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**The North Maine Woods:
Speculating About the Future**

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While the author serves as chief of the Natural Resources Division of the Maine Attorney General's Office, the views expressed here are exclusively his and do not represent the views of the Maine Attorney General or of the State of Maine.

The North Maine Woods: Speculating about the Future

I. The Geography

The 'North Maine Woods' is something of a misnomer. Many people geographically confuse it with what in fact is Eastern Maine, the coastal area that approaches the State's boundary with New Brunswick, Canada. Even in what *is* Northern Maine, the eastern portion has few forested areas, having been cleared and settled for potato and other farming for nearly two centuries. Indeed, the seemingly endless, undeveloped forestlands that people associate with "Northern Maine" are in fact in the northwestern half of the state. It isn't about geography; it's about the forest.

This 'wild' forest is also something of a mischaracterization. In many places, this isn't exactly the forest of Thoreau's romantic writings. In substantial part, it is a forest that has been cut, and cut again, and cut again. Portions of it are well described as an "industrial forest," a seeming anomaly which means that these lands have been held and used for purposes of producing timber and other forest products.

II. The History

These lands have remained largely in vast private ownerships. Despite every effort by Massachusetts (of which Maine was a part until 1820) and Maine to settle it for more than a century, most of this area, amounting to 10 million acres or half of the state's land base (roughly equivalent to the area of all the southern New England states), has gone unsettled. In many areas, the population is so sparse, and even non-existent, that it is not able to support any form of local government. Indeed, many of this area's 400 unorganized townships have no names, referred to instead by numbers (i.e., Township 6 Range 12).

Historically, these lands were sold for pennies an acre to speculators and "timber barons," later to become largely owned by multinational corporations engaged in papermaking and other major forest products industries.

For most of the past two centuries, the trees harvested from these lands were transported by river to lumber and paper mills. In the 1970's this practice came to an abrupt end, by force of environmental laws as well as economics, resulting in the subsequent creation of a vast network of roads, amounting to tens of thousands of miles, built by forest landowners to 'get the wood out.' However, these roads also serve to get the public in, including both recreationists and those who would like to develop and own seasonal and sometimes year-round homes.

Even while these lands have been in private ownership, public access to private land in the Maine Woods has been tolerated and legally encouraged, a situation perhaps unique in the nation, but a powerful part of Maine culture, tradition and law. Under Maine's common law, there is a right of public passage on foot over private lands to gain access to any of the state's thousands of lakes greater than 10-acres in size. Likewise, under Maine law it is

very difficult to maintain a trespass action against public pedestrian entry onto unimproved lands without posting the property so that anyone entering is visually on notice, something which is virtually infeasible for large land ownerships.

Traditions of public access to private land in Maine may help explain the State's relatively small amount of public land, comprising less than 6% of the State's land area. Beyond the 200,000 acres comprising Baxter State Park, which is the centerpiece of the Maine Woods, and the State's scattering of public reserved lands, most of which were retrieved from the major forest landowners as a result of extensive litigation 25 years ago, there is little public land of significant size in the State. The only National Park in Maine, Acadia, is located on the coast, and at 45,000 acres is one of the smallest in the nation. A relatively small portion of the White Mountain National Forest is also located in Maine, but most of this national forest is in New Hampshire. Indeed, in northern New England, both New Hampshire and Vermont have far greater federal and public land holdings than in much larger Maine.

Throughout Maine's history, many politically powerful voices have shown an aversion to the establishment of major public parks or any significant, publicly owned lands. Baxter Park, the centerpiece of which is Mt. Katahdin, considered by many to be the most majestic peak in the eastern United States, was quietly purchased by Governor Percival Baxter a century ago, after years of failed efforts to get the Maine Legislature to acquire it; he then gave it in trust to the People of Maine. Likewise, the creation of Acadia National Park was the result not of public action but entirely of private charity.

The legendary Allagash Wilderness Waterway, while the result of public action, was and remains a compromise derived from tough negotiations in the 1960s among the federal Department of the Interior, resistant landowners and an ambivalent state. The result is that this is one of the few waterways in the federal Wild and Scenic Rivers system that is owned by a state rather than the federal government; and even the State's ownership is substantially limited to a strip of land about 500 feet in width on each side of the river.

Perhaps a partial explanation for Maine's general failure to create significant public lands has been the reliance upon the forest products industry as the economic engine not just of 'Northern Maine' but of the whole state. However, just in the last two decades that reliance has proven to be increasingly mistaken, and likewise the presumption of public access and scarcity of development in the Maine Woods has now also been placed in question.

III. The Current Dilemma

What was the longstanding status quo is rapidly disappearing. In the past two decades, the forest products industry in Maine has been in a serious state of decline. Employment in this industry has precipitously dropped. Some paper mills have closed or been significantly scaled back. For most of the twentieth century, legendary Great Northern Paper Company was the state's largest landowner (at 2 million acres), employer and industrial producer. Just a few years ago, this Maine icon went bankrupt and its mills, under new ownership, are either closed or operating at a fraction of their former capacity and employment.

Increasingly, the Maine Woods is owned by anonymous investor groups and other companies that may be more interested in realizing development potential or speedy return on investment than long term forest productivity. Turnover in land ownership in this part of the State has reached stunning proportions, with more than seven million acres sold in the last seven years. Much in contrast to the past, tracts today often remain in an ownership for only a short time. Many of these ownerships are being broken up, with increased parcelization of this land every year.

While timber harvesting continues in the Maine Woods, its raw product is often exported for value-added processing in other states and nations. Also increasingly, the large tracts of forestlands in Maine are owned by land development companies, insurance corporations and investor groups, the motivations of which may turn on short-term profit-taking and then 'getting out.' Recently, in the center of the Maine Woods one of these landowners, a western-based land development and management company that may be the largest private landowner in America, has applied for a permit for the biggest subdivision project (which also includes resorts and other developments) in Maine's history, encompassing many townships centered on Maine's largest and most magnificent lake, Moosehead. Other lands have been sold to so-called 'kingdom buyers' and other private interests that threaten to gate off public access and/or to terminate camp and sporting camp leases that have been held for decades or longer.

In short, the Maine Woods are in the process of the most rapid and radical transformation in the last two centuries, and one can only (and literally) speculate about its future. The stakes are high. The Maine Woods comprise an area unlike anything else in the eastern half of the United States: enormous, still largely undeveloped tracts of land, laced with lakes, rivers, streams, mountains, wetlands, wildlife habitat and other publicly coveted natural values. These are the lands that inspired Thoreau and many other writers and painters even to this day.

Despite its repeated history of cutting, this is a forest that can in most cases naturally rejuvenate itself; and it is a place that people revere for good reason. It is a place that is worthy of our, the nation's, collective attention.

IV. One Line of Defense: Working Forest Conservation Easements

In the context of such uncertainties about both its heritage and destiny, one of Maine's recent responses has been to attempt to bolster the forest products industry with financial and other incentives in an effort to save what remains of the state's historically (but no longer) largest economic sector.

This approach has included the purchase, using funds from the federal Forest Legacy Program together with money from state conservation bonds and/or other public or private sources, of working forest conservation easements. Typically, these are designed to (1)

maintain land in private ownership, (2) prevent development that is inconsistent with forest products production and (3) assure traditional public access.¹

Even while they have enjoyed support from government, working forest easements have not gone without controversy. Some critics have objected that the money involved, sometimes running in the tens of millions of dollars per easement, would be better spent acquiring park or conservation lands outright. Even when these easements are purchased by private land trusts, critics have argued that the moneys involved are always tax-subsidized and that the charitable donations involved would be better spent for more publicly worthy, land conservation projects. Critics have also disparaged working forest easements as paying landowners to continue to use their lands for the same, economically beneficial but essentially unfettered forestry operations as always, while prohibiting development that, in at least some places, has no meaningful prospect of occurrence in the foreseeable future. Further, particularly when the purchase of such easements is by the government, critics argue that this gives rise to expectations by landowners that they will be publicly compensated to avoid development that the State's regulatory power might have been used to prevent, thus undermining, politically if not legally, the State's use of that authority. While many critics have been outspoken and these transactions are nearly always attended by controversy, working forest easements have enjoyed substantial political and financial support in Maine.

These easements, like all conservation easements, have also been criticized as being overly complex, lacking in uniformity, and presenting a wide array of costly stewardship and enforcement responsibilities for future generations to deal with. Often, conservation easements such as these, when *purchased* for their full fair market value (however that might be computed), are much more difficult to negotiate, and result in more compromised terms, than *donated* conservation easements.

This phenomenon is counter-intuitive: why would a fully *paid-for* conservation easement be more compromised than a *donated* easement? The answer lies in the motivation of the landowner. If, as an investor group, it has little interest in conservation but is motivated entirely by economic incentives, particularly when millions of dollars lie in the balance, the landowner will understandably drive the hardest bargain to make the most money while giving up the fewest rights.

¹ While all of the state-acquired working forest easements have included rights for the public to continue to use these lands for traditional, non-intensive public recreation, such as for hunting, fishing and hiking, the same is not the case with some easements purchased by land trusts with tax-subsidized and even some directly publicly subsidized money. For instance, the largest conservation easement in the nation covers 760,000 acres of largely scattered townships in remote portions of northern and western Maine, purchased by a private forestry-oriented foundation for its full appraised value, that forbids development but allows timber harvesting and similar land management activities on an unregulated basis, allows division of the property into virtually any number of parcels and provides no rights of public access. Another large, working forest easement purchased by a private land trust, also using publicly tax-subsidized donations, provides for public access but contains terms allowing the landowner to terminate that access should the Maine Legislature ever weaken laws, that are currently the strongest in the nation, protecting landowners from liability to the public.

In this context, compare a purchased conservation easement with a purchased easement for a new public road. In the latter case, while price may be subject to bargaining, the government would not negotiate the terms of the easement itself. Yet, in a conservation easement, everything can be up for grabs. Some would argue that these are not the same paradigms, but in the context of conservation easements that are purchased for their full appraised value, the question is whether they should be.

This phenomenon came to a head in Maine in connection with its negotiation of a several hundred-thousand-acre, working forest easement that was to be purchased from an anonymous investor group (later discovered to be Yale University's endowment). After several years, negotiations between the State and the landowner failed, but the easement was later purchased, using tax-subsidized charitable donations, by a forestry-oriented land trust.

This difficult exercise presented a learning experience for the State, resulting in an effort to create guidelines for these types of conservation easements. The purpose was to establish a baseline of terms and expectations for both State and landowner negotiators. These guidelines, themselves developed in committee with landowner input, provide that departures in a proposed easement are to be noted and justified, so that legal and policy reviewers can readily understand their rationale and accept or reject proposed changes. Even so, it remains difficult to avoid temptations to depart from the adopted guidelines when the owner of a coveted property refuses to accept the State's terms or the political pressure is on to make the next easement 'happen.' In the end, political expediency, including the desire to announce the next 'protected property,' may sometimes prevent easement holders of all stripes from adhering to their forms (and values). This is a problem that remains to be resolved both in Maine and in the nation.

V. Another Line of Defense: Land Use Regulation

During the time when most of the nation's environmental laws were born in the late 1960's and early 1970's, Maine underwent a significant political transformation from a state in which the forest products industry could do no wrong to one in which the motivations of these landowners were, for the first time, subject to political question. The result was the Maine Land Use Regulation Commission. A state agency unique in the nation, LURC, as its acronym is fondly (or not) known, was vested with land use planning and regulatory jurisdiction over all of that half of Maine that lacks city or town governance, a vast area (18,000 square miles or 10 million acres), essentially encompassing the Maine Woods.

As with the laws creating the Allagash Wilderness Waterway, the LURC law, as contemplated by its legislative founders and even to this day, has always been a compromise. LURC was intended to bring sound principles of land use planning to its jurisdiction; yet, at the same time, it was given a staff inadequate to do this enormous job. LURC was to regulate development throughout its jurisdiction; yet it was not legally allowed to regulate forestry and related land management activities in most of this area.

While the product of compromise, LURC was born of a political calculus in which the forest products industry and its vast land holdings, it was hoped, would be held in check, at least in terms of the rampant development that was feared. Ironically, then, LURC resulted from a political transformation over a century from a state that desperately wanted these lands to be cleared and settled to one that wanted these lands to remain in forest products production with as little development as possible.

Today, thirty years later, the jury is out whether LURC will be able to live up to its promise or, as some view working forest conservation easements, may best be viewed as a stop-gap measure. Time will tell, but then will it be too late?

LURC's zoning scheme is complex. Reduced to its simplest terms, it establishes allowed and prohibited land uses within three broad categories of a multiplicity of zones: Management (by far the largest area of the jurisdiction, which is mostly devoted to forestry uses that are substantially unregulated by LURC); Protection (a large array of zones variously protecting identified natural areas such as streams, lakes, wetlands and significant wildlife habitat); and Development (also an array of zones allowing for various types of residential, commercial and industrial development). Subdivision is generally allowed only in Development zones, but there is legal slippage in the law that over time allows unregulated creation of lots from one ownership.

As with many zoning programs, the LURC system is dynamic, with landowners often seeking zone changes in order to pursue development and other projects that their current zoning will not allow. Zone changes in turn are guided by statutory and regulatory provisions, but most of them require subjective judgments, leading to sometimes uncertain results.

The LURC Commission is a seven-person board of citizens from an array of walks-of life, appointed by the Governor and confirmed by the Legislature, that meets monthly to act upon matters coming before it, such as subdivision permits, zone and rule changes. Much of the work of the agency, however, is delegated to its relatively small staff, which makes routine decisions about development permit applications, enforcement matters and the like. The staff and Commission are legally supported with a modest allocation of legal time from the Maine Attorney General's office.

As with the deployment of working forest conservation easements in Maine, LURC has had some effect in temporarily and partially restraining development of the Maine Woods that might otherwise have occurred. It is much more uncertain, however, whether LURC will have a meaningful impact in this regard over the long term, when it may not be able to legally or politically deliver on what some hoped would be its promise.

VI. The Next Paradigm?

There is evidence of a collision course ahead. Can LURC and Maine's growing collection of working forest conservation easements effectively stand in the way of what may be the unrelenting force of parcelization, development and conversion of the Maine Woods?

At their best, working forest conservation easements, even as deployed in the Maine Woods today on well over a million acres, cannot have a meaningful effect in saving a body of land measuring 10 million acres, or even a smaller area that contains the natural and landscape jewels of the region. Since working forest easements cost significant sums of money and can protect from development, but not from the chain saw, only a relatively small portion of the Maine Woods, these easements can have only a modest effect in saving the landscape.

By the same token, the LURC regulatory program, while arguably effective so far in regulating the *pace* of development and subdivision, has not and perhaps cannot fully contain their inevitable course. While one of Maine's most important constitutional takings case was resolved in LURC's favor (Seven Islands Land Co. v. Land Use Regulation Commission, 450 A. 2d 475 (Me. 1982)), there are obvious political as well as constitutional limitations on LURC's regulatory power, and LURC cannot be counted upon to preserve the past into the future. Even if LURC might constitutionally prevent development in areas where traditional economic uses have been for forestry, LURC is constitutionally barred from requiring public access to private lands or from overly restricting the economic use of timber harvesting while at the same time preventing development.

Thus, while LURC so far may have been an effective force in *restraining* development within its jurisdiction, it is not the agent that can ultimately *preserve* the natural values of the most magnificent portions of its territory. For this, another paradigm may be required.

So, what then is a paradigm that *might* save the last best places in the Maine Woods (and also perhaps in the eastern U.S.) for their natural values, for their wildness, for public recreation and for creating a new and diversified economy for this increasingly economically depressed region? What can become a new economic engine to replace one (the forest products industry in Maine) that is increasingly failing? Among some economists who have considered this question, as well as among a number of people who have dispassionately thought about it, there has emerged the idea of something in the nature of a national park, preserve, forest and/or recreation area, that can become a new economic magnet for what is now Maine's largest economic sector, tourism, while at the same time preserving the best of the Maine Woods.

One proposal that has been put on the table is a very large national park and preserve, amounting to an area greater in size than Yellowstone. Even such a vast federal holding would still leave the substantial portion of the Maine Woods available for forest products and other economic uses. Other ideas embrace a smaller national park, coupled with a national recreation area or national forest that can allow for a wider range of uses, all perhaps uniquely fashioned and governed in a way that is consistent with the traditions of Maine, that is like no other state.

What might be surprising to anyone who isn't acclimated to Maine's political culture is the degree of vocal negativity and lack of political support for these ideas. The overwhelming

change that has recently come to the Maine Woods is hard enough for its local residents to grapple with, let alone the change that would come with any federal presence or any large public ownership. Nonetheless, as many communities in the area are in a rapid state of economic decline, one wonders whether their minds will change. If not, then for the Maine Woods, the future is even more uncertain and likely to be riddled with change, including the potential loss of this national treasure.

VII. The Uncertain Future

In the context of New England, Maine is a big and substantially undeveloped state, and the Maine Woods themselves are a big place. Yet these are within relatively easy driving distance of many millions, both from the south in Boston and southern New England and from the north in Montreal and Quebec. In many respects, it is a remarkable accident of history that this area still remains substantially empty – of people but not of stunning landscapes and opportunities for landscape-scale protection.

The question is not *whether* there are tools available to protect and promote the best uses of the Maine Woods for the future. The toolbox is full of implements: working forest easements; conservation easements; land use regulation; public land acquisition; and, of course, allowing some of this land, in appropriate areas, to become rationally developed. The Maine Woods are big enough for each of these to have its rightful place in securing the future of both the State's *economy* and its *nature*. The jury is out whether people, acting both publicly and privately, will take action in time.