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A Trusting Public: How the Public Trust Doctrine Can Save the New
York Forest Preserve

By: Katherine R. Leisch

“Wilderness is not a luxury but a necessity of the human spirit”
– Edward Abbey

New York – a place the eyes of the world are always upon, it seems. While people know many of the state’s accomplishments, it is likely that not as many think of it as a leading example in environmental law and conservation. As early as 1894, however, New York raised the environmental bar globally by enacting the first “wilderness” law.¹ At the 1894 Constitutional Convention New Yorkers took a firm conservationist stance by creating what is now Article XIV² of the New York State Constitution, which stated:

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. 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.³

¹ Nicholas A. Robinson, *“Forever Wild”*: *New York’s Constitutional Mandates to Enhance the Forest Preserve*, 7 Pace Law Faculty Publications (2007), available at <http://digitalcommons.pace.edu/lawfaculty/284>.

² It was originally Article VII § 7, but the quoted text has remained the same.

³ N.Y. CONST. art. XIV § 1.

These words, unprecedented in 1894, have remained the strongest preservation law in the United States.⁴ They were groundbreaking in 1894, but in fact they were taken from an even earlier New York law, which was enacted in 1885.⁵ It was this decision to put the aforementioned state law into the constitution that makes the “forever wild” law so important.

Article XIV ensures the protection of this wilderness in perpetuity, in effect solidifying the forest preserve as a part of the public trust. Furthermore, the public trust is something that predates the States in a way that makes it virtually indestructible. Therefore, Article XIV serves as a limitation on government in order to protect the forest preserve through the safeguards of the public trust. No branch of government, nor constitutional convention can destroy the public trust, including the Forest Preserve.

I. Introduction to the Public Trust

In order to better understand the weight behind the public trust doctrine, some history is in order. The public trust doctrine is one of the strongest legal doctrines in the United States even though it is less black letter law than other laws. This is partly due to its lengthy

⁴ Robert C. Glennon, *State Acquisition in the Adirondacks: The Inconsistent Purpose Doctrine and Related Legal Issues*, Presented to the Colloquium on Historic Preservation Issues in the Adirondack Park 1 (1982).

⁵ The Forest Preserve was created by statute: L1985 c. 283 sections 7 and 8. Robert C. Glennon, *Non-Forest Preserve: Inconsistent Use*, in THE ADIRONDACKS IN THE TWENTY-FIRST CENTURY TECHNICAL REPORTS VOL. 1 74, 75 (1990).

history, traceable as far back as the Roman Empire.⁶ It found its way into ancient English common law and the Magna Charta, and from England, like much of our legal system, it came to America.⁷ The way this doctrine has been woven into laws throughout history is what makes it so strong and fundamental, and is the reason why the people trust it to always be there.

While surely the general concept of the public trust dates back much further, the beginning of its codification occurred in 529 A.D. when Emperor Justinian began compiling and codifying Roman law.⁸ Justinian law stated, “the following things are by natural law common to all – the air, running water, the sea, and consequently the sea-shore.”⁹ These things were deemed *res communes* and every person had an equal right to them, including a right to prevent others’ uses from interfering with his right.¹⁰ Thus a doctrine was born, and it continued to grow, adapt, and spread throughout other areas.

The most notable adoption of this concept for our current legal system was England’s Magna Charta. Although neither the Magna Charta nor its predecessor were as comprehensive as our modern

⁶ Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 471 (1969-1970).

⁷ Joseph L. Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C. Davis L. Rev 185, 185 (1980); see Mark Dowie, *In Law We Trust: Can Environmental Legislation Still Protect the Commons?*, ORION MAGAZINE (July 2005), available at <http://www.orionmagazine.org/index.php/articles/article/122/>.

⁸ Paul Halsall, MEDIEVAL SOURCEBOOK: THE INSTITUTES 535 CE (June 1998) <http://www.fordham.edu/halsall/basis/535institutes.html>.

⁹ INSTITUTES OF JUSTINIAN 2.1.1 (J.B. Moyle, D.C.L. trans., 1883, Oxford 5th ed. 1913).

¹⁰ WILLIAM A HUNTER, INTRODUCTION TO ROMAN LAW 57-58, (5th ed. 1897).

doctrine, it was an important step in the right direction.¹¹ It essentially made the King “trustee for the public rights, but he could not appropriate them to his own use.”¹² This strengthened the public trust doctrine by making it impossible for the King to destroy; this is why the public trust doctrine is seen as a limitation on government.

Similar to other laws in the early United States, the public trust doctrine, as an English law, was part of the American legal system from the beginning. As such it was something New York retained as sovereign when it seceded from England.¹³ Later, when New York joined the Union the duties and obligations of this doctrine continued to be reserved to the state. Therefore New York has always retained the power of the King under this doctrine, and is accordingly bound by the limitations placed on such power.¹⁴ Just as the King could in no way destroy or diminish the public trust, nor can New York destroy or diminish the public trust.

II. The Power of the Public Trust – No One Can Destroy It

As demonstrated, the public trust doctrine wields great power. Due to the fact that the public trust doctrine comes to New York from the common law in effect before New York was a state, it carries a lot of

¹¹ Note, *Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, YALE L.J. 762, 768 (1970).

¹² *Id.* at 769.

¹³ *See* *Martin v. Waddell*, 41 U.S. 367, 382 (1842).

¹⁴ *See id.* at 416 (referring to New Jersey, but the doctrine of equal footing supports the conclusion that all states entered the union with the same rights and principles, and therefore the conclusion applies equally to New York).

weight when looking at what the state can and cannot do. As mentioned, the common law public trust was a limitation on the power of government. Therefore, neither New York's legislative nor executive branches can diminish the public trust in any way, and in fact that is exactly what the doctrine intends to prevent.

In New York common law is followed unless otherwise legislated. One way to preserve the rights of common law so that courts are incapable of changing the law is to put them into the State constitution, such as the Framers did with the fundamental rights. This is what the 1894 Constitutional Convention did with the Forest Preserve, effectively taking it out of the judiciary's reach also.

Taken as a whole, therefore, the public trust of the Forest Preserve cannot be destroyed by any branch of government. This principle is supported by case law. The court in *People v. Baldwin*, for example, in an adverse possession claim against the state for lands within the Forest Preserve, found that what the case turned on was whether the lands in question were held by the State for proprietary reasons or held by the State as sovereign in trust for the public.¹⁵ Finding the latter to be true, the court held that the State cannot "lose such lands as it holds for the public in trust."¹⁶ *Baldwin* also points out that the Forest Preserve was placed in the public trust before the constitutional

¹⁵ *People v. Baldwin*, 197 A.D. 285, 288 (N.Y. 1921)

¹⁶ *Id.*

provision,¹⁷ and this illustrates the purpose of the Forest Preserve. The court elucidated its holding by stating, “these lands are forever reserved for the Forest Preserve and that no power exists on the part of the Legislature or of any officer or department of the State to dispose of, or in any manner deprive the People of their title to the lands.”¹⁸ This is extremely powerful language supporting the reasoning stated above.

Further support of the perpetuity of the public trust can be found in *Illinois Central*.¹⁹ There the court states:

[t]he sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.’ Necessarily must the control of the waters of a state over all lands under them pass when the lands are conveyed in fee to private parties, and are by them subjected to use.²⁰

Illinois Central also recognizes that the public trust is present in every state. The equal footing doctrine, allowing all states to have the same

¹⁷ See *supra* note 5 and accompanying text.

¹⁸ *Id.* at 290 (citing *People ex rel Turner v. Kelsey*, 180 N.Y. 24, 26 (1904)).

¹⁹ *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, (1892) (the court was required to determine whether the State could give away land it held in trust for the public).

²⁰ *Id.* at 456.

rights and level of sovereignty as the original colonies, further supports this principle.²¹

When examining the public trust it is important not just to look at what the doctrine prohibits but also at what it requires. The public trust doctrine makes the government the trustee for the people. This duty is essentially no different than any other trustees' duties. At the very least, this means that the state cannot alter it in a material way, which will be addressed further subsequently. At the most however, when examined in terms of Article XIV, it "embodies an affirmative mandate to enhance the Forest Preserve."²² Both of these requirements of the state as trustee support the principle that the state cannot destroy the public trust and therefore cannot destroy the Forest Preserve.

III. The Forest Preserve is Public Trust

After looking at the functions and mandates of the public trust doctrine, it logically follows that it should be determined whether the Forest Preserve is protected by the public trust. The answer to that is a resounding yes, a position that is well supported by case law. The most obvious parallel comes from the most traditional application of public trust, through navigable waters within the Adirondack and Catskill State Parks, both public and private. It applies more

²¹ 72 Am. Jur. 2d *States, Etc.* § 19 (2010).

²² Robinson, *supra* note 1, at 8.

comprehensively, however, as parkland, and further on its own merits as Forest Preserve.

As introduced above, the public trust doctrine originated as a protection of waterways for navigation and other public uses. Historically this was said to be protecting the waters which ebb and flow with the tide. Case law effectively demonstrates that this has evolved to now include all navigable waters, including those within the parks. In *Illinois Central Railroad Co. v. Illinois*,²³ the court explained that English common law had defined the navigable waters to which the public trust applied, as those which were subject to the ebb and flow of the tides was based on the facts of English geography, not necessarily the purpose or state of the law. The court went on to hold that “the same doctrine as to the dominion and sovereignty over . . . the navigable waters of the Great Lakes applies, which obtains the common law [of coastal waters] and that the lands are held by the same right . . . and subject to the same trusts and limitations.”²⁴ This interpretation expanded the way public trust was applied, and makes it clear that at the very least it applies to the navigable water within the Adirondacks and Catskills.

The doctrine’s application to these parks was made clearer and more encompassing by the decision of *Adirondack League Club v. Sierra*

²³ See *supra* note 19.

²⁴ *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 437 (1892).

Club.²⁵ Here, in determining whether kayakers have a public right to use water flowing through private land, the court reasoned: “Pursuant to the public trust doctrine, the public right of navigation in navigable waters supersedes plaintiff’s private right in the land under the water.”²⁶ Therefore, “the public’s right to navigate includes the right to use the bed of the river or stream to detour around natural obstructions and to portage if necessary.”²⁷ This effectively said that not only does the public trust apply to waterways in the parks, and the Forest Preserve, but also to waterways and shoreline within private lands.²⁸

The doctrine has also been determined to apply more broadly to New York parklands. One of the many examples of case law supporting this assertion can be found in *Friends of Van Cortlandt Park v. City of New York*, where the court, in determining what could be done by the State with parkland, held that “[i]n the 80 years since *Williams*, our courts have time and again reaffirmed the principle that parkland is impressed with a public trust, requiring legislative approval before it

²⁵ 201 A.D.2d 225 (N.Y. 1994).

²⁶ *Id.* at 232.

²⁷ *Id.*

²⁸ In demonstrating this concept of the public trust applying to seemingly all waters within the Adirondack and Catskill park, it may be important to note that not only are both parks the primary source for numerous watersheds, but the Adirondack park alone has over 30,000 miles of rivers and streams, over 300,000 acres of surface water, and over one million surface acres of aquifers (Daniel Kelting & Corey Laxon, *Review of the Effects and Costs of Road De-icing with Recommendations for Winter Road Management in the Adirondack Park*, Adirondack Watershed Institute Report # AWI2010-01 (Feb. 2010)). Further analysis of this concept is beyond the scope of this paper.

can be alienated or used for an extended period for non-park purposes”²⁹

However, if these corollaries seem dissatisfactory, there is still more support that the public trust doctrine applies directly to the Forest Preserve. In an interesting case, which carefully examines the history of the Forest Preserve, the court states very precisely that

[t]he Forest Preserve is preserved for the public; its benefits are for the people of the State as a whole.

Whatever the advantages may be of having wild forest lands preserved in their natural state, the advantages are for every one within the State and for the use of the people of the State. Unless prohibited by the constitutional provision, this use and preservation are subject to the reasonable regulations of the Legislature.³⁰

The court in the *MacDonald* case, simply by looking at the history, points out that the purpose of the 1894 Constitutional Convention was to assure that these state lands were public trust lands. This is supported further by purposes behind the Forest Preserve to protect the watershed,³¹ and the 1892 law establishing the Adirondack park: “... to be forever reserved, maintained, and cared for as a ground for the

²⁹ 95 N.Y.2d 623, 750 (2001).

³⁰ Ass’n for Prot. of Adirondacks v. MacDonald, 253 N.Y. 234, 238 (1930).

³¹ ALFRED S. FORSYTH, THE FOREST AND THE LAW 12 (Sierra Club, et al., pub. 1970).

free use of all the people, for their health or pleasure, and as forest lands necessary to the preservation of the headwaters of the chief rivers of the state.”³²

IV. Can New York State Expand Public Trust Limits to New Land?

The concept of adding land to the Forest Preserve is built into Article XIV where it states “lands now owned or hereafter acquired,”³³ but is this legitimate when adding lands to the Forest Preserve equals adding land to the public trust? As discussed previously, the state cannot diminish the public trust in anyway because it is in the role of trustee; however, there are certainly no prohibitions on adding land to the trust, and as also already mentioned, it can be said that there is in fact a mandate on the state to improve the Forest Preserve in such a way.³⁴ One example supporting this expansion of the public trust is supported in the Mono Lake case, *National Audubon Society v. Superior Court*.³⁵

The Mono Lake case was an important precedent in public trust law, because the injury that was occurring was to the surrounding ecosystem. There the Supreme Court of California, sitting *en banc*, discussed the flexibility of the public trust and therefore the

³² Ch. 707, L. 1892.

³³ N.Y. CONST. art. XIV, § 1.

³⁴ *See generally*, Robinson, *supra* note 1.

³⁵ 33 Cal.3d 419 (1983).

acceptability of adaptation by broadening the uses deemed protected under the doctrine.³⁶ They then went on to hold that the public trust doctrine can be invoked for environmental conservation reasons and also that it protects nonnavigable tributaries because they affect the navigable waters already included in the public trust.³⁷ This expanded the boundaries of the public trust in order to effectively protect more for the public. The court was sure to remind the state of its limitations under the doctrine by stating: “no one could contend that the state could grant tidelands free of the trust merely because the grant served some public purpose, such as increasing tax revenues, or because the grantee might put the property to a commercial use.”³⁸ These holdings are very easily applied to the New York Forest Preserve as public trust.

What this means in terms of the Forest Preserve is that as New York purchases or acquires land within the parks it is capable of expanding the boundaries of what is protected by public trust. Furthermore, this case reminds readers of the fact that once land is in the public trust it is there forever; the State cannot simply remove it regardless of any claim that it is in the public interest to do so. However, this is an area that quickly becomes confusing in regards to the Forest Preserve and will receive further attention below.

³⁶ *Id.* at 434-35.

³⁷ *Id.* at 437.

³⁸ *Id.* at 440.

*A. How land is added to the Forest Preserve*³⁹

There are a number of ways which the state may acquire land. For example, the state may acquire it through gift or devise, through condemnation or foreclosure, or it can just be bought. Article XIV Section 1 includes the key phrase, “now owned or hereafter acquired,” requiring that when the state acquires land within the “blue line”⁴⁰ it be added to the forest preserve and therefore to the public trust. There was also general encouragement for the state to acquire more land for the Forest Preserve, as Delegate McClure urged at the outset of the constitutional convention debate: “the state should acquire all the forest lands in the Adirondacks and Catskills.”⁴¹ The principle of acquiring more land for the forest preserve was supported by a number of the delegates of 1894, including Floyd, McIntyre, and Brown.⁴²

Once the state acquires new land in the forest preserve counties either or both (depending on location) the APA and DEC are responsible for its management. As such it obtains a classification to manage it more specifically. According to the State Land Master Plan (SLMP), the land is to be classified as soon as possible, and at the most, within a year.⁴³ Both the master plan for the Adirondacks and the

³⁹ The history of adding land to the Forest Preserve is far more involved than discussed here, and deserves closer attention, but it is beyond the scope of this paper.

⁴⁰ I.e.; the boundaries of the Adirondack and Catskill Parks.

⁴¹ Glennon, *supra* note 5, at 77.

⁴² *See id.* at 77-78.

⁴³ Adirondack Park State Land Master Plan [APSLMP] (2001), at 8.

Catskills advise that the state should only be acquiring lands that would be considered Forest Preserve.⁴⁴

However, the SLMP triggers further constitutional scrutiny. It classifies the lands within the Adirondacks and Catskills for different uses and management practices based on a number of factors.⁴⁵ This begs the question: just how many categories of wilderness can there be before it is no longer the “forever wild forest lands” the Constitution requires? It is apparent upon reading both SLMPs with an eye towards the intentions of our 1894 Constitutional Convention delegates that the APA and the DEC are between a rock and a hard place with these plans.⁴⁶ The agencies must uphold the mandates of the Constitution, including “forever wild” and “for the free use of all the people,” in a time where the use and enjoyment by the people includes many things not pondered by the framers. How much mechanized access do you allow? Do you provide the types of facilities that generally make for a cleaner environment (i.e. restrooms, and campgrounds), or keep the appearance wild without as much sanitation control? As trustee for the people the state is required to maintain and improve the public trust, but how much “maintenance” of wilderness defeats the purpose of wilderness itself? This paper is not prepared to answer all of these

⁴⁴ APSLMP *supra* note 37, at 6; Catskill Park State Land Master Plan [CPSLMP] (2008), at 9

⁴⁵ *See generally*, APSLMP, *supra* notes 37; *see also*, CPSLMP, *supra* note 38.

⁴⁶ It is also apparent that they knew that when writing these SLMPs as both contain a number of parentheticals or prefaces indicating that the provisions of the SLMP in no way lend weight to the “constitutional appropriateness” of them, and that said policy is such only “if [that policy is] constitutionally permissible.” *See* APSLMP, *supra* note 37, at 6, et al.; *see* CPSLMP, *supra* note 38, at 12, et al..

questions or decide the constitutionality of every provision in both SLMPs; however one conclusion I am prepared to draw is that *all* forest preserve land should be afforded equal protection under Article XIV, and to allow otherwise is just as unconstitutional as a failure to provide all citizens equal protection under the U.S. Constitution. One example of this shortcoming can be found in the Adirondack Park SLMP's "wild forests" classification, which does not provide for the same Article XIV protection (contrary to the "wild forests" of the CPSLMP⁴⁷), and allows for silviculture (including practices that are a clear violation of Article XIV),⁴⁸

B. Inconsistent Uses

Inconsistent uses or purposes are perhaps the biggest concern when it comes to acquiring new land in the forest preserve. Since 1912 the inconsistent purpose doctrine, an amorphous non-legal argument, has been used to allow the state to acquire lands in Forest Preserve counties without putting them into the Forest Preserve even though the Constitution and Environmental Conservation Law (ECL) mandate their addition to the Forest Preserve. The doctrine in its current form and how it has been used in the past is unconstitutional. There is some argument to be made for its limited necessity, but if it is to have any legal power it must be applied consistently, in accordance with some

⁴⁷ See CPSLMP, *supra* note 38, at 38.

⁴⁸ See APSLMP, *supra* note 37, at 32.

rules, and must be properly adopted as a specific amendment to the constitution.

The doctrine comes from a 1912 Attorney General opinion, and its nefariousness is detectable from the beginning. The opinion essentially states that if land is acquired by the state for an express purpose that is inconsistent with constitutional mandates of the Forest Preserve, those provisions should not be held to apply to newly acquired land, and it will not be considered forest preserve.⁴⁹ This is directly in conflict with the ECL definition of forest preserve, which states: “The “forest preserve” shall include the lands owned *or hereafter acquired* by the state within the [counties enumerated]”⁵⁰ (emphasis added). This language has been held by the court to be “clear and definite, and does not in itself require construction,”⁵¹ and as such leaves no room for the exceptions provided for in the Attorney General’s opinion.

Interestingly, the Attorney General’s opinion almost defeats itself when looked at through the lens of the public trust. The opinion supports itself by stating: “To hold that the state cannot use for prison, asylum, memorial, and canal purposes the lands which it acquires for such purpose ... would ... deprive the state of the right to the use of the means ordinarily employed in exercising the functions of government.”⁵² This, however, is actually what the public trust

⁴⁹ 1912 NY Atty Gen. Op. 104.

⁵⁰ N.Y. ENVTL. CONSERV. LAW § 9-0101(6) (McKinney 2010).

⁵¹ *People v. Fisher*, 190 N.Y. 468, 480, 83 N.E. 482, 486 (1908).

⁵² 1912 AG Op, at 106.

doctrine's entire purpose is; it is meant to be a limitation on government. Therefore the fact that the Forest Preserve was actually created as something to be held in trust for the public means that some limitations are placed on what the government can and cannot do. The Attorney General was using this to support his creation of the inconsistent acquisition doctrine, but in fact it explains one reason why it is unconstitutional, because it gives the state more power than it can have under the public trust.

A counter argument may be that reading the Attorney General's opinion closely, it does not say that the state may just apply this rule any time it wants to. In listing the inconsistent uses of state land in Forest Preserve counties, it lists things that are either historical or serve a governmental purpose, such as jails, asylums, and hospitals. Regardless of this quasi-restrictive language however, there are still huge problems with this idea of inconsistent acquisitions. First, as already stated, but worthy of emphasis, the inconsistent acquisition doctrine clearly flies in the face of the public trust, the Constitution, and the ECL. Second, although the Attorney General opinion seems to argue that it cannot be used for simply any reason, the opinion is not law, and as such offers no real protections for how it is used. Third, although it is tempting to argue that some of these things are necessary, the idea was not unheard of at the time of the 1894 Convention, yet was still not written into the Constitution or accompanying law.

To elaborate on the latter point, the full definition of “forest preserve” in the ECL provides:

The “forest preserve” shall include the lands owned or hereafter acquired by the state within the county of Clinton, except the towns of Altona and Dannemora, and the counties of Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, Saint Lawrence, Warren, Washington, Greene, Ulster and Sullivan, except:

- a. Lands within the limits of any village or city;
- b. Lands not wild lands and not situated within either the Adirondack park or the Catskill park acquired by the state on foreclosure of mortgages made to loan commissioners; and
- c. Lands acquired under the provisions of sections 9-0107 and 9-0501.⁵³

What is significant about this in regards to the argument for allowing inconsistent acquisitions is the phrase, “the county of Clinton, except the towns of Altona and Dannemora” at the beginning. This phrase has remained unchanged since it was contained in chapter 283, section 7, of the laws of 1885, and the two exceptions contained therein are towns where a prison had been constructed, and where land had been

⁵³ N.Y. ENVTL. CONSERV. LAW § 9-0101 (McKinney).

purchased for wood supply for the prison.⁵⁴ What this means is that the creators of the forest preserve knew there were things, such as prisons, that would be inconsistent with the purpose of the forest preserve, and in recognition of this they carved out explicit exceptions for them. Equally important is what they did *not* do, which was to provide an exception for any future inconsistent uses. This set of facts supports the inference that it was never the intention to allow for new inconsistent uses or acquisitions, and even though it is not explicitly stated that way, it is implied by what was and was not included in the Constitution.

The unconstitutionality of inconsistent uses is further supported by case law and the use of the public trust doctrine. The *Friends of Van Cortland Park* case is an interesting example of the limits placed on land protected under the public trust. In that case, the court determined that even though the proposed improvement was a public benefit,⁵⁵ and the interference with the parkland would not be permanent,⁵⁶ it was still a sufficient enough interference and inconsistent use that the State could not simply begin work on the project without legislative approval. Seeing how this holding was based on the public trust doctrine alone, it seems more than logical that forest preserve inconsistent uses would be taken even more seriously

⁵⁴ Glennon, *supra* note, 5, at 75.

⁵⁵ *Friends of Van Cortland Park*, *supra* note 25, at 626. (The city was trying to build a water treatment plant).

⁵⁶ *Id.* at 631. (The construction process would only interfere for five years).

because they are protected both by the public trust and the Constitution.

Another important case to consider when looking at inconsistent uses is *Indian Lake v. State Board of Equalization and Assessment*.⁵⁷ This case stands for two things: that the Constitution is clear enough for courts to overrule inconsistent acquisition, but also that due to New York's past indiscretions in allowing inconsistent acquisition doctrine to slip through the cracks, continuing down the unconstitutional path, is easily supported.

The Proceeding was brought seeking that the State Board of Equalization and Assessment include two tracts of land, the Cascade Lake Tract and the Salmon Lake Tract, in its approval list of taxable state land.⁵⁸ The court needed to decide if the two tracts of land were "forest preserve" for tax purposes, because the pertinent tax law required for "all wild or forest lands owned by the state within the forest preserve" be taxed.⁵⁹

Justice Koreman, sitting for the Supreme Court of New York, Special Term, decided that the lands were definitely Forest Preserve because they were stipulated as "wild or forest lands"⁶⁰ and were within the counties listed in the definition of Forest Preserve.⁶¹ The court

⁵⁷ 45 Misc.2d 463, 257 N.Y.S.2d 301

⁵⁸ *Town of Indian Lake v. State Board of Equalization*, 45 Misc.2d 463, 464, 257 N.Y.S.2d 301, 303-04 (Sup. Ct. N.Y. Special Term 1965).

⁵⁹ *Id.* at 465 & 303 quoting Real Property Tax Law, section 532.

⁶⁰ *Indian Lake*, *supra* note 52, at 465.

⁶¹ Then cited as section 63 subdivision 1 of the Conservation law; now found at N.Y. ENVTL. CONSERV. LAW § 9-0101 (McKinney)

used the plain language of the statutes and the constitution to come to its conclusion and found support from cases like *Fisher* and *Patenaude*,⁶² both of which also use a plain meaning approach to finding when land is protected by Article XIV. What Justice Koreman failed to adequately address however was the concept of inconsistent uses, and their constitutionality. The court mentioned the 1912 Attorney General's Opinion in passing,⁶³ but did not discuss it at all because it felt it addressed lands that were not wild or forest lands, and the case at bar was for wild or forest land.

Then on appeal, the Appellate Division only partially upheld the Special Term's ruling. The court there went back to looking at the purpose for which the land was acquired rather than what the law says. Furthermore, although the concept of inconsistent uses was extensively argued in both the appellant's and respondent's briefs, the Appellate Court failed to discuss this issue at all.

In an effort to take a closer look on this very important Constitutional issue that has been overlooked for far too long, the following will attempt to flesh out some of the pointed arguments made by both sides on this issue.⁶⁴

⁶² See generally, *People v. Fisher* 190 N.Y. 468 (1908), and *People v. Patenaude*, 286 App Div 140 (1955). Both cases in determining whether lands were in the Forest Preserve found the statutory language clear that all lands acquired in those counties were to be part of the Forest Preserve.

⁶³ *Indian Lake*, *supra* note 52, at 466.

⁶⁴ This paper cannot fully expound on all the points made in these briefs, although all should be thought about when making amendments to the Constitution. Points made that I will not discuss in detail, but deserve attention include: comments about recreational uses that seem to imply their unconstitutionality (see

The appellants' arguments go mainly toward the legislative intent, and what they feel is the more sensible way of interpreting the statutes and constitution. Appellants argue that because a private landowner in a Forest Preserve county can use land inconsistently with the "forever wild" provision it would be "absurd" to hold that the state could not do the same types of things with its land.⁶⁵ This argument fails for exactly the same reason as the similar reasoning in the 1912 Attorney General opinion, because the Forest Preserve is part of the public trust, and as explained, the point of the public trust is to limit what the government can and can't do with certain areas. Furthermore, the argument is also invalid when simply looking at the purpose of the Forest Preserve, regardless of its relationship to public trust because it was still created in order to prevent the State from doing certain activities on it.

The appellants go on to discuss the Attorneys General opinions of 1912 and 1957, both of which state that inconsistent acquisitions in forest preserve counties are acceptable. The brief points out that no one has challenged this rule,⁶⁶ and they seem to use that as a determination that nothing is wrong with it, but that is not necessarily true.

Appellants' brief pages 12-13); the issue being one of first impression and the side-stepping other courts have done around it (see both briefs generally); the referendum discussed in respondents' brief (pages 22-23).

⁶⁵ See Brief for Appellant at 14 *Towns of Indian Lake v. State Board of Equalization and Assessment*, 26 A.D.2d 707 (N.Y. 1966).

⁶⁶ *Id.* at 21.

This is followed by their argument that the “Court should give controlling weight to the practical interpretation of the Forest Preserve provisions given and acted upon by the legislative and executive branches.”⁶⁷ Then their second point states that the statutes involved are “amendatory” rather than “contradictory” of the Forest Preserve.⁶⁸ Both of these arguments overlook the fact that when it comes to the Constitution, the legislative and executive branches don’t have the power to change the terms on their own without an amendment, and a statute created by the legislature is not equal to a Constitutional amendment.

The Respondents had effective counter-arguments to these issues raised by the appellants. First, they dismiss the “too restrictive” argument by recounting the history of the construction of Article XIV and the *MacDonald* case, stating it “was obviously what the framers of the constitutional prohibition had in mind.”⁶⁹ Respondents also found a great deal of support in other case law for their arguments even though this exact issue has been skirted.⁷⁰

The respondents go on to discuss the lack of the legislative power. They preface this with by stating “this legislation is in error and in

⁶⁷ *Id.* at 22.

⁶⁸ *Id.* at 24.

⁶⁹ Brief for Respondent at 4 *Towns of Indian Lake v. State Board of Equalization and Assessment*, 26 A.D.2d 707 (N.Y. 1966).

⁷⁰ *See id.* at 17-19. Respondents cite many cases which support a strict reading of the constitutional provisions as they are “clear and definite,” but to analyze them all is beyond the scope of this paper.

contravention of the Constitution,”⁷¹ and go on to explain, “it is beyond the power of the legislature, or any officer or department of the State to overcome the constitutional mandates.”⁷² Respondents come back to this issue in concluding their brief, and really strengthen this argument further by stating:

The appellants’ position is that the legislature, in effect, can by legislation amend the constitutional provision to delete the words ‘or thereafter acquired’ . . . ‘no power exists on the part of the legislature or of any officer or department of the state to dispose of, or in any manner deprive the People of their title to the lands.’⁷³

This also strongly harkens back to the idea of the public trust and the protections provided therein, which is further emphasized by their conclusion that “[i]f legislation can exempt lands from the constitutional mandates then there is no reason why such lands cannot be converted, used and sold precisely in the fashion . . . the constitutional provisions were designed to overcome.”⁷⁴ This is the same argument for why legislature cannot alter the public trust of the Forest Preserve. As part of this lack of legislative authority argument, the respondents’ brief discussed the Attorneys General opinions

⁷¹ *Id.* at 9.

⁷² *Id.* at 10; *see also id.* at 6, 14, & 21 (re-emphasizing this point).

⁷³ *Id.* at 26 (*quoting* *Turner v. Kelsey* 180 N.Y. 24, 26 (1904)).

⁷⁴ *Id.* at 21.

brought up by the appellants, and clearly conclude “[t]hey are directly contrary to the clear language of the Constitution.”⁷⁵

If these two appellate briefs so clearly discussed the idea of inconsistent acquisitions, and the past Attorneys General opinions, why would the court fail to address any of these concerns? This paper cannot begin to speculate on judicial discretion, but one possibility is that the court understood just how spectacular the ramifications of ruling on the constitutionality of this idea would be. It would require a significant amount of post hoc action, and perhaps does not seem worth the trouble to the court. Obviously the easiest decision to make in regards to almost everything is to just let the chips fall as they may. Which is why it appears to me that the best way to prevent this issue for continuing to be ignored is to address this issue directly via the constitution. Either by making amendments for the things that have been allowed to slip through the crack and then “shutting the door” as the framers intended, or by codifying clear and explicit rules about what is and is not forest preserve. Perhaps an amendment as simple as: when the state acquires land in the enumerate counties it is automatically forest preserve land, subject to Article XIV, unless it is acquired specifically for the purpose of, a jail, a hospital, a historic monument, that is necessary for the public welfare.

It is also important to note that even though these inconsistent acquisitions that allow state lands to be excluded from the forest

⁷⁵ *Id.* at 17.

preserve are unconstitutional, it would potentially be more harmful if inconsistent uses were put in the forest preserve. While keeping some lands out of the forest preserve is failing to uphold the mandate to improve and expand the preserve, the latter possibility would be worse in the sense that it would allow forest preserve land to not be “forever wild,” and once land is in the preserve it is there forever. Allowing the presence of these types of things weakens the entire principle of the forest preserve and Article XIV. For those reasons, and for the reason that we seem to have allowed this issue to fall too far down the slippery slope, very narrowly tailored and strict rules need to be applied to existing non-conforming uses, and to all future acquisitions, and the appropriate amendments need to be made to allow for them.

It is the Legislature’s unwillingness to go through the amendment process that is an ongoing weakness and unconstitutionality, which must be remedied immediately. This may be most aptly exemplified by the DEC’s lax attitude in granting past temporary revocable permits (TRPs).

According to DEC’s own policies a TRP is a “permit for use of State land which is temporary in nature and which will not result in an unreasonable or permanent diminution of the natural values and characteristics of such land.”⁷⁶ Additionally, the policy states that

⁷⁶ Division of Lands and Forests, *Temporary Revocable Permit Policy*, N.Y. STATE DEC (July 31, 1986) <http://www.dec.ny.gov/regulations/51387.html>.

TRPs should last no longer than a year.⁷⁷ These things did not stop the DEC from granting a TRP to Central Hudson Gas & Electric for them to build electricity distribution lines. DEC granted Central Hudson's request on December 8, 1947.⁷⁸ The utility lines are on state land in Ulster County, and have never been required to obtain the proper constitutional amendment to allow for their presence. This is just another example of an unconstitutional inconsistent use that should never have been allowed to exist without an amendment to the Constitution.

Not only are these types of inconsistent uses violations of the Constitution but they are also contrary to public trust doctrine as demonstrated by the court's holding in *Friends of Van Cortland Park*.⁷⁹ These are the reasons why it is necessary to create a very specific statute or amendment that directly addresses inconsistent and non-conforming uses in the forest preserve. It has been proven time and time again that the Constitution alone is not enough. Even though it is clear and unambiguous what the Constitution requires, there have still been allowances for unconstitutional occurrences due to a lack of enforcement.

V. Navigating the Amendment Process

⁷⁷ *Id.* at part IV(A)(2).

⁷⁸ Letter from W.G. Howard, Director of Lands and Forests to Central Hudson Gas & Electric Corp. (Dec. 8, 1947) on file with author.

⁷⁹ See *supra* notes 55-56 and accompanying text.

Although amendments should be a way to strengthen Article XIV, perhaps it occurs to some that the amendment process is simply a tempting loophole, and the answer to their problem with the Forest Preserve is to simply amend it away. This is not a valid or legal option, and it is necessary to dispel this notion before the next Constitutional Convention.

A Constitutional Commission is not granted any additional power; it only has the power to do what the state can do. As previously mentioned, the state does not have the power to destroy the public trust due to the nature of the doctrine as a limitation on state power. Furthermore, if a state were to remove the Forest Preserve from the public trust it would imply that the state can remove anything from the public trust, and if that were true there would be no doctrine at all. This defeats the argument that you can diminish the Forest Preserve without diminishing the public trust doctrine. Therefore an attempt to repeal Article XIV and abolish the Forest Preserve is nowhere within the reach of the Commission's nor the Convention's power.

A. Anti-Degradation

Anti-degradation or anti-backsliding is a principle of common sense. If you work hard and make regulations and laws to improve something, why would the same law makers want to allow progress to go backward, or undo all of the work that has been done? Even though this concept seems like it would be able to go unsaid, it has been actually written into some statutes such as § 402(o) of the Clean Water

Act, and the Clean Air Act § 172(e). It would be wise to not only consider anti-backsliding when looking at proposed amendments, but also to consider incorporating it textually the way these other environmental statutes have done.

One example of the anti-backsliding concept being functionally present in the forever wild clause, even if not expressly written in, is the amendment process so far. As practiced, the amendment process has included the principle of “land swaps,” or in other words, when something is taken out, something else must be put in. This has a similar effect functionally as an anti-backsliding clause would. It allows flexibility and adaptation without degradation. Another example is found in the way land classifications work in the parks. The CPSLMP provides that “[r]e-classification of lands to a less restrictive classification may only be accomplished by an amendment to, or revision of, the [sic] this Plan.”⁸⁰ While this is not quite as strong anti-degradation language, it is a step in the right direction.

Part of the reason that it seems like anti-backsliding is in place for Article XIV, even without explicit mention of it, is due to its place in the public trust. As mentioned, the state has a duty as trustee to not allow for any diminishment to the trust. This is why the amendments contain land swaps, because not only would it be backsliding, but it would also be a violation and diminishment of the public trust.

⁸⁰ CPSLMP, *supra* note 38, at 11.

Although, from the faults this paper has already taken note of, it may seem like what has been done over time has been backsliding, there is a difference between backsliding and actions in violation of the Constitution and/or the public trust. For example, many of the actions by the DEC have been “one step forward – two steps back” types of movement; however, these actions are not authorized by Article XIV, and were not in fact voted on specifically by the public. This is where the other definition of trust comes into the public trust doctrine.

The Forest Preserve was put into the public trust so that it would remain available to the public in perpetuity. Because changes to Article XIV require the vote of the people, therefore changes to the use of the land also require the people’s backing. Surely everyone knows the only way for anything to be accomplished in a democracy is through delegation, and the public trusts the people whom these tasks are delegated to, to look out for their interests. The public trusts that their delegates, their state, the trustee of their lands, will do what the laws they voted on tell them to do. What the law says is “forever wild,” and the law implies no backsliding; that’s what the public trusts them to do.

Although, based on the legal reasoning already discussed, an anti-degradation law or amendment is not necessary to protect the Forest Preserve, it wouldn’t hurt, and perhaps, looking at some of the actions previously discussed, some would argue it’s needed. New York’s constitutional “forever wild” provision places itself and New York in a unique exemplary role. As one of the first of it’s kind it has set the

precedent around the world for other governments to take the safety of their local environment seriously. Governments across the globe, including Russia, Italy, and Brazil, look to Article XIV, the Adirondacks, and the Catskills as a role model. As a gold standard, the State should never be permitted to degrade New York's environmental constitutional provisions. Even though as it stands now, the Forest Preserve is protected from degradation by other means, perhaps that won't always be the case. If, for example, the next Convention leads to higher standards in relation to the State's protection of wilderness, it would make sense from both the environmental standpoint and the global policy standpoint to then prevent the standard from ever slipping back down.

VI. Conclusions for a Constitutional Convention

There are a number of very important implications for a future Constitutional Convention and Constitutional Commission, considering that sound legal analysis concludes that the public trust doctrine not only applies to the Forest Preserve, but also protects it by limiting government action. The foregoing text supports this finding along with the following restatement of the logical reasoning.

The public trust doctrine was instituted in England as a permanent limitation on the powers of the Crown. The doctrine, being well established, was brought to America and applied equally in the states. As such, when New York (and others) seceded from England and

became sovereign states the doctrine remained in place, meaning that it remains as a permanent limitation on New York State's sovereignty. Therefore it is an indestructible check on government. Furthermore, the Forest Preserve is part of the public trust, and is then privy to the protection it provides. Logically it follows that the Forest Preserve is also indestructible. The "forever wild" forest preserve is forever legally protected.

What this means for any future Constitutional Convention is that an attempt to diminish the Forest Preserve by any means, including trying to weaken or repeal Article XIV or the "forever wild" clause, would be beyond the scope of its authority. Even if such an action was pushed through the political process, it would be immediately overturned in the court of law.

On the other hand, if the proposals of the Convention went toward effectively strengthening Article XIV, they would most likely pass constitutional muster. They would of course have to abide by the other laws of the state and constitution. However, as already stated, because the state is essentially in the role of a trustee, it is required to act in benefit of the trust.⁸¹ As such, any amendments of this kind would be not only approved, but also encouraged.

Finally, the Convention should address the inconsistent use and acquisition issues discussed previously, and also adopt an anti-degradation clause. The latter is especially important if it is going to

⁸¹ See generally, Robinson *supra* note 1.

strengthen or expound upon the “forever wild” provision, so that progress made in the immediate future cannot be undone down the road. Although it seems that anti-degradation is implied by any trust/trustee relationship, it is wiser to make it legally explicit.