

The National Agricultural
Law Center



University of Arkansas

NatAgLaw@uark.edu | (479) 575-7646

An Agricultural Law Research Article

**The Forest Legacy Program:
Using Conservation Easements
to Preserve the Northern Forest**

by

Laura S. Beliveau

Originally published in BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW
REVIEW

20 B.C. ENVTL. AFF. L. REV. 507 (1993)

www.NationalAgLawCenter.org

THE FOREST LEGACY PROGRAM: USING CONSERVATION EASEMENTS TO PRESERVE THE NORTHERN FOREST

*Laura S. Beliveau**

I. INTRODUCTION

In 1988, New England residents became aware that the stability that had once marked the ownership and management of the 26 million acres of their Northern Forest was disappearing.¹ Diamond International, a wood products company, announced its plan to sell over a million acres of land in Maine, New York, New Hampshire, and Vermont.² In response to this unusually large land sale, Congress purchased 45 thousand acres of New Hampshire land for \$12.75 million.³ Congress also authorized the United States Forest Service to conduct the Northern Forest Lands Study to examine ownership and use of the Northern Forest and to suggest proposals for preserving the vast tracts of working forests that characterize Maine, New Hampshire, New York, and Vermont.⁴ The Forest Service published a report and recommended a variety of public and private responses to the crisis.⁵ In response to Congress' attention to the issue, a Governors' Task Force established the Northern Forests Land Council(NFLC) to cooperate with the Northern Forest Lands Study and to recommend action to preserve the Northern Forest.⁶

* Production Editor, 1992-1993, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

¹ Phyllis Austin, *Battle for the Northern Forest*, MAINE TIMES, August 30, 1991, at 2.

² Sylvia Dodge, *Forest Management Proves Controversial*, VT. BUS. MAG., Sept. 1991, at 32.

³ *Id.*

⁴ *Id.*

⁵ FOREST SERVICE, U.S. DEP'T. OF AGRICULTURE, NORTHERN FOREST LANDS STUDY REPORT SUMMARY 2 (1990).

⁶ *Id.* at 24.

Congress has given the NFLC funding, but has not explicitly authorized the interstate agency.⁷

In 1990, Congress followed one of the recommendations of the Northern Forest Land Study⁸ by enacting the Forest Legacy Program (Legacy Program).⁹ The Legacy Program enables the federal government to purchase conservation easements to protect forest lands that face conversion to alternative uses.¹⁰

This Comment evaluates the various options available to local, state, and federal governments as they seek to balance private ownership, economic diversity, and ecological value in the Northern Forest. Section II looks at the problems in the Northern Forest and the shortcomings of traditional land use practices. Section III explores the Legacy Program and arguments propounded by the Program's supporters and opponents. Section IV examines conservation easements and the legal challenges brought against them. Section V evaluates the Legacy Program's efficacy and proposes supplementary provisions to enhance the Legacy Program's prospects for success.

II. THE NEED FOR A FEDERAL ROLE IN DETERMINING FOREST LAND USE

A. *The Economic Problem*

The greatest threats to the Northern Forest, according to many commentators, are widespread residential and recreational development and abusive forestry practices.¹¹ Sporadic, poorly planned development in traditionally forested areas may result in the destruction of the ecosystems that the federal government wants to preserve.¹²

The impetus for the Legacy Program arose from the sudden and rapid sale of vast acres of industrially-owned Northern Forest lands.¹³ In the past, paper companies and other industrial owners

⁷ Francis W. Hatch, *A Motley Crowd of Deceivers*, CONSERVATION LAW FOUND. NEWSL., Winter, 1992, at 1, 3.

⁸ NORTHERN FOREST LANDS STUDY REPORT SUMMARY, *supra* note 5, at 15.

⁹ 16 U.S.C. § 2103c (Supp. 1992).

¹⁰ S. Rep. No. 357, 101st Cong., 2nd Sess. 280 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 4934.

¹¹ Austin, *supra* note 1, at 2.

¹² S. Rep. No. 357, *supra* note 10, at 280.

¹³ See William Scheer, *Vermont Timberland Looks Good to Buyers*, VT. BUS. MAG., April 1990, at 37 (citing Diamond Occidental Forest sale of 1.6 million acres in 1988).

had exercised stable forest land ownership practices. In the late 1980s, however, the industrial landowners began selling their land to finance their other endeavors, to fulfill terms of corporate mergers, to benefit from increased returns from other investments, and to profit from higher land prices.¹⁴ Local and state measures thus far have been unable to prevent development and harsh logging practices in the Northern Forest.¹⁵

B. The Local Role

Traditionally, municipalities use zoning, through the state's delegation of its police power, to restrict landowners' use of their land.¹⁶ These restrictions are valid if they protect public health, welfare, or morals.¹⁷ Local governments generally zone by dividing land into districts.¹⁸ The governments then assign each district certain permissible uses.¹⁹

Zoning originally was both a codification of, and a response to, nuisance law.²⁰ Local governments soon began to use zoning to protect residents' economic interests in their property; often these measures resulted in excluding less affluent people who were unable to afford homes in the town.²¹ Local governments also used zoning to preserve open space.²² For example, a local government could use large lot zoning, minimum floor space requirements, and prohibition

¹⁴ See Phyllis Austin, *Emotions Are High as Debate over Northern Forests Continues*, MAINE TIMES, Aug. 30, 1991, at 6.

¹⁵ Christine Kukka, *Strategies for Saving the Northern Forest*, MAINE TIMES, Aug. 30, 1991, at 21; National Aud. Society et al., *A National Treasure Under Siege*, THE NORTHERN FOREST ADVOCATE, Winter, 1992, at 1.

¹⁶ See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926) (constitutionality of zoning); Charles E. Roe, *Innovative Techniques to Preserve Rural Land Resources*, 5 ENVTL. AFF. 419, 421-23 (1976).

¹⁷ See Standard State Zoning Enabling Act, U.S. Dept. of Commerce (1926), reprinted in DAVID CALLIES & ROBERT FREILICH, *CASES AND MATERIALS ON LAND USE* 5-9 (1985).

¹⁸ DANIEL R. MANDELKER, *LAND USE LAW* 152 (2nd. ed. 1988).

¹⁹ *Id.*

²⁰ CALLIES & FREILICH, *supra* note 17, at 2; MANDELKER, *supra* note 18, at 4 (describing zoning as elaboration of nuisance doctrine that had emerged from disputes between residential neighborhoods and incoming commercial and industrial uses).

²¹ See *Lionshead Lake, Inc. v. Wayne Township*, 89 A.2d 693, 701 (N.J. 1952) (Oliphant, J., dissenting); Robert H. Freilich & Linda Kirts Davis, *Saving the Land: The Utilization of Modern Techniques of Growth Management to Preserve Rural and Agricultural America*, 13 URB. LAW. 27, 30 (1981); Orlando E. Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 ME. L. REV. 261, 264-65 n.13 (1984).

²² Freilich & Davis, *supra* note 21, at 30.

of industrial uses as tools to conserve open space and to restrict development.²³

Zoning, however has not protected rural lands from development.²⁴ Even when perfectly implemented, regulations such as large lot restrictions²⁵ have contributed to a serious problem with urban sprawl.²⁶ Local governments, commentators note, have been less than consistent about designing, implementing, and enforcing land-use regulations.²⁷ The result has been a system of land-use provisions that excludes lower income people²⁸ and unpopular facilities,²⁹ fails to address regional environmental problems,³⁰ and leaves landowners uncertain about how they may use their property, thereby discouraging them from putting their property to the most economically and socially beneficial uses.³¹

C. The State Role

States often seek to overcome local shortcomings in regulating land use. One method states may use is land banking. The state purchases land outright in order to exercise absolute control over environmentally sensitive tracts of land and to accumulate land for state parks.³² In the United States, land banking is a fairly uncommon practice.³³ States must acquire environmentally sensitive land³⁴ for courts to uphold the land's condemnation as a valid public pur-

²³ See *Nat'l Land and Inv. Co. v. Kohn*, 215 A.2d 597, 611 (1965)(four acre minimum lot size); *Lionshead Lake*, 89 A.2d at 694-95(minimum floor space); Freilich & Davis, *supra* note 21, at 30.

²⁴ Many commentators have criticized the ineffectiveness of local zoning. See e.g., Freilich & Davis, *supra* note 21, at 30; Charlotte E. Thomas, *The Cape Cod National Seashore: A Case Study of Federal Administrative Control Over Traditionally Local Land Use Decisions*, 12 B.C. ENVTL. AFF. L. REV. 225, 231-32 (1985).

²⁵ Ordinances that require lots of at least a certain size, such as one acre or more, for single family residential development. MANDELKER, *supra* note 18, at 152.

²⁶ See *id.* at 393; Freilich & Davis, *supra* note 21, at 29.

²⁷ See, e.g., Roe, *supra* note 16, at 421; Thomas, *supra* note 24, at 232.

²⁸ See, e.g., *S. Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 336 A.2d 713, 723 (N.J. 1975); *Surrick v. Zoning Hearing Board of Upper Providence Township*, 382 A.2d 105, 111 (Pa. 1977), Freilich & Davis, *supra* note 21, at 31.

²⁹ JOHN DELAFONS, *LAND USE CONTROLS IN THE UNITED STATES* 19-20, 29, 114 (2nd ed. 1969); Delogu, *supra* note 21, at 262. Delogu discusses how municipality-based land use policies fail to address important social issues. *Id.*

³⁰ Delogu, *supra* note 21, at 262.

³¹ *Id.* at 263.

³² Freilich & Davis, *supra* note 21, at 42; Roe, *supra* note 16, at 441.

³³ Roe, *supra* note 16, at 442.

³⁴ Environmentally sensitive areas include, for example, those areas which serve as habitat for threatened or endangered plants and animals; provide recreational opportunities for residents and visitors; contain undeveloped wetlands, lakes, and rivers; or display outstanding natural features. NORTHERN FOREST LANDS STUDY REPORT SUMMARY, *supra* note 5, at 15.

pose.³⁵ The high costs of acquiring full title to land prevents this tool from meeting the public need for restrictions on development.³⁶ Moreover, once a state government purchases land, it must pay the costs of maintaining the land.³⁷ This practice may be expensive for the government and may not be the most effective use of the financial resources the state can allocate for conservation.³⁸

A state's second tool is using the police power to protect natural resources through regulation. For example, states have passed laws restricting development in environmentally sensitive areas³⁹ and directing municipalities to consider open space as an important public purpose.⁴⁰

Each of the four states holding Northern Forest land has taken some measures to protect its forested areas.⁴¹ For example, the states have conducted studies to assess the forest's status.⁴² Maine formed a Land Use Regulation Commission to bring sound planning and zoning provisions to unorganized and deorganized townships—areas which are not located within a city, town, or Indian reservation.⁴³ New York created the Adirondack and Catskill Parks and restricted residential development and industrial growth in these areas.⁴⁴

Recently, however, northeastern states have faced two challenges in their efforts to preserve open space. First, the recession has depleted the states' abilities to finance outright acquisitions and other environmental programs.⁴⁵ Second, property owners have begun to challenge state interference in court. After a long period of

³⁵ Roe, *supra* note 16, at 442.

³⁶ Freilich & Davis, *supra* note 21, at 42.

³⁷ Ross D. Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP., PROB. AND TR. J. 540, 542 (1979).

³⁸ See John Baden, *Privatizing Wilderness Lands: The Political Economy of Harmony and Good Will*, in PRIVATE RIGHTS AND PUBLIC LANDS 53 (Phillip N. Truluck, ed., 1983).

³⁹ See ME. REV. STAT. ANN. tit. 12, § 685-A(1)(1981); N.Y. ENVTL. CONSERV. LAW §§ 24-0701, 24-0903 (McKinney 1984); VT. STAT. ANN. tit. 10, § 6086(a)(1)(F), (8)(A)–(9)(C)(1984).

⁴⁰ See, e.g., ME. REV. STAT. ANN. tit. 30-A, § 4326 (Supp. 1992); N.Y. GEN. MUN. LAW § 247 (McKinney 1986).

⁴¹ ME. REV. STAT. ANN. tit. 12, §§ 681–689 (1981 & Supp. 1992); N.H. REV. STAT. ANN. § 220 (1–7)(1989); N.Y. ENVTL. CONSERV. LAW §§ 9-0101 to 9-1503 (McKinney 1984 & Supp. 1993); VT. STAT. ANN. tit. 10, § 2621 (1984).

⁴² ME. REV. STAT. ANN. tit. 12, § 681 (1981); VT. STAT. ANN. tit. 10, § 702 (1984).

⁴³ ME. REV. STAT. ANN. tit. 12, §§ 681–689 (1981 & Supp. 1992). In addition, Maine has mandated that each municipality adopt a growth management program. *Id.* tit. 30-A, § 4324. This mandate increases state control over local land use decisions because the state assists municipalities in formulating programs and may review the final product. *Id.* tit. 30-A, § 4341.

⁴⁴ N.Y. ENVTL. CONSERV. LAW §§ 9-0101 to -0109 (Consol. 1984).

⁴⁵ See Richard Andrews, *Landowners Offered Forest Legacy Plan*, 10 VT. BUS. MAG., Sept. 1991, at 40.

deference to state action,⁴⁶ courts have begun to find state-imposed restrictions to be takings for which the government must compensate the landowner.⁴⁷ In an era of government indebtedness, decision-makers have refrained from promoting any actions that cost money; thus, faced with the possibility of court-ordered compensation to property owners for decreased land values resulting from regulatory action, land-use planners and legislators may feel inhibited in their efforts to restrict land use for goals such as sound planning or environmental preservation.⁴⁸

Even where state and local land-use restrictions are successful, these regulations often fail to preserve stability in the ownership and use of rural land. Some economists who observe property law have noted that state-level decisions about land use tend to be imperfect because, in their assessments of land uses' costs and benefits, state government officials focus on an area too small to encompass the true impact of regulatory action.⁴⁹ Thus, when a political boundary fails to conform to the region over which the costs and benefits of an activity are distributed, decisions about land use are likely to burden those areas outside the political boundary.⁵⁰

D. The Federal Role

Just as a state may intervene when local land-use practices fail to meet the state's needs, the federal government may intervene when state and local measures fail to address national interests. Environ-

⁴⁶ See Marcia Coyle, *Property Revival*, THE NAT'L L.J., January 27, 1992, at 42.

⁴⁷ See *Nollan v. California Coastal Commission*, 483 U.S. 825, 841 (1987). In *First English Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), the Court did not resolve the question of whether a regulation had been a taking. 482 U.S. at 312. The Court said that if a taking had occurred, the government would have to compensate the landowner for even a temporary deprivation in the use of the property. *Id.* at 322. Changing the regulation alone would not be an adequate remedy. *Id.* See Coyle, *supra* note 46, at 1, 42 (discussing three "economic rights" cases before 1992 U.S. Supreme Court).

⁴⁸ *First English*, 482 U.S. at 321; *Agins v. Tiburon*, 598 P.2d 25, 31 (Cal. 1979).

⁴⁹ See Fred Goldberg, *Equalization of Municipal Services: The Economics of Serrano and Shaw*, 82 YALE L.J. 89 (1972), reprinted in BRUCE A. ACKERMAN, ed., THE ECONOMIC FOUNDATIONS OF PROPERTY LAW 247, 252 (1975); Christopher K. Lehman & Robert H. Nelson, *The Rise of Managerial Federalism*, 12 ENVTL. L. 981, 998-1000 (1982).

⁵⁰ See FRED P. BOSSELMAN & DAVID R. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971), quoted in CALLIES & FREILICH, *supra* note 17, at 901 (local governments tend to maximize their own tax bases and minimize their own social problems without regard to what happens outside of their borders); Goldberg, *supra* note 49, at 252 (spillover between political boundaries in theory creates non-optimal allocation of resources and in practice may give rise to substantial inefficiency).

mental concerns, especially water and air pollution, have been the major basis for federal intervention in land-use decisions since the 1970s.⁵¹

The federal government has provided incentives for denser suburban growth to curb urban sprawl by funding sewer projects.⁵² The United States Environmental Protection Agency's role in implementing federally enforced statutes such as the Clean Air Act⁵³ and the Clean Water Act⁵⁴ has decreased local governments' attempts to lure polluting industries to their states by promising lax environmental enforcement, and has given the federal government a prominent and ongoing position in state and local land-use decisions.⁵⁵ In addition, in some western parts of the country, the federal government has been a major purchaser of wilderness lands.⁵⁶ The federal government also has attempted to address concerns over the disappearance of open space by giving deductions to taxpayers who donate land to trusts held by qualified charitable organizations.⁵⁷

III. THE FOREST LEGACY PROGRAM: THE PROPOSED SOLUTION

A. *The Program Defined*

In 1990, Congress sought to combine many of the actors who play a role in land use and conservation decisions. The Legacy Program, part of the 1990 Farm Bill, authorizes the United States Forest Service (USFS) to designate and to protect forest lands that are environmentally important and are threatened by conversion to non-forest uses.⁵⁸ The Legacy Program also authorizes the USFS to use

⁵¹ Neal Roberts & Otto Hetzel, *The Inevitable Accretion: Federal and State Takeover of Land Use Control*, 3 URB. L. AND POL'Y 105, 108-10 (1980).

⁵² *Id.* at 109.

⁵³ 42 U.S.C. §§ 7401-7642 (1988).

⁵⁴ 33 U.S.C. §§ 1251-1387 (1988).

⁵⁵ Roberts & Hetzel, *supra* note 51, at 109.

⁵⁶ National forests comprise 32.0 percent of national land area, 48.9 percent of Oregon land area. Clark Binkley & Perry Hagenstein, *Policy Alternatives for Conserving the North Woods*, in CONSERVING THE NORTH WOODS: ISSUES IN PUBLIC AND PRIVATE OWNERSHIP OF FORESTED LANDS IN NORTHERN NEW ENGLAND AND NEW YORK 9-10 (Clark Binkley & Perry Hagenstein eds., 1989).

⁵⁷ 26 U.S.C. § 170(h) (1988); Janet L. Madden, Comment, *Tax Incentives for Land Conservation, The Charitable Contribution Deduction for Gifts of Conservation Easements*, 11 B.C. ENV'TL. AFF. L. REV. 105, 106 (1983).

⁵⁸ 16 U.S.C. § 2103c(a) (Supp. 1992).

conservation easements⁵⁹ and other mechanisms to protect and conserve forest areas.⁶⁰

The USFS is authorized to acquire from willing landowners both land in fee simple and interests in land, such as conservation easements and rights of public access.⁶¹ Under the Legacy Program, the USFS alone will hold the title to these interests.⁶² When acquiring lands through the Legacy Program, the USFS must specify the environmental values it is seeking to protect, the types of activities landowners will conduct, and the effects those activities will have on the land.⁶³

The Legacy Program gives the USFS one year to establish a program in the Northeast and in Washington.⁶⁴ For other areas of the nation, states must prepare an assessment that demonstrates how their region would benefit from implementation of the Legacy Program before the USFS will begin a program in the area.⁶⁵ Congress has specified that it wants to enroll in the Legacy Program environmentally significant regions and lands that face conversion from forest uses into residential, recreational, or industrial uses.⁶⁶ Congress has given priority to forest lands that have special scenery, provide recreational opportunities for the region, contain valuable animal species, and hold riparian land.⁶⁷

The USFS does not have authority to acquire land outside of previously designated Legacy Program areas without consent of the legislature of the state in which the land lies.⁶⁸ In addition, no forest land in New York may be part of the Legacy Program unless the political subdivision where the land is located agrees to participate.⁶⁹ The USFS may permit commercial activity, such as timber management, on Legacy Program land as long as the activity is consistent with the Legacy Program's values.⁷⁰

⁵⁹ A conservation easement is created when a grantor sells certain specified development rights in a piece of property but retains all unspecified property rights. See Madden, *supra* note 57, at 118–19; see also *infra* notes 106–111, 121–24, and accompanying text.

⁶⁰ 16 U.S.C. § 2103c(a) (Supp. 1992).

⁶¹ *Id.* § 2103c(c).

⁶² *Id.*

⁶³ *Id.* § 2103c(d).

⁶⁴ *Id.* § 2103c(d)(2).

⁶⁵ *Id.* A state must establish a State Forest Stewardship Advisory Committee to work with the Forest Service to delineate lands it wants to enroll in the Legacy Program. *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* § 2103c(g).

⁶⁹ H. 8088, 102nd Cong. 1st Sess. (1991).

⁷⁰ 16 U.S.C. 2103c(h)(1).

In purchasing forest land, the USFS shall pay fair market value for Legacy easements.⁷¹ Furthermore, the USFS, to the extent practical, may not pay for the entire program with more than seventy-five percent federal funds.⁷²

The statute originally authorized the USFS to purchase reserved interest deeds as the Legacy Program's primary conservation tool.⁷³ Reserved interest deeds are conveyances of partial interests in land, whereby the grantor retains only the rights to the land that he or she specifies; all other rights go to the buyer, in this case the government.⁷⁴ Because landowners might be less willing to sell reserved interest deeds, the USFS also will use the more traditional conservation easements by which the grantor specifies the development rights to be sold and retains all unspecified rights.⁷⁵

B. Sources of Public Support and Criticism

The Legacy Program's goal is to encourage continued private ownership of forest lands and industrial owners' current commercial practices while preserving the environmental quality of the region.⁷⁶ Response to the Legacy Program has been strong from both people in support of the plan and from groups opposing it. Supporters emphasize the need for action to preserve the resources of the Northern Forest; opponents stress their resistance to governmental interference in the region and the potential abrogation of private property rights.

Legacy Program supporters see great potential in the project.⁷⁷ Because more than eighty-five percent of land in the Northern Forest is held privately,⁷⁸ purchases by the federal government of conservation easements from voluntary landowners may be an efficient tool to prevent subdivision and development of up to 150 thousand acres of Northern Forest land.⁷⁹ In addition, the proponents support the sense of cooperation that the Legacy Program may foster by

⁷¹ *Id.* § 2103c(j)(1).

⁷² *Id.* § 2103c(j)(2).

⁷³ See Forest Service, U.S. Dep't. of Agriculture, *Forest Legacy Program Issues: Questions and Answers*, Sept. 9, 1991, at 3.

⁷⁴ 16 U.S.C. § 2103c(k)(1) (1988).

⁷⁵ See Forest Service, *supra* note 72, at 3.

⁷⁶ Forest Service, U.S. Dep't. of Agriculture, *Final Forest Legacy Program Implementation Guidelines*, June 4, 1992, at 1 [hereinafter *Final Guidelines*].

⁷⁷ Tom Lepisto, *Vision Becomes Action*, APPALACHIA, Sept. 1991, at 10.

⁷⁸ *Id.*

⁷⁹ *Id.*

encouraging public officials, private landowners, and conservation groups to work together in creating, conveying, and maintaining conservation easements.⁸⁰ Legacy Program supporters also feel that the project can show New England residents that the federal government's presence can help the region.⁸¹ They are optimistic that once local residents see the benefits of the Legacy Program, such as reduced damage to the forests and better jobs, then they will be less hostile to the idea of outright land ownership by federal and state governments.⁸²

Few supporters, however, feel that the Legacy Program alone is sufficient to protect the Northern Forest. They view the Legacy Program as part of a multi-faceted approach to preserving the Northern Forest region's ecology.⁸³ To address Northern Forest preservation completely, many supporters feel, will require outright acquisition of land, conservation easements, and improved local and state land-use regulations.⁸⁴

Sensitive to antipathy from private property rights advocates, Legacy Program proponents point out that because the easement grantor acts voluntarily and continues to possess the land, private ownership is more effectively maintained than it would be if the government condemned the land or purchased it in fee simple.⁸⁵ In spite of the voluntary nature of the Legacy Program, its passage has stirred up vocal opposition from individual landowners in the

⁸⁰ See Lisa Capone, *Managing Change*, APPALACHIA, Sept., 1991, at 23, 25; Lowell Krasner, remarks at the New England Environmental Conference (March 21, 1992).

⁸¹ Krasner, *supra* note 80.

⁸² *Id.*

⁸³ See Jennifer Melville, Remarks at the New England Environmental Conference (March 21, 1992).

⁸⁴ See *id.*; Nat'l Aud. Society, et. al., *Saving the Northern Forest: An Issue of National Importance*, Oct. 22, 1991, at 6-15 (advocating authorization and funding of Northern Forest Lands Council; federal and state acquisition of public land and interests in land; stronger state and local regulations to prevent land conversion; and programs to improve economic opportunities, public health, education, and social services in local communities).

Some conservationists believe that Legacy Program easements will be helpful in preventing development, but inadequate to prevent industrial landowners from practicing damaging forest management, such as clearcutting or using unsafe levels of herbicides. Kukka, *supra* note 15, at 22. Because conservation easements can cost up to 80% of the land's full purchase price, some environmentalists worry that easements may not be the best way to conserve the Northern Forest from all of its potential threats. *Id.* ("The cost of easements are extraordinarily high...and they don't do anything to protect the land from mismanagement and other activities, including gravel extraction, road construction, clearcutting and herbicides that degrade wildlife habitat. You wonder if these easements are really a good deal for the American taxpayer?") (quoting Jym St. Pierre, director of the Maine Woods Project of the Wilderness Society).

⁸⁵ See S. Rep. No. 357, *supra* note 10 at 280, *reprinted in* 1990 U.S.C.C.A.N. at 4934.

Northeast pilot program area.⁸⁶ Several groups, including the John Birch Society, have objected at public hearings.⁸⁷ One group has filed a lawsuit in New York to oppose the Legacy Program's implementation in the Adirondack Park region.⁸⁸

Private property rights advocates are concerned about the federal government becoming involved with Northeastern preservation issues. They fear the Legacy Program will facilitate increased federal involvement in local land-use decisions.⁸⁹ They are not pleased with the details of the Legacy Program's statutory language and are even more disturbed by the statute's guidelines.⁹⁰ They believe, despite the Legacy Program's voluntary nature, that the program leaves open opportunities for forced acquisition of environmentally sensitive lands.⁹¹ Private property rights advocates also argue that the Legacy Program's criteria for determining the eligibility of particular parcels are too vague.⁹² Such vague criteria, they assert, will lead to the possibility that the USFS will include vast expanses of land in the program.⁹³

In addition, private property rights advocates also protest that the Legacy Program exhibits a lack of respect for property rights. For example, Legacy Program map provisions require that a state that applies to enter some of its land into the Legacy Program must indicate ecosystem boundaries, but need not make any note of land-owner boundaries.⁹⁴ Private property rights advocates argue that this omission reflects the Legacy Program's preference for ecological values over private property rights.⁹⁵ Private property rights advocates also protest the role of private land trusts in administering portions of the program. These trusts, they charge, lack political accountability.⁹⁶

⁸⁶ Austin, *supra* note 1, at 4-5.

⁸⁷ *Northern Forest Lands*, NEW ENGLAND SIERRAN, Sept.-Oct. 1991, at 4.

⁸⁸ *Buskirk v. Adirondack Park Agency*, No. 401-91 (N.Y. Sup. Ct., Essex Cty. filed Aug. 13, 1991).

⁸⁹ *Forest Funding Okayed: Solomon Ends Opposition*, Gannett News Service, Oct. 9, 1991, available in LEXIS, Nexis Library, OMNI File.

⁹⁰ See, e.g., *Extension of Comment Period Sought on Forest Preservation Program*, UPI, Aug. 30, 1991, available in LEXIS, Nexis Library, OMNI File.

⁹¹ See *id.*

⁹² Maine Conservation Rights Institute, Comments on Forest Legacy Implementation Draft Guidelines 2 (Aug. 17, 1991) (on file with the Maine Conservation Rights Institute, Lubec, ME)[hereinafter MCRI Comments].

⁹³ *Id.*

⁹⁴ *Id.* at 3.

⁹⁵ *Id.*

⁹⁶ *Id.* at 4. See also Pacific Legal Foundation, Comments on the U.S. Forest Service's Draft

Advocates of private property rights also criticize the guidelines for permitting a regional organization such as the Northern Forest Lands Council to conduct multi-state identification of Forest Legacy areas.⁹⁷ Federal and interstate roles in administering the Legacy Program may abrogate state sovereignty and deny opportunities for meaningful input from local residents, who the Legacy Program's policies directly affect.⁹⁸ The private property rights advocates also object because the Legacy Program's implementation proceedings do not require notice; citizens cannot know how the Legacy Program affects their communities and their property.⁹⁹

Finally, private property rights advocates consider the Legacy Program to be part of a trend toward federal intervention in local land-use regulation.¹⁰⁰ They anticipate that the program's studies are just the beginning of greater federal regulation of the forests.¹⁰¹ Private property rights advocates fear that the government will use the Legacy Program's studies as support for condemning interests in land as opposed to relying on voluntary sales of easements.¹⁰² Some people fear the federal government will coerce landowners to convey their development rights or to sell full title of key parcels in order to create a national park.¹⁰³ Private property rights advocates maintain that the Legacy Program's enactment is part of a trend to devalue private property rights in favor of public use or environmental protection.¹⁰⁴ Private property rights advocates, however, might accept a conservation easement program managed at the local level because they believe that local officials are more willing to accept input from the local residents who will be directly affected by preservation schemes and that voters can hold local decision-makers accountable for their proposals.¹⁰⁵

Implementation Guidelines for the Forest Legacy Program, at 2 (Aug. 4, 1991)(on file with the Maine Conservation Rights Institute, Lubec, ME).

⁹⁷ MCRI Comments, *supra* note 92, at 3.

⁹⁸ *See id.* at 3.

⁹⁹ *Id.* at 4.

¹⁰⁰ Letter from Robert Voight, President, Maine Conservation Rights Institute, to the Director of the Cooperative Forestry Staff, Forest Service, U.S. Dep't. of Agriculture (Aug. 17, 1991) (on file with Maine Conservation Rights Institute, Lubec, ME).

¹⁰¹ Austin, *supra* note 14, at 4.

¹⁰² MCRI Comments, *supra* note 92, at 3 (requesting local referenda in every municipality containing Forest Legacy area).

¹⁰³ Austin, *supra* note 14, at 4.

¹⁰⁴ *See* MCRI Comments, *supra* note 92, at 2.

¹⁰⁶ *See id.* at 3.

IV. FEDERAL PURCHASE OF CONSERVATION EASEMENTS: A LEGAL ANALYSIS

A. The History and Description of Easements

A conservation easement is an agreement a landowner makes to restrict the development of his or her property.¹⁰⁶ Traditionally, an easement may be either affirmative or negative; and either appurtenant or in gross.¹⁰⁷ An affirmative easement allows the easement holder to enter the land or to perform acts upon it or both.¹⁰⁸ In contrast, the holder of a negative easement may restrict the landowner's use of the land.¹⁰⁹ Easements appurtenant give rights by virtue of neighboring land, while easements in gross give rights to a person or corporation whether or not the recipient owns nearby land.¹¹⁰ Thus, conservation easements are usually negative easements in gross because they give the easement holders the right to restrict the landowners' development and exploitation of the land regardless of whether the easement holder owns neighboring land.¹¹¹

Property owners initially used easements as agreements to enter upon each other's property.¹¹² Later, judicially created prescriptive easements permitted common rights of way to remain in the public domain.¹¹³ Governments began to use easements as a tool in the 1930s,¹¹⁴ and they have gained popularity over time. In 1959, for example, California began to purchase scenic easements.¹¹⁵ In the 1960s, the federal government authorized national easement purchases by enacting the Highway Beautification Act¹¹⁶ and the Land

¹⁰⁶ JANET DIEHL & THOMAS S. BARRETT, *THE CONSERVATION EASEMENT HANDBOOK* 5 (1988).

¹⁰⁷ Netherton, *supra* note 37, at 560 (1979).

¹⁰⁸ *Id.* at 560.

¹⁰⁹ *Id.*

¹¹⁰ Kemble Hagerman Garrett, Comment, *Conservation Easements: The Greening of America?*, 73 KY. L. J. 255, 257 (1984-85).

¹¹¹ *Id.* Some conservation easements may be both negative and affirmative if the public is given access to the land. Even negative easements may include minimal privileges such as allowing the easement holder to enter upon the land to monitor or to maintain its conditions. Netherton, *supra* note 37, at 560.

¹¹² Netherton, *supra* note 37, at 544.

¹¹³ A.W.B. SIMPSON, *A HISTORY OF THE LAND LAW* 266-67 (1986).

¹¹⁴ Jeffrey A. Blackie, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L.J. 1187, 1190 (1989).

¹¹⁵ CAL. GOV'T CODE §§ 6950-6954 (West 1980).

¹¹⁶ P.L. 89-285, 79 Stat. 1028 (1965).

and Water Conservation Fund Act.¹¹⁷ In 1964, the federal government enacted a tax code provision to allow a charitable contribution deduction for the donation of a conservation easement, thereby providing a financial incentive for landowners to donate their development rights.¹¹⁸

Governmental use of conservation easements for environmental preservation has increased noticeably in recent years.¹¹⁹ Both federal and state governments have begun to purchase less-than-fee interests in land instead of full title as a more economical means of furthering public purposes.¹²⁰ The sale of a conservation easement means that the landowner agrees to surrender certain rights in the land—usually rights to develop the land or to change its existing character—in exchange for money.¹²¹ The easement's fair market value equals the worth of the land without restrictions less the resale price of the land bearing the restrictions.¹²² State law generally requires the landowner to record the easement arrangement with the property's deed.¹²³ As a result of the easement transaction, the landowner sacrifices certain interests in the land, but retains the right to possess and use the land in accordance with the terms of the easement.¹²⁴

B. Legal Problems that May Arise

While Congress has tried to anticipate and to address many common pitfalls of long-term restrictions on property,¹²⁵ a program of permanent conservation easements may pose legal problems in the future.¹²⁶ The major legal issues include the USFS' constitutional and statutory authority to acquire partial interests in land, the courts' willingness to honor conservation easements, citizen standing

¹¹⁷ P.L. 88-578, 78 Stat. 897 (1965).

¹¹⁸ Blackie, *supra* note 113, at 1191.

¹¹⁹ CHARLES M. HAAR & LANCE LIEBMAN, PROPERTY AND LAW 920 (1985); Neil D. Hamilton, *Legal Authority for Federal Acquisition of Conservation Easements to Provide Agricultural Credit Relief*, 35 DRAKE L. REV. 477, 485 (1985).

¹²⁰ See Madden, *supra* note 57, at 105.

¹²¹ *Id.* at 118-19.

¹²² *Id.* at 262.

¹²³ See, e.g., ME. REV. STAT. ANN. tit. 33, § 477(1) (West 1988)(easement must be created by written instrument); N.H. REV. STAT. ANN. § 477:3a (1992); N.Y. GEN. CITY LAW § 20-f(2)(c) (McKinney Supp. 1993); N.Y. TOWN LAW § 261-a(2)(c) (McKinney Supp. 1993); N.Y. VILLAGE LAW § 7-701(2)(c) (McKinney Supp. 1993); VT. STAT. ANN. tit. 27, § 341(a) (1989); Netherton, *supra* note 37, at 556.

¹²⁴ Garrett, *supra* note 110, at 257.

¹²⁵ 16 U.S.C. § 2103c(k)(2).

¹²⁶ See Roe, *supra* note 16, at 435.

to sue for the failure to enforce the terms of an easement, and the status of a conservation easement if the surrounding area changes or if landowners seek to amend the conservation easements' terms.

Opponents may claim easements are unconstitutional because they are gifts to private persons.¹²⁷ Addressing this question in 1980, the Supreme Court of Washington affirmed the constitutional validity of a county's program to purchase rural farmland development rights.¹²⁸ In *Louthan v. King County*,¹²⁹ plaintiffs challenged the program by claiming that buying private landowners' development rights violated a constitutional prohibition¹³⁰ against using public funds for private interests.¹³¹ The court, however, declared that the ability to develop land is a valuable property right.¹³² The court went on to state that the county received valuable consideration when it exchanged money for development rights and thus did not make a gift in disbursing such payments.¹³³

Similarly, the Legacy Program's statutory authority to purchase easements is likely to stand.¹³⁴ Both federal and state governments have authorized or acknowledged conservation easements as a preservation tool. Maine, New Hampshire, New York, and Vermont all have conservation easement statutes that permit landowners to sell their development rights to charitable organizations.¹³⁵ In the past, the federal government has authorized its agencies to acquire interests in real property for a variety of conservation purposes.¹³⁶ While not always necessary for federal land acquisition programs,¹³⁷ the Legacy Program requires state government consent before the USFS can acquire interests within the state's borders.¹³⁸

One legal problem that a state consent requirement raises is the validity of an easement program when a state revokes its initial grant of authorization. The United States Supreme Court has held

¹²⁷ CALLIES & FREILICH, *supra* note 17, at 880.

¹²⁸ *Louthan v. King County*, 617 P.2d 977, 980 (Wash. 1980).

¹²⁹ 617 P.2d 977 (Wash. 1980).

¹³⁰ WA. CONST. Art. 8, § 7.

¹³¹ *Louthan*, 617 P.2d at 978.

¹³² *Id.* at 981 (citing *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978)).

¹³³ *Id.* at 981; see Thomas Grier, Comment, *Conservation Easements: Michigan's Land Preservation Tool of the 1990s*, 68 U. DET. L. REV. 193, 211 (1991).

¹³⁴ Garrett, *supra* note 110, at 211.

¹³⁵ ME. REV. STAT. ANN., tit. 33, §§ 476-479-B (1988); N.H. REV. STAT. ANN. § 477:45-47 (1992 & Supp. 1992), §§ 79-A:1, 15-21 (1991 & Supp. 1992); N.Y. GEN. MUN. LAW § 247 (McKinney 1986); VT. STAT. ANN., tit. 10, §§ 6301-6309 (1984 & Supp. 1992).

¹³⁶ See Hamilton, *supra* note 119, at 493, 524-25 (provides table of federal statutes authorizing acquisition of less than fee interests in property).

¹³⁷ *Id.* at 493.

¹³⁸ 16 U.S.C. 2103(g) (Supp. 1992).

that a state may not revoke consent once granted.¹³⁹ In *North Dakota v. United States*,¹⁴⁰ the Governor of North Dakota had consented to the Secretary of the Interior's acquisition of easements over wetlands to preserve waterfowl breeding and nesting grounds.¹⁴¹ The Supreme Court declared that the United States has the power to acquire land for valid national interests with or without state consent.¹⁴² Congress' addition of the state consent provision, however, limited that federal authority.¹⁴³ Although Congress was silent on the issue of a state's revocation of consent, the Court decided that the statute did not allow incumbent governors to revoke their consent once granted.¹⁴⁴

A second possible legal pitfall of the Legacy Program is the traditional hostility common law courts have toward permanent restrictions on land rights.¹⁴⁵ State law is not necessarily applicable to disputes over easements held by the federal government. Conservation easements that arise under federal law, however, may provide sufficient national interest to warrant federal jurisdiction and federal law.¹⁴⁶

The Supreme Court determined in *North Dakota* that because the litigation evolved from land acquisition under a federal regulatory program, it involved significant federal issues; thus, the federal courts were the appropriate body to handle the choice of law question.¹⁴⁷ The court might apply state law, but not if it was hostile to national interests.¹⁴⁸ Thus, the Court did not apply a North Dakota statute that restricted the terms of federally owned conservation easements. The court deemed the legislation hostile to national interests in bird preservation.¹⁴⁹ The Supreme Court held that a state may not impose restrictions on the easement agreements under a

¹³⁹ See *North Dakota v. U.S.*, 460 U.S. 300, 312 (1983).

¹⁴⁰ 460 U.S. 300 (1983).

¹⁴¹ *Id.* at 301. The governor's consent was required in the Migratory Bird Conservation Act: "no land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the state or the appropriate state agency." *Id.* at 303 n.3 (quoting Migratory Bird Conservation Act, 16 U.S.C. § 715k-5 (1988)).

¹⁴² *Id.* at 310. Valid statutory purposes include protecting bird habitats. Acquisition may be by purchase or condemnation. *Id.* at 309-10.

¹⁴³ *Id.* at 310.

¹⁴⁴ *Id.* at 314.

¹⁴⁵ Hamilton, *supra* note 119, at 502.

¹⁴⁶ *North Dakota v. U.S.*, 460 U.S. 300, 318 (1983).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 321.

federal conservation program.¹⁵⁰ Once granted, a state can neither revoke nor restrict its consent to a federal acquisition program.¹⁵¹

The next legal issue is who, other than the parties to the easement agreement, has standing to sue to enforce an easement's terms or to challenge the site of a granted easement. The courts in considering similar problems have used the standards delineated in the Administrative Procedures Act and Article III of the United States Constitution.¹⁵² For example, in *National Audubon Society v. Hodel*,¹⁵³ the Audubon Society had standing to challenge a land exchange because its members claimed to have aesthetic, scientific, and recreational interests in the preservation of an island involved in the exchange.¹⁵⁴ The group's members did not need to have a property interest in the land affected,¹⁵⁵ they only needed interests that the relevant legislation protected.¹⁵⁶ Similarly, in *Friends of the Shawangunks, Inc. v. Clark*,¹⁵⁷ the plaintiff was an environmental group with members who lived in the affected area.¹⁵⁸ Living near land burdened by a conservation easement was sufficient to provide the group with standing to protest the easement's proposed amendment.¹⁵⁹

Another possible legal problem with the Legacy Program's easements is a landowner's request to amend the easement's terms. The United States Court of Appeals for the Second Circuit treated this issue as a novel question on appeal in *Friends of Shawangunks*.¹⁶⁰ The circuit court reversed a lower court's ruling that had upheld a decision by the Department of the Interior.¹⁶¹

The Department of the Interior had permitted a purchaser of land to modify the conservation easement that encumbered the land.¹⁶²

¹⁵⁰ *Id.*

¹⁵¹ *Id.* See also *Swan Lake Hunting Club v. United States*, 381 F.2d 238, 244-45 (5th Cir. 1967) (deprived state of hunting rights after U.S. condemned land).

¹⁵² *Nat'l. Audubon Soc'y v. Hodel*, 606 F. Supp. 825, 831 (D. Alaska 1984); see U.S. CONST. Art. III; 5 U.S.C. § 702 (1988).

¹⁵³ 606 F. Supp. 825 (D. Alaska 1984).

¹⁵⁴ *Id.* at 832.

¹⁵⁵ *Id.*

¹⁵⁶ See *id.* at 831-32 (citing *McMichael v. County of Napa*, 709 F.2d 1268, 1270 (9th Cir. 1983)).

¹⁵⁷ 585 F. Supp. 195 (N.D.N.Y.), *rev'd and remanded on other grounds*, 754 F.2d 446 (1st Cir. 1985).

¹⁵⁸ *Id.* at 199.

¹⁵⁹ *Id.*

¹⁶⁰ 754 F.2d 446, 447 (2d Cir. 1985).

¹⁶¹ *Id.*

¹⁶² *Id.*

The modification would have changed the area from private undeveloped land, on which public access was not allowed, to a golf course providing access to members of the course.¹⁶³ The court acknowledged that although it must defer to an agency's interpretation of its own statute, the purpose of the statute clearly was to preserve wilderness areas.¹⁶⁴ Referring to the statutory mandates, the court decided that the amendment of the easement constituted a conversion.¹⁶⁵ Thus, the court did not enforce agency's decision to permit the amendment.¹⁶⁶

V. THE FOREST LEGACY PROGRAM'S PROBLEMS AND POSSIBILITIES

The Legacy Program is a fairly innovative program of environmental conservation. The Legacy Program's novelty stems from its use of conservation easements for large scale conservation purposes.¹⁶⁷ Most previous easements simply protected the natural state of property surrounding publicly owned lands or preserved the view along a highway.¹⁶⁸ To succeed, the Legacy Program requires coordination among several states and the federal government¹⁶⁹ to perform what traditionally has been a local function.¹⁷⁰

The Legacy Program has three primary goals. First, the Legacy Program seeks to preserve the environmental values of the forest lands.¹⁷¹ Second, it attempts to preserve the heritage of private ownership and industrial productivity of the forests.¹⁷² Third, the Legacy Program aims to foster cooperation among the various parties concerned about the forests' fate.¹⁷³ The Legacy Program's goals are difficult because the program tries to attain the benefits of preservation and private ownership without suffering the corresponding

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 449.

¹⁶⁵ *Id.* at 451.

¹⁶⁶ *Id.* at 452.

¹⁶⁷ See Hamilton, *supra* note 119, at 485.

¹⁶⁸ See Roe, *supra* note 16, at 431; U.S. DEP'T. OF THE INTERIOR, OFFICE OF THE ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, NEW TOOLS FOR LAND PROTECTION 32-33 (1982).

¹⁶⁹ See Forest Service, Final Guidelines, *supra* note 76, at 1, 7.

¹⁷⁰ See Delogu, *supra* note 21, at 261-64; *supra* notes 16-31 and accompanying text.

¹⁷¹ 16 U.S.C. § 2103c(c)(1988).

¹⁷² Forest Service, Final Guidelines, *supra* note 76, at 1.

¹⁷³ See S. 2427, 101st Cong. 2d Sess. (1990) (a bill to provide for the establishment of a coordinated and cooperative federal state and local forest program).

burdens of public acquisition and deforestation.¹⁷⁴ The Legacy Program is an important, although inadequate, program to secure the future of the Northern Forest. Federally funded conservation easements can play a key role in limiting development of the forests, but they are neither a panacea, as some Legacy Program supporters might claim,¹⁷⁵ nor a sign of the apocalypse, as property rights advocates may fear.¹⁷⁶

A. *The Voluntary Nature of the Forest Legacy Program*

One of the most problematic aspects of the Legacy Program is the government's inability to purchase the development rights it values most. The USFS will determine the areas in which it is willing to purchase development rights according to the land's vulnerability to environmental degradation.¹⁷⁷ The USFS will then purchase development rights from willing sellers who own land within the designated region.¹⁷⁸

Because participation in the Legacy Program is entirely voluntary,¹⁷⁹ the USFS may need to offer high prices for development rights. These prices must meet not only the value of the land's development rights, but also the landowner's perception of the value of the land's development rights.¹⁸⁰ Demand for development in forest areas is steady and likely to increase over time.¹⁸¹ Thus, the value of development rights may be a high percentage of the fair market value of the entire parcel of land.¹⁸²

In addition, landowners who own fragile land may not be the most likely to sell because there is no guarantee that willing sellers will own the most environmentally significant parcels. Thus, it is important to examine which owners may be most interested in participating in the Legacy Program.

¹⁷⁴ See *supra* notes 11–27 and accompanying text.

¹⁷⁵ See *supra* notes 75–82 and accompanying text.

¹⁷⁶ See *supra* notes 86–105 and accompanying text.

¹⁷⁷ 16 U.S.C. § 2103(c)(a); Forest Service, Final Guidelines, *supra* note 76, at 4.

¹⁷⁸ See *supra* notes 66–71 and accompanying text; Forest Service, Final Guidelines, *supra* note 76, at 11.

¹⁷⁹ 16 U.S.C. § 2103c(c) (1988) (places emphasis on fact that participating landowners shall be “willing”).

¹⁸⁰ See F. Christian Zinkhan, *Option Pricing and Timberland's Land-Use Conversion Option*, 67 LAND ECON. 317, 317 (1991).

¹⁸¹ Austin, *supra* note 1, at 3 (reporting that development rights may cost from 50% to 70% of full purchase price).

¹⁸² Kukka, *supra* note 15, at 22.

Landowners who want to participate probably will be owners who intend to remain on their land for the foreseeable future.¹⁸³ The Legacy Program is likely to appeal primarily to those industrial landowners who are not in dire financial straits and do not envision needing to sell their property.¹⁸⁴ Industrial participants probably would plan to remain in the same field of business without changing the use of their land.¹⁸⁵

For example, a paper company could be a likely participant in the Legacy Program. Because cutting timber is not inconsistent with a forest use under the Legacy Program's standards,¹⁸⁶ a paper company could receive compensation for rights it was not planning to exploit and still keep the land for the sanctioned practices it wants to conduct.¹⁸⁷ Furthermore, granting a Legacy Program easement decreases the value of the land thus reducing the owner's property tax obligations.¹⁸⁸ A likely participant would believe that the tax break plus the compensation for the easement outweighs the costs of foregoing future development options plus the risks of unanticipated restrictions arising as a result of owning federally affiliated land.

Larger, more diversified corporate landowners probably will be more willing to participate in the Legacy Program than smaller businesses or less stable landowners.¹⁸⁹ Thus, the owners most likely to participate are those owners who are least likely to need the benefits of the Legacy Program in order to maintain stable management of their forest land holdings.

Private-individual landowners are more likely than industrial landowners to want to participate in the Legacy Program. These landowners typically participate in private land trust organizations.¹⁹⁰ The altruistic goal of preserving open spaces and the prospect of being compensated for development rights that they were not planning to use are primary motivations for individual land holders to enroll their land in conservation easement programs.¹⁹¹

Ironically, although the primary target of the Legacy Program seems to be corporate landowners who are considering the option of

¹⁸³ *Id.*

¹⁸⁴ *See id.* (noting decrease in resale value of land burdened by conservation easement).

¹⁸⁵ *See id.* (expressing some conservationists' concern that conservation easements may only serve as a subsidy to paper industry).

¹⁸⁶ Forest Service, Final Guidelines, *supra* note 76, at 1.

¹⁸⁷ 16 U.S.C. § 2103c(h)(1) (1988).

¹⁸⁸ *See* Hamilton, *supra* note 109, at 518.

¹⁸⁹ Andrews, *supra* note 45, at 37.

¹⁹⁰ *See* Austin, *supra* note 1, at 3.

¹⁹¹ DIEHL & BARRETT, *supra* note 106, at 37-38.

selling land to developers, these landowners are likely to be the least willing to participate. Industry's first purpose generally is to make a profit for its shareholders. Corporate landowners may care about the land the corporation owns, but a corporation may lack altruistic motives for land conservation. In addition, knowing how land values fluctuate, corporate landowners tend to feel the need to remain flexible in the face of difficult economic times.¹⁹² They are unlikely to want to tie up their options for land use in perpetuity. Once a company sells the easement at fair market value, it loses the opportunity to benefit from future increases in the value of unrestricted land.

Industrial landowners may also hesitate to enter into long-term easement agreements with the federal government because of potential restrictions and complications involving federal land management.¹⁹³ For example, landowners are concerned that if they sell the federal government an easement on their land, their logging or industrial activity may lead to litigation over Endangered Species Act¹⁹⁴ or National Environmental Policy Act¹⁹⁵ standards.¹⁹⁶ The federal government has assured prospective sellers that no such hazard exists.¹⁹⁷ This concern, however, may hamper landowners' willingness to participate in the Legacy Program.¹⁹⁸

Alone, the Legacy Program probably will not attain its goal of preserving the ecological value of the forests. Sophisticated corporate landowners, who are not desperate for short term financial help, are unlikely to forego the benefits of retaining full title of their land in exchange for the current value of the land's development rights. Corporate landowners who may need the financial help the Legacy Program offers may prefer to sell their land to private developers and avoid the burdens of maintaining the land.

A final aspect that might deter a corporate landowner from participating in the Legacy Program is the free-rider problem. The demand for development in these forest areas is steady and likely to increase over time.¹⁹⁹ If all but one of the landowners in a certain

¹⁹² See Andrews, *supra* note 45, at 37.

¹⁹³ *Id.* at 38-39.

¹⁹⁴ 16 U.S.C. §§ 1531-1544 (1988).

¹⁹⁵ 42 U.S.C. §§ 4321-4370 (1988).

¹⁹⁶ *Id.* Both acts establish requirements federal actors, but not private actors, must meet.

¹⁹⁷ *Id.* at 39; Forest Service, Final Guidelines, *supra* note 76, at 2.

¹⁹⁸ *Id.* at 37.

¹⁹⁹ Austin, *supra* note 1, at 3; David C. Smith, *Large Land Holdings and the North Woods: Stasis—or—Changing Times*, in CONSERVING THE NORTH WOODS: ISSUES IN PUBLIC AND PRIVATE OWNERSHIP OF FORESTED LANDS IN NORTHERN NEW ENGLAND AND NEW YORK, *supra* note 56, at 58-59.

region participated in the Legacy Program, the value of the remaining owner's land might skyrocket because it would be the only acreage available. If all of the landowners were to consider this possibility, none would participate in the Legacy Program because of the opportunity to reap the disproportionately higher value of the unrestricted land. Moreover, given the USFS's current policy against condemning land,²⁰⁰ the Legacy Program administrators would be powerless to compel the surrender of development rights, even in the most crucial areas.

The differences between individual and industrial forest landowners may defeat the Legacy Program's preservation goals. For a forest system to remain ecologically viable, it must be fairly large.²⁰¹ Alone, the Legacy Program's impact will be spotty and unplanned, restricted by inadequate funding and the availability of willing landowners. Industrial reticence may compound the problem because of the sheer size of corporate holdings.²⁰²

The Legacy Program likely will have a negligible impact on preserving the Northern Forest. While it will help promote conservation by funding more easements than private land trust organizations can afford to purchase, it will not prompt people to use their land any differently than they otherwise would have. Small-tract participants probably would not develop their land regardless of the easement program and large-tract holders are less likely to be enticed and more likely to contemplate selling the land to developers. The massive size of such tracts increases the impact of their decisions on the region's ecology. The Legacy Program's inability to induce these landowners to participate in selling conservation easements may defeat the program's purpose in preserving the forests' ecological values.

B. Coordination Among Local, State, and Federal Governments

The Forest Legacy Program, and the NFLC provide an opportunity for cooperation among the different interests involved in the fate of the Northern Forest; its success, however, faces strong chal-

²⁰⁰ See Forest Service, Final Guidelines, *supra* note 76, at 1-2; Andrews, *supra* note 45, at 40.

²⁰¹ See Thomas A. Lepisto, *Nationally Significant Values*, THE NO. FOREST ADVOC., Winter, 1992, at 2 (quoting Drew Barton, forest ecologist); FOREST SERVICE, *Critical Land Must Be Identified to Protect It*, NORTHERN FOREST LANDS STUDY REPORT SUMMARY, *supra* note 5, at 18.

²⁰² See NORTHERN FOREST LANDS STUDY REPORT SUMMARY, *supra* note 5, at 12.

lenges. For example, the property rights advocates who complain about the lack of state and local input into the Legacy Program display a fundamental disagreement with the Legacy Program's goals.²⁰³ Congress enacted the Legacy Program because the Northern Forest has national and public values worth preserving.²⁰⁴ State and local regulations had been inadequate in the face of pressure for development to protect the national interest in forest resources.²⁰⁵ Thus, the federal government decided to intervene at a modest level. A substantial increase in state or local influence over the Legacy Program will result in a duplication of the programs, standards, and regulations that existed before the Legacy Program. Thus, the Legacy Program would become even less effective and innovative than it is in its current form.

The addition of the New York home rule amendment to the Legacy Program displays the difficulty the Legacy Program may face in becoming an effective program.²⁰⁶ Annual budget renewals will give opponents of the Legacy Program opportunities to organize and to tie funding of the Legacy Program to similar home-rule amendments for their regions. Thus, a municipality that does not want the Legacy Program has ample opportunities to deny an individual the choice of whether to participate in the program. In New York, if a community does not approve the Legacy Program then it is able to superimpose its local land-use agenda over the national interest in forest preservation. On the other hand, if a community does approve the Legacy Program, the program is consistent with its values and simply provides federal funds to support the goals the local community would have pursued anyway. These scenarios highlight the emptiness of the Legacy Program's potential to act as an innovative tool for national land use goals if a local government has veto power.

C. Other Ideas For Meaningful Forest Preservation

As demonstrated by the Diamond Land turnover,²⁰⁷ the Northern Forest is undergoing a period of change; the New England states alone have been unable, or unwilling, to impede the economic development that looms in the forest's future. Congress made a legis-

²⁰³ See *supra* notes 87-105 and accompanying text.

²⁰⁴ See *supra* notes 1-9 and accompanying text.

²⁰⁵ See *supra* notes 11-15 and accompanying text.

²⁰⁶ Forest Service, Final Guidelines, *supra* note 76, at 5; see *supra* note 69 and accompanying text.

²⁰⁷ See *supra* note 2 and accompanying text.

lative decision, through the Northern Forest Land Study and the pilot Forest Legacy Program, that this eastern wilderness provides a benefit to the nation as a whole and warrants federal attention. The Forest Legacy Program alone, however, is inadequate to meet the legislative goals of maintaining the Northern Forest's private ownership and ecological integrity. In order to attain these goals, the federal government must increase the amount of resources directed at protecting the Northern Forest. Despite the concerns of private property rights advocates, the Legacy Program is not likely to take anyone's land without just compensation.²⁰⁸ The Legacy Program should be used in conjunction with some state and local actions as part of a comprehensive plan for forest conservation.

First, the federal government should acknowledge the national importance of the Northern Forest and take advantage of the economic slow-down in the region by purchasing outright the most important parcels of land in the Northeast. This action can bring some parity between the amount of the land the federal government owns in the Northeast, as compared with the acreage it owns in the rest of the country. Second, Congress should authorize and fund the NFLC in order to facilitate coherent action among the Northern Forest states. Third, Congress should overturn the troublesome New York amendment which threatens to burden implementors of the Legacy Program with even more bureaucratic duties to the detriment of the forest's health. Finally, Congress must give sufficient funding to the Forest Legacy program so that it can purchase enough conservation easements to make an impact on the ecology of the region.

At the state level, governments should identify and assess the most environmentally important areas of their states and increase their purchase of tracts to encourage large-scale land protection. State and local governments should work together to develop better land use and zoning policies to allow growth that is deliberate, well-planned, and sensitive to environmental concerns.

VI. CONCLUSION

The Forest Legacy Program is an innovative solution to the problem of saving the Northern Forest. The Legacy Program responds

²⁰⁸ Forest Service, Final Guidelines, *supra* note 76, at 1-2.

both to the need for preserving this national resource and to the political sensitivities of landowners in the region. Used properly, conservation easements can be an efficient tool to prevent excess development from marring forests in the Northeast. To be effective, however, the Legacy Program must receive adequate funding and be accompanied by complementary programs and policies.