2-15-2007

"Forever Wild": New York's Constitutional Mandates to Enhance the Forest Preserve

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ASSOCIATION FOR THE PROTECTION OF THE ADIRONDACKS

Arthur M. Crocker Lecture:

Louis Marshall – Champion of Civil Rights, Conservation and "Forever Wild"

Thursday, February 15, 2007
Center for the Forest Preserve
Niskayuna, New York

"Forever Wild": New York's Constitutional Mandates to *Enhance* the Forest Preserve

by

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Preface: Personal Reflections

These lectures, honoring Louis Marshall (1873-1929) and his legacy, acknowledge the profound and historical debt that all New Yorkers owe to this extraordinary lawyer. It is a privilege to be participating in this event.

The occasion is especially welcome for me personally. I thank Peter Brinkley and David Gibson, for the invitation to share with you my reflections about Article XVI, the "forever wild" constitutional provision that Louis Marshall espoused. I happily was allied in conservation efforts with the person who inspired this lecture series, Arthur M. Crocker. I first participated with Arthur in the 1970s, in efforts to enact New York's tidal wetlands act, far from the Adirondacks. It is an honor to be a part of a continuing lectureship established in Arthur's honor. Arthur was devoted to the Adirondacks and to stewardship of the environment of New York.

Those who invited me could hardly have been expected to have known of my own associations with Arthur, or with Louis Marshall's family and legacy. Louis Marshall's sons each influenced, in happy ways, my own early years both amidst nature and at the bar. Rather than burden the substance of my lecture with these recollections, may I be excused if I provide them as a preface, as a personal homage to the Marshall family, and my own.

My first wilderness experiences were in the Mendicino coast range and the Sierra Nevada mountains of California. My parents brought me west from my New York birthplace when I was eight, and I came to love nature through hiking and camping and exploring California's wild lands. I chose, in 1969 to take my summer earnings as a kitchen pot washer at a summer camp, and invest them in becoming a Life Member of the Sierra Club. I wanted to support those who supported the lands that I had come to love. George Marshall was then the Secretary of the Sierra Club's Board of Directors, and he signed my membership card. I framed the card that he signed, along with a photo of Mount Lyle, taken by my high school mate Bob Tyson, before we climbed that glorious peak in the Sierras.

I had returned east, on my own, to attend college at Brown University. Confronted by the pollution of that day, I was appalled. I formed the Conservation Committee of the Brown/Pembroke Outing Club, where I also met my wife, Shelley. It was in college that I probably first read words written by Robert Marshall. Like many of us, I only know Bob Marshall by his writings, and Jim Marshall's musings about his brother. From college, I went to law school and came to meet the third Marshall brother, James, while a law student at Columbia Law School. At Columbia I formed the Columbia Environmental Law Society in 1968, and launched my practice in environmental law in the summer after my second year at Columbia under the mentoring of David Sive, writing briefs for the appeals of the battle protecting the Hudson River from Gov. Rockefeller's proposed "Hudson River Expressway."[*] Jim Marshall graciously came up to Columbia to meet with our student group about wilderness and the law. Later, Jim invited me to meet with partners at his firm, Marshall, Bratter, Greene Allison & Tucker. Following my clerkship with Judge Morris E. Lasker (who, with foresight, advised me to forgo an invitation to become as Assistant US Attorney in the Southern District of NY and to try my hand in 1972 at inaugurating the first environmental law practice at a large firm in New York City). I launched Marshall, Bratter's environmental law practice, and eventually became Special Counsel to the firm. From 1972 until the dissolution of Marshall, Bratter, I conferred almost weekly with Jim.

[*] Citizens Committee for the Hudson Valley v. Volpe, 302 F. Supp. 1083 (S.D.N.Y.), *aff'd* 425 F. 2d 97 (2nd Cir., 1970).

Jim Marshall moved my admission to the Bar of the U.S. Supreme Court, and his name on my admission certificate to practice before the Supreme Court also graces my wall.

Jim and I often discussed environmental law and wilderness over sandwiches at lunch in his office at Marshall, Bratter. He was then Counsel, and I was a young Associate, but together we borrowed away many billable hours over our frequent "working" lunches. When he was 79, he shared with me his essay, "An Ecological View" published in *The Living Wilderness* (Spring 1975). He published these words that are evocative of his youth in the Adirondacks: "I sit here in the garden as the evening darkens, in love with the variety of nature – Queen Anne's lace, chicory now hiding its bright blue, conifers and deciduous trees becoming a blackness, a comical toad, fireflies rising from the grass flying higher as the night comes, and ticks – and I am aware of man whose busy, inquisitive mind created an electric light behind me in a stone house, also man's work, and of women whose love of beauty made this garden of flowers. Each has a place I think, but we interact too, whether it be in love or hate or in satisfaction or discomfort, our relations constantly in flux (as are the atoms and constellations themselves). Except for the ticks, destroy any of the others and we would be the poorer. Destroy man and the light would go out, and all the others, again ticks excepted, would be the poorer; though they would not know it, there would be none to admire them, and without admiration they would only just exist." More than debating the law, these were the sorts of musings that we shared over a sandwich at lunch in the firm.

When I later was to serve in Albany as the Deputy Commissioner and General Counsel of the NYS Department of Environmental Conservation (1983-85), Jim and I continued to work on a manuscript for educating judges about the scientific concepts of ecology that they would need to know if they were to make intelligent and informed decisions about environmental law matters. We never completed the manuscript to the point of publication, but I have drawn on that experience in the seminars I have conducted for judges in Asia, Europe, Africa, and North America.

Jim Marshall lived in the present, and did not much ruminate about his Father, at least with me. When he was 90, writing from New York City, he published a letter to the editor in the *Adirondack Daily Enterprise* (April 25, 1986, p. 4). More like an essay or an op-ed piece, Jim reflected in his life in the Adirondacks: "It was 1900 and I was four years old that I began my love affair with the Adirondacks." What better testimony could there be for a Father's care: Louis provided the venue in nature where he knew that nature's lessons would be instilled in his children, becoming inseparable from love and life itself, and his son recalls this love recalled in the last decade of the son's life! Jim's letter continues: "My brothers, Bob and George, were famous as mountain climbers. …I myself had a reputation as a mountain climber but I really climbed very few. I was much more interested in fishing, in rowing our marvelous Adirondack guideboat…My sister also climbed many mountains and was a good fisherwoman. Our father loved to walk, and to fish, and to identify flowers and shrubs he had not seen before." Especially, perhaps at 90 Jim wanted to share his convictions to win over Adirondackers who read the *Enterprise*; he wrote, "the Adirondack Preserve has been a good thing. It has been a model for the federal government and other states. It has given a tone to recreation, and esthetic and spiritual satisfaction to hundreds of thousands, perhaps millions. Whatever lies ahead, I shall be grateful to the Adirondack mountains, lakes and streams."

Beginning in 1898, Louis Marshall, and Florence Lowenstein Marshall (1873-1916) made the thier Camp, "Knollwood" on Lower Saranac Lake, a natural haven for their children, to grow amidst the liberating air of wild lands, eschewing the biases and tribulations still burdening human society in city and suburb. It was here that the Marshall boys read Verplanck Colvin's survey reports and T. Morris Longstreth's *The Adirondacks.* Following in Colvin's footsteps,

Bob and George took to the mountain tops. Yet also while at Knollwood, the Marshall boys would have seen and heard their Father working with others in the Association for the Protection of the Adirondacks, fighting to ensure that Article XIV's "forever wild" strictures, which he had helped to incorporate into the Constitution in 1894,** would be observed and enforced. By his example, Louis Marshall taught that it was not enough to love and enjoy nature; one must act also to protect nature from human excess. This dimension of Louis Marshall's legacy lives on in the campaigns that each son undertook to safeguard nature.

It was exploring the Adirondacks from Knollwood that Bob Marshall imbibed the wildness and followed its call. He invoked the needs for law reform in his book, *The People's Forest*, advocating preservation of beauty and primitive nature as a tonic for human health, and in founding the Wilderness Society in 1934. George Marshall served also on the Wilderness Society Board, on the Sierra Club Board and in other conservation ventures. Jim Marshall added his own love of the law to his sibling's campaigns for nature conservation, doubtless also a legacy from his Father. He combined these passions in his own service on the Board of the Wilderness Society, and later in working with John Adams, David Sive, and others in the formation of the Natural Resources Defense Council, perhaps the world's greatest public interest environmental law firm.

Surely Louis Marshall must have known (or at least hoped) that his own love of nature and his love of justice and the rule of law would flow through to his children. It evidently did. Just as his example has inspired his children, so their examples inspire us. It was my privilege to share time and a common conviction with Jim Marshall, which he had had with his Father, that the laws of nature and the laws of humans are ultimately but one and deserve to be united.

My own career has been invested in building this union. While I was a young lawyer deciding to make a career in a field that then did not yet exist, I was largely ignorant of two of my own genealogical antecedents. My Great Grandfather, John Claflin was a founder of the Citizens Union of the City of New York; our "paths" crossed when, as a law student and young lawyer, I served on Citizens Union's Legislation Committee, critiquing legislation in Albany, and later being elected to Citizens Union's Board of Directors. I found that John Claflin also had been Vice President of the Adirondack Park Association, formed in 1890 to campaign for "the preservation of the Adirondack forests and by practical means the establishment of a State forest park therein." [See Alfred L. Donaldson, A History of the Adirondacks, vol. II, op. 182 (The Century Company 1921)]. John Claflin, and his wife Elizabeth, had a camp at Little Moose Lake, where my Grandmother, Agnes Sayer Claflin, met her future husband, my Grandfather, Crittenden Hoell Adams, and where my Mother, Agnes Claflin Adams, and her cousins played as children. Much later, in 1971, on behalf of Citizens Union, and spurred on by Jim Marshall's parallel efforts, I wrote letters to support enactment of the Adirondack Park Agency legislation. One of the advisors to the Temporary Study Commission on the Future of the Adirondacks, whose legislative recommendations we were endorsing, was then the President of The Garden Club of America, a confirmed conservationist and my cousin, Wilhemine Waller, who like my Mother was a grandchild of John and Elizabeth Claflin.

In light all these associations, I trust you will excuse me for seeking your indulgence before launching this Arthur M. Crocker Lecture, by pausing to tell the story of these

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** Reznikoff, ed., Louis Marshall: Champion of Liberty, vol. II; see also Frank., Graham, Jr., The Adirondack Park: A Political History (Knopf, 1978), pp 165-186: in 1909, for instance, Louis Marshall was by letter and personal meeting urging state officials to "make needed reforms to guard against fires, timber stealing, and threats to the Forever Wild clause." *Id.* at 167.

associations? My intent has been to shine some light upon these inter-personal strands, which I so admire, woven together over time and over generations, by the common ethic that the Adirondacks inspire alike in so many individuals from all walks of life. In this respect, I suspect that my associations are similar to those of a great many of the members of the Association for the Protection of the Adirondacks.

Because the theme of my remarks in this year's Arthur M. Crocker Lecture addresses the very purpose for which the Association for the Protection of the Adirondacks was founded, and because this theme was clearly a love of Louis Marshall (and all of us here tonight), I have taken the liberty of preparing this elongated version of my lecture, the essay which follows this Preface. I could hardly hope, in the modest thirty minutes allowed to me for my oral exposition, to win you over to the tenets of my thesis. May I invite you, therefore, to take away this essay and study the ideas set forth herein. To me, they are self-evident, but I fear that the core values within Article XIV are not yet understood by New York's officialdom, or the bar at large, or even by many who love the Adirondacks. The depths of the mandates in Article XIV seem even to have escaped the attention of many of the conservationists in New York.

The fate of Article XIV and the Forest Preserve are still at risk today, and will be tested again as the effects of climate change force our legislators to remake State policy and law. Conservationists need to anticipate these new challenges, and to assist this rethinking, I have taken the time to spell out my ideas in writing, hoping to entice you to read the arguably dry and dull words that follow. Climate change is changing all our conservation benchmarks, and organizations likes the Association for the Protection of the Adirondacks will need to guide the meaning of "forever wild" to hold fast to its core values, and implant them firmly in the new conditions that are emerging.

Like the dry shell of a seed in autumn, the cornel of something greater lies within New York's constitutional "forever wild" provisions. My lecture, and this lengthy essay, invites you to devote your imagination to bring this latent force to life. Your reading of this essay can be the spring's melt (if not the mud season), or the summer's rains that can nurture these ideas into being. I look forward to debating these ideas with you. I do not expect agreement with all the positions I take here, but I know that from the discussion about them we *can* find ways to enhance our State's stewardship of the Forest Preserve. To this end, I append to this exposition of ideas a *Bibliography of Adirondack Park Legal Materials*, *Bibliography of Adirondack Park Legal Materials*, and I am grateful to Prof. Marie Newman and Jack McNeill, Director and Associate Director respectively of the Pace Law Library, for its preparation. These references can further your study of the issues that I explore across the following pages, look at references on interest in the Association's exceptionally rich Adirondack Research Library, and arm you for the coming debates.

In closing this preface, may I return to Jim Marshall's words from his essay in *The Living Wilderness*: "As my life has moved along I have grown in the conviction that the preservation of wild or undeveloped areas of land and water, places that bar mechanical devices and other works of man, and are free of his refuse, is essential if we are to find an ecological approach to life and death. Men and women need to know, or at least know of the existence in the here and now, of the primitive earth in which they are rooted and to know that man is not the measure or maker of all things, but an interacting partner."

The Adirondack wilderness runs deep in the Marshall family and in all who cherish the Adirondack Forest Preserve and its constitutional safeguards. It is, therefore, wholly fitting that

this Arthur M. Crocker Lecture especially honors Louis Marshall. Arthur Crocker would have been proud to be the inspiration for this special gathering.

Written beside the Hudson River's waters,
descending from Lake Tear of the Clouds,
which flow past Sleepy Hollow, New York.

Nicholas A. Robinson[***]

[***] Vice President of the Association for the Protection of the Adirondacks; honorary Vice President of the Sierra Club and founder of its International Program (1969-83); first American elected to chair of the Commission on Environmental Law of the International Union for the Conservation of Nature Natural Resources (IUCN), 1996-2004; founder of the Environmental Legal Studies program of Pace University School of Law (1978) and a founding faculty member of that Law School itself (1978-2008); visiting Professor at the Yale School of Forestry and Environmental Studies and at the Yale School of Law (2006-2008). Currently a member of the Executive Committee of the Environmental Law of the N.Y.S. Bar Association and of the Environmental Law Committee and then International Environmental Law Committee of the Association of the Bar of the City of New York. Graduate of Brown University, B.A. (1967, Phi Beta Kappa) and of Columbia University, J.D. (1970, cum laude); laureate of the Elizabeth Haub Prize in Environmental Law (1993), conferred by the Free University of Brussels (Belgium).

"Forever Wild": New York's Constitutional Mandate to *Enhance* the Forest Preserve

Nicholas A. Robinson

> ***"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 an corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."***

These words within Article XIV, Section 1, of the Constitution of New York State,[1] inaugurated the concept of "wilderness" into the world of law for the first time ever, anywhere. At the time, 1894, the science of ecology was still in its infancy, but the conservation ethic had emerged from its early roots in Ralph Waldo Emerson's essay "Nature," published in 1830.[2] Conservationists urged appreciation of nature's beauty, acknowledgement of the healthful influence of mountains and forests, and support for the stewardship of fauna and flora. Maintaining an environment that is healthful, pleasing to the senses and intellect, now and in the future, was to become a legitimate duty of government, and be a fundamental norm of Environmental Law. Emerson's vision acknowledged that while humans derived wealth from the commodities extracted from nature, yet these natural resources are but "temporary and mediate, not ultimate, like its service to the soul."[3] In enacting Article XIV, first in 1894 and then again in 1938, New Yorker voters have come to embrace the conservation ethic as a rule of law.

Yet despite the repeated adoption of this constitutional norm, defiance of its provisions characterized the first ten decades of its life. It has been an uphill struggle to secure its observance, and efforts to evade its mandate abound. Just as the Civil Rights movement had to emerge in order to make real the amendments to the Constitution of the United States adopted following the Civil War, so there will need to be an Ecological Rights movement if we are to fully realize the mandate of Article XIV. There is a growing urgency in our present state of affairs; the effects of climate change magnify the importance of the Forest Preserve. We need to expand the reach of the "forever wild" clause throughout the Adirondacks, if the people and nature of this region are to prosper in the future. New York's "forever wild" Forest Preserve has been far too neglected at home, while serving as a model for wilderness laws nationally and internationally. In the coming decades it must be embraced again at home, once again to be a model for the changes that humans will need to find as we adapt to climate change all over the Earth. We must build nature's systems into our own social and economic lives, if we and nature are to endure in the future as we have in the past.

May I invite you; therefore, to explore with me some of the evident, and also some of the less apparent legal implications that can be drawn from recognizing the implicit "land ethic" that resides within the "forever wild" conception of the Forest Preserve in New York's Constitution. It

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[1] Constitution of the State of New York, as adopted in 1938, with amendments, McKinney's Consolidated Laws of the State of New York.

[2] Ralph Waldo Emerson, Nature (1836, Boston); Emerson wrote in Chapter I, "In the wilderness, I find something more dear and connate than in the streets and villages. In the tranquil landscape, and especially in the distant line of the horizon, man beholds somewhat as beautiful as his own nature."

[3] *Ibidum*, Chapter II, "Commodity," p. 15 (1879 edition, James R. Osgood & Company, Boston).

is my thesis that the executive branch of State government, our Governors and most of our other State and local authorities, have observed the mandates of Article XIV most shallowly. They have ignored their stewardship duties to promote "forever wild forest lands." Civic groups, and courts should not only concern themselves with the task of keeping government from evading the land ethic; rather we should be changing government to embrace the land ethic derived from this "forever wild," both in the Adirondacks and Catskills, and as a role model throughout the State and nation.

"Kept as forever wild forest lands"

The first sentence of Article XIV, the "forever wild" clause, embodies an affirmative mandate to enhance the Forest Preserve. Over the years, however, instead of sustaining governmental actions as stewards to affirmatively keep and enhance wilderness, New Yorkers have too often found themselves defending the minimum standard that this Article requires, relying on the second sentence, and using its express legal norms as a shield, defending the lands and timber from being destroyed. The norms in Article XIV provide much more. Basic constitutional duties and rights exist, which in turn imply the recognition of many further legal corollaries about humans and nature. It is time to elaborate these correlative rules, and to begin to embrace them heartily. In another nation, whose jurisprudence has bonds to the USA, Chief Justice Hilario Davide, Jr. , wrote about the right to the environment. In Oposa v. Factoran, he observed:

There exist today two reasons to refocus on the legal scope and application of Article XIV. First, the conservation norm to safeguard and manage wilderness is now a mature function of government, and our agencies of government are under a continuing duty to improve their observance of Article XIV. As the great constitutional lawyer, Louis Marshall, knew full well, our democracy depends upon the rule of law, and in a government of laws there is no room for illegal acts of men, such as those taken in 2005 by the NYS Department of Transportation when DOT and its agents cut trees in the Forest Preserve along State Route 3.[4] Second, this constitutional provision becomes of transcendent importance to all New Yorkers because of the cresendoing effects of climate change. Laws do not exist in a static natural world. The Fourth Assessment Report[5] of the U.N. Intergovernmental Panel on Climate Change, released February 3, 2007, describes significant changes in Earth's biosphere, indicating that lands, such as those within the Forest Preserve, will have even more enormous importance for humans and nature in coming generations than we have known in the past.

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[4] See Rosemary Nicholas and Nicholas A. Robinson, "The 2005 Constitutional Violation of New York's Forest Preserve: What Remedy?" vol. 26, no. 2, *The New York Environmental Lawyer* (NY State Bar Association, Spring 2006), at pp. 31-34. See the remedy set forth in response to constitutional assertions of the Association for the Protection of the Adirondacks, in the "New York State Department of Environmental Conservation Adirondack Park Agency Order on Consent, published in vol. 26, no. 3, *The New York Environmental Lawyer* 9-20 (2006).

[5] Intergovernmental Panel on Climate Change, "Climate Change 2007: The Physical Science Basis," Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC Secretariat, World Meteorological Organization, Geneva, Switzerland), available at www.ipcc.ch; see also Elizabeth Rosenthal and Andrew C. Revkin, "Science Panel Says Global Warming is 'Unequivocal,'" NY TIMES, p. 1, col.. 5 (February 3, 2007).

The Article XIV "forever wild" provisions are not merely dry legal restrictions, to be forgotten unless tripped over as a technicality, as when an agency of government wants to act to directly harm the Forest Preserve. By establishing a fundamental norm for the "lands" of the Forest Preserve, the Constitution directs all agents of the government, and indeed all citizens, to enhance the "wild" or naturally functioning ecological conditions in and around the Adirondacks. These enhancements can, and should, be realized through diverse legal means. The Department of Environmental Conservation[6] and the Adirondack Park Agency[7] both possess many, but by no means all, of the statutory legal authority to enhance the Forest Preserve.

In this era of climate change, it is time to examine which other agencies of government are obliged to deploy their powers so as to enhance the Forest Preserve. As Emerson also observed in *Nature*, "At present, man applies to nature but half his force. He works on the world with his understanding alone. He lives in it, and masters it by a penny-wisdom; and he that works most in it, is but a half-man, and whilst his arms are strong and his digestion good, his mind is imbruted, and he is a selfish savage."[8]

All agencies of state and local governments in New York must act to nurture the preserve of forest within the Adirondacks and Catskills.

With reference to the Forest Preserve, does not Ralph Waldo Emerson or Louis Marshall urge us to regard the Forest Preserve as more than just as a place where we should be allowed to extract timber, or build roads, or treat water as merely one more commodity, or extract minerals or wind-energy, or even coax dollars from eco-tourists? Should we not regard the constitutional status of "lands," which are reserved as "forever wild," to be a place in which our government shall act `to sustain and enhance a productive and enjoyable harmony between humans and nature, to promote efforts that prevent or eliminate damage to the environment, to enhance human and community resources, and to enrich our understanding of the ecological systems, natural, human and community resources situated within the Forest Preserve?[9]

When, in 1858, Emerson traveled "to Follansbee Water and the Lake of Loons," he espied the future of the Adirondacks. Enchanted with the mountains and forest and lakes, with

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[6] See the codified Environmental Conservation Law, vol. 17 ½ McKinney's Consolidated Laws of New York.

[7] See the Adirondack Park Agency Act, Article 27, The Executive Law, Section 800 to 820, vol. 18 McKinney's Consolidated Laws of New York.

[8] *Id*., Nature at Chapter VIII, "Prospects," page 87.

[9] These duties, implicit in Article XIV, are re-enforced by the purpose of the NY State Environmental Quality Review Act ("SEQRA"): "It is the purpose of this act to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promoter efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state." Section 8-0101 of the Environmental Conservation Law. SEQRA clearly re-enforced the mandates of Article XIV.

prescience Emerson envisioned that one day the Adirondacks would be full of summer residents, who would all progressively be "more adroit" at living in the wilderness.[10]

If we who have come to the Adirondacks in the decades subsequent to Emerson are to be "more adroit," we must know both the ecology and the economy of nature. It is essential to acknowledge that this harmony necessarily includes the economic well being of the humans and their communities within the Adirondack or Catskill Parks, as well as the flora and fauna. Article XIV contemplates a *holistic* approach to humans in nature, not one that divides humans from nature, or sacrifices natural integrity to human greed. We recognize that human culture is embedded in nature.[11] Is it not our own social and collective blindness that led New Yorkers into the "culture" wars that characterized the years of debate from 1988 to 1993 surrounding the work of the Commission on the Adirondacks in the 21st Century?[12] Was it not also this very sort of blindness, and a greed for commodities like board feet of timber, that emboldened legislators to introduce bills each year, from 1895 to 1920, which were designed to repeal the "forever wild" provision of the Constitution,[13] and also to attempt to repeal this clause in the Constitutional Convention of 1915?[14] While all efforts to repeal Article XIV have failed, is it not remarkable that proponents of repeal kept trying to do so and repeatedly failed to understand the meaning of "forever wild"? In like vein, do not New Yorkers today need to lift the cataracts from their eyes in order to see and salvage some of the important recommendations for legislative reforms,

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[10] See Ralph Waldo Emerson's poem, *A Journal*, (Houghton, Mifflin Company, New York), memorializing the philosophers' camp, at the 14th stanza:

"… As water poured through hollows of the hills
To feed this wealth of lakes and rivulets, So Nature shed all beauty lavishly
From her redundant horn.
Lords of this realm,
Bounded by dawn and sunset, and the day
Rounded by hours where each outdid the last
In miracles of pomp, we must be proud,
As if associates of the sylvan gods. We seemed the dwellers of the zodiac,
So pure the Alpine element we breathed,
So light, so lofty pictures came and went.
We trod on air, condemned the distant town,
Its timorous ways, big trifles, and we planned
That we should build hard-by, a spacious lodge
And how we should come hither with our sons,
Hereafter, -- willing they, and more adroit. … "

See also Alfred L. Donaldson, A History of the Adirondacks, vol. I, Chapter XVI, describing "The Philosophers' Camp." P.172. (New York, The Century Company, 1921). From the insightful poetry of Emerson, we can project ahead to the prose of Bob Marshall, who, in The People's Forests, wrote in like vein: "There can be no doubt that the greatest attraction of the forests is their natural beauty. As society becomes more and more mechanized, it will be more and more difficult for many people to stand the nervous strain, the high pressure, and the drabness of their lives. To escape these abominations, constantly growing numbers will seek the primitive for the finest features of life."

[11] See, The World Charter For Nature, UNGA Res 37/7; also The Earth Charter, www.earthcharter.org;and section 101 of the National Environmental Policy Act of 1969, 92 USC 4321; and Aldo Leopold, "The Land Ethic," A Sand County Almanac (1948).

[12] Barbara McMartin, Perspectives on the Adirondacks: A Thirty-Year Struggle by People Protecting Their Treasure (Syracuse University Press, 2002).

[13] Alfred L. Donaldson, A History of the Adirondacks, Volume II, Chapter XLIV, "Legislative Control," (The Century Company, New York, 1921).

[14] *Ibidbum*, p. 243.

especially those which have potential to help our human communities within the Adirondacks, contained within the 1990 study on "The Adirondack Park in the Twenty-First Century"?[15]

Humans exist within and are part of nature. If from time to time we forget this reality, today the effects of climate change will again remind us of our human dependence on the natural environment. This being so, let us turn to the deep potential to forge the harmony between humans and nature that is contained within the legal provisions of our Constitution's "forever wild" clause.

Enacting New York's Constitutional Mandate for "Forever Wild" Lands

In order to fully comprehend the legal import of the words of Article XIV, it is important to understand how the words were drafted and enacted. This history of this Constitutional provision is instructive. The words' intent is bound up in their origin.

The history of exploitation of natural resources in the Adirondacks and the acute environmental degradation that it caused in the late 19th century has been retold often.[16] At the end of the 1800s, many felt that the rise of scientific forestry held promise for the wise use of stands of timber, providing the promise of attaining in time "multiple use and sustained yield"[17] approach. However, as illustrated by the ill-fated (albeit well-intended) attempt to create a School of Forestry at Cornell University, [18] short-term economic forces greedily cut timber without regard for scientific forestry practices or any other competing uses of the land. This rush to secure wealth from the forests was abetted and compromised by corruption in government. The movement to provide professional forestry practices in the State lands of the Adirondacks stalled. Meanwhile in the wake of Verplanck Colvin's surveys of the Adirondacks made between 1872 and 1885, interest in the forest and other natural resources of the Adirondacks grew statewide. In 1884, the legislature established a Forest Preserve and a Forest Commission. The services of Prof. Charles S. Sargent of Harvard University were engaged to study the Adirondack forest and in 1885 he presented his report and recommendations, which in turn inspired several competing bills.[19]

The legislature enacted Chapter 283 of the Laws of 1885, providing that:

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[15] Report of the Commission on the Adirondacks in the 21st Century, vol. I, and Technical Reports, vol. 2 (1990).

[16] See, e.g. Frank Graham, Jr., The Adirondack Park: A Political History, (New York, Knopf, 1978).

[17] Eventually, these policies for the conservation and rational use of natural resources came to be applied to the National Forests at the federal level, and saw enactments as the "Multiple Use, Sustained Yield Act of 1960, 16 U.S.C. 528. However, translating this into a meaningful practice through forest planning and scientific – as opposed to political – forestry practices, has proven to be problematic.

[18] Alfred L. Donaldson, A History of the Adirondacks, vol. II, p. 202 (New York, The Century Company, 1920). Louis Marshall was an advocate for scientific forestry: "Marshall was by no means against the practice of forestry itself., In fact, for many years after the demise of the forestry college at Cornell, he kept up a campaign to have a similar college, with sounder planning and funding, established at Syracuse University, where he was a trustee. At last in 1911 the state established the New York State College of Forestry in Syracuse, with Marshall serving as the president of its board of trustees until his death eighteen years later." Frank Graham, Jr., The Adirondack Park: A Political History, (New York, Knopf, 1978) at p. 167.

[19] Frank Graham, Jr., The Adirondack Park: A Political History (New York, Knopf, 1978) at pp. 104-5.

"Section 7: All the lands now owned or that may hereafter by acquired by the State of New York within the countries of Clinton…Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan, shall constitute and be known as the Forest Preserve."

The legislature later added Oneida County in 1887 and Delaware County in 1888 to this statutory Forest Preserve. The roster of counties provided one Forest Preserve in the Adirondacks and another in the Catskills. Further legislation was prepared in New York City at a meeting in Morris K. Jessup's offices, involving Prof. Charles Sargent and others, to strengthen this enactment.[20] The statute was amended in 1885 again to provide:

"Section 8: The 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 corporation public or private."

The words "forever wild" and Forest Preserve were now coupled.

Moving forward, the Forest Commission issued annual reports of its work. Governor David B. Hill's message to the Legislature on January 22, 1890, recommended study of establishing a park for part of the Adirondack wilderness. The legislature asked the Forest Commission to study the matter, and a special report was issued. It included a map prepared by the State Comptroller in 1884, in which the lands of the Adirondack Park where shown with a red border, and the smaller space for a possible Forest Preserve set out in a blue border. Thus was the blue line born, the delineation of NY's "forever wild" forests.[21]

Following further reports and studies, in 1892 the legislature created the Adirondack Park and authorized the purchase and sale of lands within the countries including the Forest Preserve. In 1893, the Legislature clarified that the park "shall be forever reserved, maintained and cared for as ground open for the 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." However, the law also allowed, in Section 103, for the Forest Commission to sell timber, and the Forest Commission promptly granted wood cutting contracts. Timber was stolen from State lands, without fear of enforcement, and even with the acquiescence of the Commission. Moreover, speculators had found ways to attack the State's title to land, and actually removed some 100,000 acres from the Forest Preserve, thereby facilitating their exploitation.

Such ineffective, and even unlawful and corrupt practices, associated with the State's management Adirondack Park and Forest Preserve, prompted Frank S. Gardner, Secretary of the NY Board of Trade and Transportation, to observe that "I am convinced that the forests will never be made safe until they are put into the State Constitution."[22] Historian Alfred Donaldson recalls that those who advocated a constitutional provision were belittled in Albany as "the forestry bigots."[23]

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[20] *Ibidum*, at p. 105.-6.
[21] Alfred L. Donaldson, *A History of the Adirondacks*, vol. II, p. 181.
[22] Cited in Alfred L. Donaldson, A History of the Adirondacks, vol. II, at p. 188 (New York, The Century Company, 1921)
[23] *Ibidum* at p. 189.

It is a frailty of human nature to impute one's own motives to others, in particular one's opponents. A bias in favor of unbridled exploitation of the forests for timber or other developmental uses often precludes appreciating the merits of another point of view. Those who selfishly saw the forests as providing an entitlement for exploitation could not imagine the legitimacy of another policy, much less law. In the face of firmly held beliefs, education can not easily shift the ideological blinders. As Louis Marshall knew, even once enacted, the "forever wild" law would have to be enforced before it would be observed.

When the State convened its Constitutional Convention in 1894, the advocates for elevating the Forest Preserve to constitutional status found the delegates to be responsive. Although the Constitutional Convention was led by Republicans, it was a Democrat, David McClure, a leader of the New York City bar, who introduced the idea for a Constitutional Amendment on the Forest Preserve.[24] The president of the Convention, Joseph H. Choate, told David McClure that "You have brought here the most important question before this assembly. In fact, it is the only question that warrants the existence of this convention."[25] Colonel McClure, assisted by Louis Marshall and others,[26] presented the "forever wild" amendment to the constitution on August 1, 1894, and in a bipartisan show of support the Republican majority referred the amendment to a special committee to be chaired by McClure, a Democrat. The Committee reported out what historian Donaldson calls "this bare, unbreakable bone of forest protection." The clause read as follows:

"The lands of the State, now owned or hereafter acquired, constituting the forest preserve as fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanges, or be taken by any corporation, public or private, nor shall the timber thereon be sold or removed."

To these words, Judge William P. Goodelle of Syracuse proposed adding the words "or destroyed" at the end. This addition took the second sentence of this constitutional mandate out of the realm of treating the land and timber as a mere commodity, and tied the second sentence to the first. If wild forest lands were natural and partook of creation, then their natural character had now to be maintained. It could not be "destroyed" in any way, whether by extracting natural resources, flooding, road building, tourist resort construction, or other non-natural, non-wild undertakings. On September 23, 1894, after the 3rd reading, the amendment was adopted unanimously, 122 to zero. In that Convention, only 33 of some 400 amendments were accepted, and only this one by unanimous vote. The voters thereafter enacted the provision,[27] and it went into effect on January 1, 1895.

The Checkered Observance of the "Forever Wild" Mandate

Now began the battle to win observance of the Constitutional "forever wild" clause. The Forest Commission at once sought to circumvent it, and in response the Legislature in 1895 replaced the Commission with a consolidated Fisheries, Game and Forest Commission, which was to become the Conservation Commission in 1911, and ultimately became the Department of Environmental Conservation (DEC) in 1970. However, also in 1895 the Legislature enacted a

[24] *Ibidum* at 127.
[25] Cited in Donaldson, op cit., at p. 190.
[26] Frank Graham, Jr., The Adirondack Park: A Political History (New York, Knopf, 1978) at p. 167.
[27] *Ibidum* at p. 193.

bill[28] to repeal the Constitution's "forever wild" provision and, with the support of the new Commission, the Legislature submitted this amendment to the voters in a referendum in 1895. That November, the electorate defeated the proposed amendment by the widest margin ever to defeat a profered constitutional amendment. Notwithstanding this vote, the Forest Commission continued to agitate against the ban on timbering in the Forest Preserve.

It was not until Theodore Roosevelt became Governor, in 1900, that the Forest Commission was reorganized and its biases against the Constitution squarely confronted. Thereafter, in 1901, Governor Odell recommended merging the Forest Preserve Board into the Commission under a single Commissioner, with two Deputies. The Governor was authorized to make appointments, so that the timber lobby lost its influence over the patronage in the Forest sector of the combined Commission. Problems persisted nonetheless, with vast forest fires in 1903 and 1908 and extensive thefts of timber from State lands.

Louis Marshall was alarmed that implementation of the "forever wild" Forest Preserve mandates were at risk. Marshall joined like-minded supporters of this constitutional Forest Preserve in 1902, to launch The Association for the Protection of the Adirondacks ("AfPA"). The Association began its investigations and advocacy in support of Article XIV, and it faced no end of attacks on the "forever wild" mandate. The Association reported that some 16 million board feet of timber were stolen from the Preserve in 1904 alone. In 1908 unlawful dams were built on the Saranac River, despite a prior determination that they would violate the "forever" wild Forest Preserve by backing up water into the Preserve. The Attorney General of the day apparently lacked the integrity to appeal a questionable Supreme Court decision that had allowed a company, which had built the dams, to be accorded a "prescriptive right" to flood Forest Preserve lands.[29] In 1911, a bill to allow the removal of fallen, dead, burned or mature timber from the Preserve was introduced into the Legislature, and had to be defeated.

Meanwhile timber thefts continued. Following public protests, upon the recommendation of Governor Dix, the Legislature reconstituted the Commission on Conservation and codified the Conservation Law.[30] By 1914, enforcement against timer theft began to become effective, and the level of timber rustling reached its lowest level. By 1915, the Commission was replaced by a single commissioner, and all appointments were to have civil service protection with expert qualifications.[31]

In 1915 there was a further attempt to amend the "forever wild" provision when the State again held a Constitutional Convention. Amendments were put forward by the Convention, only to be rejected by the voters in the subsequent State-wide election. Howard Zahniser characterized the unsuccessful efforts to weaken the "forever wild" provisions at the 1915 Convention as reaffirmation. In his address to the N.Y.S. Conservation Council in 1957, Zahniser hailed the "forever wild" provision as "an historic declaration of a sovereign state of the United States declaring in its basic, fundamental law, a purpose to keep forest lands forever wild." He went on to invoke Louis Marshall in support of his statement: "I have read with special interest the record of the debate of the 1915 Constitutional convention on the Forest Preserve. Mr. Marshall said then, in leading the debate in defense of the Forest Preserve …' If I were asked to state what the most important action of the convention of 1894 was, I should say without the slightest hesitation

[28] *Ibidum* at p. 198.
[29] Suit against Paul Smith's Electric Light and Power and Railroad Company, Supreme Court Plattsburg, N.Y. (per Justice Kellogg)
[30] L. 1911, Ch. 647.
[31] L. 1915, Ch. 318.

that it was the adoption of *Section 7 of Article VII* [renumbered in 1938 as Article XIV] of the Constitution which preserved in their wild state the Adirondack and Catskill forests."[32]

Despite electoral reaffirmations of the "forever wild" mandate, various opponents of the Forest Preserve repeatedly sought to dilute the Constitution's mandate. Before the New York State Court of Appeals ruled in favor of "forever wild" in *Association for the Protection of the Adirondacks v. MacDonald,* [33] lawyers in the Department of Law developed interpretations of the "forever wild" provision that weakened its effectiveness. These Opinions of the NYS Law Department have persisted only because they have not been tested in the courts. These early and untested Opinions of the Attorney General do not adhere to the clear meaning of the "Forever wild" provision in Article XIV,[34] and should be considered limited expressly to their narrow facts and conditions at the time of each Opinion; they should not be construed to be a precedent or authority.

The Attorney-General's use of the "inconsistent purposes" doctrine should also be strictly construed, if not rejected outright, as inconsistent with Article XIV. Under this line of Opinions, if the State buys land within the Blue Line, but situated outside of the then existing Forest Preserve, it need not be included in the Preserve so long as its intended use is "inconsistent" with wilderness. However, unless the land is already in use as a road or building, it is likely to be in its natural state, and should be maintained as wild forest lands. The Attorney-General's "inconsistent purposes" rule needs to be carefully constrained. Application of this interpretive rule to natural areas inconsistent with Article XIV must therefore be eschewed. The later legislative status conferred on "wild forests" also is logically a contravention of Article XIV. If, State lands are if within the Blue Line, all these lands belong in the Forest Preserve.

What in this abbreviated legal history illustrates is that immediately upon adopting the "forever wild" mandate, strong opposition was voiced by State governmental authorities, who were close to the economic forces that sought unbridled exploitation of the forest lands. Less venal, but also as a source of opposition to the "forever wild" clause, were those officials who advocated as a substitute for the prohibition on all forestry within the Forest Preserve, a rule authorizing establishment of "scientific forestry." Both camps failed to understand the legal concept of wilderness.

All these battles during the first five decades under the constitution's "forever wild" mandate produced a pattern of public discourse and political action that focused on *what the mandate prohibited*, rather than cultivating an understanding of *what the mandate promoted*. Little attention was being paid to using the affirmative authority within the "forever wild" mandate to enhance the Forest Preserve and the natural values that it embodies. Defenders of the Forest Preserve were too busy fighting back illegal incursions, or efforts to repeal the provision altogether. Among the few positive steps taken was the enactment in 1919 of Legislation to enhance the Forest Preserve by amending the definition of the Adirondack Park to include "all lands" within the Blue Line, not just "State lands."[35] The Park became the home of the Forest Preserve in the Adirondacks, and activities within the Park should sustain the wild forest lands.

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[32] Howard Zahniser, "Where Wilderness Preservation Began," in Ed Zahniser, editor, Where Wilderness Preservation Began (Utica, North Country Books, 1992) at p.72, citing Charles Reznikoff, Louis Marshall: Champion of Liberty.

[33] 253 N.Y. 234, 10 N.E. 902 (1930).

[34] Some Opinions adhere to the clear meaning of Article XIV, see e.g. that trees may not be cut for the building or maintenance of dams, 26 St. Dep. 281 (1921).

[35] L. 1912, Ch. 444.

Another positive theme was the repeated and sustained public support for "forever wild." Whenever the public had to vote on the question of amending the Constitution to alter or remove the "forever wild" mandate, the public was constant in its support.

Further Constitutional Amendments Preserving the "Forever Wild" Mandate

The "forever wild" provisions, originally in Article 7 of the Constitution, were shifted verbatim to Article XIV of the Constitution adopted in 1938. While a number of specific additions to Article XIV have been approved by the voters, no amendments weakened the language from 1894 embodying the "forever wild" mandate. As discussed below, the reaffirmed mandate sustains a substantially more robust level of governmental action to enhance the Forest Preserve than has been provided with respect to implementing many of the State's statutes that should be deployed to enhance the Forest Preserve. It is worth reflecting further upon how the voters of the State have always reaffirmed the core "forever wild" mandate, while pragmatically amending the Constitution in very narrow ways to accommodate the needs of local communities and their social and economic well being.

The language of "forever wild," supports stronger governmental regulations, and even mandates enactment of new legislation (as well as judicial decisions) in accord with its requirements. The role of constitutional amendments to Article XIV has been to let the voters determine when a proposed use that is inconsistent with "forever wild" Forest Preserve values, should nonetheless be authorized for good and sufficient reasons. Each referendum is an act of fundamental democracy, which strengthens the core integrity of Article XIV every time it has been undertaken.

While the "forever wild" language in Article XIV is sacrosanct, its specific application in narrow instances has been modified by a number of amendments to the Constitution. Some observers have misunderstood the importance of these detailed and precise amendments. Every time a highway route encroached on the Preserve, or a town cemetery needed expanding at the edge of the Preserve, the voters would be asked to amend the Constitution. Frank Graham, Jr., writes that "The Forever Wild clause was burdened with a string of qualifying phrases that, as someone has said, made the New York State Constitution read like a highway gazetteer."[36] However, rather than being seen as a "burden," are not these amendments a badge of honor for constitutional governance and respectful of Article XIV? Vote tallies on the individual amendments each demonstrate the respect that that electorate provides for the power of the "forever wild" provision of Article XIV. The effect of these detailed amendments has been to make it all the clearer that one cannot circumvent the language of Article XV, Section 1, by administrative or legislative or private action. That some state or local authorities, even the Conservation Commissioner and Department of Environmental Conservation, may have allowed errant acts, which encroach on the Forest Preserve in the past, is not a legally sufficient reason to repeat such unlawful behavior.

Concern for the communities and economy of the Adirondacks motivated The Association for the Protection of the Adirondacks to prepare an amendment to the "forever wild" clause allowing three per cent of the Forest Preserve to be flooded for water storage purposes.

[36] Frank Graham, Jr., The Adirondack Park: A Political History (New York, Knopf, 1978) at p. 211.

Known as the "Burd Amendment," this amendment was adopted by the electorate.[37] The Burd amendment was the first of a number of amendments by which the voters of New York approved needed human developments that made incursions into the Forest Preserve. These small accommodations have not prevented expansion of the "forever wild" lands. The fact that subsequent Governors repeatedly added lands to the Forest Preserve made it easier for the public to agree to amendments that accommodate some local needs that compete with abutting wilderness areas. Despite (perhaps because of) the burdens of undertaking a constitutional amendment process, New York's public has accepted a number of specific amendments.

Given the electorate's consistent reaffirmation of the Constitution's "forever wild" mandate, there is no need to debate theoretical changes to the core content of Article XIV. The need, rather, is affirmatively to realize its full implementation. The legal foundation for doing so is found also in the decisions of New York's Court of Appeals.

The Court of Appeals' Interpretation of Article XIV

The very battle that gave rise to the Court of Appeal's landmark decision in *Association for the Protection of the Adirondacks v. MacDonald* reveals how shallow the executive branch's understanding of Article XIV has often been. In order to develop a Bobsled run for the 1932 Winter Olympics, the Olympic organizing committee arranged for legislation to be enacted, and signed by Governor Franklin Roosevelt, authorizing the new sports facility at Lake Placid "on lands in which any necessary easement may be provided."[38] The Olympic Committee sought to encroach on "forever wild" forest lands by securing an easement for their new facility. The Conservation Department cooperated with the Committee, rather than defending the "forever wild" mandate. Louis Marshall, reflecting back on this episode, blamed the legislature as well as the executive branch: "My experience tells me that a latitudinarian interpretation, on the theory that the violation is unimportant and trivial, invariably leads to an effective neutralization of the constitutional provision so treated."[39]

While the proposed Olympic encroachment seemed trivial and well worth it to the political leaders of the day, the NYS Conservation Department's approval loomed as a massive intrusion, both physical and legal, to the leaders of the Association for the Protection of the Adirondacks. The Association invoked its right under the Constitution to sue to compel observance of the "forever wild" mandate. The Appellate Division of the Supreme Court held against the Conservation Department's decision to allow the bobsled run, holding that the Forest Preserve "must always retain the character of a wilderness."[40] Rather than accept this ruling, the Attorney General appealed to the Court of Appeals.

In 1930, New York's highest Court, writing through Judge Frederick C. Craine, closed the door on the "latitudinarian" thinking that characterized the government's response to the "forever wild" mandate between 1894 and 1929. The court held, plainly, that the "The

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[37] Alfred L. Donaldson, A History of the Adirondacks, vol. II., pp. 237-9 (New York, The Century Company, 1920).
[38] L. 1929, L. 417
[39] Cited in Frank Graham, Jr., The Adirondack Park: A Political History (New York, Knopf, 1978) at 187, taken from personal correspondence of Louis Marshall, in Charles Reznikoff, ed., Louis Marshall: Champion of Liberty, vol. II, p. 1063.
[40] Association for the Protection of the Adirondacks v. MacDonald, 278 App. Div. 73 at 81 (1929).

Adirondack Park was to be preserved, not destroyed."[41] The Court rejected the attempt of the Legislature, abetted by the Governor and his Conservation Department, in effect to amend Constitution by a statute. The Forest Preserve trees "cannot be cut or removed to construct a toboggan slide simply and solely for the reason that …[the "forever wild" mandate in] the Constitution says it cannot be done."[42]

The Association's victory in the *MacDonald* litigation provides significant guidance, both for government agencies and to the public. The Court explains the duty that governmental authorities have toward the Forest Preserve under Article XIV. The decision provides, in relevant part, that:

" The forests were to be preserved as wild forest lands, and the trees were not to be sold or removed or destroyed."[43] …

" A very considerable use may be made by campers and others without in any way interfering with this purpose of preserving as wild forest lands."[44] …

"Therefore all things necessary [for preservation of the forest preserve] were permitted, such as measures to prevent forest fires, the repair 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 in any material degree. The 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 everyone 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."[45]

The Court of Appeals in the *MacDonald* ruling invited the Legislature to further clarify how the State is to sustain "forever wild forests" so that the people may derive the myriad benefits simply of spending time amidst wild nature. It is clear that wild forest lands cannot include new roads, or many other uses that occasionally in the past have been allowed to encroach on the Forest Preserve. The Legislature did enact reasonable further land use regulations, established an Adirondack Park Agency to ensure that private lands are used only in ways that protect the Forest Preserve, and provided authority for the Department of Environmental Conservation ("DEC") to promulgate the Adirondack State Land Master Plan.[46] The Park is home to the Preserve, and yet The Adirondack Park Agency has too often performed as a regional zoning or land use authority, and not as a steward for the buffer lands around and amidst the Forest Preserve.[47] The APA also clearly needs to do more to respect Article XIV. Adopted in 1972, that Plan has been too tepid in embracing the mandate of Article XIV.[48] Moreover, DEC has barely tapped most of its further statutory authority under New York's other State environmental laws in order to enhance the Forest Preserve. The DEC has done far too little to construe intelligently the concept of "wilderness" in the New York Constitution and the State's

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[41] Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 170 N.E. 902 (1930).
[42] *Id*., 253 N.Y. 240.
[43] *Id*., 253 N.Y. 240.
[44] *Id.*, 253 N.Y. at 241.
[45] 253 N.Y. at 238-9.
[46] Title 8, Forest Resources Planning," Article 9, Lands and Forests, N.Y.S. Environmental Conservation Law of the State of New York, 17 ½ McKinney's Consolidated Laws of New York.
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[48] See the critique of Barbara McMartin, Perspectives on the Adirondacks: A Thirty-Year Struggle by People Protecting Their Treasure (Syracuse, Syracuse University Press, 2002).

statutes.[49] The Unit Management Plan process has been halting and inadequately informed by a land ethic; the difficulties in preparing the High Peaks Wilderness Area Unit Management Plan illustrate the challenges that confront DEC in establishing stewardship for the Forest Preserve.[50]

If DEC cannot envision how to integrate and deploy its legislative authority to enhance the Adirondack Forest Preserve, then New York's Governor should direct DEC to do so. Failing that, then perhaps new legislation is needed to guide the DEC. Moreover, since New York confronts the likelihood that new second home development will bring ever larger numbers of visits to the Forest Preserve, and the effects of Climate Change will require adaptations to the new physical and environmental conditions that are coming to the Adirondacks, there is renewed urgency to take up a new invitation that the Court of Appeals made in its decision in 1930. We should not amend Article XIV, but we may need to craft a new statute, guiding the further implementation of Article XIV. For example, consideration should be given to enacting a biodiversity bill that would construe "forever wild" in ways to enhance its meaning, both as a place for people to find wilderness recreational opportunities, and as a place where humans can ensure ecologically rich conditions to persist in order that the effect of climate change may be better accommodated.

If any new legislation is to be considered, the starting place should be in facilitating implementation of the already well-elaborated body of New York environmental law. Much of this law can be applied so as to enhance and re-enforce the mandate of Article XIV. Both DEC and the APA know Article XIV applies to them, but both need to reform their regulations to fully implement Article XIV. Unfortunately, most government agencies other than DEC or the APA, have not made the connection.[51] If these other agencies regard Article XIV at all, often it seems it is only to regard it as a prohibition on any of their activity that might harm the Forest Preserve, but this is only half this provision's mandate. The other half entails the duties that all State agencies hold to enhance the effectiveness of Article XIV, to strengthen the ecological and social and culture values of the forest wild forest lands.

Let us explore what existing State legislation already requires State and local governmental authorities to do with respect to the Forest Preserve. These statutes need to be enforced. We can then reflect on the challenges that the changes in Earth's climate may pose for the "forever wild" status of the Forest Preserve, and then contemplate what sort of "reasonable regulations" might be appropriate to include within a new biodiversity statute.

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[49] DEC could, of course, promulgate regulations elaborating on how to better implement the "Forever Wild" mandate, but that inconsistent management styles of different Governors and Commissioners, and the inadequate funding provided by the budget process to date, has left the DEC ill equipped to do so. It would seem that a renewed legislative mandate is needed to lift up the "biodiversity" and climate change implications of "Forever Wild" to the level of attention that will be required if New York is effective to protect the Forest Preserve.

[50] Barbara McMartin, Perspective on the Adirondacks: A Thirty-Year Struggle by People Protecting Their Treasure (Syracuse, Syracuse University Press, 2002), Chapter 18, Case Study 6, on "The Citizen's Advisory Committee for the High Peaks Wilderness Area Unit Management Plan," pp. 264-276. She concludes that this High Peaks United Management Plan, for all its inadequacies, is nonetheless "a fair management tool, one that can guide DEC in the future. It is not groundbreaking, it did not deal with future and inevitable pressures, it has not solved all the problems…experience has shown that amending unit management plans can be a much swifter process than creating them." *Id* at 276.

[51] The Department of Transportation is to be commended for having twice attempted to institutionalize ways to use its authority over State highways in and around the Blue Line to operate so as to enhance the Forest Preserve, albeit with mixed results. Most other agencies have not even made the attempt.

Article XIV's Mandates to Enhance "Forever Wild"

It is self-evident that, like all New York's statutes, the Environmental Conservation Law needs to be interpreted in light of what the State's Constitution requires. Unfortunately, both the Department of Environmental Conservation, and the Adirondack Park Agency, as well as most other agencies and local authorities, have not acted as if they consider that Article XIV requires them to use all available resources to use all available resources to enhance the protection of the Forest Preserve in the course of applying their other statutory programs. In their defense, it should be noted that they are not given clear guidance from the Governor's Office in this respect, nor do they seek budget support to implement "Forever wild" enhancements. The Attorney General offers little positive guidance. Evidently, the Article XIV mandate is deemed to be either largely irrelevant or of such a low priority that its duties are never reached.

Such unlawful disregard of Article XIV must be replaced with conscious, poitive adherence to the Constitution. Therefore, it is incumbent to consider how to highlight what Article XIV requires of State agencies, and how to induce all departments of the state government to take positive actions to respect and enhance Article XIV values. The conservation community has been too much focused on seeking to avoid actions that might negatively impact on the Forest Preserve. The positive commands of Article XIV deserve as much, or more attention.

Few agencies have enacted regulations in furtherance of Article XIV, or even regulations to ensure that they will not harm Article XIV. State statutes associated with the Forest Preserve must be read, *in pari materia* as part and parcel of the same Article XIV stewardship duties. Such statutory interpretation demonstrates that several common duties apply to all State and local authorities:

> Article XIV requires that *"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."*

Let us parse these core words, examining their plain meaning and applying this meaning in light of the legislative measures that have established the framework of environmental law in New York over the past century.

What are lands? How are they to be defined? The answer is found by focusing on each word that constitutes the heart of mandate set forth within Article XIV: the (a) **lands** (b) **forever** (c) **shall** (d) **be kept** (e) **as wild** (f) **forest lands**. Parsing the first sentence of Article XIV reveals six aspects to the Article XIV Mandate, each embodied in the words employed.

(a) The ***lands***, in one sense, hold a geographic definition. They are physically situated in the Adirondacks and Catskills, a demarcated part of the Earth, within the State of New York. But lands are not maps; they are hosts to the soils, flora, fauna and waters that comprise lands. These mapped lands are mountains and wetlands, bogs and lakes, and myriad other natural areas. Lands are living resources, ecosystems and biomes.

(b) These lands are deemed for all time, ***forever,*** to be subject to this mandate in Article XIV; obviously from a positivist Constitutional perspective, this can mean for all times when the Constitution is in force and effect. From a deeper perspective, however, the framers of

this mandate clearly intended the Forest Preserve to be allowed to exist in a wild and natural state for time eternal.

(c) The word ***shall*** means more than an immediate command. Each component of State and local government under the Constitution is commanded to observe the mandate of Article XIV, and is in no way excused from doing so.

(d) Article XIV creates a deeper duty, when "shall" is tied to ***be kept***. When engaged in "keeping," we citizens of New York are not locking up the Forest Preserve as an animal in a zoo, to be imprisoned while being fed and cared for; yet too often this sort of parochial vision is what underlies both the arguments of opponents of the Forest Preserve and the ruses or behavior of state and local agencies that seek to circumvent Article XIV. The Constitutional mandate conveyed by the word mandate "kept", as the drafters clearly indicate, means to preserve and continue these lands in a state of wilderness. It is a meaning akin to the Biblical injunction to be thy keeper's brother. Being kept entails the affirmative duty of stewardship and caring. All agencies governed by the Constitution thus are directed to take affirmative measures to preserve and act intentionally to sustain these lands and forests, and not merely to refrain from harming them.

(e) This duty to keep and to preserve has the objective of sustaining a ***wild*** quality of life, which are both a scientific and a cultural construct. Humans have defined for themselves what is wild. Humans have observed how physical and ecological systems function when human impacts are absent or minimized, as in a wild state. In the wild, humans are a part of natural systems without significantly altering them. The Constitution plainly requires wild conditions. It sets *one* norm for the wilderness in the Forest Preserve. Governmental authorities should not arrive at differing opinions as to what "wild" may mean to them; they should hue to the Constitution, not their latitudinous or expedient variants.

(f) Moreover, "wild" derives its contextual meaning by being coupled inextricably with ***forest lands***, which necessarily subsume the entire web of life that supports a forest. A forest is not merely a stand of board feet of timber waiting to be cut; even scientific forestry measures the commercial forest in terms of rainfall and ground water, the biodiversity of life essential to keep forest pests at bay, or the contribution that trees make to sustaining other flora and fauna. These forests are watersheds, embracing lakes wetlands, streams, and the headwaters of the great rivers. As is clear from the history of Article XIV, within the Adirondack and Catskill mountains, serving both natural and the constitutional Forest Preserve, encompasses all ecological systems, in order to serve the human cultural dimensions such as appreciating beauty or experiencing nature as a visitor in a wild place in The Forest Preserve.

To observe and be guided by Article XIV is to comprehend this core meaning. The mandate to keep the Forest Preserve means to enhance its natural and wild character, and the human appreciation of that character in the "forever wild" Forest Preserve. Parsing each word of Article XIV, in light of history, and its scientific and cultural meaning, makes the mandate of enhancement evident. Too much debate in government has been on the second sentence, prohibiting destruction of trees. For lawyers and others to dwell so extensively during the past ten decades on the issue of destruction of trees is to risk debasing the core mandate within Article XIV.

Existing State Statutes Serving Article XIV

Other State statutes need to be construed in light of Article XIV, to reaffirm that the lands and forests, waters and mountains, and flora and fauna of the Adirondack Forest Preserve constitute an integrated whole. The Constitutional mandate is not intended to reduce this whole into them to separate rules and regulations for this fish or that mammal, for this wetland or that curb cut along a road, to this trail or that roadside parking lot. Governments have been reductionist; they have sliced and diced the wild Forest Preserve to suit their own perceived needs with regard primarily to their own narrow responsibility or interests. Too often governmental authorities have resorted to forced interpretations of what the law allows them to do, or have fabricated ruses to justify their reductionist micro-vision. The State Land Master Plan needs to reaffirm the core Article XIV values that cut across and are shared by each of its categories, not dwell exclusively on the latter. In the end, is not this reductionist approach to the Adirondacks the root cause of their gradual deterioration? To counter this piece-meal approach, it is necessary to realign State Statutes in accordance with align State Statutes in accordance with the core content of the "forever wild" mandate in Article XIV.

What *is* encompassed within the definition of wild forest lands? Do we not know the Adirondacks, as Verplank Colvin did, or Ralph Waldo Emerson did, or Louis Marshall did, as being more than just the sum of its parts? Is not the Forest Preserve a unique opportunity for you and me, as humans, to enter the flow of life across time and space, and to become aware again of our human bonds with all of life? Do not all New Yorkers depend daily upon the ecosystem services and waters provided by The Adirondack and Catskill Forest Preserve?

As the Appellate Division of the Supreme Court and the Court of Appeals both recognized, in *Association for the Protection of the Adirondacks v. MacDonald*, the framers of Article XIV (like the electorate which repeatedly votes in favor of "forever wild") intended the widest and most holistic definition for the wild lands and forests of the Adirondacks. The Forest Preserve is not merely measured acres on a map. The Adirondacks embrace all the web of life, from the microbes and moisture in the soils, to lichen on rock and tree, to the migratory species for fauna and humans that frequent these lands (for do we humans not come and go with some migratory predictability?), to the inhabiting flora, to the wetlands redolent with waters, to the mists and clouds of the hydrologic cycle that bathe these lands continuously, to rivulets, streams and rivers, lakes and glens, forests and fields, mossy hill sides and frozen waterfalls in winter, and even the ticks and the black flies. This is the ecological setting that provides the recreation, the spiritual renewal and the "tonic" that the lands of the "forever wild" Forest Preserve provide to the people.

Those who would reduce nature merely to being a place for extracting natural resources and converting that to monetized wealth, often seek to belittle the values of nature that Article XIV protects. These ecological and spiritual values do not have a dollar sign attached to them, and cannot be taken to the market place. Even those who do try to assign dollar values to ecological utilities or eco-tourism end up leaving unvalued associated core values that cannot be sustained apart from the whole.

This holistic view of the environment within the Forest Preserve is a part of State law beyond Article XIV. The most fundamental environmental statute in New York makes it clear that this approach is to be used in <u>all</u> governmental decision-making. The New York State

Environmental Quality Review Act[52] (SEQRA) is a *magna charta* for the environmental rights of all New Yorkers. Unfortunately, reductionists and mercantile interests in land speculation and real estate development have repeatedly sought to erode SEQRA. They have reduced the preparation of environmental impact statements to a procedural game, in which too often affluent development interests overwhelm the lay planning boards and modest planning consultancies that serve local governments. Meanwhile, State agencies often see SEQRA procedures as a nuisance. When deciding to undertake an act, the agency's "mind" is made up and it is not keen to look at alternatives to what it wants to do, much less spend funds mitigating adverse effects that it would conveniently overlook (as in the pre-SEQRA era). As a result of such incremental disregard for SEQRA over the past thirty years, government has come to forget what this seminally important law requires of us.

Since the statutory provisions in SEQRA already align SEQRA with Article XIV, it is high time that SEQRA be deployed to serve as a powerful tool for stewardship of the Adirondacks. SEQRA provides the legal means to gradually and firmly enhance the Adirondack environment, with particular emphasis on the Forest Preserve.

SEQRA declares a State policy to encourage a productive and enjoyable harmony between man and his environment and to promote efforts to prevent or eliminate damage to the environment and to enrich our understanding of the State's important ecological systems, natural, human and community resources.[53] To this end, the Legislature found that it is a matter of State-wide concern to maintain a quality environment that"is healthful and pleasing to the senses and intellect of man now and in the future." [54] The Legislature recognized that the capacity of the environment is limited and the government is to take immediate steps to identify any critical thresholds for the health and safety of the people of the State and prevent such thresholds from being reached.[55] Above all, the Legislature found that "all agencies" are to "conduct themselves with an awareness that they are stewards of the air, water, land and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations."[56]

All state agencies are under a duty to review their statutory authority, administrative regulations and current policies and procedures to conform to SEQRA's legislative policies and to comply with SEQRA's obligation to assess the environmental impacts of their actions.[57] The duty in SEQRA is clear: "Agencies shall use *all* practicable means to realize the policies and goals set forth" and "shall act and choose alternatives which, consistent with social, economic and other essential considerations, *to the maximum extent practicable, minimize or avoid adverse environmental effects*, including effects revealed in the environmental impact statement process" [58] [emphasis added in italics].

What can be done to apply SEQRA in accordance with Article XIV? Consider the procedural steps that still await implementation. First, every DEC regulation should be amended to identify how DEC's myriad authorities can be applied to enhance the "forever wild" mandate

[52] Article 8, Environmental Conservation Law of the State of New York, 17 ½ McKinney's Consolidated Laws of the State of New York. (herein SEQRA).
[53] SEQRA Section 8-0101.
[54] SEQRA, Section 8-0103 (1).
[55] SEQRA, Section 8-0103(5).
[56] SEQRA, Section 8-0103(8).
[57] SEQRA Section 8-0107.
[58] SEQRA Section 8=0109(1).

to enhance the forest preserve.[59] The DEC Commissioner is charged by law to "provide for the care, custody and control of the Forest Preserve,"[60] and in doing so must act in accordance with the duties set forth in SEQRA. *At a minimum*, these duties oblige the Commissioner to examine all the regulatory programs that DEC administers in the Adirondacks in order to ensure that they are aligned to care for the Forest Preserve. Second, DEC should amend the generic SEQRA regulations that the DEC administers, to ensure that all other agencies of government take special attention to enhance the "forever wild" values of the Forest Preserve.[61] Third, DEC should fund public participation in the SEQRA proceedings undertaken by any agency of State or local government, at least in the Forest Preserve, to ensure that the people of the State can speak to and advance the Constitutional "forever wild" values that may be implicated in any SEQRA environmental impact statement process.

Beyond these procedural aspects, SEQRA also requires observance of substantive norms. All State and local agencies of government are to minimize or avoid adverse environmental effects to the maximum extent practicable. This is known as the "duty to substantively mitigate adverse effects." How can every State or local authority, within or adjacent to the Blue Line, operate so as to provide stewardship, care, protection and enhancement for the Forest Preserve? There is today no clear exposition of the details for how to apply this duty to mitigate adverse effects with respect to the core wilderness values of Article XIV; DEC'S regulations could provide some generic guidance. More specific ways to avoid or mitigate adverse effects often must await scientific investigation in the course of a thorough environmental impact assessment of a particular action. SEQRA clearly requires that this inquiry should take place (and not be avoided as an inconvenience). All authorities within New York should be aligned to pursue a consistent approach to enhancing the Forest Preserve. That they do not do so now is arguably a violation of both Article XIV and SEQRA. The State DEC should undertake a generic environmental impact assessment process to articulate what measures should be taken to enhance, not just protect, the core Article XIV "forever wild" values. The public hearings associated with such an analysis would be highly educational. Following preparation of this generic environmental impact assessment process, and based on the final generic environmental impact statement that results, the DEC should promulgate generic regulations providing for how all State agencies should comply with SEQRA when their actions may affect the Forest Preserve.

SEQRA, while the most comprehensive statute to be read in support of Article XIV, is by no means the only one. As similar review is needed for all the other state laws that are applicable to the Forest Preserve. Each should be construed only in such a way as to enhance the "forever wild" values of Article XIV of the Constitution. This process can begin with the Environmental Conservation Law, although there are numerous other New York State statutes that must be examined as well.[62]

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[59] The Commissioner has broad authority to promulgate regulations, Section 3-0301(1)(m).

[60] Section 3-03-1(1)(d), Environmental Conservation Law of the State of New York, 17 ½ McKinney's Consolidated Laws of New York.

[61] SEQRA Section 8-0113 authorizes the DE Commissioner to promulgate SEQRA rules that are binding on all state and local government authorities.

[62] Consider, for example the statutory roles of the NYS Energy Development and Research Authority (NYSERDA) or the Public Service Commission, in the realm of energy systems, or those of the Department of Corrections with respect to the State's prison systems in the Adirondacks, or of the Department of Education, whose curricular mandates state-wide regularly ignore the Constitution and Article XIV (and even let local school districts ignore the Arbor Day teaching mandates), or the Department of Transportation, the Office of Parks, Recreation & Historic Preservation or the Office General Services, and many others.

The Department of Environmental Conservation was consolidated in 1970[63] and was established for the purpose of implementing a Statewide policy to improve and coordinate the environmental plans of the State in order to develop and manage "the basic resources of water, land and air to the end that the state may fulfill its responsibility as trustee or the environment for present and future generations," and "to foster, promote, create and maintain conditions under which man and nature can thrive in harmony with each other, and achieve social, economic and technological progress for present and future generations by …preserving the unique qualities of special resources such as the Adirondack and Catskill forest preserves." [64] New York DEC is charged with cooperating with Canada on resources that each share,[65] such as the great Northern Forests (of which the Adirondacks are an important part) and the migratory species.

Under this umbrella policy, the DEC and its Commissioner have the duty to care for the Forest Preserve, and are to coordinate the care both within a statewide environmental plan,[66] and within the Forest Preserve planning process.[67] One can search for some time and not find how the Commissioner coordinates his Department's myriad programs to enhance the Forest Preserve. Consider, for instance, the powers that the Legislature has vested in the DEC and its Commissioner. Through the several planning procedures mandated in the Environmental Conservation Law, the Commissioner must ensure observance of DEC's own SEQRA duties, and also ensure how all the State lands within both the public uses of the Adirondack and Catskill Parks are forever reserved and maintain for the people in such a way as to enhance the Forest Preserve within those Parks.[68]

DEC has many programs that would benefit from clearer guidance about Article XIV. For example, the means to manage forest fires has always been a high priority for DEC,[69] and will become more so in the future as human use of the Forest Preserve grows and the effects of climate change become more apparent. The DEC has authority to protect and enhance habitat for migratory species,[70] but has not fine-tuned that to apply to species that frequent the Forest Preserve. The DEC has authority over the State's Wild, Scenic and Recreational Rivers Systems,[71] The DEC cooperates with the Department of Health on zoonotic diseases,[72] but has not addressed how to manage zoonosis within the Forest Preserve. The New York Natural Heritage Program could be administered more effectively in order to complement the Forest Preserve.[73] DEC's wide-ranging power of water supplies[74] and over water pollution,[75] needs to be closely aligned within the Blue Line so as to enhance the Forest Preserve. Too often, Forest Preserve values are either ignored or violated in the exercise of these duties. Under DEC's authority air pollution,[76] especially its preparation of the State Implementation Plan for the Clean

[63] L. 1970, Ch. 140.
[64] Section 1-0101 (2) and (3)(d), Environmental Conservation Law of the State of New York, 17 1/5 McKinney's Consolidated Laws of New York.
[65] *Id.*, Section 1-0101(4).
[66] *Id.*, Section 3-0303,
[67] *Id.*, Section 9-0801, *et seq.*
[68] *Id.*, Sections 9-0301, 305, and 307
[69] *Id.*, Title 11, Forest Fire Control. Article 9, Lands & Forests.
[70] *Id.*, Section 11-0307.
[71] *Id.*, Article 15, Title 27, Sections 15-2701 to 15-2723.
[72] *Id.*, Section 11-0325.
[73] *Id.*, Section 11-0539.
[74] *Id.*, Article 15.
[75] *Id.*, Article 17.
[76] *Id.*, Article 19.

Air Act (SIP),[77] DEC inadequately provides for protection of region of the air quality in Adirondacks and Catskills, from pollution either within the region or from without. The DEC needs to align the SIP to abate intrastate air pollution and eliminate acid precipitation in the Forest Preserve[78] and to use its State authority more aggressively to compel sources from outside of New York from dumping their acid rain onto the "forever wild" Forest Preserve. DEC needs to align its extensive authority over freshwater wetlands, to provide more effective protection of this resource; DEC has not fully acted in accordance with its powers,[79] and with the statutory finding that "Freshwater wetlands are an integral part of the unique scenic, aesthetic, wildlife, recreational, open space, ecological and natural resources of the Adirondack Park." DEC has not enhanced its cooperative work with the Adirondack Park Agency or local governments on wetlands stewardship, for instance in the realm of enhancing fish and wildlife habitat. The DEC has little integrated its substantial authority for the protection of the State's natural and manmade beauty[80] with the stewardship of the Forest Preserve. DEC's urban forestry program[81] could enhance the trees in the hamlets near the Forest Preserve, in ways to complement appreciation of the "forever wild" trees.

While this illustrative recitation of the Commissioner's powers is long, it is not exhaustive. It is provided to remind us of the enormous capacity that exists to treat the Forest Preserve, and indeed all the Adirondack Region, as one bioregion, for the mutual benefit of its people and nature. Under Article XIV the State has a duty to integrate its undertakings to care for and preserve the "forever wild" lands. To the extent that DEC, as the primary governmental steward of the Forest Preserve, fails to do so, the Constitution is dishonored and the core values of the Adirondack wilderness are impaired.[82] When DEC fails to meet its own constitutional and statutory obligations, it sets a dismal example for other State or local governmental agencies. There are many ways to align DEC into a leadership position in support of Article XIV. Establishing the administrative and budgetary conditions, necessary to ensure DEC can realize its leadership duties, should be a high priority for the Governor, the Legislature, and Commissioner of Environmental Conservation, and, of course, the people of the State and groups like the Association for the Protection of the Adirondacks. But even with new budgetary allotments, the current authority must be coordinated in accordance with Article XIV.

Like DEC, all other State agencies are legally obliged to examine their duties with respect to the core mandates of Article XIV. One among them deserves a special comment here: the Adirondack Park Agency ("APA"). As noted above, the Adirondack Park is "home" for the Forest Preserve. The APA is responsible for the private lands and local government lands that encircle and embrace the "forever wild" lands. The APA has worked remarkably well, in a difficult political and social and economic set of circumstances, thanks to the extraordinary dedication of APA Members and staff over the years. APA has had a lot to do in focusing on land development issues, and yet when establishing the APA the Legislature clearly contemplated that the APA could serve a far more profound planning mission in support of the Forest Preserve, by integrating the public and private lands and cope with the "unrelenting pressures for

[77] See Section 110 of the Clean Air Act, 42 O.K. 7410.
[78] *Id*., State Acid Deposition Control Act, Title 9, Article 19.
[79] *Id.*, Section 24-0301 and 24-0901. DEC's lack of support for the Freshwater Wetlands Appeals Board has diminished the rights of the public and private property owners with respect to wetlands regulation.
[80] *Id*., Article 49.
[81] *Id.*, Article 53.
[82] See the several critiques by Barbara McMartin of DEC's shortcomings in the Adirondacks, Barbara McMartin, Perspectives of the Adirondacks: A Thirty-Year Struggle by People Protecting Their Treasure (Syracuse, Syracuse University Press, 23002).

development" of real estate.[83] Neither Governors nor Legislative sessions have provided the APA with the economic and expert resources to maximize its effectiveness. Its planning and land development regulatory roles need to be integrated with the State's over-all planning to sustain agriculture, to provide transportation, and to stimulate vibrant local economies, such as by exploring incentive zoning or new state laws to permit moving transferable development rights out of the Park to reduce density in the Park. The APA needs to align its stewardship duties for private and municipal owners of land in ways to foster Article XIV values, such as by maintaining vegetation along lake shores adequate to protect the lakes. Doubtless, more can be done across these sectors if APA, the Departments of Agriculture and Markets and Transportation and the Offices of Economic Development, all worked together,[84] as SEQRA arguably requires. If APA, with its statutory mission, fails to regard the Constitutional "forever wild" values as the lodestar that guides its decisions, how can we expect other agencies to do so? Beyond improving the APA's coordination with local governments and with other State agencies, and private property owners, the APA should address how to reconsider its mission and program in light of the core mandate of Article XIV?

APA can guide all private land uses within the Blue Line to reaffirm and enhance the integrity of the Forest Preserve.[85] While the first generation of APA activity necessarily entailed building its collaboration with local governments and private property owners, the next generation needs to address the APA's duties under the Constitution. It would seem that the staff of both DEC and APA on occasion would rather compete than collaborate when it comes to their roles in the Adirondacks.[86] Yet Article XIV permits no such inconsistency when it comes to the Forest Preserve. While the APA has protected wetlands that share hydrologic links through the entire Forest Preserve,[87] it does so arguably because of the Freshwater Wetlands Act,[88] and not because SEQRA and Article XIV require it to enhance the hydrology of the Forest Preserve. APA and DEC can do more to protect scenic vistas across all public and private lands, and from transportation corridors. APA has broad authority,[89] and could require that environmental impacts on the Forest Preserve be specifically studied and Forest Preserve conditions be enhanced, as a SEQRA condition, whenever it exercised its regulatory authority. State law requires DEC and the APA to cooperation on the wild and scenic rivers in the Adirondacks,[90] and could collaborate to more fully reaffirm wild values throughout these watercourses and heir watersheds. In short, APA

[83] Section 801, Article 27, Executive Law, vol. 18 McKinney's Consolidated Laws of New York.
[84] Section 814, Article 27, Executive Law, can provide a basis for developing more effective collaboration between APA and other State agencies, but ultimately the Governor must guide this collaboration. An Executive Order from the Governor would be useful in setting the priorities to bring about enhanced inter-agency collaboration on their operations and developments in the Adirondacks. .
[85] No one can claim a property right by way of prescription or otherwise to use the Forest Preserve for their private and exclusive activities or to favor their real property. *Helms v Diamond*, 76 Misc. 2d 253, 349 N.Y.S. 2d 917 (1973); the reverse in fact is the case under Article XIV, the private property owner or local or State agency with lands abutting the Forest Preserve is under a public trust obligation to not permit the use of their property outside the Forest Preserve in any way that would adversely affect the "forever wild" values of the Forest Preserve. APA has to do more to make this duty explicit in its APA decision-making.
[86] Section 803 sought to ensure cooperation by placing the DEC Commissioner and the Secretary of State and the Commerce Commissioner as members of the Adirondack Park Agency, but this cohabitation has not produced the effective inter-agency collaboration one might have expected.
[87] *Jones v. Adirondack Park Agency*, 270 A.D. 2d 577, 704 N.Y.S. 2d 334, leave to appeal dismissed, 95 N.Y. 2d 902(3rd Dept., 2000).
[88] Article 24, Environmental Conservation Law, 17 ½ McKinney's Consolidated Laws of New York.
[89] Section 804(9), Article 27, Executive Law, 18 McKinney's Consolidated Laws of New York.
[90] Section 15-2719, Environmental Conservation Law, 17 ½ McKinney's Consolidated Laws of New York.

needs to acknowledge that Article XIV places it under an affirmative duty to act to enhance the Forest Preserve as a basic component of everything it does, and then do so.

More is at stake here, however, than the need to reaffirm the rule of law and uphold the historic mandate of Article XIV of the State's Constitution. The people and nature of New York need a vibrant Forest Preserve as an anchor to accommodate the coming effects of climate change.

The Adirondack Forest Preserve Amidst Climate Change

Evidence of global climate change is found in the Adirondacks as elsewhere. In coming decades, some modifications in Earth's climate are predicted to induce significant changes in the Adirondacks, and at a scale and speed new to our experiences on Earth. The evidence is apparent for this fact. One consequence is that we shall have to learn how to rely upon the core values of "forever wild" to guide human society to adapt, and to enhance the resilience of the natural systems so that they can evolve with as little adverse human impact as possible. [91]

"Forever wild forest lands" exists in the Earth and they are not apart from all Earth's biological and physical systems. Humans enter the Forest Preserve to appreciate the evolution of life, which is a continuing process. Humans can alter the Earth's natural systems, as George Perkins Marsh amply demonstrated in 1864.[92] The Forest Preserve is a place where humans can take stock of their impact over generations. "Forever wild" is not a static condition, and "kept" preserved does not mean mummified. Properly understood, wilderness is a dynamic place, where we experience and study nature as little affected by humans as humanly possible. Scientific study needs such baseline areas as points of reference. Natural changes have always been a part of life and geology in the Adirondacks. We experience change in the seasons, in a single storm, and also more gradually in evolutionary trends and cumulative impacts of human behavior.

In 2005, 1,360 scientists released a report that they had made following four years of worldwide study. Entitled the Millennium Ecosystem Assessment,[93] this study documents that the Earth is experiencing a major decline in the numbers of migratory species, endangered species, and the habitats needed for all species. The "utilities" that ecosystems provide, such as wetlands recharging aquifers underground, or forests holding rain waters and melting snows to protect streams and full lakes and reservoirs, are also measurably in decline all around the world. "Nearly two-thirds of the services provided by nature to mankind are found to be in decline worldwide. … By using up supplies of fresh groundwater faster than they can be recharged, for example. We are depleting assets at the expense of our children. … We also move into a world in which the variety of life becomes ever more limited. The simpler, more uniform landscapes created by human activity have put thousands of species under threat of extinction, affecting both the resilience of natural services and less tangible spiritual or cultural values." [94] The Millennium Ecosystem Assessment warns us that migratory species that we value in the Adirondacks are already at risk. The Forest Preserve, together with the other lands of The Adirondack Park, is a reservoir of biological diversity, a great biological asset.

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[91] See the reports of the Intergovernmental Panel in Climate Change.
[92] George Perkins Marsh, Man and Nature, Or, Physical Geography as Modified by Human Action (David Lowenthal, editor, Cambridge, Mass., The Belknap Press of Harvard University Press, 1965).
[93] www.millenniumecosystemassessment.org
[94] Millennium Ecosystem Assessment Board, March 2005. A further report is due in November of 2007.

When we combine our understanding of the risks to ecosystems with threats posed by developments in other sectors, the looming ecological issues are compounded. For instance, depleting the groundwater in the middle of America, are human activities above the Ogallala Aquifer. Water shortages in the mid-west bring on consequences, such as a demand for the import of freshwater from other places, or force the migration of people to the places where water is still available. New York learned in the 1890s to protect the Adirondacks in the Forest Preserve as the source of water for the State's water-borne commerce, and as a source of recreation and solace for its people. The Adirondacks do suffer from a dose of long distance acid precipitation and mercury pollution, but the region still has bountiful fresh water, and is the source of the Hudson and the other Rivers in New York. The State depends on the capacity of the Adirondacks to retain and release water for its welfare all throughout New York State. The Forest Preserve, in its wild and untamed forests, is a great hydrologic asset.

Now, however, further risks emerge that threaten even such a vast hydrologic and biologic realm as the Forest Preserve. These risks are the effects of global climate change. The Intergovernmental Panel on Climate Change ("IPCC") delineated the risk, for the fourth time, on February 3, 2007.[95] Convened by the UN Environment Programme and the UN World Meteorological Organization, the IPCC represents the collaborative research of more than 3,000 scientists worldwide, who study all aspects of the Earth's climate. The recent report confirms that since 1750 before the start of the Industrial Revolution, a time when the Adirondacks were first being eyed for exploration, the volume of greenhouse gases accumulating in the Earth's atmosphere has grown substantially and probably will double. This will induce an increase in the surface temperatures of as much as 3.5 to 8 degrees Fahrenheit. Even assuming that human society can take action to limit the increase, such as by rapidly deploying new energy systems that do not release greenhouse gases, or by sequestering carbon dioxide and other greenhouse gas emissions, there will be significant ecological changes affecting everyone on Earth. All forests will be needed for their capacity to remove carbon dioxide from the atmosphere through photosynthesis. The Forest Preserve is invaluable as a photosynthetic force, sequestering carbon, mitigating climate change.

In response to these trends, New York has launched programs to reduce greenhouse gas emissions to 5% below 1990 levels by 2010 and 10% below 1990 levels by 2020. The N.Y.S. Energy Research and Development Authority (NYSERDA) has plans to promote alternative fuel vehicles. By themselves, however, these measures, are too modest to have any impact on the global trends projected by the IPCC. Earth's temperature is rising and may well stabilize at a new "steady state" in decades to come, but the climate of Earth will be much different.

We cannot know with certainty how much the Adirondacks will change, but we do know that they will. Another scientific study released in October of 2006, "The Northeast Climate Impacts Assessment" is a two-year study by university scientists and the Union of Concerned Scientists. It reports long-term patterns of less snow cover in winter but warmer temperatures and more rain, and hotter summers.[96] The longer-term model projections for the years 2070-2099 show that the Adirondack mountains remain as the only part of the State likely to have a snow pack each winter. The implications for increased winter sport activity in the Adirondacks and its infrastructure can be enormous. Will mass transit be built into the region to accommodate the projected possible numbers? Neither DEC nor DOT seem yet to be engaged in the studies to contemplate these future scenarios. The DEC Commissioner has a legal duty to do so; it takes

[95] IPCC, "Climate Change 2007: The Physical Science Basis," available at www.ipcc.ch.
[96] See www.climatechoices.org/ne .

years to plan and install such new mass transit systems, and to ensure that they will not compromise Article XIV values.

The DEC also must consider the effects on the flora and fauna under its care. The American Bird Conservancy reports that over the past decade 20 % of American warblers have shifted their range of occurrence to be found some 65 miles further north beyond the traditional range.[97] Species will move to higher elevations, with changes to the ecological niche of other species. *Nature* (the leading scientific journal published since 1869, edited in London) reports[98] that old growth forests continue soaking up carbon dioxide long after they reach maturity, and that more carbon dioxide in the atmosphere means that plants loose less water to transpiration. Farther afield, we know that when the Atlantic Ocean's Gulf Stream weakened by 10% between 1200 and 1850, and the Earth (along with out Adirondacks) experienced the "Little Ice Age." The current melting of the Polar ice caps and ice cover in Greenland could induce such changes again in the Gulf Stream, with as yet unknowable consequences for climates in the Adirondacks or Northern Hemisphere generally.

How will DEC monitor these phenomena? What can the effects of climate change mean for our obligations to safeguard endangered species, if the number of endangered species grows significantly? Do we need programs to affirmatively intervene to help habitat adapt so that species can survive and become endangered? Although DEC has had the legal responsibility under SEQRA to identify threshold effects,[99] such as those that the scientists of the IPCC or Millennium Ecosystem Assessment have described, DEC has been inattentive to this duty. Coping with climate change means a new agenda for the Department of Environmental Conservation and it cannot be accomplished with, its traditional, once "tried and true" approaches.

All levels of government and all civic organizations need to prepare our governmental systems for adaptation to the effects of climate change. Once well-established patterns will end, and we shall have to marshal our governmental capacity to help people and nature adapt. There will need to be relocation of human settlements, and also of the habitats of flora and fauna. Culturally, we shall have to reconceive what "forever wild" means in our Constitutional sense. We must all deeply reflect on humans in nature. What wild patterns do we keep for wild forest lands when all ecological conditions are changing? We should not be tempted to "perpetuate" or create a "Disney Land" fantasy, simulating what we have come to know and love. DEC and other land managers in The Adirondacks must do better than the homeowners along the sea coasts who are repeatedly, fruitlessly, rebuilding on barrier islands and having the Army Corps of Engineers rebuild their beaches once the seas have taken the coastal sands away. One thing seems sure, we shall need to strengthen the capacity of stressed natural systems to adapt on their own, and not try to preserve a past pattern of nature whose time to be is passing.

The Adirondacks has some experience with what these climate change effects can mean. Historically, there have been periods of drought, and there have been periods of "extra" snow and rain, including the intense, localized storms, that can erode roads (even close half of the

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[97] See Ian Brown, Marisa Tedesco, Neil Woodworth, "The Looming Threat: Climate Change in the Adirondacks and Catskills in the 21st Century," vol. LXXI, no. 1 *Adirondack* at pp. 14-17 (Adirondack Mountain Club, January/February 2007).

[98] N*ature*, vol. 445, issue 7128 "Special Report – Climate Change 2007" 578-588 – Data Keep Flooding In, at p. 581 (February 8, 2007)..

[99] Section 8-0105(5), SEQRA, Article 8, Environmental Conservation Law, 17 ½ McKinney's Consolidated Laws of New York.

Northway) and overwhelm streams and storm water systems. There have been washouts of sewage and septic systems, with the result that local water supply systems become polluted. These phenomena, in turn, produce public health problems. There have also been blowdowns of trees in the Forest Preserve, as for instance in 1950, 1995, and 1999. DEC and environmentalists and timber salvage interests have all had conflicts about what do to with the areas of blowdown in the Forest Preserve. Paul Shaffer in 1950 favored salvage as "necessary to protect the Forest Preserve," but many of the roads built to do so remain today.[100] In 1990, DEC did not allow salvage, fearing litigation over whether it would violate Article XIV. In 1999, the remnants of Hurricane Floyd took down trees, shut down trails and eroded the High Peaks Area, and the existing trail system was re-established by the Adirondack Mountain Club, on the assumption that such storm effects were a temporary phenomenon.

But, what we now know about these climatic phenomena in the Adirondacks is that the climate change models predict that such effects will recur. Rather than reacting to each incident, we should begin to anticipate them and plan for contingencies. Preparations for intense weather events induced by climate change can entail everything from realigning trails to reissuing maps showing that some campsites are no more. It can mean limiting the number of hikers and campers in risk prone locations or at risk prone times. New York may well need to rebuild its corps of Forest Rangers, and restore their many faceted independent functions. Ill equipped public water supplies will need buffering, and publicly owned sewage treatment systems will need to be upgraded to deal with changed design specifications that anticipate the new climatic conditions. Distributed energy resources, independent of any grid, will be needed for resilience. All this is a State-wide responsibility, and is not just the burden of the local communities that live around the Forest Preserve.

It is the duty of the DEC Commissioner to study and address "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."[101] The DEC Commissioner can hardly halt global climate change, but the Commissioner can – and legally must – examine what the thresholds, or tipping points, there are with respect to the care and protection of the Forest Preserve. The DEC Commissioner can establish priorities, such as assessing the responses needed for the sort of catastrophic events that the Adirondacks have already experienced (e.g., intense local storm water volumes, blowdowns, washouts of infrastructure, and hot weather exacerbating forest fire conditions).

Developing preparedness for the effects of climate change will need to be a statewide, a national, and an international undertaking. State support for such preparedness will not flow to the Adirondacks automatically.[102] Adirondackers will find it essential to embrace the mandate of Article XIV in order to give the Adirondacks a priority claim on the State's planning and adaptation funding and expertise. Since the Adirondacks, and the Forest Preserve, are unique in their vast scale, and their essential hydrologic and biological roles in the North East of America, they deserve priority treatment based on an objective scientific analysis. Nonetheless, considering

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[100] Barbara McMartin, Perspectives on the Adirondacks: A Thirty-Year By People Protecting Their Treasure (Syracuse, Syracuse University Press, 20202), at p. 246.

[101] SEQRA, Section 8-105(5).

[102] Given to abject failure of the federal government to assist in the aftermath of Hurricanes Katrina and Rita in the Gulf Coast and City of New Orleans, it is likely that a severe storm episode in New York would encounter comparable results at the federal level. This means New York will need to have self-reliance to cope with such an incident, and within the Empire State." There will be much competition for preparedness funds, as well as for emergency relief and rebuilding.

that the greatest number of voters in New York cluster along the Atlantic seacoast, encountering the effects of sea level rise, and that they too can claim a legitimate priority, what will ensure that the Adirondacks get the care they deserve? As a matter of law and policy, the Constitution provides the answer, and it is Article XIV. There is no way to escape the logic of law and precedent: the New York Constitution requires care and protection for the Forest Preserve.

Whether Article XIV will induce a Statewide movement to care for the Adirondack Forest Preserve, and by extension to all communities within the Adirondack Park, is admittedly uncertain. The courts did stand up for Article XIV against the amassed political and economic power of the State supporting the Winter Olympics in *Association for the Protection of the Adirondacks v. McDonald*, but would the Court of Appeals do so again? The Association, and others who care about both the Forest Preserve and life in the Adirondack towns, will need to rethink today's conventional wisdom. The scientific message is clear: "business as usual" is coming to an end. Since over the past ten decades the logical and law of Article XIV has been relegated to the sidelines before, there is no guarantee that the rule of law will work to the benefit of the Adirondacks in the future. The time may have come for organizations such as the Association for the Protection of the Adirondacks once again to recommend that the Governor and Legislature enact a biodiversity law for the Adirondacks, both to integrate the many duties that DEC, and other State agencies, have with respect to the Forest Preserve, and also to prepare the Forest Preserve and all within the Adirondack Park to better prepare to cope with the effects of climate change.

A New Variant of Adirondack Legislation

While there are some who propose a further amendment to elaborate, and thus make inescapable the Constitutional mandate to observe the core values of Article XIV, the words of the Constitution are already adequate for the purpose. Local governments and the Association for the Protection of the Forest Preserve should make common cause, first to ask for a tough Executive Order from the Governor that would require DEC to use its ample powers to enhance care for the Forest Preserve and preparedness for climate change, and also requiring other State Agencies to use their powers in like vein. If the Governor declines to act forthrightly, then there is clearly the need for either a judicial order or enactment of a new legislative framework to remake how DEC and the other State agencies both address the effects of climate change, and ensure affirmative stewardship of The Forest Preserve.

Proposals for new legislation should not be seen as a rehash of the arguments for or against the recommendations of the Commission on the Adirondacks in the 21st Century.[103] Some of the important insights from the debates in the 1990s can be adapted and updated and incorporated, but any new administrative or judicial order, or new legislation, should consider addressing the relationship of the Forest Preserve to the entire bioregion of the Adirondacks, including perhaps also Tug Hill and Lake George and Champlain and adjacent areas along the Hudson and other rivers. There is need to define a new focus, for the Forest Preserve is in fact an environmental anchor for the entire region in the mountains, just as Lake Champlain is its vast watershed, or the Hudson Valley and Catskills are to the south. A new scope for regional planning and intergovernmental cooperation will need to be conceived and brought to life, because the scale of climate change is vast and regional patterns of governance will be needed to cope with regional climatic effects.

[103] These are detailed in Barbara McMartin, Perspectives on the Adirondacks: A Thirty-Year Struggle by People Protecting Their Treasure (Syracuse, Syracuse University Press, 2002) at pp. 103-239.

Beyond renewed governmental measures to facilitate the collection of data and to begin planning for new infrastructure, and beyond ordering agencies to deploy their resources to enhance the Forest Preserve and help the entire Adirondack Park adapt to climate change, any new law should also make plain that the *land ethic* is a fundamental norm in New York. The land ethic embodied in Article XIV, having the clear rule of law would oblige decision-makers to see the whole of the environment, all interrelated systems, and avoid *the reductionist fallacy that blinds us to all but the little sliver before any single actor.*

While we cannot know what adaptations climate change will force upon us, and we cannot know just how we shall undertake to modify our lives, our responses *can* be guided by a set of common, basic values. If the entire society strives to follow the same environmental ethic, then we can have some measure of confidence that our human team will pull together, and not apart. With core values for a team effort, we can unite to achieve successful adaptations; if we are at logger heads and divisive, we shall remain divided and the adaptations will be still born or malformed.

The land ethic is implied in the legal concept of "be kept" as "forever wild lands" in Article XIV. Aldo Leopold elaborated the idea, along with his ideas for the value of wilderness,[104] in his essay, "The Land Ethic" in A Sand County Almanac.[105] Much of the land ethic has been endorsed in the World Charter for Nature[106] and in the subsequent Earth Charter,[107] and was promoted in "Agenda 21," the blue print for action agreed by the United States of American and all other nations at the Rio Earth Summit in 1992.[108]

While the land ethic has not yet been made a rule of law for the federal government at our national level, the land ethic has been adopted by several States within the USA. It is time for New York to join them.

Much of SEQRA embraces the land ethic already but many agencies and courts have not yet recognized this. It would be useful to make the land ethic widely effective through the enactment of a judicial procedure. Prof. Joseph Sax proposed this procedure in 1971.[109] He proposed a law that authorized citizens to seek judicial review of any government action for which the citizen could "make a prima facie showing that the conduct of the defendant has, or is likely to pollute, impair, or destroy the air, water or other natural resources or the public trust therein," and the defendant than "may rebut the primate facie showing by the submission of evidence to the contrary."[110] The genius of this simple procedure is that the government is held accountable whenever in a specific situation it fails to observe its legal obligation to protect the environment. The burden of proof shifts to the government to show that it is operating in a legal manner. This is like the authority already present in Article XIV of the New York Constitution, to allow a citizen to sue whenever an agency of the State fails to observe Article XIV. The procedural right, and the immediate shifting of the burden of proof, has the effect of making the government more attentive its legal obligations.

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[104] Aldo Leopold, A Sand County Almanac (Oxford University Press, 1949), pp. 188-200.
[105] Id., at pp 201-226.
[106] United Nations General Assembly Resolution 37/7.
[107] The Earth Charter is at www.earthcharter.org.
[108] See N.A. Robinson, Agenda 21: Earth's Action Plan (Dobbs Ferry, Oceana Publication, 1993).
[109] Joseph L. Sax, Defending the Environment: A Strategy for Citizen Action (New York, Knopf, 1971).
[110] Id at p. 250, setting forth the text of Section 3, enrolled Bill # 3055, State of Michigan, 75th Legislature, Regular Session of 1970.

Minnesota adopted legislation,[111] such as that espoused by Professor Sax. It has had measured success. The volume of litigation under the law has been modest, in part because Statute itself has the effect of making caused the State's governmental authorities be more careful in their environmental decision-making. The courts have implemented the procedure. For instance, in the case of a road that would have bisected a freshwater wetland that was shared by two adjacent farms, the highway department had not examined alternatives routes that might protect the wetland. One farmer allowed the siting of the road in his real property, but the neighboring farmer feared for the harm to the entire wetland itself, which was one ecological system crossing both farms. The Supreme Court of Minnesota,[112] in an opinion by Mr. Justice Yetka, cited the land ethic as a rule of law as follows:

"A generation ago, the conservationist Aldo Leopold espoused a 'land ethic' which he described as follows: 'All ethics so far evolved rest upon a single premise: that the individual is a member of a community of interdependent parts. His instincts prompt him to compete for his place in the community, but his ethics prompt him also to co-operate (perhaps in order that there may be a place to compete for). The land ethic simply enlarges the boundaries of the community to include solids, waters plants and animals, or collectively: the land. In short, a land ethic changes the role of Homo Sapiens from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such' … In the Environmental Rights Act, our state legislature has given this ethic the force of law."

The Minnesota Supreme Court sustained of the ecological unit of the wetland, and required the highway department to show that it considered alternatives routes that would have protected the wetlands. The Court wrote: "To some of our citizens, a swamp or marshland is physically unattractive, an inconvenience to cross by foot and an obstacle to road construction or improvement. However, to an increasing number of our citizens who have become concerned enough about the vanishing wetlands to seek legislative relief, a swamp or marsh is a thing of beauty. To one who is willing to risk wet feet to walk though it, a marsh frequently contains a springy soft moss, vegetation of many varieties, and wildlife not normally seen on higher ground. It is quiet and peaceful – the most ancient of cathedrals – antedating the oldest of manmade structures. More than that, it acts as nature's sponge, holding heavy moisture to prevent flooding during heavy rainfalls and slowly releasing the moisture and maintaining the water tables during dry cycles. In short, marshes and swamps are something to protect and preserve."[113]

Minnesota has continued to apply the land ethic as a rule of law since this decision in 1976.[114] The Supreme Court of Wisconsin has taken up the land ethic as a rule of law under hazardous waste land remediation laws:[115] "In considering whether the legislature intended an owner of property containing contaminated soil to take remedial action, this Court stated: Aldo

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[111] "Environmental Rights Act.," Min. St. 116B.01. The shifting of the burden of proof is at Min. St. 116B.04

[112] *County of Bryson v. Freeborn*, 309 Minn. 178, 243 N.W. 2d 316 (1976), quoting from A Sand County Almanac at p. 203.

[113] *Id*., 309 178 at 189.

[114] See, e.g. *In The Matter of the Application of Allard Christenson*, 417 N.W. 2d 607, 18 Envitrl L. Rep. 20,947 (1987): "We reaffirm our statement that the state's environmental legislation had given this land ethic the force of law, and imposed on the courts a duty to support the legislative goal of protecting the state's environmental resources" See also McLeod County Bd of Commissioners v State, 549 N.W. 2d 630 (1996)

[115] Wis. State Section 144.76(3).

Leopold, the great Wisconsin conservationist in his well-known work, A Sand County Almanac, (1948) at p. 203 said: 'Individual thinkers since the days of Ezekiel and Isaiah have asserted that the despoliation of land is not only inexpedient but wrong.' The statutes under consideration are a legislative recognition that the discharge of hazardous substances is one form of despoliation. The legislature has enacted this law to correct that wrong."[116]

In addition to elaborating the application of the land ethic that already exists implicity within Article XIV, New York State needs to emulate Minnesota and Wisconsin. The land ethic should cover all the environmental laws of the State. At a minimum, the land ethic must be applied to all the environmental laws that need to be harmoniously applied within the Blue Line. Recognizing the land ethic as a rule of law would implement the duty of stewardship that already inheres in SEQRA. Stewardship of biological diversity or environmental impact assessment could be made explicit, and be made to implement and complement the mandates of Article XIV.

There is adequate constitutional basis now for the Governor to order all New York's authorities to take much stronger action to enhance the Forest Preserve. Although one might counter that each agency could promulgate regulations to do so on their own volition, this would take a long time and is likely to produce inconsistent results. Accordingly, adopting a set of legal reforms "whole sale," rather than "retail," is the approach to ensuring that the mandate of Article XIV is fully realized. DEC has ample authority to do so by amending its generic SEQRA regulations. If neither the Governor nor DEC act, then perhaps in order to comprehensively guide all governmental authorities, the time has come for preparing a new statute to guide New York in adapting to the effects of climate change and safeguarding public health, and advancing biological diversity on biological.

When enacting any new legislation to cope with biodiversity and climate change, New York's Legislature should enact the land ethic as a rule of law, with the simple and elegant procedural reforms that Prof. Sax has proposed, as Minnesota and other states have done. Although the land ethic is implicitly already a part of Article XIV's mandate, our task is to make this rule explicit, and also to extend it to all of New York State's environment.

Interpreting the Land Ethic in Forever Wild

Aldo Leopold has underscored the importance of wild lands for scientific study: "A science of land health needs, first of all, a base datum of normality, a picture of how healthy land maintains itself as an organism."[117] In the coming era of climate change, the Forest Preserve is one of Earth's most important scientific reference points. If New York wishes to sustain its wildlife populations, for hunting and fishing and wildlife appreciation, it must sustain migration corridors and habitats. The Adirondacks are the biological anchor for much of the State.

New York is proud that Article XIV maintains a wild part of North America much as it was before European immigration began. As Leopold puts it, "In Europe, where wilderness has now retreated to the Carpathians and Siberia, every thinking conservationist bemoans the loss. Even in Britain, which has less room for land-luxuries than almost any other civilized country, there is a vigorous if belated movement for saving a few small spots of semi-wild land."[118] With

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[116] *Grube v. Daun*, 210 Wis. 2d 681, 593 N.W. 2d 523 (1997), citing *State v Mauthe*, 123 Wisc. 2d 288, 366 N.W. 2d 871 (1985).
[117] Aldo Leopold, A Sand County Almanac, at p. 196.
[118] *Id*., at 200.

climate change, all bits of evolved wild land may well become as scarce as an endangered species is today. Few wild areas are large enough to be managed to sustain their wilderness values. The "forever wild" Forest Preserve will be regarded soon not only as the first statutory wilderness area in the world, but also as one of the most important from a scientific perspective. What remains to be seen is whether New York will earn the reputation of having also the most effective, honest, and efficient legal regime for land stewardship in and around its "forever wild" area.

The century of legal developments in New York surrounding Article XIV are remarkable in themselves, but are incomplete. Despite assaults on the constitutional and statutory "forever wild" regime by vested or speculative economic interests, and their political allies, the people of the State of New York have invariably reaffirmed their commitment to the Constitutional Forest Preserve. It is all the more remarkable that relatively few citizens of New York ever visit the Adirondacks. They value it for the fact that it is there, and provides environmental and spiritual benefits to them indirectly. All these legal developments build toward embracing the land ethic.

The people who live in the Adirondacks value the Forest Preserve. They perceive it as their home, and often the indirect source of their livelihoods through the recreational and eco-tourism that the Adirondacks offer. Gradually, the economy of the region will derive more and more wealth from those who come to recreate there, and as business services can operate over the Internet anywhere, the Adirondacks will experience increasing flows of businesses whose leaders want the quality of life that Adirondackers enjoy. To enhance the human economy, while sustaining nature's quality of life, will present a host of new challenges for both the Adirondack Park and for the Forest Preserve.

In the coming years of climate change, "forever wild forest lands" can only be sustained with a new public-private partnership. The days of waging culture wars over the theoretical rights of property owners are over. Ask anyone in New Orleans. There is unlikely to be enough insurance to cover even the property now at risk. There must be a spirit of community, in the fullest sense, of people and of nature, if the ecology and public health and economic life of the Adirondacks are to thrive over the coming century.

Remarkable for the prescience of its framers back in 1894, the constitutional mandates of Article XIV equip all of us in 2007 with legal tools to deploy to enhance the quality of life, within the Blue Line and for all New Yorkers. The mandates of "forever wild" need to be embraced, not contested. A far-sighted conservationist, Fairfield Osborn, in 1948 anticipated the perils now reported by scientists of the Millennium Ecosystem Assessment and the Intergovernmental Panel on Climate Change. He wrote, "There is only one solution: Man must recognize the necessity of cooperating with nature. … The final answer is to be found only through comprehension of the ensuring processes of nature. The time for defiance is at an end."[119]

Thank you for your consideration of these views.

Nicholas A. Robinson

[119] Fairfield Osborn, Our Plundered Planet (Boston, Little Brown & Co., 1948) at p. 201.

Bibliography of Legal Materials on the Adirondack Park

Prepared by Jack McNeill, Associate Library Director, Pace Law School Library
Feb. 15, 2007

New York Constitution and Laws

The Constitution of the State of New York Article 14§1
Forest preserve to be forever kept wild; certain uses and exceptions authorized.

The Constitution of the State of New York Article 14§3
Forest and wild life conservation; use or disposition of certain forest preserve lands authorized.

Executive Law Article 27
ADIRONDACK PARK AGENCY ACT

- §800 - Short title.
- §801 - Statement of legislative findings and purposes.
- §802 - Definitions.
- §803 - Adirondack park agency.
- §803-A - Adirondack park local government review board.
- §804 - General powers and duties of the agency.
- §805 - Adirondack park land use and development plan.
- §806 - Shoreline restrictions.
- §807 - Local land use programs.
- §808 - Administration and enforcement of approved local land use programs.
- §809 - Agency administration and enforcement of the land use and development plan.
- §810 - Class A and class B regional projects.
- §811 - Special provisions relating to agency project review jurisdiction and the shoreline restrictions.
- §812 - Public hearings.
- §813 - Penalties and enforcement.
- §814 - State agency projects.
- §815 - Interim development controls.
- §816 - Master plan for management of state lands.
- §817 - Activities of the United States in the Adirondack.
- §818 - Judicial review.
- §819 - Applicability.
- §820 - Severability.

State Finance Law, Article 6
§97-E, Forest preserve expansion fund.

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Purchase and Acquisition of Land by the United States

- §50, Consent of state to purchase of land; authority to
- §51, Proceedings for acquiring title.
- §52, Governor may execute deed or release.
- §57-A, Application of article to Adirondack park.

Environmental Conservation Law, Article 1

1-0101, Declaration of policy.

Environmental Conservation Law, Article 3

3-0115, Establishment of forestry and wildlife management areas by United States; consent of state.

Environmental Conservation Law Article 9

Lands and Forests

Title 1 – (9-0101 - 9-0113) General Provisions

9-0101 - Definitions.
9-0105 - General powers and duties.
9-0107 - Acceptance by department of lands for parks and for silvicultural research.
9-0109 - Acquisition of lands within the Adirondack or Catskill parks.
9-0111 - Delegation of authority to license guides.
9-0113 - Adopt-a-natural resource stewardship program. (9-0101 - 9-0113) General Provisions

Title 3 - (9-0301 - 9-0307) Use of Lands and Forests

9-0301 - Use and diminution of Adirondack and Catskill parks.
9-0303 - Restrictions on use of state lands.
9-0305 - Signs and advertising in Adirondack and Catskill parks.
9-0307 - Forest preserve lands; detached parcels outside Adirondack and Catskill parks.

Title 5 - (9-0501 - 9-0509) Reforestation Areas

9-0501 - Power to acquire reforestation areas; prohibition against compensation or gratuity.
9-0503 - Certificate of purchase; exemption from taxation.
9-0505 - Sale of products from reforestation areas.
9-0507 - Leasing of oil and gas rights on reforestation areas.
9-0509 - Lease of land to federal government for use by the federal aviation agency.

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9-0701 - Purpose of program.
9-0703 - Forest regions.
9-0705 - Regional forest practice boards.
9-0707 - State forest practice board.
9-0709 - Duties of regional forest practice boards.
9-0711 - Duties of state forest practice board.
9-0713 - State assistance.
9-0715 - Cooperating owner.
9-0717 - Community forests.

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- 9-0801 - Legislative purpose and findings.
- 9-0803 - Forest resources assessment.
- 9-0805 - Forest resources plan.
- 9-0807 - Committees.
- 9-0809 - Public participation.
- 9-0811 - Cooperation with federal agencies.
- 9-0813 - Assistance from state agencies.
- 9-0815 - Request for comment on local laws or ordinances pertaining to the practice of forestry.

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- 9-0901 - Jurisdiction of certain parks and reservations.
- 9-0903 - Recreation facilities.

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- 9-1101 - Proclamation by Governor.
- 9-1103 - Additional powers of the department.
- 9-1105 - General prohibitions.
- 9-1107 - Fire towns.
- 9-1109 - Fire protection areas.
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- 9-1113 - Top lopping evergreen trees.
- 9-1115 - Railroad patrol.
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- 9-1503 - Removal of protected plants.

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- 71-0701. Applicability of title.
- 71-0703. Penalties.
- 71-0705. Enforcement.
- 71-0707. Resisting or obstructing departmental agent or employee.
- 71-0709. Injury to state lands.
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71-0713. Recovery for damages from fires.
71-0715. Rules of evidence applicable to forest fire cases.

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11-2103, Acquisition and use of property.
11-2105, State game refuges.

0503, Protection of water bodies; permit.

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1729, Eminent domain.

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15-2701 - Statement of policy and legislative findings.
15-2703 - Definitions.
15-2705 - Jurisdiction of the commissioner and the Adirondack park agency.
15-2707 - Classes of river areas includable in system, criteria; management objectives.
15-2709 - Administration of the system.
15-2711 - Establishing boundaries.
15-2713 - Initial designations.
15-2714 - Additional designations.
15-2715 - Designation of additions to the system.
15-2717 - Cooperation with the federal government.
15-2719 - Cooperation clause.
15-2721 - Conflict with other laws.
15-2723 - Penalties and enforcement.

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Freshwater Wetlands Title 8, Regulation of Wetlands in the Adirondack Park
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24-0805 - Land use regulations for freshwater wetlands in the Adirondack park.

Environmental Conservation Law Article 24
Title 5, Local Implementation
24-0511 - Local freshwater wetlands protection procedures in the Adirondack park.

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41-0101 - Sixth park region; definition.
41-0103 - Regulation of navigation.
41-0105 - Acquisition, maintenance and operation of parks, state recreational and historic facilities and services.
41-0107 - Approval of certain applications and projects.

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43-0101 - Legislative intent.
43-0103 - Definitions.
43-0105 - Lake George park commission; continuation.
43-0107 - Powers.
43-0109 - Expenses; employees.
43-0110 - Wastewater management.
43-0111 - Commercial use in zones.
43-0112 - Stormwater management and stream corridor management.
43-0113 - Appropriations by municipalities in certain counties.
43-0115 - Restrictions on use of signs and advertising devices.
43-0117 - Operation of ferries and certain other boats, barges and vessels restricted.
43-0119 - Land use restrictions within Lake George park.
43-0121 - Compliance with sewage disposal requirements.
43-0123 - Environmental review.
43-0125 - Regulatory and user fees.

Public Lands Law, Article 2

§24, Sale or exchange of certain detached parcels of forest preserve lands.

New York Agency Regulations

Adirondack Park Agency
http://www.apa.state.ny.us/Documents/Laws_Regs/RulesRegs200510_2.pdf

Department of Environmental Conservation

http://www.dec.state.ny.us/website/regs/index.html
Chapter I - Fish and Wildlife Parts 1-189
Chapter II - Lands and Forests Parts 190-199
Chapter III- Air Resources Parts 200-317
Chapter IV- Quality Services Parts 320-486
Chapter V - Resource Management Services Parts 500-614
Chapter VI - General Regulations Parts 615-624
Chapter VII - State Aid Parts 625-637
Chapter VIII- Law Enforcement Parts 640-642
Chapter IX - Independent Agencies within the Department Parts 645-648
Chapter X - Division of Water Resources Parts 649-941

Proposed Regulations: http://www.dec.state.ny.us/website/regs/proposed.html

New York Case Law

Forest preserve lands

"Wild forest lands," might include lands owned by the state adjoining such "wild forest lands," it does not include other lands located at a distance from any forest. Long Sault Development Co v. Kennedy, State Treasurer People ex rel. Ball (3 Dept. 1913) 158 A.D. 398, 143 N.Y.S. 454, affirmed 212 N.Y. 1, 105 N.E. 849, error dismissed 37 S.Ct. 79, 242 U.S. 272, 61 L.Ed. 294.

Lease, sale or exchange of preserve lands

Reversionary interest in land held by the State Department of Environmental Conservation would not prohibit use of land for construction of telecommunications tower. Moncure v. New York State Dept. of Environmental Conservation (3 Dept. 1996) 218 A.D.2d 262, 639 N.Y.S.2d 859.

If a stipulation in an action of ejectment attempted to dispose of lands belonging to the forest preserve was prohibited. People v. Witherbee (3 Dept. 1917) 178 A.D. 368, 164 N.Y.S. 915, reversed 179 A.D. 964, 166 N.Y.S. 1108, affirmed 228 N.Y. 535, 126 N.E. 918.

Agreement to manage ski center was lawful, where the agreement did not constitute the lease, sale, or exchange of lands and pertinent facilities. Slutzky v. Cuomo, 1985, 128 Misc.2d 365, 490 N.Y.S.2d 427.

When title to premises within the forest preserve was once acquired by the people, no act of any officer or agency of the state or no judgment of any court could divest the state of ownership therein. Hazkate Holding Corporation v. People, 1927, 130 Misc. 409, 224 N.Y.S. 22.

Corporate acquisition

Lands which had once become a part of the forest may not be acquired by any corporation, private or public. People v. Adirondack Ry. Co., 1899, 160 N.Y. 225, 54 N.E. 689, affirmed 20 S.Ct. 460, 176 U.S. 335, 44 L.Ed. 492. See, also, Adirondack R. Co. v. Indian River Co., 1898, 27 A.D. 326, 50 N.Y.S. 245.

Timber removal

The Constitution reserves to the people the title to the lands and timber within the forest preserve, and prohibits the legislature and state officers and departments from disposing of them. People v. Santa Clara Lumber Co., 1914, 213 N.Y. 61, 106 N.E. 927. See, also, People v. Kelsey, 1904, 180 N.Y. 24, 72 N.E. 524; People v. Pulver, 1929, 226 A.D. 416, 235 N.Y.S. 655.

Addition of five new parking areas to forest preserve and construction of trails did not involve unconstitutional amount of tree cutting or improper use of forest preserve. Balsam Lake Anglers Club v. Department of Environmental Conservation (3 Dept. 1993) 199 A.D.2d 852, 605 N.Y.S.2d 795, appeal withdrawn 83 N.Y.2d 907, 614 N.Y.S.2d 389, 637 N.E.2d 280.

Constitutional provision does not prohibit all cutting or removal of timber from forest preserves but prohibits cutting and removal of timber to a substantial extent. Balsam Lake Anglers Club v. Department of Environmental Conservation (3 Dept. 1993) 199 A.D.2d 852, 605 N.Y.S.2d 795, appeal withdrawn 83 N.Y.2d 907, 614 N.Y.S.2d 389, 637 N.E.2d 280.

A deed to the state in settlement of the action which reserved to defendants the right to enter upon the land and remove certain timber within ten years was not a violation of former section 7 of Article 7. People v. Finch, Pruyn & Co. (3 Dept. 1923) 207 A.D. 76, 202 N.Y.S. 582, affirmed 238 N.Y. 584, 144 N.E. 902.

Trees standing upon the forest preserve were property within the meaning of Penal Law governing larceny. People v. Gaylord (4 Dept. 1910) 139 A.D. 814, 124 N.Y.S. 517.

No fish and game protector and forester, or the chief game protector of the state of New York, has authority to sell timber and logs from the forest preserve and the purchaser would not acquire title that would enable him to maintain an action for conversion. Pashley v. Bennett (3 Dept. 1905) 108 A.D. 102, 95 N.Y.S. 384.

Insubstantial and immaterial cutting of timber-sized trees in state forest preserve was constitutionally authorized in order to facilitate public use of forest preserve, so long as such use was consistent with wild forest lands. Balsam Lake Anglers Club v. Department of Environmental Conservation, 1991, 153 Misc.2d 606, 583 N.Y.S.2d 119, affirmed in part, reversed in part on other grounds 199 A.D.2d 852, 605 N.Y.S.2d 795, appeal withdrawn 83 N.Y.2d 907, 614 N.Y.S.2d 389, 637 N.E.2d 280.

Highways, timber removal

The removal of reasonable amount of growing timber for the construction of a state highway was proper exercise of authority by State Department of Public Works. D'Angelo v. State, 1951, 200 Misc. 657, 106 N.Y.S.2d 350.

Recreational purposes, timber removal

Chapter 417 of the Laws of 1929, which authorized the Conservation Commissioner to construct and maintain a bobsleigh run or slide on state lands in the Forest Preserve in the town of North Elba, and necessitated the removal of a substantial number of trees from the land set was unconstitutional. Adirondacks, Association for Protection of v. MacDonald, 1930, 253 N.Y. 234, 170 N.E. 902.

Roads and trails, highways
Construction of new trails in state forest preserve did not violate provision of State Constitution requiring that forest preserve lands be forever kept as wild forest lands by increasing human activity; framers of State Constitution intended not to prevent or hinder public use of forest, but to allow forested areas to revert to their natural or wild state without human interference with natural succession of different types of trees, selective cutting or thinning to improve timber, or harvesting of any mature timber. Balsam Lake Anglers Club v. Department of Environmental Conservation, 1991, 153 Misc.2d 606, 583 N.Y.S.2d 119, affirmed in part, reversed in part on other grounds 199 A.D.2d 852, 605 N.Y.S.2d 795, appeal withdrawn 83 N.Y.2d 907, 614 N.Y.S.2d 389, 637 N.E.2d 280.

Ski trails
Agreement to operate ski trails on lands owned by the state which are part of Adirondack Park forest preserve was not a lease of forest preserve lands in violation of article of the Constitution.. Slutzky v. Cuomo (3 Dept. 1986) 114 A.D.2d 116, 498 N.Y.S.2d 550, appeal dismissed 68 N.Y.2d 663, 505 N.Y.S.2d 1027, 496 N.E.2d 240.

Adverse possession
The lands of the Forest Preserve created by Laws 1885, c. 283, and former section 7 of Article 7 were held by the state in her sovereign capacity in trust for a public purpose and could not be acquired by adverse possession. People v. Baldwin (3 Dept. 1921) 197 A.D. 285, 188 N.Y.S. 542, affirmed 233 N.Y. 672, 135 N.E. 964. See, also, People v. Douglass, 1926, 217 A.D. 328, 216 N.Y.S. 785.

Eminent domain
Where the special condemnation proceedings instituted under the Adirondack Park Act of 1897, Laws 1897, c. 220, by the forest preserve board against lands of a private owner within the territory of the Adirondack park, were fully completed by service of the certificate of condemnation on the owner before the Adirondack Railway Company, which had previously filed a map and profile for an extension of its road through the same lands, commenced condemnation proceedings on its part, the land became a part of the forest preserve, and thereupon former section 7 of Article 7 intervened against the railway company. People v. Adirondack Ry. Co., 1899, 160 N.Y. 225, 54 N.E. 689, affirmed 20 S.Ct. 460, 176 U.S. 335, 44 L.Ed. 492.

When state takes property through eminent domain, it takes in fee simple absolute and extinguishes all easements. Thomas Gang, Inc. v. State (3 Dept. 2005) 19 A.D.3d 861, 797 N.Y.S.2d 583.

Owner of land that was inaccessible by motor vehicle was not entitled to easement over state's lot. Thomas Gang, Inc. v. State (3 Dept. 2005) 19 A.D.3d 861, 797 N.Y.S.2d 583.

Forever wild forest land applied only to the lands of the state "now owned or hereafter acquired," and a regulation of the use of the land after acquisition did not affect either the right of a public service corporation or of the state to acquire it. Ramapo Mountains Water, Power & Service Co. v. Commissioners of Palisades Interstate Park (2 Dept. 1917) 177 A.D. 700, 164 N.Y.S. 430.

A railroad could not acquire the right to operate through the forest preserve, hence, it followed as a fair deduction that the state should not take land for the forest preserve which was already subject to the rights of a railroad. Adirondack Ry. Co. v. Indian River Co. (3 Dept. 1898) 27 A.D. 326, 50 N.Y.S. 245.

Attorney General Opinions

Forest preserve lands

Forest land in a Forest Preserve county, acquired by the State for the specific uses and purposes of the New York State College of Forestry at Syracuse University, does not become part of the Forest Preserve since it is acquired for uses and purposes wholly inconsistent with its preservation as wild forest. 1957, Op.Atty.Gen. 299.

State-owned land adjacent to Old Forge dam was not part of forest preserve. 1927, Op.Atty.Gen., 37 State Dept.Rep. 149.

Revocable permits

The Conservation Department may grant a revocable permit to use an abandoned cement mine on forest preserve lands for food storage experiments. 1954, Op.Atty.Gen. 156.

Timber removal

Selective cutting of those few scattered trees necessary to maintain trails and to lesson soil compaction, erosion and destruction of vegetation does not violate the "forever wild" provisions of the state constitution, if done in strict conformance with a management plan. Op.Atty.Gen. 86-F3.

The cutting of browse in the forest preserve by the Conservation Department for the purpose of feeding wild deer does not constitute a violation of the constitutional prohibition of the removal or destruction of timber. 1948, Op.Atty.Gen. 159.

Pruning and removal of trees in Forest Preserve was permissible as far as good forestry demanded. 1927, Op.Atty.Gen. 252, 37 St.Dept.Rep. 390.

The conservation commission had no power to authorize the cutting and removal of living trees to be used in the repair or reconstruction of dams on streams in the forest preserve. 1921, Op.Atty.Gen., 26 St.Dept.Rep. 281.

The prohibition of former section 7 of Article 7 would be presumed to be limited to the exploitation of timber for commercial or manufacturing, and was not intended to prevent such incidental cutting and removal of trees as might be deemed necessary in establishing roads or paths or in promoting the pleasure and convenience of visitors. 1919, Op.Atty.Gen., 21 St.Dept.Rep. 412.

Former section 7 of Article 7 did not prevent the removal of an immaterial amount of tree growth for the purpose of opening vistas or views in connection with the building of pedestrian trails in the Forest Preserve. 1935, Op.Atty.Gen. 274.

Removal of dead trees for aesthetic reasons alone was unauthorized. 1933, Op.Atty.Gen., 48 St.Dept.Rep. 589.

Fire protection, timber removal

Trees in the forest preserve destroyed by a hurricane may be removed for the purpose of eliminating the fire hazard created thereby, but sale or other disposition of the salvaged trees cannot be made without legislative authority. See L.1951, c. 6. 1950, Op.Atty.Gen. 154.

It was not only the right but the duty of the Conservation Department to remove dead stubs in the Forest Preserve when they were a menace to safety and life. 1935, Op.Atty.Gen. 308.

Reasonable cutting and removal of timber for the building of a road necessary for the protection of the Forest Preserve from fire was not a violation of former section 7 of Article 7, and might be done when such destruction was not to any material degree. 1933, Op.Atty.Gen. 369.

Highways

In the construction of a memorial highway authorized by former section 7 of Article 7 through the Forest Preserve, the construction of toll facilities at one portion of the highway was within the scope of the authorized highway. 1933, Op.Atty.Gen. 382.

Under the provisions of Laws 1924, c. 275, the state commissioner of highways might occupy state-owned lands in the forest preserve for the reconstruction of state and county highways which had been heretofore improved or which might hereafter be designated by law for improvement by the state, without violating former section 7 of Article 7. 1931, Op.Atty.Gen. 142.

Former section 7 of Article 7 did not by implication deprive the legislature of power to authorize the state commission of highways to construct highways on rights of way dedicated for that purpose over forest preserve land by chapter 330 of the Laws of 1908; nor did that section of the Constitution deprive the legislature of power to authorize the use of stone, sand and gravel, to be taken from forest preserve land, in the construction of said highways and the use of land for spoil banks, to the end that the cost of construction might thereby be properly reduced. 1921, Op.Atty.Gen. 130.

Former section 7 of Article 7 was never intended to prevent the state from constructing a needed highway across its own land. Op.Conservation Commission, 1918, 17 St.Dept.Rep. 567.

Sand and gravel removal, highways

Taking sand and gravel from land in forest preserve for maintaining State highway within such preserve was permissible provided such taking did not impair the preservation of its character as a "wild forest" area. 1936, Op.Atty.Gen. 251.

The provisions of former section 7 of Article 7 prohibited the Conservation Commission from allowing contractors improving highway routes through parts of the State Forest Preserve, to take rock and stone from said preserve adjacent to said highways for the construction thereof, but as the land within the limits of said highways was not a part of the Forest Preserve, it was not subject to this prohibition. 1920 Op.Atty.Gen., 22 St.Dept.Rep. 689.

Highways, timber removal

The Conservation Department may not permit the cutting of 5,000 trees in the forest preserve for the purpose of relocating or reconstructing an existing State highway therein. 1954, Op.Atty.Gen. 157.

Under the provisions of this section, Laws 1921, c. 401, as amended by Laws 1924, c. 275, Laws 1937, c. 488, is ineffective to authorize the State Superintendent of Public Works to occupy a right of way for relocation of highway, if such relocation involves the removal or destruction of a considerable number of trees. 1948, Op.Atty.Gen. 166.

Laws 1924, c. 275 did not confer authority upon the Conservation Department and the State Department of Public Works to construct the Saranac Lake-Raybrook and Lake Placid-Raybrook highways in Essex County over State Forest Preserve land, causing the removal in the former case of approximately four thousand trees and in the latter of about two thousand seven hundred trees. 1933, Op.Atty.Gen. 395.

Former section 7 of Article 7 gave implied power to remove timber necessary for building a highway from Seventh Lake to Raquette Lake village through the forest preserve. 1925, Op.Atty.Gen., 35 St.Dept.Rep. 171.

The state highway department could not, under the limitations contained in former section 7 of Article 7, deviate or change the route of a highway in the forest preserve, if such change necessitated the cutting and removal of any of the standing timber outside of the limits of an old established highway. 1915, Op.Atty.Gen. 190.

Roads and trails, highways

Roads constructed or improved through the forest preserve for fire protection purposes do not become highways, but the Conservation Department had authority to grant permits for the temporary use for private purposes of such a road, provided the same would not damage the road, interfere with its use by the Department for the purposes for which it was constructed, or tend to a substantial extent to destroy the wild forest character of the preserve. 1955, Op.Atty.Gen. 185.

A truck trail, constructed by the Conservation Department on forest preserve lands, may not be used by the owners of adjacent private lands for vehicular traffic. 1947, Op.Atty.Gen. 179.

Where the owner of private lands in one of the Forest Preserve counties has heretofore been permitted to use an unimproved tote-road passing over state lands, by the employment thereupon of horse-drawn vehicles, for the purpose of transporting hardwood timber cut by him on his own lands, the Conservation Department may in its discretion permit the improvement by him of such road to the extent of making it usable by motor vehicles throughout the year, under certain conditions. 1947, Op.Atty.Gen. 174.

The Conservation Commissioner had the authority to construct dirt roads or truck trails in the forest preserve for the purpose of aiding and protecting it from fire hazards, but such roads were not public highways and public use thereof was not allowable. 1935, Op.Atty.Gen. 300.

Ski trails

This section was intended and must be interpreted to authorize a ski trail development in the fullest sense. 1957, Op.Atty.Gen. 197.

The Conservation Department, under L.1948, c. 468, must confine itself to such study of the proposed ski development in Warren county as may be conducted without clearing, grading and basic improvement, and may not proceed to construct experimental ski trails for the purpose of observing effect of sun and wind thereupon. 1948, Op.Atty.Gen. 169.

Additional legislation is necessary in order to implement the constitutional amendment of 1947, providing authority to construct and maintain ski trails and appurtenances on certain mountains in the forest preserve and to impose charges in connection therewith. 1948, Op.Atty.Gen. 166.

If and when the proposed "ski amendment" to this section is approved at the 1947 general election such trails and appurtenances as are located on forest preserve lands must be constructed by a state agency; it is immaterial whether such construction is auxiliary to a main development now existing on private land; under existing law the Catskill portion of such proposed development may not be so operated that the people are charged a fee for the use thereof; neither the Adirondack nor the Catskill development may be operated by others, except as agents of the state; and it seems that this section after the proposed amendment will not authorize the construction on forest preserve lands of such facilities, if they are intended primarily to supplement or complement essentially private enterprises of the same nature located on adjacent private lands. 1947, Op.Atty.Gen. 171.

The Conservation Commissioner may authorize construction of ski trails in the Forest Preserve with a minimum of timber removal, where such trails will increase the use of said lands for their true purpose without affecting their true natural character. 1934, Op.Atty.Gen. 268.

Mineral, gas, and oil extraction

This article prohibits the searching for and the taking of gas and oil within the forest preserve, and the Conservation Department has no power or authority to permit the same. 1954, Op.Atty.Gen. 170.

The Commissioners of Allegany State Park have no present statutory authority to make a lease of state lands in such park under which the lessee would be empowered to withdraw therefrom underlying deposits of oil and gas. 1943, Op.Atty.Gen. 428.

The Conservation Department had no authority to issue a permit for the mining of gold on forest preserve land, and the fact that no trees would be cut or destroyed did not alter the situation. 1934, Op.Atty.Gen. 282.

Pipe lines

The laying of a water supply pipe line without removal of timber or in any manner affecting the character of the forest preserve as "wild forest land" was permissible. 1936, Op.Atty.Gen. 251.

The Department of Conservation had power to grant revocable permission for the laying and maintenance of a gas pipe line across certain state owned lands under its control. 1936, Op.Atty.Gen. 248.

There was no power in conservation commission to authorize the laying of a pipe across forest preserve land for piping water. 1925, Op.Atty.Gen., 35 St.Dept.Rep. 353.

Power and telephone lines
Where permission for the occupation and use of forest preserve lands adjoining an old highway has been granted by the Conservation Department to the Department of Public Works without transfer of jurisdiction, consent of both departments is required for the construction and maintenance of electric power transmission line thereon. 1950, Op.Atty.Gen. 153.

Where the construction of an additional transmission line along a public highway which would entail the present removal from Forest Preserve lands of approximately ninety trees within a distance of approximately two miles, the trimming of many other trees and additional removals in the future, a revocable permit for such construction will be denied. 1950, Op.Atty.Gen. 149.

The Conservation Department may grant a revocable permit for the erection and maintenance of an electric power line and a telephone line crossing forest preserve lands, if it determines that the wild forest character of the forest preserve will not be thereby impaired. 1949, Op.Atty.Gen. 132.

The State Conservation Commissioner has authority to grant a revocable permit for the installation of an aerial or an underground electric transmission line across forest preserve lands used as a public camp site if upon a survey of the physical situation it appears that the installation would not impair the character of wilderness of the forest preserve. 1945, Op.Atty.Gen. 168.

Camps and campsites
The authority of Conservation Commissioner to grant permits for temporary use of forest preserve and use and maintenance of buildings thereon is limited by the provisions of this section, and no authority exists for permitting a private organization to continue to use buildings on land acquired for forest preserve for the operation of a Boys' camp. 1941, Op.Atty.Gen. 280.

There is no bar in this section to the exaction of a reasonable fee for the use of the public campsites in the forest preserve. 1940, Op.Atty.Gen. 315.

Land acquired by the State in a Forest Preserve county to be improved and developed as a park and campsite for the use of the public, with monies appropriated for that purpose, in a section not wild and forest lands as the same is generally understood, does not come within the constitutional provisions relating to the forest preserve. 1940, Op.Atty.Gen. 313.

The maintenance of CCC camps in the Forest Preserve, of a temporary character and with no destruction of trees or lands, when necessary for the protection of the forests, was not a violation of former section 7 of Article 7. 1935, Op.Atty.Gen. 325.

The right of the State Conservation Department to build shelters and furnish food for the cost of operation in remote sections of the forest preserve was of doubtful constitutionality. 1934, Op.Atty.Gen. 279.

Easements
An essential element of a right of way by necessity is unity of title between the dominant and servient estates, so that the mere fact that a privately-owned parcel of land is enclosed on three of its four sides by forest preserve land does not necessarily mean that there exists a right of way by necessity over the State-owned land. 1955, Op.Atty.Gen. 185.

The Conservation Department has authority to grant right of way occupation over forest preserve lands to the Department of Public Works. 1946, Op.Atty.Gen. 175.

Where first easement to Adirondack Mountain Club failed because club neglected to improve right of way into a roadway, with the fee passing to the state in grant for forest preserve prior to expiration of period in which condition subsequent could be performed, and the right of re-entry being established by the state because of special facts, the state could not impose a second easement on the land because of limitations of this section. 1941, Op.Atty.Gen. 280.

Residence within preserve
A right reserved by the state's grantor of forest preserve lands to maintain, use, control and operate a dam at the outlet of a lake on the lands conveyed and to enter upon such lands for the purpose of constructing, repairing, maintaining and operating the dam does not entitle the gate tender of the dam to live upon the lands conveyed or to cut fire wood thereon or cultivate a portion thereof. 1949, Op.Atty.Gen. 128.

Top soil
Authority to remove top soil and trees from open field to another portion of Forest Preserve may be granted by the Department of Conservation, if such removal does not impair the "wild forest" character. 1937, Op.Atty.Gen. 242.

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