commission-generated amendments to the Concept Plan, which considered public and stakeholder comments.¹⁷¹

In the time since LURC approved the Concept Plan, several environmental organizations have filed appeals with the Maine Superior

163. See Ted Koffman, Me. Audubon Soc'y, Remarks at Conservation Finance Forum: Lessons from Moosehead Lake (Dec. 8, 2009) ("You don't come to a verdict of [punishment for] a crime until you come to the conclusion that they are guilty of that crime.") (recording on file with author).

164. LURC ZONING APPROVAL, *supra* note 7, at 15–20.

165. Telephone Interview with Cathy Johnson, *supra* note 162. Groups appealing the LURC decision cite ME. REV. STAT. tit. 12, § 685-B (1999). However, LURC maintains the position that this section applies to development reviews, *not* concept plans. E-mail from Aga Pinette to author, *supra* note 136.

166. LURC ZONING APPROVAL, *supra* note 7, at 23.

167. *Id.*

168. *Id.* at 24.

169. *Id.*

170. *Id.*

171. *Id.* at 24–34.

Court, alleging that LURC, by rewriting the Concept Plan itself, violated the procedures it was required to follow, which is a repeat of the argument they made to LURC after LURC decided to conduct commission-generated amendments.¹⁷² The case is still in court, and as the dust begins to settle from the administrative fight, it is becoming increasingly apparent that the dispute over the Plum Creek Concept Plan has had a very divisive effect between environmental, conservation, and development stakeholders—a relationship that even LURC staff has identified as “very strained.”¹⁷³

While the dispute over the Plum Creek Concept Plan is still not complete, it has already consumed thousands and thousands of dollars of investment and fundraising as well as “countless hours put in by both professional and unpaid advocates on both sides of the issue.”¹⁷⁴ The question remains, however: is this really the best and most efficient way to resolve this dispute, especially taking into account that this type of dispute most likely will occur in the future, even amongst the same players? Part IV of this Note will attempt to answer this question and provide guidance for future participants on how to structure the best and most cost-effective dispute resolution process for future land disputes in the Northern Forest.

C. Evaluating the Dispute-Resolution Process at the Connecticut and Moosehead Lakes and Identifying Obstacles to Collaboration in the Northern Forest

In New Hampshire, the Connecticut Lakes Headwaters Partnership Task Force can be viewed as a model for land use issues with similar stakeholders and interests—in regulatory and nonregulatory settings—insomuch as it incorporated the major elements needed for successful interest-based collaboration.¹⁷⁵ This does not mean, however, that organizing a collaborative effort for all Northern Forest land disputes is as simple as following an example. Examining the process and constraints to collaboration evident in the Moosehead Lake dispute helps to highlight the fact that not all Northern Forest land disputes are created equal.

First, Maine does not have the amount of historical collaboration between environmental groups and timber companies that exists in New

172. Kevin Miller, *Two Groups Appeal Plum Creek Decision*, BANGOR DAILY NEWS, Oct. 22, 2009, at A1.

173. Telephone Interview with Aga Pinette, *supra* note 145.

174. Robert Kimber, *After Plum Creek*, DOWNEAST, Sept. 2009, at 64.

175. See discussion *infra* Part IV.

Hampshire.¹⁷⁶ The “fear that outsiders will intervene and destroy their way of life”¹⁷⁷ is no less prevalent among Northern Forest residents in Maine as it is elsewhere in the Northern Forest. However, cohesion between advocates of a traditional way of life and conservation and environmental organizations has been less successful in Maine’s Northern Forest than in other Northern Forest states.¹⁷⁸ Many Mainers are extremely skeptical of outsider environmental groups in particular and that “[e]nvironmental zealots, within and without the government, are using every dodge, every piece of misdirection, much misinformation to mislead not only the American public, but also more rational environmentalists, from the real objective.”¹⁷⁹ Meanwhile, environmentalists had been skeptical of Plum Creek as a timber manager well before its plans for development were ever released.¹⁸⁰

Second, the stakeholders involved in the Moosehead Lake process are much different than those involved in New Hampshire. Plum Creek’s development plan represents the exact “threat” to the Northern Forest that caused governors, conservation groups, timber companies, and even the Task Force itself, to work toward a collective goal in the first place.¹⁸¹ How does a development corporation engage in a collaborative dispute resolution process in the Northern Forest with the groups who have collaborated to fight its presence in the first place?

Skepticism over Plum Creek’s real intentions with their holdings only increased in 2001, when the company developed a 272-acre subdivision

176. Telephone Interview with Charles Levesque, *supra* note 67; Telephone Interview with Dave Houghton, *supra* note 11.

177. Bonnie Docherty, *Maine’s North Woods: Environmental Justice and the National Park Proposal*, 24 HARV. ENVTL. L. REV. 537, 537 (2000).

178. Telephone Interview with Charles Levesque, *supra* note 67; Telephone Interview with Dave Houghton, *supra* note 11.

179. Docherty, *supra* note 177, at 548–49 (citing Robert O. Voight, Editorial, *The Charade of Access to Public Lands*, BANGOR DAILY NEWS, June 28, 1999, at A7).

180. *See id.* at 557 (“Plum Creek, described by environmentalists as a ‘forest liquidator,’ has a reputation for selling off parts of its land to developers to help fund its clearcutting efforts in other regions.”) (citation omitted); Charles R. Scott, *Liquidation Timber Harvesting in Maine: Potential Policy Approaches*, 29 HARV. ENVTL. L. REV. 251, 253–54 (2005) (“Although Plum Creek Timber Co. did sell significant portions of undeveloped land to the state and to a conservation group, it also angered environmentalists by violating preexisting conservation easements and by cutting down the nest of a federally threatened bald eagle.”) (citation omitted).

181. *See HARPER, supra* note 80, at v. “We are seeking reinforcement rather than replacement of the patterns of ownership and use that have characterized these lands . . . 22 million acres of private land in Northern Forest are gradually giving way to residential and recreational development. . . . In areas where the market value of land for development is many times greater than its value for growing timber, it is unlikely that traditional land uses will continue.” *Id.* (internal quotations omitted).

near Moosehead Lake,¹⁸² despite reassurances in 1998 that its only intentions were sustainable forestry with its new land holdings.¹⁸³ Environmental groups criticized Plum Creek for “slicing and dicing the best of Maine’s North Woods into second home development . . . [and] not . . . managing for long-term timber values.”¹⁸⁴ These past experiences polarized the stakeholders and made it difficult to cooperate even before Plum Creek submitted its Concept Plan.¹⁸⁵ Facing this existing sensitivity to development in the Northern Forest and the particular resentment toward Plum Creek’s recent activities, the proposed Concept Plan for the largest development in Maine’s history was primed for a polarizing dispute—regardless of the legal merits of the Concept Plan itself.

Third, and *most importantly*, all rezoning and development concepts for unincorporated lands in Maine must go through a government agency: LURC.¹⁸⁶ Therefore, the agency, not a self-convened group of stakeholders, was ultimately responsible for approving or not approving the Concept Plan. This approval system is a traditional, rights-based decision-making process, which forces LURC to approve or deny the plan in an up-down vote, naturally deciding winners and losers in the end. The task for LURC is not simple: it must listen carefully to all sides, and seek a decision that satisfies the parties as well as meeting all legal requirements. While many lawyers and agencies may think of this type of dispute resolution to be the most equitable for all parties, this style of dispute resolution has notable deficiencies and scholars have termed this problematic process as “The Solomon Trap.”¹⁸⁷

The Solomon Trap, which is the process currently used by LURC, manifests itself in four phases. In the first phase, the agency responsible for making the controversial decision (LURC) identifies all affected parties and asks them for their views.¹⁸⁸ The agency holds public meetings, solicits comments, and offers its own comments.¹⁸⁹ In the second phase, the agency reviews comments, “weighs the trade-offs, gives due consideration to questions of fairness, and crafts a solution that comes closest to addressing

182. Scott, *supra* note 180, at 254.

183. Austin, *supra* note 91.

184. Scott, *supra* note 180, at 254 (alteration in original) (quoting Phyllis Austin, *Plum Creek: Finding Gold in Maine*, ME. ENVTL. NEWS, June 12, 2002, available at <http://www.meeepi.org/files02/pa061202.htm>).

185. *Id.* at 256.

186. LURC, *About Us*, *supra* note 128.

187. SUSAN L. CARPENTER & W.J.D. KENNEDY, *MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE FOR GOVERNMENT, BUSINESS, AND CITIZENS’ GROUPS* 22 (2001).

188. *Id.*

189. *Id.*

everyone's interests and that is in harmony with the agency's goals and priorities."¹⁹⁰ In the third phase, the agency announces a decision and parties are surprised to see that their key issues are not addressed the way they wanted them to be because they thought that they had educated the agency during phase one.¹⁹¹ "He seemed so sympathetic to our concerns when we talked to him. What happened?"¹⁹² This disappointment generally turns to a feeling of betrayal and parties plan on opposing the entire decision, and publicly attack the decision as "irrational and irresponsible."¹⁹³ The agency decision-maker, meanwhile, relies on the rationale that "[it's] what I'm paid to do—make tough decisions and then catch the flak [sic]. After all you can't please everyone."¹⁹⁴ The fourth and final phase occurs when the agency is forced to defend its position¹⁹⁵—which the parties appeal—drawing out the divisive nature of the rights-based approach even more.

While there may be times that the required process actually works without much dissatisfaction with the outcomes, agencies responsible for major land decisions, such as LURC, need to recognize the risks associated with this kind of dispute resolution process. LURC should be especially wary of using such a dispute resolution design when the parties on both sides are *entrenched* and *passionate*. The next natural question is: how does an agency use a different process, or at least integrate a more collaborative process, when the current system is mandated by law? Before this question can be addressed, however, stakeholders need to design a collaborative process that works.

IV. ORGANIZING AND UTILIZING AN EFFECTIVE COLLABORATIVE INTEREST-BASED DISPUTE RESOLUTION SYSTEM IN THE NORTHERN FOREST: THE BASIC ELEMENTS OF SUCCESS

Stakeholders can and should use a collaborative effort in the Northern Forest as a means of reducing strain between parties and satisfying each disputants' underlying interests. Lawyers need to play a central role in advocating a process that will create the maximum benefits and lowest costs for their clients. A lawyer's primary role should be advocating for good

190. *Id.* at 25.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

process “[t]o help parties take advantage of the opportunities” for avoiding high costs and mistrust, while advocating for opportunities for joint gain.¹⁹⁶ As previously discussed in Part I of this Note, using an interest-based collaborative dispute resolution system can reduce costs and satisfy each stakeholder’s underlying interest.

Scholars and practitioners focus on two primary interests: intrinsic interests and instrumental interests. Intrinsic interests are those that focus on the favorable terms of settlement, while instrumental interests focus on the effects the process and outcome have on possible subsequent dealings.¹⁹⁷ For example, a conservation organization’s intrinsic interest in a collaborative negotiation for land disputes may be to conserve as much land as possible at the end of the day. Intrinsic interests are balanced with the instrumental interests of the organization. The instrumental interest of the conservation organization may be to build trust and a good working relationship with other stakeholders so as to make collaborative negotiation more likely in the future.

The transition of the Northern Forest presents stakeholders with more and more major land disputes, and stakeholders need to recognize the importance of treating each of these disputes as an individual dispute within a broader *conflict*. To achieve intrinsic interests in future disputes, stakeholders need to pay attention to how their conduct and the process they choose to settle disputes affects their instrumental interests and, in effect, their future intrinsic interests. As stated by Peter Howell of the Open Space Institute, “[b]alancing conservation and development at large scale is not science, but an art. It is iterative and requires negotiation to get to yes”¹⁹⁸ Collaborative approaches that seek to satisfy the underlying interests of all parties involved are the most likely to satisfy both intrinsic interests as well as instrumental interests because the process narrows the issues, requires parties to work together, and fosters respect and a working relationship.

A. Designing a Collaborative Interest-Based Dispute Resolution System

Despite a common misperception that collaborative negotiation requires parties to “give in” to each other’s desires and meet somewhere in the middle, the collaborative approach should have both “assertive and

196. Nolon, *supra* note 21, at 105.

197. DICTIONARY OF CONFLICT RESOLUTION 236 (Douglas H. Yam ed., 2009).

198. Howell, *supra* note 130.

cooperative” elements.¹⁹⁹ This means that parties to a collaborative effort need to cooperate in a way that doesn’t compromise their underlying interests. Three basic elements are crucial for a successful collaborative negotiation: (1) inclusiveness, (2) transparency, and (3) responsiveness.²⁰⁰ Both a Process Manager and a Technical Committee are instrumental to ensuring that these three factors are included in the process.²⁰¹ Each of these elements are examined individually and applied to both the Task Force negotiations as well as the Moosehead Lake Concept Plan and Conservation Framework negotiations.

1. Inclusiveness

Once a dispute has been identified, the first crucial element is to include the right people early on in the process to help foster working relationships.²⁰² This should include stakeholders or individuals with a broad array of interests that are likely to be affected by the dispute, and should occur before any permit application if the dispute entails granting a permit or approval from a regulatory agency.²⁰³ In order to ensure that a broad array of interests is included, the disputed issue itself should be framed as broadly as possible.²⁰⁴

The Connecticut Lakes Headwaters Partnership Task Force provides a very good example of dealing with inclusion. First, the Task Force stated its goals as broadly as possible as “conserving the natural resources of the Connecticut Headwaters property, guaranteeing public access, and maintaining the land’s central role in the culture and economy of the region.”²⁰⁵ Second, TPL assigned its consultant, Charles Levesque, as process manager. The process manager was in charge of setting up the Task Force and consulting other possible stakeholders to help identify those who should be included in the negotiations.²⁰⁶ Moreover, the process was designed so that any group or individual who wanted to participate in the meetings could do so, even if they were not identified as a party to the Task

199. Nolon, *supra* note 21, at 135 (citing Ralph Kilmann, *Thomas-Kilmann Conflict Mode Instrument*, <http://www.kilmann.com/conflict.html> (last visited Sept. 13, 2010)).

200. *Id.* at 137–46.

201. *Id.* at 136.

202. *Id.* at 137.

203. *Id.* at 140–41.

204. *Id.* at 140.

205. TPL, *supra* note 89.

206. Telephone Interview with Charles Levesque, *supra* note 67; Telephone Interview with Jane Difley, *supra* note 127.

Force.²⁰⁷ Once convened, the parties spent the entire first meeting identifying their interests and desired goals, rather than their positions.²⁰⁸ Overall, this process design helped set the stage for a collaborative negotiation where trust and respect were as much a focus as the ultimate goal of coming to a final consensus on land use.

In contrast, the Conservation Framework negotiations during the LURC process were not intended to be inclusive. Instead, the negotiation was conducted under a “cone of silence,” where the parties tried to “keep the process as transparent as possible,” while protecting confidential matters.²⁰⁹ Basically, being transparent while protecting confidential matters meant that the parties did not attempt to hide that they were meeting but wanted to keep the details of their meetings secret. The parties involved in the Conservation Framework were generally confined to those willing to make fee purchases or purchase conservation easements from Plum Creek.²¹⁰ This excluded many stakeholders, including the public, other conservation groups, and LURC itself in a way that created lasting hard feelings.²¹¹ In the end, stakeholders and the public had the chance to look at the terms of the Conservation Framework “only when the pie [was] baked,”²¹² though it is worth noting that the Conservation Framework was intended to be flexible,²¹³ and did indeed substantially change over time due to public and stakeholder input.²¹⁴

2. Transparency

Once a process manager chooses the parties to a collaborative negotiation, the negotiation itself must be transparent: allowing people to see “what *is* happening, what *has* happened, and what *will be* happening.”²¹⁵ To achieve this level of transparency, notice of meetings, agendas, and schedules should be posted, and an even more engaged method of outreach may be necessary.²¹⁶ This does not mean, however, that

207. Telephone Interview with Charles Levesque, *supra* note 67.

208. *Id.*

209. Telephone Interview with Bruce Kidman, *supra* note 158.

210. *Id.*

211. E-mail from Aga Pinette to author, *supra* note 136.

212. Marc B. Mihaly, *Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions Through Partnership with Experts and Agents*, 27 PACE ENVTL. L. REV. 151, 181 (2009).

213. Telephone Interview with Bruce Kidman, *supra* note 158.

214. E-mail from Aga Pinette to author, *supra* note 136.

215. Nolon, *supra* note 21, at 141.

216. *Id.* at 141–42.

all information should be accessible to the public. For example, while the specifics of the terms of a conservation easement should be transparent, the selling price of the easement can and should remain confidential if the parties wish. Being transparent “refers to what is happening in meetings and at the ‘table,’ but does not extend to the information parties decide not to share.”²¹⁷

The Task Force identified a need to keep the process as transparent as possible. During the early meetings of the Task Force, stakeholders discussed and adopted an Outreach Plan.²¹⁸ The primary objective of the Outreach Plan was “to keep New Hampshire citizens informed about the work of the Task Force and to provide opportunities for public involvement regarding the work of the Task Force and the vision of the IP property.”²¹⁹ The public outreach campaign was quite extensive and included various forms of outreach: press releases and other press contacts, direct public involvement, public meetings, a website that displayed meeting times and had links for contact information, Steering Committee member constituency contact information, and taped Steering Committee meetings that could be viewed on public access television.²²⁰

The Conservation Framework negotiations were not transparent. Parties agreed from the beginning that they should work under a “cone of silence.”²²¹ The first LURC heard about the terms of the Conservation Framework was from a press release that came out right around the time Plum Creek submitted its amended Concept Plan, which included mention of the Conservation Framework.²²² Even after Plum Creek submitted the amended Concept Plan, LURC staff had difficulty getting information about what the Conservation Framework actually involved or entailed.²²³ The initial secrecy of the Conservation Framework raised concerns and formal objections from many parties involved in the LURC process,²²⁴ including strong concerns by at least one stakeholder who claimed that the regulatory process should not include “non-regulatory things.”²²⁵

217. *Id.* at 143 (internal quotations omitted).

218. TASK FORCE, *supra* note 107, at 33.

219. *Id.*

220. *Id.*

221. Telephone Interview with Bruce Kidman, *supra* note 158.

222. E-mail from Aga Pinette to author, *supra* note 136.

223. *Id.*

224. *Id.*

225. Telephone Interview with Cathy Johnson, *supra* note 162.

3. Responsiveness

A responsive process is crucial to a collaborative approach and produces challenges that require “constant attention from a skilled and patient process manager” in order to respond to “new information and anticipate the next steps.”²²⁶ The new information is usually provided via some type of technical Steering Committee, which is tasked with objective fact-finding.²²⁷ In the context of land disputes, the Technical Committee may be in charge of identifying areas that are better suited for development and those that are too ecologically sensitive for development. It is the task of the Steering Committee to adapt and respond to the new information that the Technical Committee provides.²²⁸ In order to ensure predictability, the parties to the process should create ground rules that establish ways to respond to new information.²²⁹ Generally, the new information will influence how the parties consider and decide an important issue. For collaborative processes, consensus, and unanimity are the most appropriate methods of decision-making.²³⁰ The type of consensus normally used in collaborative decision-making does not require *every* party to agree on every issue; rather consensus is “overwhelming agreement.”²³¹ While a consensus group strives for unanimity, it may be necessary to settle for an agreement that satisfies almost all of the participants.²³²

The Task Force provides an excellent example of a responsive collaborative process. First, the Task Force was split into two committees: the Technical Committee and the Steering Committee.²³³ The Technical Committee was charged with “provid[ing] timely information on the natural resource attributes, economic data and protection methods for the IP lands to assist the Steering Committee in fulfilling its charge.”²³⁴ The Technical Committee released a total of eight items of written work products during the process, including maps, ecological information, a report on the tourism

226. Nolon, *supra* note 21, at 144.

227. TASK FORCE, *supra* note 107, at 8.

228. *Id.*

229. Nolon, *supra* note 21, at 145.

230. *Id.* at 146 (citing SUSAN CARPENTER & W.J.D. KENNEDY, *MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE FOR GOVERNMENT, BUSINESS, AND CITIZENS' GROUPS* 29 (2d ed. 2001)).

231. LAWRENCE E. SUSSKIND & JEFFREY L. CRUIKSHANK, *BREAKING ROBERT'S RULES: THE NEW WAY TO RUN YOUR MEETING, BUILD CONSENSUS, AND GET RESULTS* 19 (2006).

232. *Id.*

233. TASK FORCE, *supra* note 107, at 6–7.

234. *Id.* at 8.

economy, and different protections options.²³⁵ The Steering Committee was charged with developing “a consensus approach”²³⁶ to decision-making, and worked to publish key agreements made at each meeting.²³⁷

The Conservation Framework, as well as the LURC process, was also designed to be responsive. Plum Creek initially reached out to the Nature Conservancy because it recognized a need for technical information on the ecology and conservation value of the property within the Concept Plan.²³⁸ The Nature Conservancy served two roles in the Conservation Framework: it provided technical assistance related to conservation easements and ecologically sensitive areas of the property to the rest of the members, and participated in the decision-making of the group as a whole.²³⁹ During one of the earliest meetings, the parties to the Conservation Framework agreed to keep any decisions flexible, hence the use of the term “framework.”²⁴⁰ The parties expressed their desire to change the terms of the agreement if they obtained new information either from the group’s own work or by any new information provided during the LURC process.²⁴¹

To summarize the findings above, successful collaborative negotiation for land use disputes in the Northern Forest should utilize a *process manager* to ensure that the process is *inclusive, transparent, and responsive*, and should include a *technical committee* in charge of providing the Steering Committee with the information it needs to make informed and responsive decisions.

B. Integrating a Collaborative Interest-Based Dispute Resolution System into an Existing Regulatory Process: Negotiated Rulemaking as Guide

Many attorneys and parties to the LURC decision-making process might agree that interest-based collaborative efforts can be helpful, but they may view collaborative decision-making as improperly delegating LURC’s authority. After all, LURC has a required process.²⁴² If LURC was to utilize a collaborative process, it would have to go beyond its statutory authority and own rules and regulations. This view, while understandable, incorrectly “assumes that the collaborative process is a *substitute* for the official

235. *Id.* at 10.

236. *Id.* at 8.

237. *E.g., id.* at 11–13 (listing many of the key consensus agreements).

238. Telephone Interview with Bruce Kidman, *supra* note 158.

239. *Id.*

240. *Id.*

241. *Id.*

242. ME. REV. STAT. tit. 12, § 685-B (2010).

decision-making process.”²⁴³ However, these agreements are not substitutes for the required agency decision; rather they supplement the required statutory process²⁴⁴ by providing a forum for a better understanding of interests. Yet the agency still retains the statutory authority to approve, deny, or modify the conclusions of the collaborative process.²⁴⁵ Participants in the collaborative process still have the same rights to participate in the required process as everyone else.²⁴⁶

Once parties have chosen to use a collaborative process to supplement an agency’s required process, they need to decide when the collaborative process should occur in relation to the required process. Here, the experiences of negotiated rulemaking provide helpful guidance.

Federal and state agencies have been selectively using negotiated rulemaking for years, to promulgate particularly complex and controversial rules.²⁴⁷ The purpose of negotiated rulemaking, or “reg-neg” as it is commonly referred, is to bring stakeholders together “to jointly prepare the text of a proposed rule before the agency submits the rule to the formal rulemaking process.”²⁴⁸ This negotiated rule is created using a consensus-driven collaborative approach.²⁴⁹ Conversely, under the Administrative Procedure Act, the *agency* usually drafts a proposed rule, publishes it in the Federal Register, and provides opportunity for notice and comment.²⁵⁰ After the agency receives comments, it promulgates a final rule, which is accompanied by a “concise general statement” explaining the basis for the rule and changes from the draft rule.²⁵¹ After the rule is promulgated, an aggrieved party can seek judicial review of the rule.²⁵²

243. Nolon, *supra* note 21, at 147.

244. *Id.*

245. *Id.*

246. *Id.*

247. See, e.g., Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 41 n. 40 (2000) (“[N]egotiated rulemaking . . . is typically used only for rules that are quite difficult and controversial. It is not, and should not be seen as, a process for all rules regardless of complexity or controversy.”); Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987 (2008) (providing a general history of negotiated rulemaking); Daniel P. Selmi, *The Promise and Limits of Negotiated Rulemaking: Evaluating the Negotiation of a Regional Air Quality Rule*, 35 ENVTL. L. 415 (2005) (discussing negotiated rulemaking by a regional air quality agency in California).

248. Matthew J. McKinney, *Negotiated Rulemaking: Involving Citizens in Public Decisions*, 60 MONT. L. REV. 499, 500 (1999) (emphasis omitted).

249. Lubbers, *supra* note 247, at 988.

250. Administrative Procedure Act, 5 U.S.C. § 553 (2006).

251. *Id.* § 553(c).

252. *Id.* § 706.

Reg-neg does not replace the basic process of rulemaking described above; rather it supplements traditional notice and comment rulemaking by having a group of stakeholders—including the agency—engage in a collaborative approach to produce the first draft of the rule.²⁵³ Crucial to reg-neg is a solid deadline for negotiations. If the deadline is not met, the agency will unilaterally draft the rule.²⁵⁴ A deadline ensures that stakeholders boil down the issues and work towards the rule; or risk having the agency promulgate a rule that does not account for the parties' interests.²⁵⁵ After the draft rule is published, it then follows the same notice and comment process described above.²⁵⁶

While scholars and lawyers continue to debate some of the benefits of reg-neg, empirical evidence and interviews with participants in reg-neg suggest that in the context of environmental rulemaking, participants were more satisfied with the overall process than participants in conventional rulemakings.²⁵⁷ This is true both for negotiated rulemaking at the federal level²⁵⁸ as well as at the state level.²⁵⁹ Echoing the benefits of collaborative approaches in general, in California, where reg-neg was used to promulgate a rule related to toxic air emissions, the participants “exhibited a significant level of creativity. Solutions found during the negotiation process would likely not have occurred within the procedural limitations of the normal rulemaking process.”²⁶⁰

Agencies tasked with making decisions on controversial land disputes in the Northern Forest can and should use negotiated rulemaking as a guide for integrating a collaborative process into the existing regulatory decision-making process. LURC, for example, can look to Maine's own Administrative Procedure Act for guidance, which includes a section on negotiated rulemaking.²⁶¹ Furthermore, LURC should seek explicit

253. Lubbers, *supra* note 247, at 988–91.

254. Selmi, *supra* note 247, at 466–67.

255. *Id.* at 467.

256. Lubbers, *supra* note 247, at 988–991. For a more complete breakdown of the negotiated rulemaking process, see generally, Harter, *supra* note 247, at 33–36.

257. See generally, Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation Versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence*, 10 J. PUB. ADMIN. RES. & THEORY 599 (2000) (providing a compilation of interview data from participants in EPA-led negotiated rulemaking, as well as participants in traditional notice and comment rulemaking and finding that participants in negotiated rulemaking were more satisfied with the process).

258. *Id.*

259. See e.g., Selmi, *supra* note 247, at 469 (describing negotiated rulemaking for air quality standards in California and concluding that “regulatory negotiation can help parties with very different interests reach creative solutions to regulatory problems”).

260. *Id.* at 420.

261. Maine Administrative Procedure Act, Consensus-Based Rule Development Process, ME.

legislative authority to conduct collaborative and consensus-based decision-making for complex and controversial plans, such as the Plum Creek Concept Plan. This is to say that Maine should develop a statute that explicitly allows LURC to use a collaborative process in concept plan disputes, in order to incentivize its use and make the process as predictable as possible.

LURC's final permit approval for Plum Creek's Concept Plan looked a lot like traditional rulemaking, as it was the agency that provided notice and comment, and in the end, rewrote the entire Concept Plan in a way that conformed to LURC's idea of "balance."²⁶² Suggesting that Plum Creek meet directly with stakeholders, as well as setting up a consensus-based approach to the Concept Plan in the beginning might have avoided a situation where the agency ultimately took control of writing the Concept Plan. Furthermore, LURC got a taste of how collaborative decision-making helps the agency recognize the true interests of each party when it informally met with some stakeholders during their efforts to revise their CLUP in an effort to solicit additional information and clarification on certain concerns of the parties, and to attempt to identify interests.²⁶³

In sum, integrating a collaborative consensus-based approach into an agency's required process for land use disputes can and should be used, so long as it doesn't subvert the agency's authority to make a final decision on the dispute. Furthermore, parties submitting a concept plan should encourage the agency to convene stakeholders for consensus-based amendments to their own development plan before the agency's required process.²⁶⁴ Using the example of negotiated rulemaking, the agency should identify and convene stakeholders *before* a land use plan is *formally submitted* to the agency for notice and comment. Furthermore, the collaborative process must have a strict deadline and cannot interfere with any of the agency's required steps. Finally, like negotiated rulemaking, this

REV. STAT. ANN. tit. 5, § 8051-B (2007).

262. Telephone Interview with Cathy Johnson, *supra* note 162.

263. See Telephone Interview with Bruce Kidman, *supra* note 158 (mentioning that LURC expressed how beneficial the informal meetings were to understanding the stakeholders' true interests and found the informal meetings revealed more information about true interests of the parties than previous notice and comment and informal public hearings).

264. Development companies in New England have been engaging other stakeholders in their own development proposals for years, and note many of the benefits to this approach as outlined in this note. *E.g.*, DVD: Growing Together: Consensus Building, Smart Growth, and Community Change (New England Environmental Finance Center 2006) (on file with Vermont Law School Dispute Resolution Program).

process should not be mandatory and should only supplement agency decision-making when the issue is particularly complex and controversial.

CONCLUSION

The landscape of the Northern Forest is rapidly transforming from large timber company-owned forested tracts to a more fragmented pattern of ownership, which incorporates residential development, industrial development (such as wind power), and liquidation TIMO's. This transition will require stakeholders in the Northern Forest to come up with civil and creative ways to settle increasingly frequent land use disputes. While the underlying conflict between land development and timber and conservation stakeholders will continue, building trust and working relationships between stakeholders can minimize the conflict's polarizing effects. To build trust, stakeholders should focus on engaging in collaborative dispute resolution that satisfies both instrumental and intrinsic interests of parties. In this respect, lawyers should play a central role in advising their clients to use a collaborative dispute resolution process that provides maximum benefits to their clients in present *and* future Northern Forest land disputes.

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