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History of New York State's "Forever Wild" Forest Preserve and the Agencies Charged with Carrying out Article XIV's Mandate

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HISTORY OF NEW YORK STATE’S “FOREVER WILD” FOREST
PRESERVE AND THE AGENCIES CHARGED WITH CARRYING
OUT ARTICLE XIV’S MANDATE

Jessica B. Silver

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I. Introduction

The State of New York is currently governed by the Constitution it adopted in 1894. Article XIV, § 1, formally known as Article VII, § 7, is probably the most controversial, yet well-known, provision of this Constitution because it “inaugurated the concept of ‘wilderness’ into the world of law for the first time ever, anywhere.”¹ This provision declares that the State owned land in the Adirondack and Catskill State Parks constituting the Forest Preserve shall remain “forever wild,” yet the State’s implementation of this mandate has varied since the time of its enactment, depending on the views and policies of the regulating agency. This paper traces the history of Article XIV’s interpretation by the Courts, Attorney Generals, and the environmental agency charged with its enforcement in an effort to guide future interpretation consistent with the Constitution’s mandate.

This paper also makes suggestions for the enhancement of Article XIV at the next Constitutional Convention, which will either be held in 2017, as required by the Constitution, or in the next few years, if the Legislature follows the recommendation of the Governor-Elect, Andrew Cuomo.² The last time the people of New York voted to hold a Constitutional Convention was in 1969. In light of “the financial crisis facing New York...coupled with the wide-spread dissatisfaction of the public with the government,” there is reason to believe that the

¹ N.A. Robinson, “*Forever Wild: New York’s Constitutional Mandates to Enhance the Forest Preserve*,” p.7 (“Arthur Crocker Lecture,” 2007).

² See Andrew Cuomo, “*The New NY Agenda: A Plan for Action*,” (Cuomo 2010).

Legislature will ask the voters whether they would like to hold a Constitutional Convention sooner than 2017.³ The purpose of this paper is to prepare the policy-makers who will have a voice at the Convention on the issues pertaining to Article XIV and its future implementation by the Department of Environmental Conservation for the benefit of New York.

II. Article XIV is Enacted to Preserve and Protect New York State's Forest Preserve

On November 6, 1894, New York State voters adopted a new Constitution, which included as an amendment Article VII, § 7.⁴ On November 8, 1938, this section was amended and renumbered as Article XIV, § 1.⁵ Presently, Article XIV, § 1, also known as the “forever wild” clause, requires the following:

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.⁶

³ Peter J. Galie, *When is Constitutional Revision Constitutional Reform?* *Constitutional Development in New York*, 12 N.Y. ST. B.A. GOV'T, LAW & POL'Y J. 5, 12 (2010).

⁴ THE CONSTITUTION OF THE STATE OF NEW YORK WITH NOTES, REFERENCES AND ANNOTATIONS, TOGETHER WITH THE ARTICLES OF CONFEDERATION, CONSTITUTION OF THE UNITED STATES, NEW YORK STATE CONSTITUTIONS OF 1777, 1821, 1846, UNAMENDED AND AS AMENDED AND IN FORCE IN 1894, WITH AN INDEX OF THE REVISED CONSTITUTION AND THE CONSTITUTION OF THE UNITED STATES 187 (Robert C. Cumming, Owen L. Potter & Frank B. Gilbert eds., James B. Lyon 1894).

⁵ N.Y. Const. art XIV, § 1 (1894).

⁶ *Id.*

This amendment provides constitutional protection for the Forest Preserve, which was created by the Legislature in 1885 with the passage of Chapter 283 of the Laws of 1885.⁷

Chapter 283 of the Laws of 1885 defined the Forest Preserve to include all state lands within eleven Adirondack counties and three Catskill counties,⁸ which was “comprised of scattered parcels totaling about 681,000 acres.”⁹ In 1889, the Legislature expanded the Forest Preserve to include all state-owned wild land within twelve Adirondack counties and four Catskill counties,¹⁰ which are the counties that make up the Forest Preserve today. In 1890, the Forest Preserve was again redefined, but this time to exclude from the Forest Preserve land within villages and cities that were not wild lands.¹¹ In 1892, the Adirondack Park was created by the Legislature and a blue line was placed on the New York State map encircling State-owned forest lands as well as private lands in the Adirondack region “to provide adequate protection to forests and identity to a consolidated Forest Preserve.”¹² In 1916 and 1924, New York voters approved bond acts and appropriations for acquiring private land for the public Forest Preserve and by 1950, the Forest Preserve consisted of over 2.1 million acres.¹³ Today, the Forest Preserve is defined in section 9-0101(6) of the Environmental

⁷ 1885 N.Y. Laws 482.

⁸ *Id.*

⁹ Philip G. Terrie, *Contested Terrain* 95 (Alice Wolf Gilborn ed., Adirondack Museum & Syracuse U. Press 2008) (1999).

¹⁰ 1889 N.Y. Laws 20.

¹¹ 1890 N.Y. Laws 18.

¹² *Contested Terrain*, *supra* note 9, at 83, 101.

¹³ *Id.* at 143.

Conservation Law¹⁴ and in sum it is “all state-owned lands within the Adirondack and Catskill state parks”¹⁵ that is wild, which is roughly 3 million acres.¹⁶

While Chapter 283 provided the Forest Preserve lands with statutory protection, “the forest preserve was given constitutional protection to bring a halt to the commercial exploitation of the State’s forest preserve, and presumably, to protect them for use by all the people of the State.”¹⁷ The Legislature had good intentions when enacting the Forest Preserve statute in 1885, which provided that “[t]he lands now or hereafter constituting the forest preserve shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private.”¹⁸ However, economic pressures from the lumber industry swayed the Legislature early on to redact from this “forever wild” mandate. Beginning with the passage of Chapter 475 of the Laws of 1887, which amended Chapter 283 of the Laws of 1885, the State granted the right to sell, lease, and cut timber from the Forest Preserve lands.¹⁹

¹⁴ N.Y. Envtl. Conserv. Law § 9-0101(6) (McKinney 2010).

¹⁵ Weinberg, McKinney Practice Commentary, N.Y. Envtl. Conserv. Law § 1-0101 (2006); *See also Helms v. Reid*, 394 N.Y.S.2d 987, 1000-1001 (N.Y. Sup. Ct. 1977) (citing N.Y.S. Conserv. Dept. Rep., *The Adirondacks, New York’s Forest Preserve and a Proposed National Park*, note 11 at 5).

¹⁶ DEC Website, <http://www.dec.ny.gov/lands/4960.html>.

¹⁷ *Helms v. Reid*, 394 N.Y.S.2d at 994 (quoting William H. Kissel, *Permissible Uses of New York’s Forest Preserve Under “Forever Wild*, 19 Syracuse L. Rev. 969 (1968)).

¹⁸ 1885 N.Y. Laws 482.

¹⁹ 1887 NY Laws 600.

When lumber baron Theodore Basselin was appointed to the Forest Commission, which was created by the Laws of 1885 to protect and manage the State's forest lands in the Adirondacks and the Catskills,²⁰ the Commission clearly understood the change in the statutory mandate from keeping the lands "forever wild" to its use as a timber reserve. However, the Commission's dealings with the Forest Preserve were corrupt and timber theft was rampant in the late 1880s to early 90s. The public noticed and on September 15, 1889, the front-page headline of the New York Times shouted, "Despoiling the Forests—Shameful Work Going on in the Adirondacks. Everything Being Ruined by the Rapacious Lumberman—State Employees Engaged in the Business."²¹

The legislation creating the Adirondack Park also reaffirmed the Legislature's backsliding and new intentions that the timber within the Park could be put to the timber industry's use. In 1893, the Legislature provided the following:

Such park shall be forever reserved, maintained and cared for as ground open for free use of all the people for their health and pleasure, and as forest lands, necessary to the preservation of the headwaters of the chief rivers of the state, and *a future timber supply*; and shall remain part of the Forest Preserve.²²

²⁰ *Contested Terrain*, *supra* note 9, at 96.

²¹ *Despoiling the Forests—Shameful Work Going on in the Adirondacks. Everything Being Ruined by the Rapacious Lumberman—State Employees Engaged in the Business*, N.Y. Times, Sept. 15, 1889; *See also* Terrie, *supra* note 9, at 97.

²² 1893 N.Y. Laws 643 (emphasis added)— *See also* Robinson, *supra* note 1, at 11.

Section 103 of the Laws of 1893 also provided that the Forest Commission could sell timber in any part of the Forest Preserve, with the proceeds of such sales going to the State treasurer.²³

The people of New York recognized the importance of the forest lands in the Adirondacks and the Catskills and “[d]elegates to the constitutional convention became convinced that neither loggers nor the Forest Commission could be trusted on the Forest Preserve.”²⁴ The constitutional amendment further memorializing the importance of the Forest Preserve was accepted by the Legislature unanimously and was passed by the voters in New York State in 1894. The amendment to the New York State Constitution provided enhanced protection for this land “to prevent the cutting, destruction or sale of timber as had previously been permitted by the Legislature to the detriment of the forest preserve.”²⁵

III. How Article XIV of the New York State Constitution is Interpreted Today

It is the New York State law that “[w]here words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation.”²⁶ Only when the legislative intent is not clear from the statutory text may the courts “go outside the statute in an endeavor to

²³ 1893 N.Y. Laws 635.

²⁴ *Contested Terrain*, *supra* note 9, at 102.

²⁵ 1996 N.Y. Op. Att’y Gen. 5, *1 (1996) (citing *Ass’n for Prot. of Adirondacks v. MacDonald*, 239 N.Y.S. 31 (App. Div. 1930), *aff’d*, 170 N.E. 902, 904-905 (N.Y. 1930)).

²⁶ N.Y. STAT. Law § 76 (McKinney 2010).

ascertain their true meaning.”²⁷ When the legislative intent is not clear from the text of the statute, courts may employ methods of statutory construction and “call in the aid of extrinsic considerations.”²⁸

The Legislature carefully drafted the language of Article VII, § 7, later known as Article XIV, § 1, to close the gaps that had caused confusion in the statutory enactment in Laws of 1885. Section 7 of Chapter 283 of the Laws of 1885 stated, “[a]ll the lands now owned or which hereafter may be acquired by the state of New York, within the counties of...shall constitute and be known as the forest preserve.”²⁹ In drafting the amendment using the language in Chapter 283 as the framework, the Legislature clearly reinforced the State’s intention for the lands to be State Forest Preserve lands by writing in the language “as now fixed by law.” In addition, the Legislature’s inclusion of the phrase “nor shall the timber thereon be sold, removed or destroyed”³⁰ to the language of section 8 of Chapter 283 is indicative of the Legislature’s intention for a total ban on logging within the Forest Preserve.

The Legislature also reconsidered the language of the “forever wild” provision in “[f]our constitutional conventions, 1894, 1915, 1938, and 1967...and the basic language adopted in 1894 has remained

²⁷ Comment, N.Y. STAT. Law § 92 (McKinney 2010) (quoting *Reed v. James W. Bell & Co.*, 69 N.Y.S.2d 898, 900 (N.Y. Sup. Ct. 1947)).

²⁸ Comment, N.Y. STAT. Law § 71 (McKinney 2010) (citing *Bromley v. Mollnar*, 39 N.Y.S.2d 424 (N.Y. Co. Ct. 1942)).

²⁹ 1885 N.Y. Laws 482.

³⁰ *Id.*

unchanged.”³¹ However, despite the plain language speaking the Legislature’s intent in clear terms, extrinsic considerations, such as the legislative history, have been employed by the courts, agencies and the Attorney Generals to interpret the “forever wild” clause. “[I]t is clear intent, not clear language, which precludes further investigation as to the interpretation of a statute,”³² and the intent of the provision has been questioned numerous times.

A. Legislative History Reveals Legislative Intent in “Forever Wild” Clause

In 1977, the New York supreme court in *Helms v. Reid* acknowledged that the “records of the convention may properly be used to determine the meaning of this provision.”³³ The text of the amendment was first drafted by the Special Committee on State Forest Preservation, a committee appointed by the Convention “to consider and report what, if any amendments to the Constitution should be adopted for the preservation of the State forests.”³⁴ The Special Committee determined the following:

[I]t is necessary for the health, safety and general advantage of the people of the State that the forest lands now owned by and hereafter acquired by the State, and the timber on such lands, should be preserved intact as forest preserves, and not, under any circumstances, be sold...for the perfect protection and

³¹ Alfred S. Forsyth & Norman J. Van Valkenburgh, *THE FOREST AND THE LAW* II 19 (Ass’n for the Protection of the Adirondacks 1996).

³² Comment, N.Y. STAT. Law § 76 (McKinney 2010) (citing *Commissioner of Social Services v. Jessie B.*, 444 N.Y.S.2d 556 (N.Y. Fam. Ct. 1981)).

³³ *Helms v. Reid*, 394 N.Y.S.2d at 995 (citing *In re Dowling*, 113 N.E. 545 (N.Y. 1916)).

³⁴ Forsyth, *supra* note 31, 21-25.

preservation of the State land, other lands contiguous thereto should, as soon as possible, be purchased or otherwise acquired...³⁵

In addition, David McClure, Chairman of the Special Committee, emphasized in his argument to the Convention “the value of wild forests for water storage, water for navigation, and water supply.”³⁶ Expanding further on the Committee’s position with regard to the timber and the Forest Preserve lands, David McClure argued the following:

[W]e should not permit the sale of one acre of land. We should keep all we have. We should not exchange our lands...there is no necessity why we should part with any of our lands. We should not sell a tree or a branch of one. In the primeval forest when the tree falls it is practically dead and where it falls it is a protection to the other trees...the Legislature should purchase all of the forest lands, both in the Adirondacks and the Catskills, not now owned by the State, and should preserve them, even though it costs millions of dollars to do it. The millions so invested will be well spent.³⁷

Delegate Judge William P. Goodelle of Syracuse also succeeded in convincing the convention to include the language “or destroyed” to the amendment’s text to prevent the destruction of trees from the flooding of dams, which New Yorkers had previously watched happen when a dam was built on the Beaver River.³⁸ “Other amendments to the clause were advocated by delegates, but were ultimately rejected: one for exchange of lands; another authorized the Legislature ‘by suitable laws,

³⁵ *Id.* at 21.

³⁶ *Id.* at 23.

³⁷ *Id.* at 23-24 (quoting *N.Y. Const. Conv. 1894*, Vol. IV, p. 139).

³⁸ *Id.* at 24 (citing *N.Y. Const. Conv. 1894*, Vol. IV, p. 141).

to provide for the preservation and protection of the forest'; [and] another excepted certain lands..."³⁹ The delegates to the convention clearly intended that the forest lands and trees be preserved intact, and the language of Article VII, § 7 reflects this strict mandate.

B. Legislative Enactments and Amendments Applicable to Article XIV

Even though the convention rejected the amendment authorizing the Legislature to pass laws relevant to the preservation and protection of the forest,⁴⁰ the Legislature still has the power to do so under the Constitution. Section 2 of McKinney's Statutes provides that "[u]nder the Constitution and provisions therein for distribution of governmental powers, the Legislature is given the power to determine policy and make law."⁴¹ In enacting legislation, the Legislature must follow the procedures provided by Article III of the New York State Constitution,⁴² which do not require a popular vote.⁴³ Section 15 of McKinney's Statutes provides that "[t]he Legislature may or should in certain cases submit a law to popular vote."⁴⁴ Only when the Constitution requires a referendum in the enactment of certain laws or when a statute requires a referendum, is a popular vote required.⁴⁵ Therefore, the Legislature has the authority to create laws that apply

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ N.Y. STAT. Law § 2 (McKinney 2010).

⁴² N.Y. Const. art III (1894).

⁴³ N.Y. STAT. Law § 15 (McKinney 2010).

⁴⁴ *Id.*

⁴⁵ Comments to N.Y. STAT. Law § 15 (McKinney 2010).

to the Forest Preserve without the approval of the public so long as the laws do not enlarge or abridge the Constitution.⁴⁶

There are two ways for the Legislature to amend the Constitution. The first begins with the proposal of an amendment before the Senate and Assembly, followed by an opinion by the Attorney General on how the amendment will affect other provisions of the Constitution. The Senate and Assembly then vote on the amendment in light of the changes made after the opinion. If the amendment passes both houses by a majority, then the amendment gets “referred to the next regular legislative session convening after the succeeding general election of members of the assembly.”⁴⁷ If the amendment passes by a majority in both houses in this session, then the amendment is put to the voters. If the voters ratify the amendment by a majority, the amendment is added to the Constitution.⁴⁸ The second way to amend the Constitution is through a constitutional convention. Every twenty years the Constitution requires that the people of New York be asked to vote on whether to hold a constitutional convention to amend or revise the Constitution. In addition, the legislature may ask the people of New York to vote on the issue of whether to hold a constitutional convention before the minimum twenty-year requirement.⁴⁹

⁴⁶ Comment to N.Y. STAT. Law § 2 (McKinney 2010); citing (*People v. Allen*, 93 N.E.2d 850 (N.Y. 1950)).

⁴⁷ N.Y. Const. art XIX, § 1 (1894).

⁴⁸ *Id.*

⁴⁹ N.Y. Const. art XIX, §2 (1894).

With the Forest Commission's long history of abuse to the Forest Preserve, the Legislature dissolved that Commission and created the Fisheries, Game and Forest Commission in 1895,⁵⁰ which was to "[h]ave the care, custody, control and superintendence of the forest preserve [to] [m]aintain and protect the forests..."⁵¹ However, in 1895, lobbying by the timber industry persuaded some Legislatures that they should amend the Article VII, § 1 to permit logging on the Forest Preserve land. The Legislatures of 1895 and 1896 both approved this amendment with the support of the new Commission, and the amendment was put to the New York voters later in 1896. The New York voters defeated this amendment by more than two to one and reaffirmed their desire to keep the Forest Preserve "forever wild."⁵² While Article VII, § 7 put a halt to logging on Forest Preserve land, the timber industry still actively cut the trees from the lands surrounding the Forest Preserve in the Adirondack Park.⁵³

With the invention of paper, "logging in the Adirondacks reached its peak between 1890 and 1910"⁵⁴ as companies demanded pulp. This increase in logging combined with the added mileage of railroad tracks in the region led to the terrible forest fires of 1903 and 1908, which "showed that uncontrolled exploitation of Adirondack forests could

⁵⁰ 1895 N.Y. Laws 238.

⁵¹ 1895 N.Y. Laws 244.

⁵² Terrie, *supra* note 9, at 102.

⁵³ *Id.* at 106.

⁵⁴ *Id.* at 107.

destroy everything that made the region vital to the state's welfare.”⁵⁵ In 1910, the Legislature passed the Forest Fish and Game law, which put restrictions on the method loggers used when cutting trees.⁵⁶ This enactment greatly reduced the forest fires. In 1911, the Legislature attempted to enact a law that would “allow the removal of fallen, dead, burned or mature timber from the Preserve.”⁵⁷ This provision was defeated, and it clearly would have violated the Constitution, which prohibits the removal of timber from the Forest Preserve.

Also in 1911, Governor Dix exercised his power under New York Constitution Article IV, § 3⁵⁸ and addressed the Legislature in his inaugural address recommending the consolidation of the Forest, Fish and Game Commission and the State Water Supply Commission.⁵⁹ The Legislature followed the Governor's direction and under the authority granted to the Legislature by Article V, § 3⁶⁰ of the Constitution, the Legislature in 1911 consolidated the Commissions under the new the Conservation Department. The new Department included a Conservation Commission,⁶¹ a division of lands and forests, a division of inland waters, and a division of fish and game.⁶² The Constitution provides that the Legislature may “assign by law new powers and

⁵⁵ *Id.* at 114.

⁵⁶ 1909 N.Y. Laws 1137; *See also* Terrie, *supra* note 9, at 114.

⁵⁷ Robinson, *supra* note 1, at 14.

⁵⁸ N.Y. Const. art IV, § 3 (1894).

⁵⁹ Alfred Lee Donaldson, A History of the Adirondacks 234 (The Century Co., vol. 2 1921).

⁶⁰ N.Y. Const. art V, § 3 (1894).

⁶¹ 1911 N.Y. Laws 1497.

⁶² 1911 N.Y. Laws 1499.

functions to departments, officers, boards, commissions or executive offices of the governor, and increase, modify or diminish their powers and functions.”⁶³ The Legislature exercised this authority in 1911 and codified the Conservation Law to direct the Department in the implementation of its duties.⁶⁴

In 1913, the people of New York approved the first amendment to Article XIV, which “provided that up to 3 percent of the total acreage of the Forest Preserve could be used ‘for the construction and maintenance of reservoirs for municipal water supply, for the canals of the state and to regulate the flow of streams.’”⁶⁵ This amendment can now be found in section 2 of Article XIV.⁶⁶ In 1914, the people of New York approved a convention.⁶⁷ The proposed Constitution produced by the Convention attempted to amend the “forever wild” provision even further, but was ultimately rejected by the voters in 1915 reaffirming the public’s desire to keep these lands “forever wild.”⁶⁸ In 1916 and 1924, New York voters approved bond acts and appropriations for acquiring private land for the public Forest Preserve,⁶⁹ and in 1919 the Legislature expanded “the definition of the Adirondack Park to include ‘all lands’ within the Blue Line, not just ‘State lands.’”⁷⁰ From 1918 to 1931, the voters in New York passed amendments to Article XIV

⁶³ *Id.*

⁶⁴ 1911 N.Y. Laws 1496.

⁶⁵ Forsyth, *supra* note 31, 30.

⁶⁶ N.Y. Const. art XIV, § 2 (1894).

⁶⁷ Galie, *supra* note 3, 8.

⁶⁸ See Robinson, *supra* note 1, at 14.

⁶⁹ *Contested Terrain*, *supra* note 9, at 143.

⁷⁰ Robinson, *supra* note 1, at 15 (citing L. 1912, Ch. 444).

authorizing the construction of specific highways through the Forest Preserve, which can now be found in section 1, and the voters granted the State the right “to acquire lands for the establishment of forest tree nurseries and reforestation areas all across the State, significantly including those parts of the forest preserve counties outside the Adirondack and Catskill parks.”⁷¹ This amendment is now codified as section 3 of Article XIV.

In 1938, New York voters adopted the new Constitution, which renumbered the “forever wild” provision from Article VII to Article XIV, but otherwise did not make any significant changes to the “forever wild” provision. In 1941 and 1947, New York voters approved the legislative enactments for ski trails on Whiteface Mountain, Belleayre Mountain, and Gore Mountain. This amendment and a number of other amendments were adopted in the years leading up to the Constitutional Convention in 1967. While the 1967 proposed Constitution was rejected by the voters, the Legislature secured other amendments to Article XIV following the convention.

The amendments to the “forever wild” provision authorized by the voters of New York are compiled in a long list affixed to the once simple language of Article XIV, § 1. All of the amendments, except for the provisions applying to the highways, are conditional land grants, conditioned on the terms that Forest Preserve land will be exchanged for land of an equal or greater amount, which was to be added to the

⁷¹ Forsyth, *supra* note 31, 43.

Forest Preserve.⁷² The following is a summary of the amendments.

The State is authorized to construct, complete, maintain, and relocate to eliminate hazardous conditions federal interstate highway route 502 to federal standards as well as any other highway specifically authorized by constitutional amendment in the future. The State is authorized to construct and maintain a specific number of ski trails on Whiteface Mountain, Belleayre Mountain and on Gore and Pete Gay Mountains. Forest Preserve land is granted to the village of Saranac Lake for refuse disposal, to the town of Keene for a cemetery, and to the town of Long Lake and Raquette Lake for drinking water wells and a municipal water supply. Forest Preserve land is granted to the town of Arietta for the extension of the runway and landing strip at its local airport, and a later amendment was passed to extend the runway further and to provide “for the maintenance of a clear zone around such runway.”⁷³ An amendment provided for a land swap with International Paper Company for the same amount of land in order for the State “to consolidate its land holdings for better management.”⁷⁴ An amendment to Article XIV, § 1 also grants Forest Preserve land and the buildings thereon to non-profit Sagamore Institute, Inc. for historical preservation purposes. Lastly, an amendment granted Forest Preserve land to National Grid to construct a new power line.⁷⁵

⁷² N.Y. Const. art XIV, § 1 (1894).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

The Legislature asked the voters twice whether or not to hold a Constitutional Convention since the 1967 attempt, and in both 1977 and 1997 the voters said no.⁷⁶ However, “[f]ifty-two amendments were adopted between 1968 and 2010.”⁷⁷ Besides the amendments described above, Section 4 of Article XIV passed into law, which provides:

The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of agricultural lands...The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources.⁷⁸

The amendment also requires the Legislature to acquire new lands and waters, and any buildings thereon suitable for preservation are to become part of the state nature and historical preserve for the use and benefit of the people.⁷⁹ Adopted in 1939, Article XIV, § 5 states, that “[a] violation of any of the provisions of this article may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of any citizen.”⁸⁰ The Appellate Division interpreted this amendment in *People v. System Properties* to mean the following:

⁷⁶ Galie, *supra* note 3 , 10.

⁷⁷ *Id.* at 9.

⁷⁸ N.Y. Const. art XIV, § 4 (1894).

⁷⁹ *Id.*

⁸⁰ N.Y. Const. art XIV, § 1 (1894).

The power to enforce the State's rights with respect to the forest preserve is vested by the Constitution, in the first instance, in the Attorney General. The Constitution gives a secondary right to any citizen of the state to maintain an action to restrain a violation, if the Attorney General defaults, provided that the Appellate Division consents to the maintenance of such action.⁸¹

While amendments to the constitution added provisions to Article XIV rejected by the framers, such as the exchange for lands,⁸² the legislature's authority to propose amendments, which the voters then adopt or reject, is the correct way to amend the Constitution. Conditions change over time, and it is important that the law remain fluid by allowing it to be subject to future amendments, so that the law reflects the present day needs and circumstances of the society it governs. The issues that face the people of New York today differ in many respects from the issues New York faced in 1894. Article XIV includes specific, narrow exceptions that were authorized by the voters of the State rather than general, broad exceptions.

There are legislative enactments that do clearly violate the Constitutional mandate of Article XIV, however they have not yet been challenged before the courts. Two examples are Chapter 401 of the Laws of 1921 and Chapter 275 of the Laws of 1924, which both granted the state commission of highways the right to use "stone, gravel and sand [from the Forest Preserve] and to occupy a right of way on certain lands in the forest preserve in order to construct the state and county

⁸¹ *People v. System Properties*, 120 N.Y.S.2d 269, 280 (App. Div. 1953).

⁸² N.Y. Const. art XIV, § 1 (1894).

highways....”⁸³ These amendments applicable to the Forest Preserve are not covered by the constitution’s text, which is a violation of Article XIV and McKinney’s Statutes § 2. Section 2 of New York’s statutory law provides that “[u]nder the Constitution...the Legislature is given the power to determine policy and make laws.”⁸⁴ The term “under” imposes a limitation on the Legislature’s powers,⁸⁵ and the Legislature may not act counter to the Constitution’s mandate nor may the Legislature use its powers to expand what the Constitution authorizes.⁸⁶ Therefore, these legislative enactments should be challenged in the courts of New York for the protection of the state Forest Preserve. Furthermore, since the amended language of Article XIV is still clear, Article XIV should continue to be strictly construed,⁸⁷ and inconsistent uses should be prohibited unless authorized by new constitutional amendments.

C. Early Case Law and Attorney General Opinions

Interpreting Article XIV

Before the *MacDonald* decision in 1930,⁸⁸ Article XIV § 1 was interpreted by the courts using strict construction to give meaning to the legislative intent. In 1900, the Supreme Court of the United States “held that the construction of a railroad was an inconsistent public use

⁸³ L. 1921, Ch. 401; *See also* Forsyth, *supra* note 31, 41.

⁸⁴ N.Y. STAT. § 2.

⁸⁵ *Id.* (citing *F.A. Straus & Co. v. Canadian Pac. R. Co.*, 173 N.E. 564, 567 (N.Y. 1930)).

⁸⁶ Comment to N.Y. STAT. Law § 2 (McKinney 2010); citing (*People v. Allen*, 93 N.E.2d 850 (N.Y. 1950)).

⁸⁷ N.Y. STAT. Law § 76.

⁸⁸ *MacDonald*, 170 N.E. at 904-905.

of the state's land in the Forest Preserve.”⁸⁹ In 1904, the Court of Appeals of New York recognized that neither the legislature nor other officers or departments of the state of New York had any power or right to deprive the People of the title to the lands in the Forest Preserve.⁹⁰ In 1914, the Court of Appeals of New York held that the Forest, Fish and Game Commissioner could not grant a party the right to the timber on land which had contested ownership, but which the Commissioner thought to be Forest Preserve land. The court held that fee title had to be determined on the land before such a grant could be made because the removal of timber from Forest Preserve land would violate the Constitution.⁹¹ In 1910, the appellate division of the New York supreme court emphasized the gravity of the offense of cutting timber from the Forest Preserve in *People v. Gaylord*. The court upheld the criminal conviction for grand larceny of an employee of the Forest, Fish and Game Commission who feloniously was cutting and selling Forest Preserve timber. These court decisions were decided in accord with the strict construction of Article XIV's text in view of its legislative history.

Attorney General opinions prior to the *MacDonald* opinion varied in their interpretations of Article XIV. Attorney General opinions are not legally binding, but rather are advisory opinions often issued at the request of an agency. Attorney General opinions “are usually accorded

⁸⁹ *MacDonald*, 239 N.Y.S. at 38 (citing *Adirondack Ry. Co.* 176 U.S. 335).

⁹⁰ *People ex rel. Turner v. Kelsey*, 18 Bedell 24, 26, 72 N.E. 524 (N.Y. 1904).

⁹¹ *People v. Santa Clara Lumber Co.*, 106 N.E. 927 (N.Y. 1914).

considerable weight,”⁹² and the opinions interpreting the “forever wild” provision are indicative of the issues contemporaneously before the agencies charged with enforcing and regulating the Forest Preserve. However, the opinions provided inconsistent advice to the agencies in their explanations of what is permissible under Article XIV because their advice rested more on political motives than on sound legal bases.

In 1910, the supreme court of New York noted that “previous constructions [of the “forever wild” provision] by [the] Attorney General [were] that such lands belonging to the state ‘cannot be cleaned up, and burned or decayed timber cannot be taken therefrom.’... ‘This is in all probability the construction of the constitutional provision which is in accord with its true meaning, and we believe it will be upheld by the courts.’”⁹³ However, in 1919, an Attorney General opinion was issued authorizing incidental cutting and removal of trees to establish roads or paths or for the pleasure and convenience of the Forest Preserve visitors.⁹⁴ The Attorney General clearly did not strictly construe the words of Article XIV in this case. In 1921, it was the opinion of the Attorney General that the Conservation Commission could not authorize the cutting or removal of trees in the Forest Preserve for the purpose of dam reconstruction.⁹⁵ This decision was based on the strict construction of Article XIV. Yet again, in 1927, the Attorney General

⁹² Forsyth, *supra* note 31, 47.

⁹³ *MacDonald*, 239 N.Y.S. at 39 (quoting *Newcomb v. Ostrander*, 122 N.Y.S. 823, 826 (N.Y. Sup. Ct. 1910), *aff’d*, 125 N.Y.S. 1133 (N.Y. Sup. Ct., App. Div. 1910)).

⁹⁴ 1919, Op. Atty. Gen., 21 St. Dept. Rep. 412.

⁹⁵ 1921, Op. Atty. Gen., 26 St. Dept. Rep. 281.

issued a position that cutting and removing trees in the Forest Preserve as good forestry demanded was consistent with the Constitution.⁹⁶ These opinions go back and forth authorizing, using a more liberal construction, and then prohibiting, using strict construction, the cutting and removal of trees rather than providing the Commission with a consistent answer as to what Article XIV requires.

Four Attorney General opinions also diverged from strict construction of Article XIV on the grounds that the authority to do so existed prior to the constitutional enactment. In two of those opinions, an attorney general held that the construction and maintenance of roads was permissible under Article XIV because the “authority to do so existed prior to 1894, and had not been expressly abrogated by the Constitution.”⁹⁷ The third opinion was issued in 1912 and held that the Lake George Battleground Park area was not “wild land” at the time of the amendment’s enactment and therefore was exempt from the “forever wild” mandate.⁹⁸ The opinion stated the following:

I think where the statute authorizing the purchase of lands for the State plainly indicated that such land is to be used for a definite purpose which is inconsistent with its use as wild forest lands, where such purpose is one which the state had for many years previous to the enactment of the law defining the forest preserve recognized as necessary or proper in promoting the ends of government, that the provisions of law defining the forest preserve should not be held to apply so as to bring it

⁹⁶ 1927, Op. Atty. Gen. 252, 37 St. Dept. Rep. 390.

⁹⁷ *Id.* (citing 1919 Op. Atty. Gen. 266; 1921 Op. Atty. Gen. 130).

⁹⁸ Forsyth, *supra* note 31, 48 (citing 1912 Op. Atty. Gen. 104).

within the constitutional provisions relating to the forest preserve.⁹⁹

The fourth opinion relied on the 1912 opinion and held that the Conservation Department did not have authority over the regulation of the Hinckley and Delta reservoirs, which are within the Forest Preserve counties, because the 1894 Constitution preserved the “laws governing canal operations and relating to regulating their waters...The Attorney General regarded these provisions to be of equal standing with Article VII, section 7, and ruled that the...lands...had never become part of the Forest Preserve.”¹⁰⁰

These opinions are not legally binding but courts should construe the legality of such opinions before affording them any weight. The amendments to Article XIV are evidence that lands intended to be exempt from the Forest Preserve are expressly stated in the statute’s text. If the State were to accept the reasoning of the last four Attorney General opinions discussed, it would be like opening Pandora’s Box because “the reasoning would justify any exception if only it had some connection with a governmental function ante-dating 1894!”¹⁰¹

D. Interpretation of Article XIV after *MacDonald*

⁹⁹ *Id.* at 49.

¹⁰⁰ *Id.*

¹⁰¹ Forsyth, *supra* note 31, 49.

In 1930, the New York Court of Appeals issued the *Association for the Protection of the Adirondacks v. MacDonald* decision, which has since been treated with great deferential weight by the courts and Attorney Generals interpreting Article XIV.¹⁰² The issue before the court was whether or not the legislative enactment authorizing the cutting and clearing of trees on Forest Preserve land for the purpose of constructing a “bob-sleigh run” to be used in the 1932 Olympic Winter Games was constitutionally permissible under Article XIV. Using strict construction, the Appellate Division of the Supreme Court unanimously held that the legislation was unconstitutional and that the Forest Preserve “must always retain the character of a wilderness.”¹⁰³ The Conservation Department appealed to the Court of Appeals, which also unanimously affirmed that the legislature had enacted an unconstitutional use of the Forest Preserve. The Court of Appeals decision is most widely known for the following language, which authorizes a “reasonable interpretation” of the constitutional mandate:

The Adirondack Park was to be preserved, not destroyed. Therefore, all things necessary were permitted, such as measures to prevent forest fires, the repairs to roads and proper inspection, or the erection and maintenance of proper facilities for the use by the public which did not call for the removal of the timber to any material degree...Unless prohibited by the constitutional provision, this use and preservation are subject to the reasonable regulations of the Legislature.¹⁰⁴

¹⁰² *MacDonald*, 170 N.E. 902.

¹⁰³ *MacDonald*, 239 N.Y.S. at 40.

¹⁰⁴ *MacDonald*, 170 N.E. at 903-904.

The supreme court of New York in *Helms v. Reid* noted that “[t]hese standards of ‘reasonable’ and ‘necessary’ obviously raise problems in the implementation of such a decision and require factual determinations as to each use sought to be made of the preserve.”¹⁰⁵ However, factual determinations should be made for each proposed use of the Forest Preserve, especially when the constitutionality of such use is questioned. Also, the courts have consistently used the terms *reasonable* and *necessary* when interpreting other provisions of the New York State Constitution, which can provide further guidance for how Article XIV should be interpreted.¹⁰⁶ In addition, the *MacDonald* Court of Appeals opinion has “set a precedent for tree-counting which is still used today in deciding the scope of proposed projects, and whether the required cutting amounts to ‘a material degree.’”¹⁰⁷

More importantly, the court in *Helms* stated in dicta that “[i]t does not seem to be reasonable to interpret the ‘forever wild’ clause as requiring a constitutional amendment any time any timber whatsoever is to be cut in the preserve no matter what the purpose.”¹⁰⁸ While the *MacDonald* decision set the boundaries for encroachments on Article XIV, the effect of the statement in *Helms* would be to broaden the language of Article XIV. Courts should not give effect to the *Helms*

¹⁰⁵ *Helms v. Reid*, 394 N.Y.S.2d at 996.

¹⁰⁶ See N.Y. Const. Art. 1, § 3 (1894) (citing *Thomas v. Lord*, 664 N.Y.S.2d 973 (Sup. Ct. 1997) (holding that the right to practice religion in prison is subject to reasonable regulation as may be necessary for the protection and well-being of all inmates)).

¹⁰⁷ Edith Pilcher, *A Centennial History of the Association for the Protection of the Adirondacks 1901-2003* 11 (Association for Protection of Adirondacks 2003).

¹⁰⁸ *Id.* at 999.

statement because the language of Article XIV provides specific exceptions for uses that required timber to be cut from the Forest Preserve. Those provisions of Article XIV would be given no effect if as the court in *Helms* stated, amendments were not needed to authorize the removal of trees from the Forest Preserve.

Following the *MacDonald* decision, the Attorney General opinions followed the Court of Appeals “reasonable” approach. In 1986 Attorney General Robert Abrams issued an opinion to Henry G. Williams, Commissioner of the Department of Environmental Conservation on whether the DEC could cut living trees in the forest preserve for the maintenance of its existing trails.¹⁰⁹ The Attorney General held that “the carefully planned and supervised selective cutting in the forest preserve of only those few scattered trees necessary for the maintenance of popular and steep trails to lessen soil compaction, erosion and the destruction of vegetation may be conducted consistent with the ‘forever wild’ provisions of the State Constitution, as long as it does not occur to any material degree.”¹¹⁰

As Attorney General Dennis C. Vacco noted in a 1996 Attorney General Opinion, in interpreting Article XIV, § 1, “we must take into consideration the strict construction of the ‘forever wild’ provision as indicated by the debates before the Constitutional Convention [in 1894], the amendments to the Constitution to allow inconsistent uses

¹⁰⁹ 1986 N.Y. Op. Atty. Gen. 15 (1986).

¹¹⁰ *Id.* at *5.

and their strict construction, and [the opinion] by the Court of Appeals in MacDonald.”¹¹¹ Attorney General Vacco issued this Opinion in response to a request from counsel to the Department of Environmental Conservation (“DEC”) on the issue of whether the DEC could issue four temporary revocable permits (“TRPs”) to a private power company for the installation of electrical cable on the beds of lakes within the Forest Preserve for the benefit of thirteen private residences.¹¹² The Attorney General first assessed whether the granting of these TRPs would be in conformance with the strict construction of the “forever wild” provision,” which “prohibits the sale, lease or exchange or taking by any corporation of any land that is part of the forest preserve.”¹¹³ The Attorney General concluded that granting the TRPs was in fact a grant of permanent interest in the Forest Preserve lands rather than a temporary interest because the clearing operations and construction by the power company would “negate any possibility that the Department of Environmental Conservation could, as is the basic characteristic of a ‘temporary revocable license’, resume full possession and control at will.”¹¹⁴ Also, the Attorney General recognized that uses in nonconformance with the provision were prohibited unless authorized by a specific constitutional amendment and any such amendments also

¹¹¹ 1996 N.Y. Op. Att’y Gen. 5, *2.

¹¹² *Id.* at *1.

¹¹³ *Id.* at *2; N.Y. Const. art XIV, § 1 (1894).

¹¹⁴ *Id.* at *3.

must be strictly construed.¹¹⁵ Finally, the Attorney General applied *MacDonald* and reasoned that since this proposed use was not to benefit the public, but rather thirteen private residences, the use was prohibited by the constitutional provision.¹¹⁶ This negatively implies that the Attorney General may have come to a different conclusion if the use was to benefit the public.

IV. History of the Agency's Implementation of Article XIV

In 1895, the Legislature created the Fisheries, Game and Forest Commission, which replaced the corrupt Forest Commission of 1885, to oversee the Constitutionally-protected Forest Preserve.¹¹⁷ Specifically, this Commission “was formed to take on functions related to fish and game regulations, hunting seasons, and poaching”¹¹⁸ and to prevent timber theft. Similar to the Forest Commission’s appointment of a lumber baron to its Commission, the men who worked for the Fisheries, Game and Forest Commission were well-learned scientific foresters whose interests clashed with Article VII, § 7’s mandate.¹¹⁹ These men viewed the “forever wild” provision as a temporary amendment enacted as “an emergency ad hoc response to a pressing need for immediate

¹¹⁵ *Id.* (citing 1993 N.Y. Op. Att’y Gen. 395; 1954 N.Y. Op. Att’y Gen. 157; 1990 Op. Att’y Gen. No. 90-F4).

¹¹⁶ I recognize that TRP’s have been granted for power lines throughout the preserve in some cases. This should be explored before the next Convention to determine the Constitutionality of such Forest Preserve uses.

¹¹⁷ 1895 N.Y. Laws 238.

¹¹⁸ DEC Website, <http://www.dec.ny.gov/about/9677.html>.

¹¹⁹ Philip G. Terrie, *Forever Wild: A Cultural History of Wilderness in the Adirondacks* 109-122 (Syr. U. Press 1994).

action”—rampant timber theft and forest fires.¹²⁰ In the reports of the Commission, the men of the Commission opposed the “forever wild” provision and discussed the advantages that controlled forestry practice would have on the watershed and the benefits of dam generated hydropower within the Preserve.¹²¹ Despite their opposition, they did work towards the benefit of the preserve by “implement[ing] [] effective fire control and work[ing] assiduously to expand and consolidate the Forest Preserve...with the assumption that [] they were establishing a healthy forest that the state would eventually harvest.”¹²² The Fisheries, Game and Forest Commission also recognized the recreational utility of the Preserve for field sports, such as hunting and fishing.

In 1900, the Commission was renamed the Forest, Fish and Game Commission and it continued to oppose the “forever wild” mandate of Article VII, § 7. In an attempt to persuade the Legislature to amend the provision, this Commission submitted a report written by the U.S. Department of Agriculture Division of Forestry detailing the benefits of conservative forestry in site-specific plans for townships in Forest Preserve counties. The general theme of this argument was that conservative forestry “could protect both the watershed and the aesthetic appeal of the region, while generating a constant flow of

¹²⁰ *Id.* at 121.

¹²¹ *Id.* at 121.

¹²² *Id.* at 111.

revenue.”¹²³ The Forest, Fish and Game Commission also recognized the importance of the Forest Preserve for recreation such as hunting and fishing and advocated for better transportation to allow hunters and fishers to utilize the Forest Preserve for this purpose.

In 1911, the Legislature reorganized the Forest, Fish and Game Commission into the Conservation Department, which included a Conservation Commission,¹²⁴ a division of lands and forests, a division of inland waters, and a division of fish and game.¹²⁵ The Legislature also codified the Conservation Law to guide the policies of this Department.¹²⁶ This Conservation Commission continued to advocate for changes to Article VII, § 7, and discussed the revenue potential of the Preserve in its reports to the Legislature. The Conservation Commission did manage to get an amendment passed for the limited flooding of the Preserve for the construction of dams. While the Forest Preserve was created in part to protect the State’s watershed, the Commission’s argument in favor of dam construction that would flood and destroy trees was that the effects of uncontrolled timber removal in the previous years now required the construction of dams and reservoirs to control the flow of the rivers. In essence, “[t]he watershed argument, without which there would never have been a Forest Preserve or state-protected wilderness in the Adirondacks, was thus

¹²³ *Id.* at 122.

¹²⁴ 1911 N.Y. Laws 1497.

¹²⁵ 1911 N.Y. Laws 1499.

¹²⁶ 1911 N.Y. Laws 1496.

called upon to justify the elimination of much of the wilderness that had been inadvertently saved.”¹²⁷

In addition, following World War I, the Conservation Commission recognized that the Forest Preserve could be used for recreational activities other than just hunting and fishing. In 1919, the Conservation Commission stated the following in its report:

It is...surprising that in more than thirty years of continuous development of the Forest Preserve...not a single vacationist's trail was ever built or marked on State property at State expense, not an open camp or fireplace was constructed by the State, nor any vacation map or guide book published by the State, nor in fact much else done by the State itself to make this big vacation country more accessible, more usable, and better known to those whose property it is.¹²⁸

The Commission requested funds to create trails, camps, and fireplaces throughout the Forest Preserve, which was a whole new area of the Conservation bureaucracy's encroachment on the “forever wild” provision. However, since the invention of the automobile, the Commission began to recognize the importance of the tourism industry for the Adirondack and Catskill region, and the need to cater to the people's recreational interests.

In 1927, the Conservation Commission, which was previously acting within the Conservation Department, now became known as the Conservation Department. This Department was responsible for two

¹²⁷ *Forever Wild*, *supra* note 119, 124.

¹²⁸ *Id.* at 128.

areas: “fish and game, and lands and forests—with the latter including responsibility for the Forest Preserve.”¹²⁹ The Adirondack Park was broken into six forest districts, each headed by foresters. There was no effective oversight for these districts, therefore the policies relating to the Forest Preserve varied from district to district.

The Department focused on increasing recreational opportunities for the people of New York by maintaining the trails and constructing lean-tos within the Forest Preserve. The Department also attempted to construct a bob-sleigh run on Forest Preserve land for the 1932 Winter Olympics, but this land-use was denied by the New York Court of Appeals as discussed above in *Association for the Protection of the Adirondacks v. MacDonald*. The Court of Appeals reminded the Conservation Department that the Forest Preserve “must always retain the character of a wilderness.”¹³⁰

Even though forest fires were greatly reduced since the turn of the century, in the 1930s, the Conservation Commission cut and removed timber from the Preserve to create “fire truck roads” for the future protection of the trees. In the 1940’s the Conservation Department constructed “dams on remote Adirondack rivers and streams.”¹³¹ The Department was in charge of protecting the Forest Preserve and its

¹²⁹ Stuart Buchanan, *The Evolution of the Department of Environmental Conservation*, in, *THE GREAT EXPERIMENT IN CONSERVATION: VOICES FROM THE ADIRONDACK PARK* 253, 255 (William F. Porter, Jon D. Erickson, & Ross S. Whaley, eds., Syr. U. Press 2009).

¹³⁰ *MacDonald*, 239 N.Y.S. at 40.

¹³¹ *Forever Wild*, *supra* note 119, 134.

timber, yet over the years they held the axe by which the trees have fallen.

In the early 1950's, tourism and recreational interests in the Forest Preserve increased and the Conservation Department proposed plans to designate certain areas of the Preserve as Wilderness.¹³² This was a significant departure from the Department's previous treatment of the Preserve. Keeping in line with its new vision, in 1963, the Department banned "motorized vehicles in parts of the Forest Preserve previously identified as potential Wilderness areas, followed by a formal proposal for the establishment of twelve Wilderness areas within the Adirondack Park in 1965."¹³³ It was until the early 1950's that This Department defined how Article XIV should be balanced to provide for both the human element and the wild.

A. Department of Environmental Conservation

By Chapter 140 of the Laws of 1970, the Legislature created the Department of Environmental Conservation, which was to carry out the state policy of environmental protection under the new Environmental Conservation Laws.¹³⁴ The Department of Environmental Conservation consolidated into "a single agency all state programs designed to protect and enhance the environment,"¹³⁵ and the Conservation Department was dissolved. While the Conservation

¹³² Buchanan, *supra* note 129, 254.

¹³³ *Id.*

¹³⁴ 1970 N.Y. Laws 866.

¹³⁵ DEC Website, <http://www.dec.ny.gov/24.html>.

Department's responsibilities were focused on "the management of fish, wildlife, public forest lands, and outdoor recreation," the DEC now had "significant new responsibilities, including a strong regulatory mission focused on implementation of clean air, clean water, and solid and hazardous waste rules, in addition to its traditional natural resource management focus."¹³⁶

The DEC also focuses on enhancing the recreational activities for the Forest Preserve visitors. The DEC is responsible for creating and maintaining the almost 2,000 miles of trails throughout the Forest Preserve and the court in *Galusha v. New York State DEC* has held that the DEC must make some trails in the Forest Preserve accessible to the handicapped in order to comply with the mandates of the American Disabilities Act.¹³⁷ DEC is also responsible for establishing and maintaining the campgrounds throughout the Forest Preserve. The DEC has carried out this duty haphazardly because some campgrounds exist in the Forest Preserve under the theory that they are constitutional, but other campgrounds have been authorized under the inconsistent purpose doctrine¹³⁸ under the theory that campgrounds are an unconstitutional use of Forest Preserve land. The DEC is also responsible for wildlife management in the Forest Preserve, and the

¹³⁶ Buchanan, *supra* note 129, 255.

¹³⁷ *Galusha v. New York State DEC*, 27 F.Supp.2d 117 (N.D.N.Y. 1998).

¹³⁸ The inconsistent purpose doctrine has been applied by Attorney Generals and courts to authorize the State to acquire land in a Forest Preserve county that would otherwise be Forest Preserve land, yet since the State's intended use for the land upon acquisition was never wild land, the land does not become part of the Forest Preserve and can be put to that inconsistent use.

DEC also has a program for regulating invasive species. The DEC also issues permits, sporting licenses, pesticide certification, and business registrations. The DEC's Environmental Conservation Police Officers and Forest Rangers enforcing these permits and licenses. Violators are restrained by the DEC through administrative and civil actions.

The Department is organized into seventeen different departments with different offices, all under the oversight of the DEC Commissioner. The State is also divided into nine regions, each with a DEC office responsible for protecting the region's environment. A central office also exists in Albany. DEC regions three and four are responsible for the Catskills, and regions five and six are responsible for the Adirondacks. This environmental agency had to quickly adapt from the smaller, uncoordinated power structure of the Conservation Department "to a matrix organization that relied on cross-program coordination to function effectively."¹³⁹ There is still a need today for better coordination between the two regions each governing the Catskills and Adirondacks in order to achieve the most effective and efficient means for protecting the Forest Preserve.

B. Environmental Conservation Law Must be Consistent with Article XIV

The DEC was created and given its power through the Environmental Conservation Laws ("ECL") enacted by the Legislature

¹³⁹ Buchanan, *supra* note 129, 255.

in 1970.¹⁴⁰ As discussed above, Article III of the New York State Constitution grants the Legislature “the power to determine policy and make law.”¹⁴¹ The Legislature does not have the power to circumvent the Constitution or to act beyond the scope of its powers granted by the Constitution, which is the Supreme law of the state.¹⁴² Therefore, the ECL must be consistent with what the Constitution requires. Particularly relevant to this paper, this means that the ECL must be consistent with Article XIV.

The ECL governs the DEC and sets forth the agency’s new responsibilities for the entire state of New York. It is the DEC’s job to “implement and enforce these legislative mandates.”¹⁴³ The Legislature enacted the ECL in broad language leaving it up to the DEC to interpret the legislation. To establish uniformity in the agency’s interpretation the DEC enacted rules and regulations defining in explicit terms what the ECL requires. These rules and regulations are codified in Title 6 of the New York State Compilation of Codes, Rules and Regulations.¹⁴⁴ Similar to the limitations the Constitution places on the Legislature, the DEC must stay within the bounds of the enabling legislation of the ECL and its interpretations must be

¹⁴⁰ 1970 N.Y. Laws 866.

¹⁴¹ N.Y. STAT. Law § 2 (McKinney 2010); N.Y. Const. Art. III (1894).

¹⁴² Comment to N.Y. STAT. Law § 2 (McKinney 2010); citing (*People v. Allen*, 93 N.E.2d 850 (N.Y. 1950)).

¹⁴³ DEC Website, <http://www.dec.ny.gov/65.html>.

¹⁴⁴ N.YCCR Tit. 6

consistent with the provisions of the ECL.¹⁴⁵ Therefore, if the rules and regulations promulgated by the DEC are consistent with the ECL and the ECL is consistent with the Constitution, the rules and regulations must be consistent with the Constitution.

C. Rules and Regulations Interpreting the Environmental Conservation Law Must Satisfy the New York State Environmental Quality Review Act

The rules and regulations also must satisfy the requirements of the New York State Environmental Quality Review Act (“SEQRA”).¹⁴⁶ SEQRA declares it a State policy to “encourage productive and enjoyable harmony between man and his environment.”¹⁴⁷ SEQRA was enacted “to promote efforts which will eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems...important to the state.”¹⁴⁸

To fulfill this enactment, the Legislature declares that “[s]ocial, economic, and environmental factors shall be considered together in reaching decisions on proposed activities.”¹⁴⁹ While the goal is to “maint[ain] [] a quality environment for the people of this state that at all times is healthful and pleasing to the senses and intellect of man,” the Legislature articulates that “[e]very citizen has a responsibility to contribute to the preservation and enhancement of the quality of the

¹⁴⁵ N.Y. Const. Art. 3, § 1 (1894) Notes of Decision (citing *Golden v. Paterson*, 877 N.Y.S.2d 822 (2008)).

¹⁴⁶ McKinney’s ECL, §8-0103(6).

¹⁴⁷ McKinney’s ECL § 8-0101.

¹⁴⁸ *Id.*

¹⁴⁹ McKinney’s ECL § 8-0103(7).

environment,” so therefore the maintenance of a quality environment that is *pleasing* to all men will now “depend[] on [the] [] quality [of the] physical environment” at issue.¹⁵⁰

SEQRA also requires the government to “take immediate steps to identify any critical thresholds for the health and safety of the people of the state and to take all coordinated actions necessary to prevent such thresholds from being reached.”¹⁵¹ SEQRA also places a special emphasis on “agencies which regulate activities of individuals...which are found to affect the quality of the environment,”¹⁵² such as the DEC. Therefore, when proposing or approving any action, which may have a significant effect on the environment, such as the codification of the rules and regulations applicable to the Forest Preserve, the DEC must prepare an environmental impact statement according to the procedures set forth in Article 8 of the ECL.¹⁵³ The Appellate Division of the New York Supreme Court in *Balsam Lake Anglers Club v. DEC* held that the DEC’s finding of whether a proposed action will have a significant effect on the environment and require an environmental impact statement under SEQRA “should be upheld if the agency ‘identified the relevant areas of environmental concern, took a “hard

¹⁵⁰ McKinney’s ECL § 8-0103.

¹⁵¹ McKinney’s ECL § 8-0103(5).

¹⁵² McKinney’s ECL § 8-0103(9).

¹⁵³ McKinney’s ECL § 8-0109.

look” at them, and made a “reasoned elaboration” of the basis for its determination.”¹⁵⁴

D. Creation of Adirondack Park Agency and the Executive Laws Requiring Collaboration and Cooperation with the Department of Environmental Conservation

In 1972, two years after the enactment of the ECL and the Department, the Legislature created the Adirondack Park Agency (“APA”), an executive department, to regulate land use development within the Adirondack Park.¹⁵⁵ The Legislature recodified the ECL in 1972 to include the new responsibilities for the DEC as provided by the Executive Laws establishing the APA.¹⁵⁶ The purpose of the new law was to provide land-use regulation for the private lands and local government lands within the Adirondack Park to protect the surrounding Forest Preserve lands.¹⁵⁷ The APA also was created as a control mechanism for the DEC because previously there was no other oversight body for the DEC, which had a tendency to act haphazardly when authorizing uses for the Forest Preserve.

The Legislature created the Adirondack Park Land Use and Development Plan “to guide land use planning and development throughout the entire Adirondack park, except for those lands owned by the state.”¹⁵⁸ The APA is assisted in its regulatory duties under the

¹⁵⁴ *Balsam Lake Anglers Club v. DEC*, 199 A.D.2d 852, 855 (N.Y. App. Div. 1995) (quoting *Matter of Citizens Accord v. Town Bd.*, 192 A.D.2d 985, 987).

¹⁵⁵ McKinney’s Exec. Law § 800.

¹⁵⁶ L.1972, c. 664.

¹⁵⁷ McKinney’s Exec. Law §801.

¹⁵⁸ McKinney’s Exec. Law §805.

park land use and development plan by the Adirondack park local government review board, which is comprised of twelve local residents.¹⁵⁹ Both the APA and the review board work together to periodically review the plan to evaluate if any changes should be made in light of new circumstances.¹⁶⁰ The plan classifies the land into specific land use categories and sets an overall intensity guideline allowing land uses “generally considered compatible with the character, purposes, policies and objectives of such land use area.”¹⁶¹

In addition, “[t]he agency is authorized to review and approve any local land use program proposed by a local government.”¹⁶² The differences between the land use programs proposed by local governments and the Adirondack Park Land Use and Development Plan are small. The APA is only authorized to approve programs that are compatible with the “purposes, policies and objectives of the land use areas” designated by the Adirondack Park Land Use and Development Plan.¹⁶³

The APA was also required to prepare the State Land Master Plan (SLMP) “in consultation with the Department of Environmental Conservation.”¹⁶⁴ Therefore, “the SLMP was developed and adopted with little input from department staff and given to a new Adirondack

¹⁵⁹ McKinney’s Exec. Law §803-a.

¹⁶⁰ McKinney’s Exec. Law §805.

¹⁶¹ *Id.*

¹⁶² McKinney’s Exec. Law §807.

¹⁶³ *Id.*

¹⁶⁴ McKinney’s Exec. Law §816.

Park Agency to implement.”¹⁶⁵ While “[t]he SLMP brought organization to the Adirondack Forest Preserve by classifying land areas into categories based on their character and use,” a rift between the APA and the DEC developed because the DEC was required to collaborate with this new agency that was to oversee the lands which had always been under the DEC’s responsibility.¹⁶⁶ The Executive Laws do not clearly define where the DEC’s authority ends and where the APA’s authority begins with regard to the Forest Preserve, so both agencies are acting with the feeling that they have concurrent jurisdiction over the Forest Preserve. This only adds to the tension between the two agencies because the DEC feels that they have been an effective land manager and now they have a new agency constantly looking over their shoulder.

The supreme court in *Helms v. Reid* has held that the SLMP is a legally enforceable document.¹⁶⁷ The SLMP classifies the Forest Preserve land into the following categories: 1) wilderness, 2) wild forest, 3) canoe, 4) primitive, 5) intensive use, 6) wild, scenic and recreational rivers, 7) travel corridors, 8) historic, and 9) state administrative. The DEC is also directed by section 816 of article 27 of the Executive Law to develop Unit Management Plans (“UMPs”) for the land classified by the SLMP, in consultation with the APA.¹⁶⁸ The DEC

¹⁶⁵ Buchanan, *supra* note 129, 256.

¹⁶⁶ *Id.*

¹⁶⁷ *Helms v. Reid*, 394 N.Y.S.2d 987.

¹⁶⁸ McKinney’s Exec. Law §816.

also must consult with the APA if it wants to make any changes to the SLMP or the UMPs. Today, the DEC still has not completed Unit Management Plans for all of the land in the Forest Preserve, which is in violation of executive law.¹⁶⁹

E. Department's Responsibilities for the Forest

Preserve in the Catskills

The Catskills Forest Preserves have been treated differently than the Adirondack Forest Preserves since as far back as 1884. In 1884, the Sargent Commission was created to research the need for forest preservation in New York State.¹⁷⁰ In its report to the Legislature, the Commission recommended only three Catskill counties be included in the forest preserve because “they had ‘visited the forest region’ of the Catskills, but concluded these forests were ‘of less general importance than the preservation of the Adirondack forests.’”¹⁷¹ Even though the Catskills Forest Preserve is within the blue line, the Legislature pays the Catskills much less attention when compared to the Adirondacks. While the Adirondack Forest Preserve is clearly demarked with brown and yellow signs, today one may barely notice when they step within the boundaries of the Catskill Forest Preserve. However, the Catskill Forest Preserve is a very important resource for the protection of the State’s watershed and has grown to over 290,000 acres of protected

¹⁶⁹ I recognize that the APA distinguishes between Class A and Class B projects. This is important and should be explored, but it is not within the scope of this paper.

¹⁷⁰ L.1884 Ch.551.

¹⁷¹ Forsyth, *supra* note 31, 16.

land.¹⁷² Public use of the Catskill Forest Preserve has increased over the years for recreation purposes in addition to its value as an ecological and scenic reserve.

While the Legislature created the APA and mandated the creation of the Adirondack Park State Land Master Plan, the Legislature did not create a similar oversight agency or require a land use plan for the Forest Preserve in the Catskills. The SLMP for the Adirondacks was a precautionary measure, and the Legislature did not feel it was necessary for the Catskills because since the advent of the Forest Preserve, the wildlife in the Catskills had recovered substantially. To cope with environmental degradation and increasing land use issues, the DEC on its own initiative in 1985 developed a Catskill Park State Land Master Plan, which applies only to Forest Preserve land and not private lands.¹⁷³ In 2008, a revised Plan was released, which now classifies the Catskill Forest Preserve into the following categories: 1) wilderness, 2) wild forest, 3) intensive use, 4) administrative, 5) primitive bicycle corridor, and 6) conservation easements.

The DEC recognizes the possibility that such land classifications in the Forest Preserve may be unconstitutional by violating the “forever wild” mandate of Article XIV. The DEC states in the Catskill Plan that “[t]hese guidelines are subject to any future legal rulings further restricting uses of the Forest Preserve and they are not to be considered

¹⁷² *Catskill Park State Land Master Plan* 5 (N.Y.S. 2008).

¹⁷³ *Id.*

as attempts to make determinations as to the constitutional appropriateness of any such structures, improvements or uses.”¹⁷⁴ However, as discussed previously in this paper, agencies are granted power through the Legislature, and they cannot authorize action beyond the power given to them in their enabling legislation. The Legislature also must not overstep the boundaries and limitations of the power granted to it by the Constitution. The DEC here is pretty much asking for the Catskill Plan to be challenged on the basis of its constitutionality. The DEC states in the plan that “[n]othing in the guidelines for lands within each major classification shall be deemed to prevent the Department from applying more restrictive management where necessary to comply with constitutional requirements or to protect the natural resources of such lands.”¹⁷⁵

The DEC would benefit from a court declaring the land classifications and uses on Forest Preserve lands under the Plan as unconstitutional because this decision could then be applied to the land uses authorized under the Adirondack Park State Land Master Plan. If a court declares the classifications of land and uses permitted by the Plan as unconstitutional under Article XIV, then both the Adirondack Park State Land Master Plan and the Catskill State Land Master plan would have to be significantly modified or even scrapped all together. The APA’s powers could be reduced to that of an oversight body in

¹⁷⁴ *Id.* at 12.

¹⁷⁵ *Id.*

charge of the issues affecting private and local government land use issues and the DEC could go back to being the sole regulatory agency with powers over the State Forest Preserve land. This is an interesting possibility to consider since many of the uses authorized in the Forest Preserve by such land use plans do clearly violate the provisions of “forever wild.”

V. Implications for Constitutional Commission and the Constitutional Convention

Convention delegates have discussed Article XIV at every Constitutional Convention since its enactment in the Constitution of 1894. Other states and nations have recognized the value of the “forever wild” provision and have followed New York’s lead by enacting similar legislation to protect forests. Today, studies indicate that climate change is real and will have devastating effects on the environment in the near future. Climate change is already a major issue before the international community, and while the U.S. has not signed on to the Kyoto Protocol, it is likely that the U.S. will address climate change with national legislation in the near future in an effort to preserve the environment. Global warming is one of the biggest long-term threats to the Forest Preserve, therefore it is highly likely that the Article XIV will be an important part of the discussions at the next Constitutional Convention. The purpose of this paper is to inform and prepare the Constitutional Commission, delegates to the Convention, and interested parties on the issues related to the DEC’s

implementation of Article XIV. My suggestions below are based on my knowledge of these issues after a semester of learning about the Forest Preserve in a Seminar at Pace Law School taught by Phil Weinberg and Nicholas Robinson, well-known environmentalists in the State of New York.

A. Pros and Cons of Leaving the Text of Article XIV in its Current Form

The only benefit that I see for leaving the text of Article XIV in its current form is that nothing would be done to detract from its current mandate. ECL provision and the DEC rules and regulations providing guidance for the agencies implementation and regulation under Article XIV are already in place, and over time, guidance from Executive orders, court decisions and Attorney General opinions will further refine what is required from the agencies under Article XIV. The consistency in the Amendment's language could improve overall efficiency of its implementation.

I believe that the major con for leaving the provision in its current form is that much more could be added to Article XIV to benefit the environment. Also, the amendment has grown in size over the years to include exceptions to the "forever wild" mandate. If Article XIV is not amended to establish boundaries for the types of uses or the number of uses that can be granted exceptions under the Amendment, the Amendment's effectiveness to preserve the Forest Preserve is at risk. While the Amendment can only be amended with the vote of the people

in New York, the effectiveness of Article XIV is sliding down a slippery slope. Future generations of voters may read the current language of Article XIV authorizing the ski slopes on Whiteface Mountain as a determination that the use of Forest Preserve land for ski slopes is permissible and constitutional under Article XIV. Therefore, if Article XIV, § 1 is to remain the same, it might be helpful to include language such as “the following are inconsistent uses for the Forest Preserve that were authorized by the voters of New York” before the words “[n]othing herein contained shall prevent the state from constructing, completing and maintaining any highway....” This will prevent the New York voters from getting confused as to what the amendment requires and which uses are not permissible in the Forest Preserve without an amendment to the text.

B. Pros and Cons of Strengthening Article XIV in Certain Areas

There are many reasons for strengthening Article XIV. First, I believe that Article XIV should be strengthened to combat climate change caused by global warming. As discussed above, I think that the U.S. will enact national climate change legislation in the near future, and the U.S. Government may focus on areas such as the Forest Preserve, which already act as important carbon sinks for greenhouse gases. There is always the threat that the U.S. Government could take this great resource out of the hands of New York to be administered by a Federal agency if New York mismanages the Forest Preserve.

Therefore, if New York wants to remain a model for environmental progress, New York should enhance Article XIV as soon as possible to ensure that the protection of the Forest Preserve remains contemporaneous with the times and in the hands of the people in New York State.

Article XIV can be strengthened in this respect in a number of ways. Article XIV could include a specific exception for windmills in the Forest Preserve to make the Forest Preserve more sustainable. A con to wind farms in the Forest Preserve is that we would be extracting another resource from the Forest Preserve, which the State intended to remain forever wild. Instead of extracting timber, the State would be extracting the Forest Preserve's wind energy. However, I think the pro outweighs the con on this issue because harnessing wind power will not deplete the Forest Preserve's wind resource in the same way that cutting timber would deplete the Forest Preserves timber resource.

Another approach to consider if Article XIV is strengthened to achieve sustainability is an amendment to authorize the use of biofuels such as wood pellets. The amendment could be narrowly tailored to allow for the use of wood pellets produced from fallen trees within the Preserve to the extent necessary to power the Forest Preserve. Under the *MacDonald* approach, the use of wood pellets might actually be interpreted as constitutional. The purpose of using the fallen trees to make wood pellets is to preserve the Park through the use of sustainable energy. Under *MacDonald* the Court of Appeals recognized

the “Park was to be preserved, not destroyed.”¹⁷⁶ Without a sustainable energy source such as wind farms or biofuels, trees are cut down for the construction of power lines through the park. The use of the fallen timber to make wood pellets to power the Preserve is reasonable so long as the amount of fallen timber needed does “not call for the removal of the timber to any material degree.”¹⁷⁷ The con for using wood pellets as a source of biofuels is that using the fallen timber to energize the park defeats the old arguments used to prevent the removal of fallen timber, such as the benefits to the watershed. Either way, this amendment could be put included in an amendment to give the people of New York a voice in this decision.

Another amendment that would benefit the Preserve under Article XIV would be to include the following after the term destroyed: “It is the policy of the State of New York to be energy efficient and sustainable in the Forest Preserve.” If this amendment or something to this effect is included, the State DEC could be required to use hybrid or electric vehicles in the preserve. The State DEC already has the power under section 3-0301(1)(y) of the ECL to “limit the consumption of fuels and use of vehicles” to prevent and control air pollution emergencies,¹⁷⁸ but they have not done so. Climate change caused by greenhouse gases is a huge air pollution emergency and the DEC should either be required to put this provision to use by Executive Order or through an

¹⁷⁶ *MacDonald*, 253 N.Y at 238.

¹⁷⁷ *Id.* at 238.

¹⁷⁸ McKinney’s ECL § 3-0301(1)(y).

amendment to the Constitution. At a minimum, the DEC and APA should be required to use hybrid vehicles in the courses of their official duties within the Forest Preserve. The con to this requirement is that the DEC and APA are already strapped for funds, and this would be a costly measure to enact.

Another important change that should be made by Executive Order or by amending the ECL is the consolidation of the DEC regions that govern in the Catskills and in the Adirondacks. Currently, DEC regions 3 and 4 are responsible for the counties that make up the Catskill Forest Preserve and regions 5 and 6 are responsible for the Adirondack counties that comprise the Forest Preserve. One of the main reasons for creating the DEC was to consolidate the environmental agencies for governmental efficiency. Better governmental efficiency in the Forest Preserve could be achieved if one region was in charge of the Catskills and one region in charge of the Adirondacks. The con of this change is that the consolidation will face a lot of local opposition. Currently, local governments have formed relationships with the DEC's covering their respective areas. The local governments are concerned that if the regions change, treatment under the laws will change because they will no longer have their friends in the government. However, the local governments can cultivate new relationships, and the benefits gained by consolidating the agencies outweigh the cons.

Another issue that needs to be addressed with an Executive Order, a judicial opinion or an amendment to Article XIV is the constitutionality of the Adirondack State Land Master Plan and the Catskill State Land Master Plan under Article XIV. The DEC states in the Catskill plan that “[t]hese guidelines are subject to any future legal rulings further restricting uses of the Forest Preserve and they are not to be considered as attempts to make determinations as to the constitutional appropriateness of any such structures, improvements or uses.”¹⁷⁹ The constitutionality of such plans should be investigated. If the plans are deemed unconstitutional, then the APA should be restricted to covering private and local land issues, while the DEC could go back to being the sole regulating agency for the Forest Preserve. The pro of this change is that it would resolve the jurisdictional conflicts between the two agencies that have existed since the APA’s creation.¹⁸⁰ A con to this change is that the park has already been divided according to the land uses authorized by the plans and reversing this would cause confusion for park visitors. Uses that formerly were allowed in specific areas under the plans may become widespread and uncontained in the Forest Plan if such a change is made.

¹⁷⁹ *Catskill Park State Land Master Plan* 24.

¹⁸⁰ An example of a jurisdictional issue is that while the DEC regulates the wetlands in the entire state, the APA is responsible for the wetlands in the Forest Preserve. The APA also does not have the funds to carry out many of its programs.

Another legislative change that would benefit the Forest Preserve would be to require a referendum for all legislative actions that affect the Forest Preserve. As discussed earlier in the paper, the Legislature is not required to call a referendum asking for the people of New York to vote on such legislative actions. As noted in the paper, the Legislature has enacted many laws that are inconsistent with Article XIV's mandate. It would benefit the Forest Preserve to give the people a voice before the Legislature enacts provisions that are to the detriment of the Forest Preserve.

Lastly, an amendment should be considered to create a utility land bank for power lines in the Preserve similar to the highway land bank provision in the ECL. This would place a limit on how much Forest Preserve land can be used for utilities in the future for the benefit of keeping the land "forever wild." The con to this amendment is that it basically would be authorizing more the utility companies to use Forest Preserve land for this inconsistent purpose.

C. Pros and Cons of Weakening Article XIV

There are no pros to weakening Article XIV. The con to weakening Article XIV is that the "forever wild" provision is an important piece of environmental legislation protecting a natural resource, biodiversity, and the New York watershed. The voters in New York have reaffirmed their commitment to Article XIV every time the question was put to them, therefore this amendment should either remain as is or should be strengthened in the areas discussed above.