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THE USE OF MEDIATION TO RESOLVE THE DISPUTE OVER LOW-HEAD HYDROELECTRIC DEVELOPMENT AT SWAN LAKE

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PREFACE

This report is about a negotiation process: who participated, why there was a need to negotiate, what issues were involved, and the outcome of the negotiation. As such, it describes a process we are all familiar with. We all negotiate, almost constantly, in order to get most of what we really want when we can not have all we would like.

It is also about a mediation process. In a mediation process, parties in dispute receive assistance in negotiating a resolution of their differences. A mediator organizes and directs the negotiations until they are concluded or the parties can continue without help. Parties enter into mediation voluntarily and agreements are made at their discretion. A mediator, unlike an arbitrator, has no authority to impose a settlement on the parties. The parties are free to reject proposals made by the mediator or the other parties or withdraw from the process at any time. Once they sign an agreement with one another, however, it acts with the same force as a contract and the parties can hold one another accountable for failure to perform under the terms.

In many instances, it seems that the involvement of a neutral mediator causes parties in dispute to consider a wider range of options in the course of their negotiations and may cause them to agree on a solution different from that proposed by any of them at the outset. For this reason, complex negotiations between parties confronted with environmental disputes can often be assisted by a neutral mediator. Careful examination of the mediation process that occurred in Swanville may provide a model for the resolution of other natural resource disputes. Therefore, the report concludes with a section on the implications of the case for those concerned with hydroelectric development and its environmental impacts -- public officials, developers and representatives of host communities.

The report was written by the mediator of the dispute and represents the views and behavior of the parties as the mediator understood them. It is intended to present the mediator's observations in a way which will inform and assist others who may someday face a difficult situation like the one the Town of Swanville and Maine Hydroelectric Development Corporation faced, and successfully resolved, in the spring and summer of 1979.

David O'Connor
Boston, 1980

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SUMMARY OF THE CASE

In 1978, the president of Maine Hydroelectric Development Corporation, Lawrence Gleeson, announced that the company planned to spend almost a half million dollars to renovate five dams on the Goose River near Belfast, Maine to generate electricity. The most important part of the plan involved the use of the first of the dams, the one which stands at the lower end of Swan Lake, not to generate power, but to regulate the flow of water to the downstream dams. In short, Swan Lake was to be used to retain water when the downstream dams were operating at capacity through normal runoff and to release water for them when rainfall and runoff were low. For Maine Hydro, management of the Swan Lake dam could make an otherwise marginal proposal lucrative.

However, Swan Lake and the dam which regulated its water level were vitally important to the town of Swanville, a community of about 400 persons wrapped around the shore of the lake. The residents use Swan Lake for swimming, fishing, boating, drinking water, and rely on it to maintain property values (and therefore property taxes) in the face of inflation, serious unemployment and a diminishing agricultural industry. The town was so concerned about the impact of this proposed hydroelectric project that in November, 1978 it petitioned the Federal Energy Regulatory Commission (FERC) to deny Maine Hydro's application on the grounds that it would damage the environment, reduce property values and eliminate recreational opportunities for its citizens.

In December, 1978, FERC accepted Swanville's petition and granted the Town status as an intervenor* in its review of Maine Hydro's license application. Meanwhile, community sentiment had long since turned against Maine Hydro and there were threats of reprisals if the company went ahead with its plans. Efforts to bring the developer and the community face to face for rational discussion of the project were unsuccessful.

In the spring of 1979, the Maine Office of Energy Resources requested the assistance of an environmental mediator to resolve the dispute. In May of 1979 the parties, represented by Gleason on the one hand and the Selectmen from Swanville and their attorney on the other, voluntarily agreed to enter into negotiations with one another under the direction of a mediator in an effort to resolve their differences. Their decision to enter into mediation was unprecedented in Maine and very possibly in the history of hydropower development in the United States.

The Federal Energy Regulatory Commission supported their decision, anxious to learn if hydropower licensing disputes might be more efficiently and more satisfactorily resolved at the local level with the help of mediators. (See page 55 for a discussion of this question.) The Maine Office of Energy Resources hoped some settlement could be achieved that was acceptable to both sides and believed that negotiations between developers and host communities

*To qualify for intervenor status, one must show that participation is either "necessary or appropriate to the administration" of the Federal Power Act, or "may be in the public interest" (18 C.F.R. § 1.8, Conservation of Power and Water Resources). Once the Commission grants intervenor status it is required to hold a series of hearings to allow the applicant and intervenor each to present their case as well as to allow for comments by other concerned parties and for the preparation of studies that may be required to rule on the application. It is a lengthy and costly process for all.

might encourage the responsible development of hydropower capacity in the state.

The negotiations took place over five months and included five joint negotiating sessions, a public information meeting, two tours of the lake and numerous private discussions between the mediator and one or the other of the parties. The two most important and most difficult issues to resolve were the establishment of minimum and maximum lake levels and the plan for management of the area around the Swan Lake dam.

In the end, the parties reached agreement on a strategy for management of the Swan Lake dam by Maine Hydro so that the level of the lake will (1) not rise above a point 2.5 feet below the top of the dam at any time during the year, nor (2) fall below a point 5.0 feet below the top of the dam during the summer months, nor (3) fall below a point 7.5 feet below the top of the dam during the remainder of the year. At the same time, they agreed to take a number of actions to improve and clarify responsibilities for management of the area around the dam and to create a Swan Lake Committee comprised of representatives from Swanville and (ex officio) Maine Hydro, to "ensure future communication and cooperation" and to "develop and implement a plan for management and public use of the area around the (Swan Lake) dam."

The final agreement signed by the parties on August 2, 1979, covers fourteen different areas of concern, including water rights and recreational opportunities, upper and lower limits for fluctuation of the lake level, flood control procedures, dam maintenance and repair, and management of the area around the Swan Lake dam.

The parts of this agreement pertaining to water use and dam management have been incorporated by the Federal Energy Regulatory Commission in the license it has since issued to Maine Hydroelectric Development Corporation for operation of the Goose River Hydroelectric Project and the Town of Swanville has withdrawn its opposition to the project.

II. THE SITUATION PRIOR TO MEDIATION

Maine Hydro's Situation

In the spring of 1976, Lawrence Gleeson left his job as a systems planning administrator with Sun Oil Company and formed Pennsylvania Hydroelectric Development Corporation and began efforts to obtain rights to operate a number of hydroelectric projects in Pennsylvania. After some initial successes in Pennsylvania, he began to investigate the potential for hydroelectric development in Maine. In the course of his investigation he located a number of dams which had been abandoned or were not in use and which were, in his estimation, promising sites for hydroelectric development. This led him to form Maine Hydroelectric Development Corporation and to seek to acquire the rights to develop these sites. One of these sites was a series of five dams along the Goose River, north of Belfast, Maine.

The Goose River has its headwaters in Swan Lake about ten miles north of Belfast and drops from an elevation of 200 feet above sea level at the lake to a few feet above sea level when it empties into Belfast Bay. It is not a large river by any means, averaging forty to fifty feet wide most of the way and is rarely deeper than three feet. Gleeson estimated the mean flow to be 40 cubic feet per second (cfs). He calculated runoff from the surrounding hillsides to contribute approximately fifty percent of the total stream flow. The remaining fifty percent was provided by Swan Lake.[1]

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[1] Maine Hydroelectric Development Corporation, "Application to the Federal Energy Regulatory Commission for a Minor License to Construct and Operate a Hydroelectric Project on the Goose River"; September, 1978 (Mimeographed; See Appendix 1 for the complete text of the License Application) (Hereafter, Maine Hydro, "License Application")

Over a period of many years, all of the dams and the rights to make use of the water in Swan Lake and the Goose River had been acquired by a leatherboard manufacturer, The Sherman Company. Gleeson arranged to lease these rights from the company with an option to purchase them outright if he could successfully construct and license a hydroelectric project on the river.

On its route to the sea the river passes over, first the dam at Swan Lake, which has an 8 foot head, then Mason's Dam which has a 31 foot head. Next comes Kelley Dam, which has a 22 foot head, followed by the Mill Dam (near the site of the leatherboard manufacturing plant, originally constructed by the Sherman Company) which has a 21 foot head, and finally, a dam originally constructed by Central Maine Power Company which has a head of 79 feet. Maine Hydro in its license application, stated that "the degree of regulation of this stream, which drains approximately 21 square miles of coastal Maine, should permit operation of this project at an annual capacity factor of approximately 80%. In total, Gleeson estimated the power generating capacity of the system to be 430 kilowatts which could produce 2,700 megawatt hours of electricity annually.[2]

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[2] Maine Hydro, "License Application", page 1. The power generation capability of the Goose River project (2,700 megawatts) could provide electricity to serve the lighting requirements of 400 to 500 residences each year. However, it is important to note that the power produced by the project would flow into the power transmission system maintained by Central Maine Power Company and will not be distinguishable, to retail purchasers, from power produced by other sources within the Central Maine Power Company system. Thus, regardless of the efficiencies of the Goose River Project, residents of the Swanville area would find no appreciable difference in their electricity bills as a result of the project.

Of the five dams included in the proposed project only the Swan Lake dam would not be used to generate power. This dam, however, was crucial to the effectiveness and financial feasibility of the proposal for the lake holds some 7,500 acre feet of water storage capacity and the dam could provide a sufficient supply of water to the downstream generating stations to keep them operating at full capacity most of the year. In times when there was little or no natural runoff it controlled virtually all of their water supply. Most hydroelectric facilities cannot claim nearly this degree of control over river flow and therefore have a much lower "capacity factor" (the amount of time the facility can be reliably called upon to deliver full output).[3]

There was one more aspect of the Goose River project which made it desirable to a developer such as Gleeson. Maine Hydro's license application reported that "the process of consolidating essential water rights under a single owner was begun in the 1880's; the result is that, now, the excellent regulation potential of the basin has been developed and is available to this project." This meant that the rights to the dams and, therefore, under Maine state law, the "reasonable use" of the water that flowed over them, was no longer available to "riparian" (water front) land owners, and flowed over

[3]The flow of water along a river in an uncontrolled state varies significantly from season to season and even week to week. Turbines must be sized to capture as much of this flow as possible while not incurring excessive capital carrying costs. If a river flow is largely uncontrolled, the capital cost of the equipment must be amortized over a much smaller volume of productive hours in a given period of time, and one cannot predict when it will be available. Both characteristics make it less economical. Because of Swan Lake and the dam there, the Goose river project offered the rare prospect of being able to provide maximum output, consistently.

them, was no longer available to "riparian" (waterfront) landowners, and could be leased to Maine Hydroelectric by a single corporate entity.[4] Management authority could be transferred easily and completely to Gleeson.

Maine Hydroelectric expected its proposal would raise concerns on two fronts. The Maine Department of Inland Fisheries and Wildlife could be expected to be concerned about the effect of fluctuating lake levels on fish habitats and the people of Swanville could be expected to be concerned about the effect of these same fluctuations on recreational opportunities. Nonetheless, Gleeson felt Maine Hydro could respond to these concerns by demonstrating that regulated river flow for downstream power production would produce fluctuations in the lake which were substantially less than those that had occurred when the downstream dams had been used for mechanical power and production of manufactured goods. Gleeson expected lake level fluctuations to be moderate and therefore a net improvement over past fluctuations. He foresaw a desirable situation for both the natural environment and recreational use.

> "Development and operation of a co-dependent system of hydroelectric sites, sized approximately to the stream's flow, will quite reasonably produce a beneficial effect upon fish and wildlife resources as opposed to the effects of historic usage. The primary difference will lie in stream flow regulation. The stations are to be operated continuously, at essentially fixed power settings, as contrasted with the historic usage situations in which shift/workday/production schedules dictated highly variable power settings and resultant variations in stream flow."[5]

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[4] See Olson, Robert A. et al., "A Case Study Analysis of Legal and Institutional Obstacles and Incentives to the Development of the Hydroelectric Potential at the Goose River, Maine", September, 1979; Energy Law Institute, Franklin Pierce Law Center, Concord, New Hampshire, pages 24-25.

[5] Maine Hydro, "License Application", page 2.

Maine Hydro went on to state in its license application that "regulation of flow is likely to enhance the warm water fisheries" that exist in the sluggish, lower portion of the river. The company recognized, and had "no objection" to, the continuation of historical patterns of recreational uses of the lake for fishing, swimming and boating.[6]

Swanville's Situation

The residents at Swanville had long been familiar with the capabilities of the Swan Lake dam. The 10 foot high, 250 foot wide dam, made of stones and cement, was constructed in the 1850's to regulate the flow of water to mills located downstream and to increase the capacity of the lake to retain flood waters. However, at the time, the area around the lake must have been sparsely settled, used mostly by hunters and fishermen from nearby Belfast. Therefore, the impact of higher or fluctuating lake levels on those who owned property around the lake would have been minimal.

Over the years, the population in the vicinity of the lake gradually increased but, until recently, remained small except for the summer months. Then, the population of Swanville would swell when the residents of Belfast and surrounding communities would fill the cottages around the lake. Over the last decade there has been a slow but steady increase in the number of cottages around the lake and conversion of older seasonal

[6] Ibid.

cottages to year-round residency. By 1978, Swanville had reached a stage in its development when it would take great pains to protect its interest in continued access to the natural beauty, recreational opportunities and clean water of Swan Lake.

There had been anger and dissatisfaction in Swanville over the management of the level of Swan Lake long before Maine Hydroelectric announced its plans to put the downstream dams back in operation. Management of the dam to serve downstream manufacturing plants had caused unpredictable and extreme fluctuations, while few benefits, if any, were delivered to the residents of Swanville by these manufacturing operations.

Under common law doctrine, land owners along a river or other inland body of water have the right to a "reasonable use" of that water as it touches or flows past their land. However, through a process of deed consolidation, begun in the 1880's, the Sherman Company had purchased the rights to the water from lake front and river front land owners. Having sold their water rights, these land owners no longer had a right to "reasonable use" of the water.[7]

Under Maine law, the owner of the water rights could operate the dams and manage the flow of the river in whatever ways were necessary to take advantage of its potential for "beneficial" use.[8] Thus the Town of Swanville could do little, under Maine laws to gain control or influence over the regulation of lake levels as long as the Sherman Co. controlled the water rights and was using the power generated by the dams.

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[7] See Olsen, et al., page 25.

[8] Neglected Dams Act, Vol. 6, Maine Revised Statutes Annotated, Title 12, Chap. 6, § 304.

When the leatherboard plant burned down in December, 1976, the dams were no longer in "beneficial use," and authority to regulate their operation passed to the State's Soil and Water Conservation Commission under the State's Neglected Dams Act.[9] In May, 1977, following a series of public hearings, the Commission established an upper level of 2.5 feet below the top of the dam and a lower level of 6.5 feet below the top of the dam and directed the operators of Swan Lake dam to operate it in such a way as to comply with these limits. The Commission stated in its ruling that "high water has resulted in significant flooding of property, undermining of foundations, septic field failures and shore erosion" and that water quality had been reduced because of low water. The residents of Swanville were very pleased that the State of Maine, which had been unable to respond to their pleas for help in the past, had required positive, protective measures at last.[10]

However, only a month later, in June of 1977, Gleeson announced his plan, put the Mill Dam back in operation producing electricity instead of mechanical power, and applied to the Federal Energy Regulatory Commission for a license to operate a hydro project. Authority to regulate operation of the Swan Lake dam passed from the State Soil and Water Commission to the Federal Energy Regulatory Commission.[11]

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[9] Ibid. § 305. The Maine Soil and Water Conservation Commission has the authority to regulate dam operations in certain instances under Maine's Neglected Dams Act but not in cases where the dam is "operated for the beneficial use of the owner or operator." The law states that "such beneficial use shall include but not be limited to the generation of hydroelectric power."

[10] See Maine Soil and Water Conservation Commission, Findings of Fact and Order, May, 1977 (See Appendix 2 for the complete text of the Order)

[11] The Federal Energy Regulatory Commission is authorized to issue licenses for water power development by the Federal Power Act (16 U.S.C. 797 (e))

The residents were shocked and angry. They felt sure this meant the level of the lake would fluctuate, not according to their needs, nor in harmony with nature's patterns, but according to the needs of the downstream power generators. Later, Gleeson indicated he would abide by the limits set by the Soil and Water Conservation Commission until the Federal Commission ruled on his license application. But the townspeople were skeptical and unsatisfied. Not long thereafter, their worst suspicions were confirmed, not by human malfeasance, but by a series of events which are distinguished most by unfortunate timing, bad luck, and confusion.

The Goose River watershed received an unusually large amount of rain in the early spring of 1978. Water in the lake in March and April approached the upper limit set by the Conservation Commission of 2.5 feet below the top of the dam. This created serious concerns among residents. As the water approached the top of the dam it began to lap against the foundations of homes built in recent years around the lake with foundations below a level equal to the top of the dam. Homeowners could see that, if the water was allowed to rise to the top of the dam, their property and foundations would be inundated. This was not a situation they trusted Gleeson to protect them from. Moreover, they were aware that needs for water in the summer and fall suggested that future water supply would be best protected by retaining as much water as possible in the lake. Resentment of the company's initiatives and fear of its future plans led to violence when vandals tore rocks from the downstream side of the dam, near the gates, allowing water to spill through uncontrollably, and tossed them to the upstream side to further hamper effective operation of the gates.

The damage to the dam severely reduced its ability to hold water. Millions of gallons were lost long after it had dropped below the 2.5 foot mark. This was unfortunate because the latter part of the spring and the entire summer of 1978 were extremely dry. By July, leakage, evaporation and lack of rainfall had caused the water level to drop well below the 6.5 foot mark and in August, the water had reached 9.5 feet from the top of the dam. Gleeson claimed there was nothing he could have done to prevent this but the residents did not believe him. They grew more and more angry as water intake pipes were exposed, cutting off water supplies, shoreline areas dried up and concentrations of animal and agricultural wastes began to build up in the lake and give off unpleasant odors. Most residents observed this as the results they had predicted when the Soil and Water Conservation Commission lost authority to protect the lake levels. They were sure the water running through the gates every day was being put to profitable use by Gleeson downstream.

During the fall of 19[illegible], Gleeson made efforts to respond by repairing the gates and inviting residents to meet with him on several occasions so that he might explain the details of the proposed project. But the residents felt resentful and distrustful and believed they had "seen enough of Gleeson's operation to know what to expect."

The Selectmen from Swanville wanted to stop the escalating atmosphere of hostility toward Gleeson but were also anxious to protect the Town's interest in responsible lake level management. Consultations with an attorney in Augusta who specialized in environmental law suggested that the most effective course of action would be to intervene in the license proceeding before the Federal Energy

Regulatory Commission and seek to have the license denied or heavily conditioned to protect the Town's interests. The Selectmen and their attorney were aware that an intervention process would be lengthy and might tax the resources of Maine Hydro beyond its limits and force Gleeson to withdraw his proposal.

The Selectmen discussed this with residents at the annual fall town meeting and again at a special open meeting. The residents authorized expenditures of a limited amount of Town funds to retain Goodall to represent them before the Commission.

On November 9, 1978, Goodall filed the Town's petition with the Federal Commission. In it the Town alleged that fluctuation of the level of Swan Lake could: affect the ground water table upon which local residents depend for potable water; impair property owners who take water directly from the lake for domestic purposes; and destroy the recreational values of the lake and the property values of littoral landowners; economically harm marinas located on the lake; and damage fishery and waterfowl habitats.

The Town also alleged that degradation of littoral property values would erode the Town's property tax base; that the Goose River watershed could not support the proposed project without interfering with the other private and public uses of the watershed; and that Maine Hydro had not adequately evaluated the impact of the project on recreation, fish and wildlife, riparian and littoral landowners, and navigation.[12]

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[12] Town of Swanville, Maine, "Petition to Intervene in Application for Minor License for Hydroelectric Project", November, 1978 (See Appendix 3 for the complete text of the Petition).

On January 9, 1979, after reviewing Gleeson's response to the Town's allegations, the Federal Energy Regulatory Commission granted the Town the right to intervene in the license proceeding, finding that "it may be in the public interest to grant Swanville's petition to intervene". However, it pointed out that "admission of the intervenors shall not be construed as recognition by the Commission that they might be aggrieved by any order entered in this proceeding."[13]

Despite this qualification the town felt it had won a major victory in its effort to stop or significantly alter Gleeson's project. The Selectmen hoped to obtain protection equal to, or better than, that provided by the Soil and Water Conservation Commission, since a federal agency was, in their eyes, more powerful than a state counterpart. The attorney for the Town began to assemble the technical analysis that would be necessary in the proceeding before the Commission.

However, in late January of 1979, a crude fire bomb exploded on the dam causing the gates to catch fire. The atmosphere in the community was tense and the methodical approach favored by the Selectmen came under severe pressure. Newspapers across the state were beginning to cover the dispute and gave the fire bombing incident more than ample coverage. Communication between the parties had come to a standstill and no one seemed sure what might happen next.

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[13] Federal Energy Regulatory Commission, "Notice Granting Intervention," January, 1979 (See Appendix 4 for the complete text of the Notice).

The Entry of the Mediator

John Joseph, director of the Maine Office of Energy Resources, knew that Maine Hydro had applied for a license to operate the Goose River Project and was aware of the escalating tensions in Swanville. During the fall of 1978 he had had occasion to meet with a person who described himself as an "environmental mediator" to discuss a dispute over construction of a large coal-fired power plant on an island off the coast of Maine. Mediation was not a process he was familiar with in energy and environmental disputes but the type of behavior and the nature of the problem in Swanville had no precedent in his experience. In his meeting with the mediator, Joseph had sensed that mediation might create an informal atmosphere in which the parties could communicate directly with one another about their needs and concerns. Joseph thought it might be the right way to solve the problem to everyone's satisfaction. If this were to occur, it could work to the advantage of both developers and host communities as the state's low head hydropower potential was developed in the future. Joseph invited the mediator to meet with him and discuss the case.

In fact, the idea of mediation had been suggested to the parties in an indirect way some time earlier in the dispute. The invitation to make use of a mediator occurred in the form of a letter to the editor of the Belfast Republican Journal in April, 1978, written by Frank Ricker, Executive Director of the Maine Soil and Water Conservation Commission. He stated: "In my conversations with the littoral

owners . . ., I offered to sit down with Mr. Gleeson and try to work out a solution beneficial to all parties and Mr. Gleeson's commercial operation" and ". . . I am willing to discuss the matter with him in an attempt to reach an agreeable solution."[14]

Ricker's offer to mediate was not acted upon. This may have been because he or his agency was not acceptable to the parties, or because the offer was indirect, or because he admitted he had "no legal authority to force Mr. Gleeson", or for that matter, the Town, to do anything. Whatever the case may be, no mediation or serious negotiations had occurred between the parties at the time Joseph considered inviting the parties to work with a professional environmental mediator.

After discussing the case with Joseph, the mediator met with representatives of the Federal Energy Regulatory Commission in Washington in February, 1979 to discuss their views on mediation, generally, and any concerns or objections they might have to an invitation to the parties to enter mediation in this particular case. Their response was uniformly positive and supportive of the concept.

There seem to have been a number of reasons for the Federal Energy Regulatory Commission representatives to support the use of mediation to resolve the Swan Lake dispute. First, they doubted FERC would be able to satisfy, entirely, the demands of both parties. Second, they assumed that resolution of the dispute through an intervention process, regardless of the merits of the positions taken by the parties, would be more time-consuming and costly to all parties

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[14] Ricker, Frank W., Letter to the Editor, Belfast Republican Journal, April, 1978.

than the benefits to be gained from such a process by any of those involved, including the Commission. Third, the representatives seemed to feel that the underlying issues in dispute concerned control of community resources which might best be resolved locally. The feeling among the representatives of the Commission was that if a solution could be worked out at the local level through direct negotiations among the parties, it would be more likely to serve the variety of local concerns, be achieved more quickly and less expensively than through the licensing process and be more likely to succeed in the long run than a resolution designed by the Commission.

With the support of the Commission and the Maine Office of Energy Resources, the mediator decided to introduce himself to the parties and discuss the idea of entering into a mediation process with them. In February, 1979, the mediator met first with the Selectmen, then with Gleeson, and raised the possibility of voluntarily entering into a negotiation process with one another under the direction of a mediator.

At their first meeting, the Selectmen were suspicious of the mediator and angry that he had discussed the case with FERC. They did not understand what mediation was, why it would be needed when the Commission's process seemed adequate, or why they should agree to negotiate with Gleeson. They felt there was "no room for negotiation" and that they would prove their case before the Commission. Finally, they did not believe that a mediator sponsored even in part by the State Office of Energy Resources could be neutral.

The mediator explained what mediation was and how it might be helpful. He then responded to their concerns by pointing out that since the case was being handled by the Federal Commission and mediation could not occur without its support, it was, in the mediator's judgement, essential that the Commission approve of the concept before discussing it with the parties. He suggested that the apparent lack of room for negotiation would be proven or disproven only after an attempt at negotiation had been made. Finally, he reported that the Office of Energy Resources had no authority over the mediator and understood the need for the mediator to remain neutral. The Selectmen remained suspicious but agreed to discuss the matter with their attorney and proceed on his advice.

The mediator then met with Gleeson and repeated his invitation. Gleeson responded by stating that "any negotiations were better than none," and that if the Federal Commission had supported the concept, he was willing. Gleeson's primary concern was that the mediation process would be used by the Town as a tactic to delay resolution of their dispute and drive up the cost of the project. The mediator assured Gleeson that he would not allow this to happen and that both sides would have to sign a "participation agreement" before the process got underway in which they would declare their intention to resolve their differences expeditiously by negotiating "in good faith."

In each meeting, the parties claimed that they had been reasonable and conciliatory, while the other had proven untrustworthy and

uncooperative; that their case would win the licensing debate. The Town alleged that Maine Hydro had operated the dam in arrogant disregard of the interests of the lakeside residents, while Maine Hydro contended that the Town had ignored previous offers to negotiate.

In each meeting with the parties the mediator discussed the issues that would have to be resolved for them to consider the mediation process successful. Swanville's Selectmen insisted that the quality of the water in the lake be preserved for purposes of drinking, swimming and fishing; that the value of lakefront property be preserved for the purposes of maintaining assessed tax valuations; and that fluctuation of the level of the lake minimized. Gleeson insisted that the results assure Maine Hydro's right to a volume and rate of flow of water from Swan Lake sufficient to operate the generating sites economically, that he be able to operate the Swan Lake dam to maintain this flow, and that some mechanism be established which would require the Town to join with him in his efforts to respond to complaints by local residents regarding the maintenance of lake levels and policing of the area around the dam.

When the mediator met with the Town's attorney the following morning, he received a tentative acceptance of his invitation. The Town would agree to participate in three meetings and then determine whether or not to continue. In addition, the Town would require that Gleeson make available to its hydrologist all hydrological information pertaining to the proposed project.

The mediator agreed to see that these conditions were met if the Town, in turn, would sign an agreement promising to negotiate in good faith, and agree not to withdraw from the mediation process without explaining its reasons for doing so beforehand. The attorney obtained the approval of the Selectmen for these conditions.

The essential ingredients for initiating a formal mediation process were in place. The mediator recommended to the Office of Energy Resources and the Federal Energy Regulatory Commission that a mediation process begin as soon as the parties had reviewed and were prepared to sign the participation agreement.[15]

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[15] See Appendix 5 for the complete text of this document.

THE MEDIATION PROCESS

The First Session: A Tour of the Lake

On May 2, 1979, Lawrence and Catherine Gleeson of Maine Hydro. three Selectmen and a Planning Board member from the Town of Swanville, the Town's attorney and hydrologist, several representatives of the Federal Energy Regulatory Commission and the mediator toured the lake and the dams along the Goose River. The purpose was to examine the physical characteristics which the parties felt supported their arguments or caused their concerns. The Selectmen pointed out damage done to property from high water in the lake and described the scene the preceding summer when the lake had been low. Gleeson described how each of the dams would be outfitted with equipment to produce power and explained exactly how the dam at Swan Lake could be used to regulate the flow of water downstream. He also explained why maintaining a minimum flow was necessary to preserve the river bed downstream and provide water to the wells which supply water for the city of Belfast. He described the damage done by vandals to the dam and described his limited ability to police the area around the dam.

That evening the mediator met with the Town's attorney and Gleeson to complete arrangements for the next day's first formal mediation session. Most importantly, final adjustments were made to the participation agreement so that it could be signed by each

of the parties in the presence of the other. The order for presentations was agreed upon. After the mediator's opening remarks, the representatives of the Federal Energy Regulatory Commission would describe the Commission's view of the mediation process, then Gleeson would describe his proposal and the issues he wished to have addressed in the course of the mediation and then the Town would describe its concerns and the issues it wished to have addressed. It was agreed that the major work for the first meeting would be establishing a procedural framework within which each party would be able to address and negotiate issues of substance.

The Second Session: Establishing Groundrules and Opening Proposals

The following morning, May 3, the same group of persons that had toured the lake met in a restaurant near Swanville. The mediator began by describing his role and the purpose of the mediation process: to facilitate negotiation between the parties on the matters which had caused them to be in dispute and to assist them in developing an agreement which would protect their interests. All this would be done without passing judgement on the principles the parties held and would continue as long as they chose to make an effort to resolve their differences but not longer.

One of the representatives from FERC described the position of the Commission. The Commission believed it would be wise for the parties to attempt to resolve their differences through direct negotiation before resorting to its administrative procedures for resolving disputes over licensing; that it supported the involvement of a

mediator; and that if the parties could reach an agreement the Commission could incorporate some or all of the agreement, within the limits of its authority, in a conditional license approval. However, the agency was free, he pointed out, to reject any or all parts of such an agreement. Finally, he indicated that the Commission viewed the use of mediation in this case as an experiment in an effort to determine how the agency might responsibly expedite the licensing of low head hydroelectric projects.

Discussion then moved to a number of procedural issues. The parties discussed and signed the participation agreement and reached agreement on a number of other procedural matters: to review a summary of the discussion from each joint meeting prepared by the mediator; to prepare a written description of the terms of their agreement, if one was reached, or of the reasons for termination of the mediation process prior to the formal conclusion of the mediation process; to refrain from public comment on the substance of the negotiations until they were concluded; to make the summaries of discussion available to the public and press, upon request, once they had been approved by both parties.

Next, each party presented to the other their proposals for a summer operating schedule (to be effective June 15 through Labor Day). However, before any negotiation could take place the mediator pointed out that the priority of various issues, including the summer operating schedule, had to be discussed and some order for consideration of these issues needed to be established. In order to do so, each party needed to describe and explain its proposals. In short, the mediator asked

that each side understand the entire set of proposals the other was making before negotiations began. Further, where there were areas of disagreement concerning hydrologic and other scientific data, the parties needed to determine how and why their information differed.

As each side presented its proposal it became clear that the identifiable issues were held in reverse order of priority by each party. The Town felt there were only two issues: the lower and upper limits on the level of the lake. The lower limit of the water level of Swan Lake appeared to be its primary concern because too low a water level disrupted recreational use and enjoyment of the lake and created health concerns and environmental concerns. The upper limit appeared to be the Town's next most important concern because property damage was caused by too high a lake level caused this feeling.

Maine Hydro saw things differently. First and foremost, Gleeson claimed he needed to have sufficient flexibility in the operation of the dam to protect against flooding downstream and be assured of a sufficient volume of water to operate the downstream turbines economically. He also would have to be able to release sufficient water to maintain the downstream riverbed and to supply Belfast's wells; finally, Gleeson wanted the Town to assist Maine Hydro in policing the area around the dam at Swan Lake.

Each party then made specific proposals which would meet their needs. The Town proposed the lake never be raised above three feet below the top of the dam nor be allowed to drop below five feet below

the top of the dam throughout the year. Maine Hydro, on the other hand, proposed that it open the gates to release water whenever the water level rose above two feet from the top of the dam, and close the gates whenever the water level fell below five feet from the top of the dam during the summer months. The remainder of the year there would be no specified lower limit.

The meeting closed with a summary by the mediator of the agreements reached during the course of the meeting, assignment of tasks to be completed before the next meeting, and agreement to meet again on May 15th in Augusta.

The Mediation Strategy: Separate the Issues and Narrow the Disagreements

Between the May 3rd meeting in Belfast and the next meeting, held on May 15th in Augusta, the mediation team examined the parties' initial proposals and considered alternate strategies to accommodate their concerns. They characterized the basic problem in the following manner: How could the Town be assured of relatively stable and predictable lake levels while allowing Gleeson adequate flexibility in the use of his primary storage site, Swan Lake? Specific solutions were less important to the mediators at this point than getting parties to agree to a statement of the problem that would enable them to work together on solving it.

Nonetheless, like the parties, the mediators searched for a strategy to resolve the tension between the Town's need for predictable lake levels and Gleeson's need for flexibility in operating the

gates. The mediators noted that, in general, the lake levels preferred by each side rose and fell throughout the year in a similar fashion. Each seemed to want the dam used to hold water in the lake through the spring and summer and each wished to see the lake level reduced in the fall and winter to accommodate spring runoff. They thought a system of cyclical guidelines whereby gate management would be adjusted according to anticipated rainfall and runoff might be satisfactory. The operations of the gate could be targeted to keep the water level within a "green zone" representing a range of water levels within which Maine Hydro would be allowed to operate the dam with complete freedom. On either side of the green zone they envisioned a "yellow zone", ranges of high or low lake levels within which Maine Hydro would manage the flow of water from the lake in a specified manner, releasing more water as the lake rose and less water as the lake fell. Beyond the yellow zones would lie "red zones" where extremely high or low water levels would require that the Swan Lake dam be completely opened or closed. These zones could shift from month to month or season to season as preferred levels shifted. The mediators believed that outlining the green and red zones would be relatively easy, since these areas were likely to be similar for both sides, and would show them the similarities in their preferred levels. The difficulty would come in establishing the borders of the yellow zones and the gate management program within those zones.

The Early Caucuses: Problems of Mistrust and Poor Communication

Prior to the next joint meeting, the mediator caucused with the Selectmen to determine their view of the "optimum lake levels." The discussion led to an unexpected confrontation. The Selectmen suspected that the mediator's efforts were a ploy to get them to agree to lake levels different than those specified in their opening proposals. The Selectmen accused the mediator of being biased in favor of Gleeson and threatened to terminate the mediation process.

After a private discussion with the Town's attorney, the mediator took responsibility for the misunderstanding and repeated his purpose: to help each side reach an agreement which protected their most important interests. The Selectmen explained the reasons for their suspicions and mistrust. They felt they had been ignored or misled by every organization to whom they had turned for help in the past. They feared the mediation process would be no different.

The mediator assured them this would not be the case; that the process would allow them to deal with the mediator and Gleeson without fear of being taken advantage of. The caucus ended with the Selectmen and the mediator on better but still distant terms. The candid exchange between the mediator and the Selectmen seemed to encourage them to believe they would be listened to and respected. In any case, they had agreed to continue to participate.

The Third Session: Beginning a Dialogue on the Issues

That evening, May 15, the parties met in Augusta for the second time and began to delve more deeply into the substance of the dispute. The mediator invited each party to re-state its proposal and then to answer questions. Not surprisingly, as each of the parties offered this re-statement, they proved to have made minor adjustments to the proposals offered at the first meeting. The most important of these was a demand by Gleeson that the final agreement include a public meeting in Swanville at which the Selectmen would describe the benefits of the project for the Town and encourage cooperation with Maine Hydro by members of the community.

Needless to say, the Selectmen were surprised by this demand. The last thing the Selectmen had expected was to be asked to help Gleeson promote his project and assure his safety. They felt it was not necessary to include it as part of the agreement.

Gleeson responded by describing the refusal of the Town residents to listen to his past efforts to explain the project and how it would benefit Swanville. He said there had been vandalism of the dams and threats on his life and the safety of his family.

The Selectmen seemed to be moved by the sincerity of Gleeson's appeal for help and agreed to help run a public meeting at some future date to allow Gleeson to explain his project -- if agreement could be reached on lake levels. They did not agree to support or promote the project unless they felt it was one they were satisfied with.

The remainder of the evening was spent on efforts to work out an agreement on lake levels.

In their discussion with Gleeson, the mediator learned that he was willing to attempt to define some limits for lake level fluctuations. However, his conception of limits was not the same as the town's. Gleeson was accustomed to analyzing water supplies with a mathematician's appreciation for the subtleties of statistical probabilities. He knew that the precipitation in a given year would be predictable only within a range of uncertainty and that the management of the gates at Swan Lake could moderate, but not control, lake levels. In his view, the forces of nature would be controlling and it was only because he had carefully charted and analyzed the broad predictabilities of rainfall that he could be confident his project would succeed. The storage capacity of Swan Lake was his best protection against the uncertainties of future precipitation, but in his view it was limited protection at best.

Thus, Gleeson's primary concern was to retain as much flexibility as possible in the use of that storage capacity. For him, limits on fluctuation would have to be understood as guidelines and his ability to meet those guidelines would vary in relation to changes in rainfall and the resulting changes in his need for water downstream.

The Selectmen were not the least bit familiar with the use of differential equations and statistical probabilities for predicting rainfall and future water supply nor were they interested in them. Whenever Gleeson began to discuss his project in these terms, they

would quickly lose interest and become suspicious of his motives. Moreover, the Selectmen were unfamiliar with the operational requirements of a hydroelectric project. They believed the operator had a substantial degree of control over the amount of water which backed up behind a dam since he could release or restrain water "as he pleased." They saw limits on lake level fluctuations in absolute terms as levels which would not be exceeded.

In short, they believed Gleeson had a great deal more control over the level of the lake than he believed he did. Nonetheless, they began to make agreements on limiting lake levels rather quickly.

The first level agreed upon was a lower limit of 5 feet from the top of the dam during the summer months. Gleeson's proposal had been identical to the Selectmen's on the lower limit for this period and no negotiation was required. The next subject discussed was the upper limit in the spring. The Selectmen had proposed an upper limit of two feet from the top of the dam. Gleeson was prepared to accept this limit if provisions were made to allow him to accommodate unexpectedly large spring runoff. This was the first time the parties faced the need to define more precisely what a "limit" was.

After lengthy discussion of problems related to managing heavy runoff and flooding, both at the dam and downstream, the parties reached agreement on a schedule for release of water as it rose above the two foot limit. The Selectmen seemed to be persuaded to accept this approach by Gleeson's description of the problems encountered by homeowners downstream if all flood water was released instantly.

Thus, in the case of high water levels, the "limit" was understood to be a point at which Gleeson would institute gate management strategies to moderate the level in consideration of the downstream flow.

The mediator agreed to draft a description of the flood control plan for review at the next meeting. The parties agreed to meet again on May 21 to continue negotiations.

The Fourth Session: Disagreement Over the Level of the Lake in the Fall

The major subject for discussion at the third session was the lower limit which would apply for the non-summer months. This proved far more difficult to reach agreement on than any of the participants had expected. By setting an upper limit on the level of the lake in the spring and a lower limit in the summer, Gleeson and the Selectmen created a situation in which more water would be wasted or stored at either time than might otherwise be preferable given the runoff anticipated thereafter. The pressures created by these restrictions were not evident until debate on the lower limit in the fall got underway.

Gleeson made it clear that because of the requirement to maintain a minimum level 5 feet below the top of the dam until Labor Day, he would curtail or stop operation of the downstream stations throughout most of the summer months. However, in the early fall he would need to draw down the lake for two reasons -- to supply the mean water flow to the generators throughout the fall (to make up for the curtailment in the summer) and to make available sufficient storage capacity to handle runoff the following spring.

Given the uncertain amount of precipitation each spring, Gleeson felt it would be impossible (and unwise) to establish a minimum fall lake level. He argued that a minimum might cause flooding or waste of water the following spring. Since the lake would be at or near 5 feet below the top of the dam on Labor Day he expected that in most years it would not be necessary to draw the lake down below 7 or 7.5 feet from the top of the dam. Pressed by the mediator to state a non-summer lower limit that he could accept, he offered 9.5 or 10 feet from the top of the dam.

The Selectmen had an entirely different perspective on the non-summer lower limit. They felt that the hostility created by the low levels of the lake in 1978 were a good indicator of the residents' feelings about unrestricted drawdown. Moreover, they felt that agreeing to a lower limit in excess of the 6.5 foot mark set by the Maine Soil and Water Conservation Commission would be tantamount to a surrender to Gleeson. They felt, also, that lack of a specified limit would make it impossible to hold Gleeson accountable for failing to live up to his commitments.

Gleeson, after a number of caucuses with the mediator, proposed a lower limit of 7 feet below the top of the dam. He would accept nothing higher.

As the third meeting on May 21 wore on, the 6-inch difference on the lower limit brought negotiations to a standstill. It became clear that the Selectmen would need the authorization of the residents before they would agree to anything below 6.5. Since Gleeson

had wanted a public meeting all along, he readily agreed. At first the mediator resisted this strategy, arguing that it would make future negotiation more difficult if the residents were invited to express their opinions on the remaining differences. The parties were convinced this was not the case and persuaded the mediator it would be useful and constructive. They agreed to allow the mediator to draft and circulate for review and revision a summary of the agreements reached to date and a description of the remaining differences.[16]

The Fifth Session: A Public Information Meeting

The Public Information Meeting took place on June 14, 1979 in the Swanville Town Hall and signaled a turning point in the negotiations for a number of reasons. As those in attendance read the Summary of Agreements and the parties, first Swanville, represented by its attorney, Clifford Goodall and then Maine Hydro, represented by Gleeson, made their cases in support of those agreements, there was a shared effort to gain approval and advice unprecedented in the previous relations between the Town representatives and Maine Hydro. Admittedly, each made an appeal for the non-summer lower limit they had proposed, but this difference seemed to grow increasingly insignificant as the evening wore on.

When public comment grew heated and antagonistic, the First Selectman rose several times to remind the townspeople of the need for reason and cooperation. The residents attending made it clear

[16] See Appendix 6 for the complete text of this document.

that the majority of them were most concerned with property damage which resulted from high water. Low water seemed to create only minor inconveniences by comparison. Several residents angrily claimed that the 2 foot upper limit was too high; that it would not prevent damage to their property. Consensus on what the limits should be, however, did not develop, for the effect of different lake levels varied at different locations on the lake. To resolve this issue, the Selectmen and Gleeson agreed to tour the lake by boat, once with the lake at the 2 foot level and once at the 2.5 foot level.

The presentation of the tentatively proposed agreement and the effort to ascertain public opinion on the maximum winter drawdown and certain comments on the proposed agreement was an important part of the mediation process. It demonstrated that there was real potential for cooperation and agreement. It showed the community that the medation process was open and that their concerns and advice would be respected. It indicated the shape of the agreement to come and the cooperation thus far. It granted Gleeson the recognition and public their ability to present the costs and benefits of each proposal honestly, clearly, and without emotionalism. Finally, it helped to refocus the negotiations: the lower limit did not turn out to be as important to the townspeople as the Selectmen had thought it was. the townspeople as the Selectmen had thought it was.

The public meeting and the tours of the lake keyed the final agreement on lake levels. The potential for high water damage at 2 feet convinced both the Selectmen and Gleeson that a 2.5 foot upper limit was essential. With local concern on the lower limit less

critical and a 5 foot range of fluctuation necessary to run the Goose River project and to accommodate spring runoff, a 7.5 foot lower limit was agreed to for the non-summer lower limit.

The Sixth Session: Beyond the Issue of Lake Levels

The fifth session occurred on July 20th at the Grange Hall in Swanville. Two important considerations were addressed at that meeting: discussion of the effects of lake level fluctuation on the fish habitat and the management of the area around the dam.

Because the dams to be used by the hydro project were already in place, environmental disturbances caused by construction, renovation, or flooding would be insignificant. Once in operation, the project would provide a steady flow of water to the Goose River, creating an almost ideal environment for animals downstream. At Swan Lake, minimal drawdown in the spring and summer would protect waterfowl nesting and bass spawning. According to the Maine Department of Inland Fisheries and Game, the only environmental drawback presented by the project might be caused by sizable drawdown from October to May. During this period, lake trout (togue) might spawn in Swan Lake. Drawdown after spawning might expose and kill the eggs.

The parties were aware that the Maine Department of Inland Fisheries and Game was concerned about the impact the agreement might have on togue spawning. The parties agreed with the mediator that it would be wise to invite the Department to their next meeting to discuss the agreement to determine what impact, if any, there might be on the togue.

At the meeting, the Department's representatives described the State's togue spawning program. The togue in Swan Lake, stocked by

the Department since 1971, were as yet too young to spawn. They noted that stocked togue sometimes never spawn in the wild, and that, depending on the habits of the fish in Swan Lake, those that did spawn might do so in areas deep enough to remain underwater despite the 2 to 3 feet of drawdown possible after Labor Day under the proposed lake levels.

Gleeson wished to have the Department's position made explicit, pointing out that he might not be able to obtain financing for construction if there was the chance it might seek to alter his operating limits in the future. The Department's representatives recognized this risk but refused to foreclose the possibility that the Department might request FERC to disallow drawdown after October 15.[17]

The remainder of this meeting was focused on resolving the differences between the parties over the management of the area around the Swan Lake Dam. Just above the dam on the east shore of the lake is a sandy area used by many local citizens as a landing for placing their boats in the lake and removing them. It is also not uncommon to see young people or families sunbathing and swimming near the dam in the summer. In the winter it is the logical place to build a fire

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[17] In fact, prior to the issuance of the license but after the Memorandum of Agreement had been signed, the Department of Inland Fisheries and Wildlife requested that the Federal Energy Regulatory Commission restrict drawdown during the fall months to protect the spawning habitat of lake trout. (See Appendix 7 for the text of a letter from Glenn H. Manuel, Commissioner, Maine Department of Inland Fisheries and Game to William W. Lindsay, Director, Office of Electric Power Generation, Federal Energy Regulatory Commission, September 10, 1979). Subsequently, in its order issuing a license to Maine Hydro, FERC stipulated that it should determine "what measures can be reasonably taken to provide protection to lake trout during the spawning and post-spawning period (October 15 through May 1)" and that "within three years from commencement of operation of the project, the Licensee shall file for approval a report describing measures deemed appropriate for protecting the lake trout of Swan Lake and taking into consideration other beneficial uses."

to warm ice skaters or ice fishermen. Just below the dam, in the warm months is a grassy area (less than a half acre) which slopes from the road to the river. It has a picnic table and on weekends families picnic there and children play along the river's edge.

On warm summer evenings the area around the dam is a favorite gathering place for boisterous people in their late teens and twenties. The activities of this group bother many of the residents who live in nearby houses and they complained regularly that Gleeson (like his predecessors) did nothing to stop or discourage these activities. Gleeson claimed that he had attempted to do this for his own interests as well as theirs, fearing that the activities would eventually lead to damage of the gates or an accident for which he might be liable. Signs he posted were removed as fast as he put them up and he had been threatened with bodily harm when he had attempted to remove these people himself. It was impossible to expect the county police force to be able to patrol the area other than infrequently. Moreover, Gleeson felt that letting any of the residents, even the best behaved, have use of the area, was to risk law suits in the event someone was injured, either on land or in the water around the dam.

Gleeson was convinced that the only way to adequately manage the area, even though it was private property, was with the help of the Town and its elected officials. He felt that official recognition of a shared responsibility for policing and maintaining the area was the most reliable and lasting way to assure his acceptance by the Swanville community.

The Selectmen saw the matter differently. They acknowledged that policing the area was a problem for Gleeson but they felt there was little they could do to help and that it would be inappropriate for the Town to be involved in the management of privately owned property. They steadfastly refused to participate in any activities which might make the Town liable for injuries or damages that might occur in the area. His proposal seemed impractical, inappropriate and dangerous.

The mediator sensed a joint management plan could improve and strengthen future relations between the parties but it could also create and inflame disagreements as easily. The mediator had advised Gleeson to wait until an agreement on lake levels could be reached before formally insisting that a joint management plan be devised.

On July 20th, Gleeson proposed that the Town be responsible for "normal maintenance" of the area around the dam, provide two trash barrels, two picnic tables, and see that the grass was mowed. Furthermore, he proposed that the Town install a guardrail around the grassy area to encourage parking across the street and pay the annual premium on Maine Hydro's liability insurance. Maine Hydro would install gates to keep persons from walking on the dam and post signs notifying persons attempting to walk on the dam of the dangers and risks incurred by such actions.

The mediator caucused with the Selectmen before they responded. They were angered at the degree to which they were being asked to assume responsibility for the area. After considerable deliberations

and consultation by both sides with the mediator, the meeting was reconvened and the Selectmen offered a counter-proposal. They proposed the formation of a Swan Lake Committee, comprised of representatives of Swanville and two neighboring communities with property along the lake, be created to monitor and report on compliance with the various provisions of the agreement and that the committee in consultation with Maine Hydro develop and implement a plan for management and public use of the area around the dam. In addition the Town would ask the Maine Department of Transportation to install the guardrail requested by Gleeson.

After some discussion to clarify the responsibilities and authority of the Committee and the actions to be taken immediately, Gleeson accepted their proposal.

The mediator then presented a draft of a Memorandum of Agreement and the parties edited it to reflect the agreements reached that day. The parties scheduled a meeting for August 2 to sign the document.

The Seventh Session: Finalizing the Agreements

The final Memorandum of Agreement developed in several stages with the parties revising and refining its wording until the hours just before the signing. Some parts of it were first articulated in the "summaries" of discussion. Most first appeared in the "summary of agreements" prepared by the mediator for the public information meeting. The final agreement covered fourteen topics including: recognition of the parties' water rights and recreational opportunities, measurement of water levels, a plan for controlling flood

waters, gate operating procedures for maintaining summer and non-summer lake levels, procedures for the release of spring runoff, plans for routine maintenance and repair of the dam, procedures for responding to emergencies caused by weather conditions, authorization of a monitoring committee to maintain the area around the dam and other aspects of the agreement, delineation of the parties' legal rights and responsibilities, and commitment by aprties to cooperate in protecting the recreational value of Swan Lake and the eocnomic feasibility of the project.

Once signed, the agreement was designed to become binding upon the parties when the FERC granted a license to Maine Hydro which incorporated the parts of the agreement pertaining to lake level management. Most important in this regard were the provisions that the upper and lower limits would allow not more than five feet of fluctuation in lake level from Labor Day to June 21 and would assure Maine Hydro of adequate flexibility in storage and release of water to the downstream dams for economical operation of the project. From June 15 until Labor Day, Maine Hydro would close the gates to maintain the level of the lake at five feet from the dam's top through the summer but would release the minimum flow necessary to maintain the downstream environmental and water supply for Belfast. The area around the dam at Swan Lake would be managed and policed by the Swan Lake Monitoring Committee and Maine Hydro, in consultation with the State Police, Sheriff, and others.

In the section entitled "legal rights and responsibilities" the Town and Maine Hydro declared their intention to abide by all government laws and regulations. If at any time the parties find that provisions in the agreement conflict with their legal responsibilities, those provisions will no longer be binding. In the event of such conflict, the parties agreed to modify the agreement to eliminate the conflict. The agreement is binding upon the parties and their successors so long as the Swan Lake dam constitutes part of any hydroelectric project similar to the one describe in Gleeson's license application.

The day before the signing of the final agreement, Gleeson's attorney requested the addition of the section on "legal rights and responsibilities." when this section was presented to the Selectmen, they were concerned that it could be construed to make them responsible for operation of the dam under certain circumstances. They momentarily resisted signing. However, assured by their attorney that this was not so, both parties were prepared to sign the agreement.

The Memorandum of Agreement between the Town of Swanville and Maine Hydroelectric Development Corporation was signed by the three Selectmen and Lawrence Gleeson on August 2, 1979 and submitted to FERC soon thereafter.[18]

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[18] See Appendix 8 for the complete text of the Memorandum of Agreement.

Maine Hydro's license was granted on March 24, 1980. Article 26 of that license states

> "The Licensee shall, in the interest of protecting and enhancing the scenic, recreational and other environmental values of the project, cooperate with the Town of Swanville, Maine (Town) in implementing the terms of the agreement for operation of Swan Lake Dam, signed by the Licensee and the Town on August 2, 1979. The Commission reserves the right to order any changes in the project's operating procedures that may be needed to resolve any differences between the licensee and the Town concerning the terms of the agreement."

Articles 27, 28 and 29 require Maine Hydro to determine measures which will protect lake trout which spawn in Swan Lake consistent with other "beneficial" uses of the lake. However, the Commission did not establish a limit on drawdown in the non-summer months more restrictive than that set by the Memorandum of Agreement signed by Maine Hydro and the Town of Swanville.[19]

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[19] See Appendix 9 for the complete text of the license issued to Maine Hydro.

IMPLICATIONS OF THE CASE

At the time of this writing it has been more than a year since the signing of the Agreement between Maine Hydro and the Town of Swanville. The requirements set forth in the Agreement have been included in the conditions attached to the license, which was issued March 24, 1980. It may be useful to reflect on the implications of this case for government officials concerned with the licensing and regulation of hydroelectric development, developers of hydro projects, communities affected by the impact of these projects, and mediators.

It is important to keep in mind that generalizations from one case must be tentative at best. Therefore, this section does not attempt to provide a manual of what to do, but catalogue what was done and why it was important in this case.

Implications of the Case for Regulatory Officials

In the Swanville case, regulatory officials took a number of actions which made possible a successful mediation process.

1. Officials of the Federal Energy Regulatory Commission made their support of mediation evident to the parties. This encouraged the parties to consider the proposal seriously. The officials explained that an agreed upon proposal would have a greater chance of being licensed than a proposal which was in dispute. At the same time, they pointed out that the grounds for rejecting an application on environmental issues were narrow and might not be found in this case.

2. The officials of the Commission and the Maine Office of Energy Resources allowed the mediator to present the concept of mediation to the parties and invited them to participate. This allowed the parties more freedom to decline the invitation than they would have felt had either of these organizations extended the invitation. Moreover, it gave the parties a chance to assess the mediator's style and approach to the case and to have their questions answered by someone experienced in mediation.

3. The officials from the Commission were willing to try to incorporate the conditions of an agreement which resulted from mediation in a final license approval. This was the reward the parties needed to keep them involved. The developer wanted a license. The community wanted an enforceable agreement. Commission approval would provide both.

4. The officials carried out all of their regulatory responsibilities. If the parties failed to reach an agreement their case would revert to the standard process for intervention proceedings. The agency was able to fulfill its responsibilities and at the same time encourage the parties to attempt mediation.

5. The officials assured the parties that they could participate in a mediation process without prejedice to any rights or future proceedings before the Commission on the case. This reassured the Town, which was not confident the mediation would be successful. If the case had to return to the

intervention proceedings, the Town did not want its petition weakened by having participated in a mediation process. Knowing the process would be confidential until after the Commission rendered its final decision seemed to put these fears to rest.

6. Finally, when the agreement was delivered to the Commission, it acted favorably on the amended application within a few months. It incorporated the important conditions of the agreement in the license approval. Both parties saw their efforts result in a timely decision which responded to their concerns.

In conclusion, it is clear that the supportive and considered response by the Commission to the proposal to mediate was crucial to the eventual success of the process.

Implications of the Case for Communities Affected by Hydro Development

The Town of Swanville took a number of actions which made possible a resolution of the dispute in a way that protected its interests.

1. Concerned residents successfully organized themselves into a single, cohesive bargaining unit. Not surprisingly this occurred through the Town's political process and the persons appointed to represent the Town's interests were the Selectmen who retained legal counsel. Organization of concerned citizens and selection of spokespersons are vital steps toward being able to negotiate as equals.
2. The Town successfully petitioned the Commission for status as an "intervenor" in the project's licensing. This established the Town as an entity with concerns to be reckoned with. This encouraged the Town to believe in the legitimacy of its concerns and served to articulate the nature of those concerns. At the same time the petition gave evidence of the Town's determination to stop the project or obtain concessions in its design and operation if it were in the Town's power to do so. The Commission's acceptance was crucial if the Town were to have any grounds on which to justify its demands for change. When the Commission accepted the petition, the Town was encouraged to believe it might prevail.
3. The Town chose to enter into negotiations with the developer. Negotiation seemed to hold greater promise from the Town's perspective (and that of their attorney) than an intervention proceeding. The opportunities for clarification of issues,

face-to-face negotiation, and accommodation might not have arisen during the intervention proceedings. For example, the public information meeting (which revealed the concern of the residents for flooding), and the development of the flood management plan might never have occurred had there not been negotiation between the Town and developer. Likewise, formation of the Swan Lake Committee and development of a plan for management of the area around the dam might never have occurred.

4. The Town reserved its right to return to the licensing process and assured its ability to do so without prejudice to its standing before the Commission. With this, the Town could withdraw from the mediation process with no loss of appeal rights and a minimal loss of time and legal fees. And, until an agreement was signed, it protected the Town from any results of the mediation process which appeared harmful to the Town's interest.

5. The Selectmen returned to their constituents for discussion of the proposed agreements. This allowed them to test the reaction of the community to the agreements already reached and to gain guidance on the difficult question of the lower water level limit. As a result, the problem of the lower limit was eliminated and a strategy was devised to resolve the outstanding difference on the upper limit. Overall, the meeting served to reaffirm the confidence of the community in the Selectmen's ability to fairly represent their interests

in the negotiations and served to authorize them to conclude the process.

6. The Town insisted that its agreement with Maine Hydro become part of the project's license. This meant that the Town could rely on the Commission and its police powers to enforce the terms of the agreement if the Town's ability to assure compliance through discussion and future negotiation was ineffective.

7. The Town won acceptance of its proposal for the creation of a "committee" which would provide a forum for discussion and negotiation with the developer in the future. This signalled to the developer and the Commission the Town's intention to remain actively concerned with the project and implementation of the agreement. It also created the opportunity for the Town to continue to have a significant degree of influence over the project without incurring the legal fees and delays caused by the Commission's appeal process or the courts in the future.

Implications for Developers of Hydroelectric Power

Maine Hydroelectric Development Corporation took a number of actions which contributed to a successful resolution of its dispute with the Town of Swanville while preserving the economic feasibility of the proposed project.

1. The company was willing to negotiate with the Town to make the project acceptable. This was true even prior to the Town's successful petition to intervene and it offered the Town an opportunity to alter the project to protect its interests. Without a willingness on the part of the developer to negotiate with the host community, the mediation process could not have occurred and no agreement could have been reached.

2. Maine Hydro was willing to abide by the decisions and authority of the Commission. This clarified the lines of authority which circumscribed the project. Even though as a federal agency, the Commission may have been farther away and less accessible than a state or local authority, it was an agency of the government charged with balancing competing public interests. There was never any confusion regarding the location of final decision-making and enforcement powers. Recognition by the developer of a controlling authority with a public interest assured the Town that the company respected laws and regulations and would be willing to abide by them. This was particularly important when the

Commission agreed to incorporate an agreement in its license approval. The developer could then be expected to adhere to the restrictions and would be accountable to an acknowledged authority.

3. Maine Hydro reserved all of its legal rights even while it agreed to enter into mediation. Like the Town, the company recognized the possibility that mediation might not be successful and wanted to reserve the right to return to the intervention process with its arguments unaffected and its position uncompromised by the attempt at mediation. This was essential for the developer to make the choice to enter the mediation process freely and with confidence.

4. The representatives of the Company were willing to put forward specific proposals in writing in attempts to meet the Town's concerns. This gave the Town (and the mediator) a clear idea of what was being proposed and how it reflected the degree to which the developer understood what the Town was requesting. It also showed the developer was willing to commit himself to certain specific actions to meet the Town's concerns. Finally, it made it possible to pinpoint areas of outstanding disagreements and future problems in implementing the proposal.

5. Maine Hydro agreed to have the results of its negotiations with the Town put into writing and sign the document. This showed a willingness to specify actions to be taken and to be accountable to the Town and the Commission for future

performance. It also indicated the company's intention to hold the Town equally accountable in return for promises it had made.

6. Maine Hydro agreed to the creation of a local entity (the (Swan Lake Committee) which would "monitor" implementation of the Agreement. This Committee holds the prospect for continuing the negotiation process started in the mediation. For this reason it holds equally good prospects for resolving the many differences, whether large or small, between Maine Hydro and the Town which will arise during the implementation of the Agreement.

Implications of the Case for Environmental Mediators

This case confims many standard assumptions about how a mediator ought to operate to successfully resolve a dispute. A few of the most important are discussed below.

1. The approval and authorization of the Commission was crucial to successful entry to the case. The parties would not have accepted the mediator or mediation without it.
2. The parties were allowed to propose preconditions on the process before agreeing to participate and the mediator did the same. This allowed all to have a chance to negotiate with one another on procedural issues -- a less threatening and more instructive introduction to formal negotiation than beginning with emotion-laden substantive issues.
3. The mediator did not claim to have special technical or legal expertise but did claim to understand negotiation and to be neutral. This encouraged the parties to believe the process would not be so sophisticated that they might be tricked and at the same time suggested that it would be fair and would concentrate on matters of direct concern to them, avoiding irrelevant formalities and procedures and eliminating the incentive for complex scientific and economic analysis which might otherwise be used to obscure weak, confused or unjustifiable demands.

4. The mediator held most caucuses and joint sessions near the site of the project. This gave a sense of immediacy and relevance to any who might otherwise have denied the importance of the issues in dispute (from water levels to parking signs). It also created an experience of negotiation within the community which may have removed images of negotiation as an alien and pre-determined event. It proved to fit as well in Swanville as anywhere, and this may encourage more negotiation there in the future on public/private disputes of this kind.

5. The public information meeting enhanced the negotiations. Instead of encouraging re-trenchment and face-saving postures as the mediator had feared, it created new areas for negotiation (e.g. the lower and upper limit) and resulted in a sincere effort by both sides to explain themselves, to ask together for the support and advice and cooperation of the community. It indicated that both sides recognized the community's long term interest in a peaceful and well-managed physical environment and served as a clear example of how the Town and Maine Hydro could work together to achieve that goal.

THE USE OF MEDIATION TO RESOLVE FUTURE HYDROPOWER LICENSING DISPUTES

During the course of the mediation process questions were raised on a number of occasions about the potential to apply mediation to other disputes over hydro development. More specifically, the question was put -- How could the existing licensing process be modified to encourage mediation? The case of Swanville suggests there are no major procedural or legal impediments to mediation of these disputes.

In fact, as a result of the successful mediation of the dispute over hydroelectric development at Swan Lake, it is possible to offer a number of potential benefits regarding the use of mediation to resolve disputes which occur within the licensing process and intervention proceedings directed by the Federal Energy Regulatory Commission.

Potential Benefits of More Frequent Mediation

1. Mediation may allow the parties to examine a wider range of options than they do when battling one another in an intervention proceeding. Solutions to the disputes may tend to be more environmentally sound and/or more economically or energy efficient as a result.

2. The number of intervention proceedings settled without recourse to a formal resolution of the dispute by the Commission may increase as a result of mediation because the negotiations would be managed by an independent mediator who has (a) no substantive interest in the outcome; (b) professional skill in mediation; and (c) greater latitude than Commission staff to design a solution acceptable to the parties.

3. In some cases, parties may make use of the intervention process when their most serious concerns are not related to the energy or environmental impacts of the proposed project. The Commission is limited to protecting the interests of the Federal Power Act. It has difficulty

> requiring measures which address these peripheral concerns and justifying allocation of resources to these cases. Mediation might allow the Commission and its staff to concentrate more of its resources on the technical and legal analysis of the most significant cases.

It does not appear that the existing licensing process need be changed to allow mediation to occur. If anything, the formal nature and adversarial tone of the existing intervention process would seem to encourage parties to enter into a less formal and more flexible process to resolve their differences.

Institutional Barriers to Mediation

Nonetheless, there are a number of "institutional" impediments to mediation. First, officials are largely unaware that the services of professional mediators are available to them. Second, officials are reluctant to seek out such help because it may appear they are unable to do their job or are inviting parties to a dispute to sidestep existing procedures. The case of Swanville indicates neither accusation need be true, but the reluctance of regulators to take such risks is familiar and understandable.

Third, the existing intervention process tends to create the impression that the issues in dispute are not negotiable. Parties are anxious to present the strongest case they possibly can. A developer seeks to create the impression that any change in the proposed project will make it economically infeasible or technically unsound. Opponents seek to create the impression that the proposed project is unsafe, uneconomical, or environmentally destructive.

Even though there may be ample room for negotiation, there is no incentive or reward for being conciliatory when one is not in negotiation. It is very difficult for officials to determine if negotiation would result in substantive and constructive changes in a project. Therefore, they are unlikely to encourage such negotiation, whether it occurs under a mediator's direction or not.

Fourth, there is no standard procedure yet established for an agency or commission to introduce parties to a mediator or to authorize and account for the results of a mediation process. Given that the courts have found it feasible and useful to establish such procedures, it seems likely that regulatory agencies may someday do the same. For the time being, each instance of mediation is unique and precedent-setting and these agencies inevitably approach the prospect gingerly. As the Swanville case demonstrates, the approval and encouragement of the adjudicating authority is crucial to the success of any mediation effort.

Recommended Actions

There are a number of actions which FERC or other regulatory agencies might take to foster negotiation and mediation. The first step is to indicate in the agency's rules and regulations that direct negotiations between the parties is a preferred way to resolve intervention (or similar) proceedings. The second is to provide opportunities (such as workshops and seminars) to brief regulatory officials on the mediation process, how it can work within the existing regulatory framework and how they can obtain mediation

assistance. The third step would be to have these officials work with a team of mediators to design a procedure to be followed when parties wish to enter mediation. These procedures would describe the most advantageous time to invite the parties to meet with a mediator, the best way to present this invitation, steps for obtaining approval of the process by the agency, steps for reserving legal rights and participating without prejudice, and possibly provisions for payment by the parties and/or the agency for the services of a mediator.

Implementation of Recommended Actions

The most logical way to implement these recommendations might be to undertake a limited experiment in mediation designed to determine the usefulness of mediation to the Federal Energy Regulatory Commission. This experiment would most likely include observations of the existing intervention process by mediators, mediation of a number of cases selected by the mediators in consultation with the FERC legal and technical staff, and preparation of a written report which addresses the following questions:

CASE LOAD

1. What percentage of licensing disputes involved in intervention proceedings are suitable for mediation?

2. In what proportion of these disputes do the parties agree to enter into mediation?

3. What types of issues and parties distinguish these cases from the rest?

4. What criteria seem to emerge for successful mediation of hydropower licensing disputes?

5. What is the potential for mediation to reduce the number and severity of disputes over hydropower licensing and allow the Commission to allocate staff resources more effectively?

PROCEDURES

6. What changes in present procedures for handling intervention proceedings (or other aspects of a case) could be made to increase the number of settlements and/or the prospects for successful mediation?

7. What are the essential elements for presenting mediation to the parties?

8. What are the general steps taken to complete the mediation process?

SUBSTANCE

9. What effect does the involvement of a mediator have on the definition of the issues which are in dispute?

10. What effect does mediation have on the resolution of these issues compared to the likely results of direct negotiation between the parties or a resolution defined by the Federal Energy Regulatory Commission?

Conclusions

The use of mediation to resolve the dispute at Swan Lake suggests that mediation may be helpful in resolving a greater number of hydropower licensing disputes. It also suggests the general criteria for a successful mediation and a procedure for incorporating mediation into the licensing process when disputes occur. For these reasons, it seems quite clear that further investigation of the potential for mediation to be helpful in these cases is warranted. That investigation will require controlled experimentation, testing and analysis along the lines suggested above to determine the costs and

benefits of using mediation on a regular basis in the hydropower licensing process. The case suggests that the increased use of mediation to resolve hydropower licensing disputes may serve the interests of all those concerned with the responsible and efficient development of hydroelectric power.