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Todd Thomas

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ADIRONDACK LAND USE UNDER THE “FOREVER WILD” CLAUSE AFTER *PROTECT!*

Todd Thomas[†]

INTRODUCTION

During the 2021 term, the New York Court of Appeals decided the appeal of a Third Department decision, *Protect the Adirondacks! Inc. v. Department of Environmental Conservation*.¹ This matter, as decided, stands to have a great impact on the management of the Forest Preserve. This Article reviews the limited history of “Forever Wild” jurisprudence and how the most recent decision may inform the complex land use decisions of the Adirondack and Catskill Parks. While major focus has been applied to the destruction of trees and the proper methodology for quantification of destroyed timber, or even what constitutes “timber” under the clause in the appellate cases, the holding of a unitary reading of the two “Forever Wild” clauses presents a novel approach to Forest Preserve management decisions going forward.

I. HISTORY

In a period from 2012 to 2014, New York State employees created twenty-seven miles of trails in the Adirondack Park for recreational uses termed “Class II trails.”² The trails are mainly nine

[†] Todd Thomas is a practicing attorney with an interest in legal research and social science writing. He is a University at Buffalo School of Law alumnus.

¹ See *Protect the Adirondacks! Inc. v. N.Y. Dep’t of Env’t Conserv.*, 106 N.Y.S.3d 178 (N.Y. App. Div. 2019).

² *Id.* at 179.

feet wide but extend to twelve feet at various curves and grades.³ The trails are designed to be durable, with features to promote runoff and involved varying levels of change to the landscape and harvesting or trimming of trees. While the trails are intended to be multi-use and accessible throughout the year, winter snowmobile use was “primarily” the purpose.⁴

Environmental advocacy organizations sued the state alleging the trail work was a violation of Article 14 of the New York State Constitution, the “Forever Wild Clause.” The State prevailed at the trial court level, but at the Appellate Division, Third Department, the Court ruled with the advocates on one issue and the State on another. The matter was recently heard by the Court of Appeals, which held that the destruction of timber to create these trails did, in fact, violate the Forever Wild Clause of the New York Constitution.

II. THE ADIRONDACK PARK AND *FOREVER WILD*

The Adirondack Park is an area in upstate New York comprising about six million acres. The boundaries of the Park were established by State law in 1892, although they have been amended over time.⁵ By law, all State-owned lands within the boundary are known as the Forest Preserve and have a protected status.⁶ Depredations in the late 1800s, despite attempts to protect the forests, caused the creation of a Constitutional clause that now resides at Article 14 of the New York State Constitution. Article 14 is the “Forever Wild Clause” and begins, in its current form: “The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands.” This is followed by “They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.” The remainder of the Clause are amendments authorizing specific projects upon the Forest Preserve.

³ See *id.* at 180.

⁴ *Id.* at 179.

⁵ See N.Y. Env’t Conserv. Law § 9-0101.

⁶ See *id.* at § 9-0101(6).

Approximately 3.4 million acres are privately owned.⁷ The majority of the publicly-owned portion are forest lands.⁸ Under the Adirondack Park Agency Act, which created the agency of the same name and established regulatory authority, all land is divided into regional zoning schemes for public and private lands. The Adirondack Park Agency promulgated a State Land Master Plan providing guidance and regulation for use of Forest Preserve lands in 1973.

III. PROTECT IN THE COURTS BELOW

The trial court, after thirteen days of testimony and several experts, held that there was no violation of either clause of Article 14. The Class II trails neither impacted the wilderness character or resulted in excessive destruction of trees of the Forest Preserve.⁹

The matter was appealed to the Third Department of the Appellate Division.¹⁰ In a 4-1 decision, the Appellate Division affirmed in part and reversed in part. The Appellate Division found no violation of Article 14 based on violation of the first part of the Forever Wild Clause.¹¹ In large part, this was based upon the court’s holding that the “record evidence supports the determination the trails are more similar to hiking trails than to roads.”¹² The court noted the width of the trails, at nine to twelve feet, was between that of hiking trails (two to eight feet) and roads (twelve to twenty).¹³ The court also noted, in referring to the factual findings of the lower court, that the Class II trails were not paved or gravel covered nor

⁷ See *Welcome to the Adirondacks*, N.Y. DEP’T OF ENV’T CONSERV., <https://www.dec.ny.gov/outdoor/119734.html> (last visited June 1, 2021).

⁸ The publicly owned section also includes the properties of municipalities, both local, such as town halls or garages, as well as State institutions, such as prisons or college campuses.

⁹ *Protect the Adirondacks! Inc v. N.Y. Dep’t of Env’t Conserv. and Adirondack Park Agency*, Index No 2137-13 (N.Y. Sup. Ct., 2017).

¹⁰ See *Protect the Adirondacks! Inc. v. N.Y. Dep’t of Env’t Conserv.*, 106 N.Y.S.3d 178, 179 (N.Y. App. Div. 2019).

¹¹ See *id.* at 180.

¹² *Id.*

¹³ See *id.*

“crowned to divert water.”¹⁴ However, in a previous paragraph, the Court refers to the Defendant-Respondent’s guidance documents which reference grading, levelling and “cutting of side slopes by means of ‘bench cuts.’”¹⁵ Additionally, the Appellate Court found a lack of violation in the lack of disturbance to forest canopy and in the objective of creating Class II trails to reduce snowmobile use elsewhere.¹⁶

However, the court did find the destruction of trees to be a constitutional violation. The Court noted that the twenty-seven miles of trails would involve cutting 6,184 trees of at least three inches in diameter.¹⁷ Although Defendant-Respondent argued that the use of “timber” related to trees of a certain size or merchantable value, the Appellate Division said the word as used in the Constitution referred to “all trees, regardless of size.”¹⁸ The total number of trees, as put forward into the record by Plaintiff-Appellant, would therefore be about 25,000 trees to be destroyed by the trail construction.¹⁹ The court found that this level of destruction was “to a substantial extent” or “a material degree.”²⁰ The precise language used by the Appellate Division was quoting *Association to Protect the Adirondacks v. MacDonald*, a 1930 Court of Appeals case, which supplies the only meaningful standard in use for Article 14 cases.

IV. THE *MACDONALD* STANDARD

The leading case on the question of activities in the Forest Preserve remains *Association for the Protection of the Adirondacks v. MacDonald*, as decided by the Court of Appeals in 1930.²¹ In the lead up to the 1932 Winter Olympics, famously held within the

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 181.

¹⁷ *Id.* at 182.

¹⁸ *Id.*

¹⁹ *Id.* at 183.

²⁰ *Id.*

²¹ *Ass’n for Prot. of Adirondacks v. MacDonald*, 253 N.Y. 234 (1930).

Adirondack Park at Lake Placid, New York, the State Legislature passed a law authorizing MacDonald, as Conservation Commissioner, to construct a bobsled run on state land.²² Such construction would disturb about four and a half acres of Forest Preserve.²³ At the time of the planned project, the Court noted the Forest Preserve comprised 1,941,403 acres.²⁴ An estimated 2,500 trees would be cut from the site.²⁵

“Taking the words of Section 7 in their ordinary meaning,” the court wrote, referring to the Forever Wild Clause, “we have the command that the timber, that is, the trees, shall not be sold, removed or destroyed.”²⁶ In referring to the framers of the Forever Wild Clause, the Court of Appeals noted they had established “a measure forbidding the cutting down of these trees to any substantial extent for any purpose.”²⁷ Applying this section, the Court held that the law passed authorizing the sledding run was unconstitutional in violation of the Forever Wild Clause.²⁸

However, in reaching this decision, the Court of Appeals noted an inherent conflict in preservation of wild forest lands for the public. They noted “[w]hat may be done in these forest lands to preserve them or to open them up for the use of the public, or what reasonable cutting or removal of timber may be necessitated in order to properly preserve the State Park,” was not before them at this time.²⁹ In other terms, as supplied by this writer, preservation of the wild lands for public use may require human intervention which may seem contrary to the wild nature. The wording creates the standard that has been largely applied since, in that there are some purposes that may require infringement upon the Forest Preserve for the purposes of preservation or use of the Forest Preserve. While the Court of Appeals did not lay out further criteria, such statement has

²² *See id.* at 236.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 237.

²⁷ *Id.* at 242.

²⁸ *Id.*

²⁹ *Id.* at 240.

since been the guiding principal in determining the constitutionality of certain projects being undertaken upon State lands within the Adirondack Park.

The Appellate Division in the *Protect* matter reflects that there is a dearth of appellate court precedent concerning Article 14.³⁰ The Court briefly summarizes *MacDonald* and then *In the Matter of Balsam Lake Anglers Club v. Department of Environmental Conservation*.³¹ *Balsam* was an appeal of an Ulster County case, not set in the Adirondacks, but in the Catskill Park.³² The State lands of the Catskill Park are also Forest Preserve subject to Article 14.³³ In *Balsam*, the Department of Environmental Conservation had planned to construct various trailhead parking lots, to alter the course of certain trails to avoid private lands, and to construct new trails.³⁴ Among plaintiff's contentions in opposition to the planned work was that such work would violate the Forever Wild Clause.³⁵ Again, the trial court notes the "specific constitutional issue has rarely been litigated."³⁶ One trail was to be two miles long and six feet wide and had resulted in the cutting of seventy-three trees "of timber size."³⁷ The construction of new trails was challenged on an absolute basis, in that any human intervention was not wild.³⁸ Relying on *MacDonald*, the trial court found the extent of tree loss on the relocated trail was "less than one cord of firewood" inclusive of smaller trees.³⁹ The court noted that such wood "will be

³⁰ *Protect the Adirondacks! Inc. v. N.Y. Dep't of Env't Conserv.*, 106 N.Y.S.3d 178, 181 (N.Y. App. Div. 2019).

³¹ *Id.* at 181-82 (citing *Balsam Lake Anglers Club v. Dep't of Env't Conserv.*, 199 A.D.2d 852 (N.Y. App. Div. 1993); *Ass'n for Prot. of Adirondacks v. MacDonald*, 253 N.Y. 234 (1930)).

³² *Balsam Lake Anglers Club v. Dep't of Env't Conserv.*, 583 N.Y.S.2d 119, 121 (N.Y. Sup. Ct. 1991).

³³ N.Y. Env't. Conserv. Law § 9-0101.

³⁴ *Balsam Lake Anglers Club*, 583 N.Y.S.2d at 121

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 122.

³⁸ *Id.*

³⁹ *Id.*; see also *Ass'n for Prot. of Adirondacks v. MacDonald*, 253 N.Y. 234 (1930).

completely decomposed within a few years leaving no trace.”⁴⁰ As such, the court held that such cutting was not unconstitutional.⁴¹ With regard to the new trails, the court referred again to *MacDonald* and noted the balancing approach noted in the discussion of that matter, holding that “facilities consistent with the nature of the forest preserve could be constructed” and holding the new trails were also not an unconstitutional action.⁴² At the Appellate Division, the court upheld the trial court rulings, finding that there was not an “unconstitutional amount of cutting.”⁴³

Apart from the cases cited by the Appellate Division in *Protect*, there is truly limited appellate review of Article 14 matters and, where Article 14 is implicated, *MacDonald* is usually involved. Certain trial courts have issued decisions on land use matters impacting Article 14 and have also relied upon *MacDonald*. *Helms v. Reid*, coming soon after the passage of the Adirondack Park Agency Act, involved a challenge to use classifications as violating the Forever Wild clause.⁴⁴ In a novel pleading, Helms argued that the actions of the State actors in designating various use classes violated the wilderness character or, in the alternative, that all State actions were constitutional, and therefore his acts should also be permissible. Supreme Court, Hamilton County, in 1977, notes as well the dearth of decisions on this clause and endeavors to offer judicial interpretation.⁴⁵

In *Flacke v. Fine*, the Supreme Court in St. Lawrence County dealt with a dispute between the State Department of Environmental Conservation and the Town of Fine, within the Adirondack Park.⁴⁶ The town sought to widen a road by easement running through the Forest Preserve and refused to comply with the Department of Environmental Conservation requirement of a permit and State oversight. The court found that *MacDonald* did allow for the limited

⁴⁰ *Id.*

⁴¹ *Id.* at 123.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Helms v. Reid*, 394 N.Y.S.2d 987 (N.Y. Sup. Ct. 1977).

⁴⁵ *Id.* at 991-92.

⁴⁶ *Flacke v. Town of Fine*, 448 N.Y.S.2d 359 (N.Y. Sup. Ct. 1982).

cutting as contemplated by the road widening, but State law and regulation establishing a procedure for road work were not voided merely because the town had a constitutional ability to do the road work.⁴⁷ As such, the work could proceed with the town being required to obtain the permit.

In the unreported *Residents' Committee to Protect the Adirondacks v. Adirondack Park Agency*, the Residents' Committee to Protect the Adirondacks⁴⁸ sued to prevent expansion of Gore Mountain ski area on state owned land.⁴⁹ Among the causes of action alleged was that the level of development was in violation of Article 14. The Court disagreed, noting *MacDonald* spoke to the need for tree cutting for public purposes, and finding that the recreational and economic benefits of the ski center were a public benefit that was within the Constitutional strictures.⁵⁰

V. THE PROTECT DECISION AND ITS POTENTIAL IMPACTS

In May 2021, the New York State Court of Appeals made its determination in *Protect*, ruling that construction of the snowmobile trails violate the Forever Wild Clause. This decision reviews and discusses the *MacDonald* case in some detail, retaining its position as the leading case on Forest Preserve jurisprudence. However, the Justices of the Court of Appeals continue to build on their previous Adirondack holdings in reshaping Adirondack land use law in *Protect*.

In October of 2019, the Court of Appeals heard the most recent Adirondack land use case prior to *Protect*.⁵¹ On newly acquired State land, in the watershed of a river classified under the Wild,

⁴⁷ *Id.* at 363

⁴⁸ The Residents' Committee to Protect the Adirondacks and the Association for the Protection of the Adirondacks have since merged into Protect the Adirondacks! Inc.

⁴⁹ *Residents' Comm. to Protect Adirondacks, Inc. v. Adirondack Park Agency*, No. 10045-09, 2009 WL 2138838 (N.Y. Sup. Ct. July 13, 2009).

⁵⁰ *Id.* at *11.

⁵¹ *Matter of Adirondack Wild: Friends of the Forest Preserve v. N.Y. Adirondack Park Agency*, 138 N.E.3d 1055 (N.Y. 2019).

Scenic and Recreational Rivers Act, the State planned to use a specific roadway for snowmobile use.⁵² An environmental advocacy group sued, alleging various violations of the Rivers statute and the State’s environmental statutes and regulations concerning Adirondack land use.⁵³ The Court, in an opinion by Chief Judge DiFiore, upheld the planned land use. Judge Fahey dissented while agreeing in some ways with the majority, due to unanswered questions about the level of use and impacts that were projected.⁵⁴

Judge Wilson, joined by Judge Rivera, dissented in the longest opinion of the decision.⁵⁵ The other opinions were concerned solely with the practical, be it the statutory definitions of types of waterways or the historical uses of the roadway prior to State purchase. Judge Wilson, however, began his analysis with the history of the Adirondack Park and the deforestation that led to Article 14.⁵⁶ He further included a reference to Dr. Seuss’s *The Lorax*, who notably “spoke for the trees” who could not speak for themselves.⁵⁷ While Judge Wilson only briefly mentions the Constitutional article in moving into the statutes and regulations that govern land use, the attention of a judge who would hear *Protect* to the idea of an innate value of wilderness was a novel holding in Adirondack law. The idea is not technical, and as yet lacks terms a practitioner could use to apply it, but in this nascent form still imposes the question of “is this preserving wild forest lands?” as the initial query instead of “how many trees are destroyed?” or “how much road renovation is completed?”

Rivera, Wilson, and Fahey were joined by Justice Rivera to form the majority in the April 2021 decision in *Protect* at the Court of Appeals. At oral argument, the majority were active questioners.

The lines of questioning in oral argument were replicated in the opinions issued by the Court. Judge Rivera, writing for the majority, found the Class II trail project unconstitutional and that such a

⁵² *Id.* at 1057.

⁵³ *Id.* at 1058.

⁵⁴ *Id.* at 1063.

⁵⁵ *Id.* at 1068.

⁵⁶ *Id.*

⁵⁷ DR. SEUSS, *THE LORAX* (1971).

project would require a Constitutional amendment to proceed under the language of the Forever Wild Clause. Much of the decision relies on the previous decision of the Court of Appeals in *MacDonald*.

The *MacDonald* standard applies an adequate, if vague, test for the destruction of timber within the Forest Preserve. However, the application of this standard to “kept as wild forest lands” is lacking. No specific criteria are supplied, apart from the idea of balancing public use with preservation. In much of the limited case history, the constitutionality determination hinges upon trees downed. The trial court in the pending appeal undertook an analysis, with the proffered proof regarding visibility of the trails and the nature of their construction.⁵⁸ In a trial that lasted 13 days, testimony was given regarding trees cut as well as impact on forest canopy and effects of various trail construction methodologies. The Court found that the impacts were not to such an extent to violate the preservation arm of the clause. However, nowhere in New York jurisprudence is any test or standard apart from *MacDonald* applied to Article 14 questions.

“Wild forest” is undefined at law, but an understanding can be derived, for example, from the biological sciences. A forest is more than the trees, and trees are more than the specimens large enough to have commercial value. The preservation of the wild spaces was originally discussed in terms of the trees, because logging and deforestation were a threat to the Adirondack region, in promoting erosion that was harmful to the land and watersheds. Article 14, however, does not command the State to keep the Forest Preserve as wild forest lands for the protection of timber, but instead solely to keep them as wild forest lands.

The concept of “wilderness” can also be found in federal law, such as the Wilderness Act which calls for some wild areas to be maintained “for the preservation of their wilderness character” (16 USC 1131(a)). This concept has been subject to significant litigation without any clear answer as to an exact definition. However, the attempts to define how to manage federal wild lands speaks to ways the Forever Wild clause might be understood and implemented.

⁵⁸ *In re Protect the Adirondacks! Inc. v. N.Y. State Dep’t of Env’t Conserv.*, 988 N.Y.S.2d 525 (Sup. Ct. 2013).

In the *Protect* decision, the Court of Appeals did not delve into these alternate theories of wilderness protection, relying instead on the language of the Forever Wild clause and the *MacDonald* decision. However, the potential exists for going beyond *Protect* given the Court’s strict reading of the Forever Wild Clause.

The *Protect* Court overturned the Appellate Division’s dual clause reading of the Forever Wild Clause. In the lower Court, *supra*, the “kept as wild forest lands” and “timber removed” were treated as separate obligations.⁵⁹ The Court of Appeals, however, ruled that the “timber” clause merely restated the pressing threat to the Forest Preserve at the time of creation and did not create a separate obligation upon Adirondack actors.⁶⁰ This determination was a unanimous among the judges of the Court.⁶¹

The majority and dissent, however, broke ranks on how to conceptualize the Class II trails.⁶² The majority approach appeared to view the additional size and construction involved as more akin to roads. The dissent viewed the trails as more akin to hiking trails. The two approaches to their view on the Constitutionality of the Class II Connector Trails then hinge in part of the differences in factual interpretation more so than the application of the Forever Wild Clause.

Immediately after the decision, there was speculation that the *Protect* holding might impact minor trail maintenance and pro-snowmobile groups decried the decision as another attempt to force them from the Adirondack Park.⁶³ Neither extreme view fits with the holding of the case. The balancing of *MacDonald* remains a valid legal approach, wherein the protected lands are also to be used and development for “use” is permitted where not consequential.

⁵⁹ *Protect the Adirondacks! Inc. v. N.Y. Dep’t of Env’t Conserv.*, 106 N.Y.S.3d 178, 183 (N.Y. App. Div. 2019).

⁶⁰ *Id.* at 182.

⁶¹ *Id.* at 183 (Lynch, J. dissenting).

⁶² *Id.* at 182.

⁶³ Gwendolyn Craig, *Court of Appeals: Clearing Trees for Snowmobile Trails Unconstitutional*, ADIRONDACK EXPLORER (May 4, 2021), <https://www.adirondackexplorer.org/stories/court-of-appeals-clearing-trees-for-snowmobile-trails-unconstitutional>.

Likewise, snowmobile traffic is impacted only so much as Class II Connector Trails cannot proceed without a Constitutional Amendment. Existing and other potential trail uses remain possible and the Class II trails were not held improper or barred, but instead the necessary permissions to undertake such development much comply with State law.

Protect is not so much new law on the state of the Forest Preserve as clearly an interpretation of *MacDonald*. Cases decided for decades under the rubric of *MacDonald* remain valid to consider the uses permissible on the Preserve(s) without Constitutional amendment.

VI. CONCLUSION

Article XIV requires that State-owned Adirondack lands be preserved as wild forest lands and protected from alienation or timbering. These are two separate clauses yet have often been rolled together. Historically, tests for violation have focused on the quantity of trees removed from State land. This is an insufficient standard and neglects the first clause, regarding wild forest preservation. Instead, a separate standard should be put forward by the Court of Appeals. One idea is that a forest ecosystem as a holistic matter should be the consideration applied before any other analysis of planned human impact upon State Forest Preserve lands, but in any case, some standard beyond the number of trees cut should stand to differentiate the clauses and their differing objectives.