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COURT OF APPEALS

STATE OF NEW YORK

PROTECT THE ADIRONDACKS! INC.,

Respondent,

-against-

NO. 21

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION AND
ADIRONDACK PARK AGENCY,

Appellants.

20 Eagle Street
Albany, New York
March 23, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 21, Protect
2 the Adirondacks! Inc. v. New York State Department of
3 Environmental Conservation.

4 Counsel?

5 MS. CLARK: Good afternoon, Your Honors.
6 Jennifer Clark appearing on behalf of DEC and EPA. I
7 request to reserve two minutes of my time for rebuttal.

8 CHIEF JUDGE DIFIORE: You may have two minutes,
9 Counsel.

10 MS. CLARK: Thank you. This is a case about
11 building trails in forest preserves. The Third Department
12 erred when it deemed both trails unconstitutional solely
13 due to the amount of timber cut to build them.

14 The proper test for determining constitutionality
15 requires a consideration of context to decide whether the
16 trails would impair the wild forest nature of the preserve.

17 JUDGE RIVERA: Counsel? Counsel?

18 MS. CLARK: Yes.

19 JUDGE RIVERA: Hello. Is it a fact-finding based
20 on the expert testimony that we cannot revisit - - -

21 MS. CLARK: Um - - -

22 JUDGE RIVERA: - - - as to whether or not timber,
23 at the time that the word was adopted, would include these
24 smaller trees.

25 MS. CLARK: No, Your Honor. That - - - that is



1 not an affirmed finding of fact. That is a question of
2 constitutional interpretation, the kind that this court
3 routinely is responsible for - - - for undertaking, Your
4 Honor.

5 And you know, as we're talking about the meaning
6 of the word "timber" in the constitutional - - -

7 JUDGE RIVERA: Let me - - - let me - - -

8 MS. CLARK: - - - provision here - - -

9 JUDGE RIVERA: - - - Counsel, let me - - -
10 Counsel? I'm sorry.

11 MS. CLARK: Yes.

12 JUDGE RIVERA: Let me - - - let me follow up on
13 that issue. I - - - I do not disagree it's a question of
14 constitutional interpretation. But if it is argued below
15 as a question of what was the drafters' understanding at
16 the time, and that turns on experts testifying as to the
17 historical context, why aren't we, then, bound by whatever
18 are the fact - - - right, the facts related to the
19 historical context that would then inform our
20 constitutional analysis?

21 MS. CLARK: So I agree with Your Honor that of
22 course, there was historical testimony that was provided at
23 trial and that that was part of what Supreme Court
24 considered in making a decision that then ultimately was
25 also considered by the Third Department.



1 But those were ultimately legal conclusions that
2 were made by those courts based upon the facts that were
3 put before them; one of those facts being historical
4 context.

5 This court is certainly free to come to and
6 should come to a different legal conclusion based on that
7 same - - - those same historical - - - historical facts.
8 And what we know here from the - - - the evidence put forth
9 is that there was a distinction in 1894 and again in - - -
10 in 1915 at both the Constitutional Conventions between
11 timber and trees, and that the delegates to the
12 Constitutional Conventions chose the word "timber" for a
13 reason, that there was commercial logging that was
14 occurring - - -

15 JUDGE FAHEY: Well, Counsel - - -

16 MS. CLARK: - - - at the time - - -

17 JUDGE FAHEY: - - - can I - - - can I stop - - -

18 MS. CLARK: - - - that - - -

19 JUDGE FAHEY: - - - can I stop you for a second?

20 Judge, thank you.

21 The 1915 Convention, that constitution was
22 rejected by the voters, wasn't it?

23 MS. CLARK: Yes, Your Honor, it was rejected by
24 the voters.

25 JUDGE FAHEY: So that - - - that - - -



1 MS. CLARK: So it doesn't have - - - yes.

2 JUDGE FAHEY: - - - that being the case, why
3 would we use a 1915 argument to interpret the 1894 delegate
4 analysis of what the meaning of the word is?

5 MS. CLARK: Well, Your Honor, I think that what
6 was discussed at the convention in 1915, as you mentioned,
7 the - - - the proposal that was ultimately rejected by the
8 voters, was adopted by the delegates. And in making - - -
9 in having their discussion surrounding that, it shed light
10 on what they understood it to mean at the time, and what
11 they - - - they understood it to mean in 1894, which was,
12 you know, much more recent then than it was - - - than it
13 is now.

14 So it provides - - -

15 JUDGE FAHEY: Well - - -

16 MS. CLARK: - - - additional historical context
17 for us, and it provides additional intent information about
18 what the delegates wanted at the time when they were
19 enshrining this constitutional protection.

20 JUDGE FAHEY: Much - - - much of the argument - -
21 - once we move beyond whether trees equal timber or timber
22 equals trees - - - which seems to me to be an esoteric
23 argument that misses the underlying point, which was that
24 the purpose of the constitutional amendment was to preserve
25 as much as possible the forever wild nature of the



1 Adirondacks Preserve. And - - - and so whether it's 6,100
2 trees or - - - that we're talking about that qualify for
3 the timber or 25,000, we're still talking about a
4 significant reduction in the overall number of trees in the
5 Adirondacks.

6 What - - - what I'm wondering is, is most of the
7 argument that you make appears to be the - - - it's a
8 rational argument. And it's really what I would expect
9 from DEC if DEC was told they did not have a rational basis
10 to do what they're proposing to do. And you're saying, no,
11 we do have this rational basis to go ahead and do these
12 things.

13 These are very familiar arguments. You know, we
14 studied it; we counted up the number of trees; we thought
15 the effect would be minimal; and so we thought it would be
16 a good idea to go ahead.

17 What I wonder, though, in the context of the
18 constitution and - - - and what I see particularly in the
19 Adirondacks v. MacDonald case, is that when they're talking
20 about the bobsled run in 1930s being put into Lake Placid,
21 and that was a violation of the constitution, the court
22 ruled then, and that's still good law today.

23 And that analysis says to me that something may
24 be rational, but it could still be unconstitutional. It's
25 perfectly rational to put in an Olympic park to attract



1 people. It has good economic benefits. It's certainly a
2 legitimate form of recreation and something that the State
3 could be proud of.

4 But this state made a policy choice, and the
5 policy choice that they made and they've preserved for over
6 a hundred years was to say that while that may be a
7 perfectly rational choice, those economic benefits, whether
8 it be commercial logging or snowmobiling, result in a
9 destruction of this forest and a compromise of the - - - of
10 the ecological validity - - - actually the unique gift that
11 we've been given from God to preserve this.

12 And that's why they said in 1930, it's rational,
13 but it's not constitutional. And I'm having a hard time
14 seeing why this is any different, I guess is where I'm at.

15 MS. CLARK: Okay. So Your Honor, I - - - I agree
16 that MacDonald is certainly still good law. But there's
17 the - - - a gulf between the project that was proposed
18 there and - - - and the project that's proposed here.

19 And just to be clear, you know, the - - - the
20 purpose of the constitutional provision was certainly to
21 preserve the wild forest nature for future generations of
22 New Yorkers, and part of that was to preserve it so that
23 future generations of New Yorkers could enjoy access to the
24 preserve.

25 So it's not a question - - - it - - - you know,



1 the State's not arguing that it's some kind of balancing
2 test with different factors and that somehow you have to
3 balance access against preservation. The idea is that you
4 would preserve the wild forest nature, minimizing any
5 impacts, while making sure that the primary goal of the
6 delegates to preserve it so that future generations of New
7 Yorkers could enjoy and access it, is accomplished.

8 So in MacDonald, the - - - the court - - - this
9 court took a contextual view. They looked at the fact that
10 it would be not just numbers just - - - not just the
11 numbers of trees cut in MacDonald, but how that cutting
12 would take place. It would be in a concentrated area. It
13 would - - - the equivalent of a clear cut. Basically one
14 concentrated area.

15 It involved bringing in mechanical implements
16 that one would not normally find - - - expect to find in
17 the forest preserve to allow this bobsled run to go up and
18 then have a - - - a return. It was an extremely wide area
19 that they would be cutting from.

20 Here we have trails, trails that do not disturb
21 the forest - - - the forest canopy. We have an affirmed
22 finding of fact that - - -

23 JUDGE FAHEY: I don't - - - I don't believe that
24 - - -

25 MS. CLARK: - - - these trails are - - - are not



1 visible from above.

2 JUDGE FAHEY: - - - let me stop you for a second.
3 I don't believe the record supports that. I think that the
4 destruction of the overstory in the forest has been
5 described as minimal. And this is a case of one man's
6 ceiling is another man's floor. The wild preservation of
7 the forest will not survive if the forest overstory is
8 destroyed. And that would mean it's a - - - it's a - - -
9 it's a death by 1,000 cuts, is what DEC is presenting us
10 with here.

11 They're saying this is a scientific form of
12 forestry that we can do, and it will have a minimal impact.
13 But 1,000 minimal impacts that - - - and they will take
14 place once we allow this to go forward. And if we should
15 allow this to go forward, we would be saying not that what
16 you're doing is wrong, but we're saying that all these
17 little things that you want to do will have no impact on
18 the forest itself. And that simply is contrary to
19 everything we see around us today.

20 On a daily basis, the forests in the North
21 America are burning to the ground. And this proposal would
22 affect the overstory that protects the only truly wild
23 forest in the Eastern United States.

24 MS. CLARK: Your Honor, with regards to the - - -
25 just to - - - to come back quickly to the forest canopy, we



1 - - - that is - - - that - - - both experts agree that it
2 would be maintained intact throughout. These trails are
3 nine to twelve feet in width. And many other trails in the
4 forest preserve also run approximately eight feet,
5 including for hiking, for cross-country, for horseback
6 riding. So this is not a - - - a new kind of trail that
7 doesn't otherwise exist in the forest preserve - - -

8 JUDGE RIVERA: Well, Counsel, let me understand -
9 - -

10 MS. CLARK: - - - on - - -

11 JUDGE RIVERA: - - - Counsel if I could - - -

12 MS. CLARK: - - - the record that - - -

13 JUDGE RIVERA: Counsel? Counsel, I'm sorry. If
14 I can interrupt you?

15 MS. CLARK: Yep.

16 JUDGE RIVERA: I know your red light is on. If
17 the Chief Judge will permit me this one question.

18 CHIEF JUDGE DIFIORE: Yes.

19 JUDGE RIVERA: If I'm understanding your
20 interpretation of the Constitution, that would permit every
21 seedling, every sapling that's below what the - - - the
22 entity - - - the Agency has decided is the - - - the
23 threshold of what's timber and what's a tree - - - to be
24 destroyed, and that would not be in violation of the
25 Constitution. What - - - why is that not a proper sort of



1 end result of your analysis?

2 MS. CLARK: Certainly not, Your Honor. That - -
3 - that is not at all the test that - - - that the State
4 proposes, because the - - - the first sentence - - - the
5 wild forest - - - the forever wild provision is divided up
6 into two sentences. The first sentence requires that the
7 land shall be forever kept as wild forest lands. So every
8 portion of the preserve, whether it be a seedling, a
9 sapling, a huge tree, or a vegetation that is not a tree,
10 is protected by that.

11 So everything that is done must preserve the wild
12 forest nature, and that - - -

13 JUDGE RIVERA: (Audio interference).

14 MS. CLARK: - - - is true regardless of how this
15 court interprets the word "timber" in the second sentence,
16 and - - - and whether they agree with the State's
17 interpretation or not.

18 JUDGE WILSON: But then, Counsel - - -

19 MS. CLARK: It still remains true that - - -

20 JUDGE WILSON: - - - Counsel, Counsel - - -

21 MS. CLARK: - - - the overarching goal of the
22 provision, which is to preserve the wild forest nature,
23 must be - - - must be pre - - - must be maintained.

24 CHIEF JUDGE DIFIORE: Judge Wilson has a question
25 for you.



1 JUDGE WILSON: Thank you, Chief.

2 So Counsel, if you're viewing the first sentence
3 as independent of the second, which I understand you to be
4 saying - - - correct me if I'm wrong - - - then why isn't
5 it correct that the Records of the Convention supplemented
6 by the Attorney General opinions from the twenty-five years
7 or so after that, demonstrate that the intent of the first
8 sentence was essentially that the forest preserve be left
9 as untouched by man or as created by God. Those are sort
10 of the words that are used to describe the intent at the
11 Convention and the interpretation of several Attorneys
12 General, from 1895 through 1915 or so.

13 What - - - why isn't the - - - why don't you lose
14 under the first sentence, if it's independent of the
15 second?

16 MS. CLARK: So Your Honor, just to clarify the
17 position of the State, I think the - - - it's best
18 understood that the second tes - - - sentence is making
19 explicit that which is already implicit within the first
20 sentence rather than it being necessarily operating
21 independent of each other. Rather it's that the - - - the
22 second sentence is highlighting specific concerns that were
23 animating the delegates at the time.

24 It's more like a - - - a clarification or a
25 specification of some of their particular concerns rather



1 than any argument that they're operating independently.
2 Actually, we say that they need to be read in light of each
3 other rather than independently.

4 And the - - - if you look at the - - - the
5 primary conversation among the delegates at the 1894
6 Convention, they are discussing two animating concerns.
7 Obviously in the background history is the commercial
8 logging. So that - - - their goal is to stop that from
9 happening. That is the historical context.

10 And their goals for the future are to preserve
11 the - - - the forest preserve as a great resort for the
12 people and to make sure that its - - - its value as a
13 watershed is protected. And those goals help explain what
14 would - - - what would preserve the wild forest nature.

15 Access to the preserve for New Yorkers of all
16 abilities is perfectly in line with and is, in fact, the
17 animating purpose of protecting the preserve for future
18 generations.

19 JUDGE GARCIA: Chief, can I off - - - ask a
20 question?

21 CHIEF JUDGE DIFIORE: Yes, Judge Garcia.

22 JUDGE GARCIA: Counsel, why, if you look at the
23 provision which has these sentences we've been talking
24 about, there's another few pages of "notwithstandings" you
25 can do X. And I know that some of those - - -



1 MS. CLARK: Yes.

2 JUDGE GARCIA: - - - are roads some of those are
3 - - - but some of them are ski trails. I mean, why doesn't
4 that give the impression, at least, that this
5 constitutional provision is so strict that to do these
6 types of things, for example, to build a trail for
7 motorized vehicles like snowmobiles, you need a
8 constitutional amendment?

9 MS. CLARK: So Your Honor, if you look - - -
10 there - - - it's true, there's a long list of
11 constitutional amendments. And the - - - if you look at
12 what they are, they are things that look a lot more like
13 the bobsled run in MacDonald than what - - - than the
14 trails that we have here.

15 You mentioned - - - Your Honor mentioned ski
16 slopes. Those are - - - we're not talking about cross-
17 country trails - - - cross-country skiing trails. These
18 are 150-foot, 200-foot-wide downhill ski slopes that
19 require bringing in a mechanical implement to - - - you
20 know, something you need to get up and down a ski slope - -
21 - that one - - - one would not expect to find in the
22 preserve.

23 JUDGE GARCIA: But you're - - -

24 MS. CLARK: You're talking about highways that
25 require - - -



1 JUDGE GARCIA: - - - snowmobiles, not ski slopes.

2 MS. CLARK: - - - that do disrupt the forest
3 canopy greatly and that require paving, something that also
4 one would not expect to find in a forest preserve.

5 Those are also, you know, things that don't
6 necessarily further the purpose of maintaining it so that
7 it could be enjoyed by all New Yorkers.

8 What you'll see is notably absent from the list
9 of constitutional amendments is a trail of any kind. There
10 are no trails on there, because trails are in line with
11 what this constitutional provision was - - - was put - - -
12 put into the constitution for in the first place:
13 maintaining the wild forest nature of the preserve so that
14 it could be enjoyed by future generations.

15 JUDGE GARCIA: That - - - that might be a hiking
16 trail, I think. But this is a trail for a mechanized
17 vehicle. So you talk about putting a ski lift in, you're
18 talking about mechanized traffic going through a road,
19 which to me, looks more like a road than even a ski slope.

20 So you know, that looks more like some of these
21 things that they've gotten amendments for.

22 MS. CLARK: Well, Your Honor, I - - - I want to -
23 - - I want to interject there, because plaintiff
24 specifically did not pursue a challenge against snowmobile
25 use. That is not part of this litigation. We're talking



1 about the trails. These are multi-use, multi-season
2 trails. Their range - - - they're primarily nine feet in
3 width. And as I mentioned, other trails in the preserve
4 are - - -

5 JUDGE FAHEY: Can I stop you there one - - -

6 MS. CLARK: - - - is within - - -

7 JUDGE FAHEY: - - - second? Ma'am, can I stop
8 you one second?

9 I understand that argument, and you're correct as
10 far as the record goes. I think that's unquestioned. But
11 the way I understood Judge Garcia's question was, is the
12 primary use of - - - of this type of Class II trail, is to
13 allow snowmobiles to use it. And the use of snowmobiles,
14 besides having an economic benefit for the surrounding
15 community, does bring a mechanized road-like nature to the
16 - - - to the trails that are being designed.

17 There's no other purpose for a nine-foot trail
18 than to put in a snowmobile. And it - - - it seems to me
19 disingenuous to argue it as anything other than that.

20 I mean, you're totally right. They dropped the -
21 - - we're not saying that snowmobiles can be banned from
22 the park. I think you're right about that. But what we
23 are saying is that the - - - the design for these trails is
24 primarily a design to allow access to snowmobiles.

25 And my review of the record seems to show that



1 all the Class II connector trails throughout the park are
2 really designed for that particular purpose.

3 MS. CLARK: Your Honor, these - - - you're right,
4 that snowmobiles are one of the uses - - - pardon me - - -
5 for these trails. Certainly that is true. And in order to
6 protect those who are using the park, that yes, there is a
7 certain width requirement. That I - - - that width
8 requirement is not a - - - a large deviation from other
9 trails in the park that accommodate all types of other
10 uses, like snowshoeing, cross-country ski trails, horseback
11 riding trails, any - - - that are about eight feet in
12 width, and hiking trails that range from three to eight
13 feet in width.

14 And I would just - - - I would - - - I would
15 disagree with the idea that the - - - the construction
16 techniques used here are somehow more akin to what you
17 would use to - - - to build a road. In fact, we have an
18 affirmed finding of fact that's supported by the record
19 evidence, to the opposite, that these trails are actually
20 more akin in their construction, in their impact on the
21 surrounding environment, to hiking trails than they are to
22 roads.

23 And there was a thirteen-day trial at which
24 plenty of evidence was put forth, and that was the
25 conclusion by Supreme Court that was - - - that was upheld



1 by - - - by the Third Department. So the - - - the record
2 does demonstrate that - - - that these are much more
3 similar in construction and impact on surrounding
4 environment to - - - to hiking trails.

5 JUDGE GARCIA: Chief, I have one more - - -

6 CHIEF JUDGE DIFIORE: Counsel, what would be - -
7 - some of the practical effects of the A.D. analysis be on
8 DEC's policies and activities and projects?

9 MS. CLARK: Sure, Your Honor. So it is - - -
10 what has happened since the Appellate Division decision is
11 that the State has - - - has ceased construction on - - -
12 on trails of any kind, that includes planned trails - - -
13 foot trails, relocating hiking trails, building new hiking
14 trails, and have also not undertaken some projects,
15 including building new water lines for safe drinking water
16 access and other kinds of just general main - - -
17 maintenance that need to be undertaken in order to maintain
18 the trails that already exist.

19 So certainly, the impact of the Appellate - - -
20 the Appellate Department's decision has been that it has -
21 - - it has had a - - - a wide impact on what the State has
22 been able to do in the preserve.

23 And along that same line, you know, I just want
24 to be - - - be clear, when we're talking about you know - -
25 - I believe the phrase before was death by a 1,000 cuts - -



1 - there is - - - I want to make a couple points on that
2 front.

3 First, there's an - - - an upper limit that is in
4 place to the amount of trails that are allowed in the
5 preserve that are open to - - - to snowmobile use. There
6 are limits in the preserve on the types of land
7 classification that can be open to - - - to snowmobiles.
8 They're - - - they're only allowed in wild forest lands and
9 not the other types of lands.

10 And EPA and DEC take seriously their
11 responsibility to - - - to safeguard the preserve. That's
12 in the State Land Master Plan which dictates that there be
13 a trail increase in existing trails accessible to
14 snowmobiles. So what you'll see in this - - -

15 JUDGE STEIN: Counsel - - -

16 MS. CLARK: - - - is that - - - is that because
17 there were some additional trails that were built that were
18 open to snowmobiles, miles of trails that had previously
19 been opened, they're closed to snowmobile use, that they
20 moved trails that were in sensitive interior areas out to
21 areas that are much closer to the roadway, so that there's
22 a net benefit to - - - to the forest preserve.

23 JUDGE STEIN: Counsel, if I - - - Judge Stein
24 here. If I could just follow up on the Chief Judge's
25 question.



1 So you talked about what DEC has not felt that
2 they've been able to do. But what is the effect of that on
3 the public use of the forest preserve?

4 MS. CLARK: Your Honor, so I - - - I think, you
5 know, it's - - - it's important to remember that - - - that
6 we're not just talking about - - - of course, this case is
7 about the trails at issue in this case, but - - - but DEC
8 and the EPA take - - - as I said - - - very seriously,
9 their responsibility to be stewards of the preserve.

10 So at - - - you know, with regards to overall the
11 building and maintenance of trails that would provide
12 access to the public, the - - - the Appellate Department's
13 decision has caused them to - - - to cease building and
14 maintaining trails. It has caused them to need to pull
15 back on some - - -

16 JUDGE STEIN: What are the - - -

17 MS. CLARK: - - - maintenance that they would
18 otherwise be doing, because the standard put forth by the
19 Appellate Division is - - - it's simply not workable and
20 impracticable for them to do what they need to do in order
21 to ensure access.

22 And I'm - - - I'm not just talking about these
23 trails, I'm just speaking more - - - more generally, as
24 Your Honor asked sort of about the overall impact.

25 CHIEF JUDGE DIFIORE: Thank you, Counsel.



1 MS. CLARK: Of course all of - - - (Audio
2 interference).

3 JUDGE FAHEY: Judge, could I ask - - -

4 CHIEF JUDGE DIFIORE: Judge Fahey?

5 JUDGE FAHEY: I'm sorry we're going over this.
6 But what's your understanding of what the phrase "forever
7 wild" means, legally?

8 MS. CLARK: Well - - -

9 JUDGE FAHEY: And let me tell you, it's - - -
10 it's a hard question. I'm not - - - I'm not - - - if you
11 don't have the answer on the tip of your tongue, I
12 understand. And - - - and I've struggled with it myself.
13 But I think it's important for us to have a sense of - - -
14 of what are we talking about here. What - - - how - - -
15 what does "forever wild" actually mean?

16 Is it a balancing of interests between what
17 people could use for the forest for and the nature of the
18 forest itself? Is a snowmobile encompassed in what - - -
19 what the phrase "forever wild" means? Is - - - is a ski
20 slope - - - are these things - - - or it's just simply a
21 constitutional barrier that can only be surmounted by the
22 People of the State of New York voting, not this court, or
23 anyone else?

24 It - - - what do you think it means?

25 MS. CLARK: Well, Your Honor, the words of that



1 first sentence that you're referring to are that the forest
2 preserve shall be forever kept as wild forest lands. And I
3 think that of course, exactly what that means, is - - - is
4 a question of interpretation.

5 But the best guide that we have is what we know
6 from the historical record, the delegates were - - - were -
7 - - were convening to - - - to protect.

8 And what we know is that there was extensive
9 commercial logging taking place at the time. The delegates
10 wanted to stop that. And their concern was that - - -

11 JUDGE FAHEY: Let me ask you this. Let me ask
12 you this. Wouldn't you say that it was a radical move in
13 1894 to declare twenty-five percent of the State of New
14 York off limits to all development?

15 MS. CLARK: Your Honor, I don't - - - I don't
16 know if off limits to all - - - I guess I - - - I don't
17 know what "all development" means. I don't know that that
18 - - - as we know from MacDonald, there is not an absolute
19 interpretation of the destruction of timber clause. This
20 court explained that to us in MacDonald already; because an
21 absolute - - - interpreting that term absolutely would mean
22 minimal or no access - - -

23 JUDGE FAHEY: Well - - -

24 MS. CLARK: - - - to New Yorkers. So - - -

25 JUDGE FAHEY: - - - I - - - I can - - -



1 MS. CLARK: - - - so I'm not sure that one can
2 read it as a - - - as a - - -

3 JUDGE FAHEY: I still don't - - -

4 MS. CLARK: - - - as no development.

5 JUDGE FAHEY: - - - I do struggle, too, with what
6 "forever wild" means. But I think in the struggle to deal
7 with it, if we're going to change our thinking on it, then
8 I guess the question for us really comes down to how do we
9 do that? Do we do that by a court case or - - - or a
10 bureaucratic DEC ruling on what constitutes it, or like
11 Judge Garcia said, does - - - do we have to vote on it and
12 do the People of the State have to vote on it to make that
13 kind of change?

14 JUDGE WILSON: And Chief, if I might, I have one
15 more if you - - -

16 CHIEF JUDGE DIFIORE: Judge Wilson.

17 JUDGE WILSON: So Counsel, I wanted to ask you,
18 in - - - in light of Judge Garcia's questions, my
19 understanding is that the most recent amendment to this
20 section of the constitution was by referendum in 2017,
21 which created a land bank. Are you familiar with that?

22 MS. CLARK: I am - - - I am familiar with that
23 amendment. I don't know if I'm - - - I would know,
24 necessarily - - -

25 JUDGE WILSON: Okay.



1 MS. CLARK: - - - the historical background, but
2 yes, I'm familiar with the amendment.

3 JUDGE WILSON: So - - - so my question really is
4 the following. At least as I understand it, the idea was
5 that there were small things that these local communities
6 needed to do, including sometimes putting up a pole to
7 carry a cable wire or bracing an existing telephone pole,
8 or you know, small things like that, that were going to
9 require a constitutional amendment, each time, to do that,
10 because the brace or the pole might have to be on forest
11 land.

12 And the idea was to create a 250-acre bank of
13 land that local communities, going through a bunch of
14 hoops, could draw on so long as they at least, one for one,
15 substituted other - - - well, provided money that could be
16 used to purchase other land to add to the forest preserve.

17 And so if - - - if that under - - - if my
18 understanding there is correct about how that's working, my
19 question is, doesn't that then suggest that this
20 constitutional provision is so dramatic, so forceful, that
21 the - - - even the current understanding is that to brace
22 an existing telephone pole, if the brace is going to be on
23 the forest preserve, you have to amend the constitution;
24 and what the legislature after what looks like many years
25 of negotiating finally came up with this land bank



1 solution.

2 So my question is, isn't your interpretation sort
3 of inconsistent with what the legislature most recently
4 thought and what the most - - - what the People most
5 recently voted on?

6 MS. CLARK: So with the caveat that - - - that I
7 don't know all of the background of that, but taking what
8 Your Honor - - - you know, what Your Honor said, I - - - I
9 would - - - what really is left out of that is the idea of
10 - - - of the purpose - - - of the purpose of the provision
11 in the first place and the purpose of any kind of project
12 that takes place thereon.

13 We know that the purpose of the provision is to
14 protect the preserve so that it could be enjoyed by future
15 New Yorkers. What Your Honor is describing does not fit
16 inside that. It's a - - - you know, it's a - - - it's for
17 municipal convenience, or you know, for the municipal
18 telephone lines, or whatever. And certainly that's
19 important, but that has nothing to do with allowing New
20 Yorkers to enjoy - - - enjoy the wild forest lands.

21 So I think that is the - - - the thing that's
22 really missing there. And if one looks at - - - at what is
23 missing from the - - - the amendments, they are - - - they
24 are trails that provide access to New Yorkers, which is
25 really at the heart of the constitutional provision.



1 CHIEF JUDGE DIFIORE: Thank you, Counsel.

2 Counsel?

3 MS. CLARK: Thank you.

4 MR. CAFFRY: May it please the Court, John Caffry
5 for the plaintiff and cross-appellant, Protect the
6 Adirondacks!. And I would like to reserve one minute for
7 rebuttal on our cross-appeal.

8 CHIEF JUDGE DIFIORE: Sir, we'll - - - you don't
9 get rebuttal time.

10 MR. CAFFRY: Okay, thank you. That's fine. Then
11 I get more time now.

12 CHIEF JUDGE DIFIORE: Um-hum.

13 MR. CAFFRY: If the court follows the precedent
14 set by the Association v. MacDonald case, then the
15 defendant's appeal has to be denied, and the plaintiff's
16 cross-appeal has to be granted.

17 What they want you to do is overturn the
18 precedent set by Association v. MacDonald. We think one of
19 the primary issues to be decided here is whether the
20 prohibition - - -

21 JUDGE STEIN: Well, what - - - what do you - - -
22 what do you think has to be - - - would have to be
23 overturned - - - over here. Just - - - sorry.

24 MR. CAFFRY: Okay.

25 JUDGE STEIN: Because my reading of MacDonald is



1 that first of all, they said a reasonable interpretation in
2 view of the purposes of the forest preserve, and I think as
3 - - - as your adversary has described what was at issue
4 there is very, very different to what is at issue here.

5 And - - - and in addition to that, as I read the
6 - - - the papers in the MacDonald case, it appears to me
7 that they only were talking about trees of three inches
8 DBH. So what is it about MacDonald that you think that
9 they're trying to overturn?

10 MR. CAFFRY: Well - - - well, first of all, I
11 would disagree that what was proposed in MacDonald is all
12 that different from what's proposed here. The bobsleigh
13 run was proposed to be six to twenty feet wide.

14 JUDGE STEIN: So - - - so does your argument,
15 then, depend upon that interpretation that there's - - -
16 there's very little difference between what was at issue
17 here and - - -

18 MR. CAFFRY: That's only part of it. What - - -
19 what the MacDonald case said at its heart was yes, the
20 forest preserve was to be preserved for the use of the
21 people. But only if it doesn't result in the destruction
22 of a material amount of trees. So that has to take primacy
23 over the access issue.

24 JUDGE STEIN: But doesn't - - -

25 MR. CAFFRY: And - - -



1 JUDGE STEIN: - - - doesn't that have to be - - -
2 what is material and what is substantial, doesn't that
3 depend - - - if you have a forest preserve that is - - -
4 that is ten acres, okay, and you want to - - - you want to
5 remove fifty percent of the trees to put in a parking lot,
6 okay, well, that might be substantial.

7 Now, what if that same parking lot was a spot for
8 two cars in - - - to allow hikers to go into a forest
9 preserve of thousands and thousands and thousands of acres,
10 and - - - and I don't know what the total number of trees
11 would be? Doesn't the context of what you're talking about
12 as well as the purpose make a difference?

13 MR. CAFFRY: I don't believe so.

14 JUDGE STEIN: Isn't that what MacDonald says?

15 MR. CAFFRY: I don't believe so. In the
16 MacDonald case, if you read the statute or the session law
17 which authorized the bobsled run and directed Commissioner
18 MacDonald of the Conservation Department to build it on the
19 forest preserve - - - and the statute is quoted in the
20 synopsis of the Appellate Division decision - - - that is
21 the only place I could find it - - - it says the bobsled
22 run was to be for the use and benefit of the people. It
23 said it was to be destroyed - - - or cut no more trees than
24 were needed for its width. And that care was to be taken
25 not to damage the adjacent forest.



1 So there, in effect, is what the State has said
2 here is the context. We're being careful. We're
3 minimizing the damage.

4 Faced with a statute that said that, the
5 MacDonald court still said that was not permissible,
6 because it would destroy a material amount of trees, and
7 also because, separately, the bobsled run was not
8 consistent with the wild forest nature of the land.

9 JUDGE FAHEY: Can I stop you one second? So are
10 you saying to us that - - - they used a three-inch DBH
11 standard in MacDonald, right?

12 MR. CAFFRY: Not really. No. That was the - - -

13 JUDGE FAHEY: Well, let's - - - let's just say
14 that they did, all right?

15 MR. CAFFRY: Let's just say that they did.

16 JUDGE FAHEY: Slow down. And they're using a
17 three-inch DBH standard here, right? And so - - - so
18 therefore, if I understand your argument, you're saying it
19 would be the same. And - - - and if it was wrong in
20 MacDonald, it's wrong here, right? Is that what you're
21 saying to us?

22 MR. CAFFRY: In effect, that - - - yes. If you
23 cut that many trees, a substantial or material number of
24 trees, it's wrong, regardless of the purpose. And if - - -
25 it's deemed desirable by the People of the State, they - -



1 -

2 JUDGE FAHEY: Well - - -

3 JUDGE GARCIA: Can - - - can I follow - - -

4 MR. CAFFRY: - - - can go and get an amendment.

5 JUDGE GARCIA: - - - up on that for a second?

6 MR. CAFFRY: Yes, Your Honor.

7 JUDGE GARCIA: To go back, I think, to what both
8 Judge Fahey, I guess, and particularly Judge Stein are
9 saying. As I read MacDonald, there is this overlay and
10 there's some almost conflicting language, but - - - that
11 look, you have the statement that they adopted a measure
12 forbidding the cutting of these trees to any substantial
13 extent for any purpose, right? That's pretty broad
14 language.

15 But there does seem to be the suggestion in
16 MacDonald that the purpose has some effect on how you
17 analyze "substantial".

18 So what would concern me would be would you apply
19 the same test to action taken to prevent damage to the
20 forest, right? And I think it's mentioned somewhere in
21 MacDonald. Like what if you're clearing trees to prevent a
22 fire, right, or a fire hazard? Would you count trees in
23 the same way, so to speak, that you count trees for a
24 toboggan slide or for a hiking trail, or - - -

25 So it seems there are three categories to me:



1 prevention-type maintenance on this end of the spectrum;
2 then private type of use - - - quasi-private, maybe, of
3 this toboggan slide; and then in the middle is this kind of
4 let's enhance public use purpose.

5 And so what I struggle with is, is there a
6 different approach or is it a consistent approach, but that
7 we apply differently, because this is a different purpose
8 here?

9 MR. CAFFRY: I - - - I don't think it - - - it's
10 a different purpose. I think the approach is the same. If
11 you read that sentence - - -

12 JUDGE GARCIA: But what about the fire hazard?
13 Would you still just count trees?

14 MR. CAFFRY: Well, I - - - I think we could have
15 a long discussion here about let burn versus natural fire
16 such as you see in the west. And you know, there's a long
17 history of that that's really outside the record or I
18 believe outside the scope of - - -

19 JUDGE GARCIA: But do you think that's a
20 discussion the court would really want to get into on a
21 forever wild challenge, when they come in and they say,
22 look, we have to clear 2,000 trees out of this area,
23 because if we don't there's X damage to the forest, and
24 then they litigate that for ten years?

25 MR. CAFFRY: Well, I guess, one could say that



1 fire is a natural part of a forest. That goes to - - -

2 JUDGE WILSON: So but so then would the
3 constitution prevent you from fighting a fire in the forest
4 that was threatening the - - -

5 MR. CAFFRY: No, it would not.

6 JUDGE WILSON: - - - that was threatening
7 adjacent homes?

8 MR. CAFFRY: No, and - - - and - - -

9 JUDGE WILSON: But why not?

10 MR. CAFFRY: As the - - - because - - -

11 JUDGE WILSON: If the burned out forest is the
12 natural condition, then why not?

13 MR. CAFFRY: You've - - - because to some extent
14 it's not necessarily natural. And I really think that
15 issue is not - - - not here before us.

16 JUDGE GARCIA: But you're saying it's the same
17 test for every purpose, so how do we distinguish that, if
18 we wanted to?

19 MR. CAFFRY: In the case of a fire, if it was
20 threatening catastrophic damage, you may - - -

21 JUDGE GARCIA: Or let's say if there was a burn
22 before, and now it's getting close to a - - - you know,
23 residences, and they want to clear out some of the smaller
24 trees, and they want to, you know, create some kind of a
25 thing to prevent that, in their view, from spreading into



1 this residential area, they got to get a constitutional
2 amendment to do that?

3 MR. CAFFRY: No, of course it wouldn't be con - -
4 - and there may be room in MacDonald, in that particular
5 situation. On the other hand, I don't think it would - - -

6 JUDGE WILSON: Well, but Judge Garcia's question
7 is - - -

8 MR. CAFFRY: - - - get back to the recreational -
9 - -

10 JUDGE WILSON: - - - Judge Garcia's question is
11 why there would be room in MacDonald for that particular
12 situation? Where - - - where in MacDonald is that rule?

13 MR. CAFFRY: It says all things that are
14 necessary - - - that are necessary could be allowed. But
15 it clearly - - - when it - - - if you parse that sentence,
16 it clearly says that when it comes to access for public
17 use, that is only if the amount of tree destruction is not
18 substantial and material.

19 JUDGE RIVERA: So - - - so if I'm understanding
20 you with the point you're trying - - - if I'm - - - if I'm
21 understanding what you're saying, you seem to be drawing a
22 - - - a distinction between actions that might at first
23 blush appear, or - - - or consistently be destruction of
24 trees, but the point of that is to save life or property
25 that's external to the preserve, and therefore that might



1 fit within MacDonald - - - what you're quoting now, this
2 language about what is all that is necessary?

3 MR. CAFFRY: Well, I think in MacDonald, they're
4 talking about protecting the preserve itself.

5 JUDGE RIVERA: No, but that's why I'm asking you.
6 I thought the question posed - - - I may have misunderstood
7 it - - - I thought the question posed: what if - - - not
8 the fire internally, that was one line of questioning - - -
9 but what if the fire now jeopardizes life and property
10 external to the preserve? Are you drawing a distinction
11 between those two scenarios? I thought you were, but I may
12 have misunderstood you.

13 MR. CAFFRY: I'm not sure MacDonald answers that
14 question, and I don't think this court has to - - -

15 JUDGE FAHEY: But can I ask you this? In
16 fairness to - - - to your opponent, what do you think
17 "forever wild" means, and what do you think that phrase in
18 the constitution means?

19 MR. CAFFRY: I think the best definition is in
20 the - - - towards the end of the MacDonald decision, where
21 it says to preserving the wild state now existing. I also
22 think that it's instructive to look at the essay by Robert
23 Marshall that was cited in the Court of Appeals decision,
24 where it basically says there's little or no sign of man,
25 other than trails or temporary shelters.

1 And those are the types of things that are - - -
2 I believe, were intended by the Court of Appeals in
3 MacDonald, to be - - -

4 JUDGE FAHEY: So if I understand you correctly,
5 you're saying basically that you view the forever wild
6 provision as one where the human use of the forest is
7 allowed, but it's limited to that which doesn't destroy its
8 uniquely wild nature?

9 MR. CAFFRY: I believe that would be a good
10 definition.

11 JUDGE STEIN: So - - - so let me ask you this,
12 Counsel.

13 JUDGE FAHEY: I see.

14 JUDGE STEIN: The - - - the State is saying,
15 well, you know, because of where we are in this litigation,
16 we haven't been able to do maintenance and - - - and it's
17 affecting the access of the public. So if - - - if we
18 assume that the access of the public is one of the
19 purposes, if not one of the main purposes of - - - of
20 creating this forest preserve, what do you do about
21 maintaining the - - - the - - - the indisputably, just foot
22 trails? No - - - not big enough for - - - for snowmobiles
23 or anything like that; but just the foot trails that there
24 are many miles of throughout the preserve. And can the
25 State remove some saplings and seedlings that may be trip



1 hazards, or you know, other things of that nature? Or is -
2 - - are you saying that - - - that none of that is
3 permitted either?

4 MR. CAFFRY: First, I don't believe that issue is
5 technically before this court. It was first raised in a
6 footnote in the State's brief before the Court of Appeals,
7 which is certainly not the time to raise an issue for - - -
8 in the first instance. There's no proof of that introduced
9 at trial.

10 Secondly, it's not true that the State has
11 stopped working on trails. They may have cut back, but
12 it's simply - - -

13 JUDGE STEIN: But - - -

14 MR. CAFFRY: - - - not true - - -

15 JUDGE STEIN: Well, but if - - -

16 MR. CAFFRY: - - - and we've pointed out - - -

17 JUDGE STEIN: - - - aside from - - - aside from -
18 - -

19 MR. CAFFRY: - - - in - - - so assume for the
20 sake of discussion - - - yes.

21 JUDGE STEIN: Yeah. Well, you don't even have to
22 assume that. All I'm saying is - - - is when we're
23 determining what the meaning of these words is - - -

24 MR. CAFFRY: We're - - - we - - -

25 JUDGE STEIN: - - - what are we allowing? Is



1 this - - - are you - - - are you - - - do you want us to
2 make an absolute rule here that you cannot remove? You
3 know, and it may - - - may take several hundred of these
4 things to - - - I don't know how many it takes - - -

5 MR. CAFFRY: It - - -

6 JUDGE STEIN: - - - to - - - to keep a trail
7 clean and safe and to keep things from erode - - - you
8 know, various erosion things.

9 MR. CAFFRY: We do not believe that the decision
10 from the Appellate Division or its decision in Balsam Lake
11 would impede normal trail maintenance or hiking trail
12 construction.

13 For instance, in the record there is tree counts
14 from the construction of trails on Goodman Mountain and
15 Coney Mountain: thirteen trees for about a mile; sixty-
16 nine trees for about a mile. And those were trees one inch
17 and up.

18 So you can, we believe, within the scope of
19 MacDonald, cut a certain number of trees to build a trail
20 or maintain a trail.

21 JUDGE STEIN: But are they going to have to come
22 to court every time - - -

23 MR. CAFFRY: No, no.

24 JUDGE STEIN: - - - to determine - - -

25 MR. CAFFRY: If it's a low number like that - - -



1 JUDGE STEIN: - - - whether - - -

2 MR. CAFFRY: - - - if it's lower than the Balsam
3 Lake number, we're not challenging the Balsam Lake number
4 of 350 trees, one inch or larger, over two miles; 150 per
5 mile. We're not challenging that. We think that allows a
6 reasonable - - -

7 JUDGE STEIN: Well, aren't some of - - -

8 MR. CAFFRY: - - - amount of trail construction.

9 JUDGE STEIN: - - - aren't some of the trails
10 here less - - - aren't they removing fewer trees per - - -
11 per mile here?

12 MR. CAFFRY: One or two of the small trails.

13 JUDGE STEIN: Um-hum. So what if - - - so what
14 if they decided that they just wanted to - - - they - - -
15 they would take it one trail at a time, one piece at a
16 time, okay? So we're not talking about either 6,100 trees
17 or - - - or 25,000 trees, however you want to count them.
18 We're just going to take this piece and then we're going to
19 take this piece, and - - - and so there you go.

20 MR. CAFFRY: We'd have to look at that and see if
21 they're, in effect, to borrow the term from Seeker (ph.) -
22 - - which of course this isn't the Seeker case - - - but
23 are they segmenting a broader project to get it under the
24 threshold?

25 Here we know this is a big system of Class II



1 trails. We don't really have to get into that. In the
2 future, again, if they're just maintaining a trail and
3 they're what they call side cutting or brushing, because
4 the branches are growing from the sides, that's not a
5 problem. None of the - - - either Balsam Lake or the
6 Appellate Division in this case prohibit doing that.

7 If a few small seedlings have grown up under one
8 inch, it shouldn't be a problem to remove them.

9 JUDGE GARCIA: Chief, may I ask a question?

10 CHIEF JUDGE DIFIORE: Yes, Judge Garcia.

11 JUDGE GARCIA: Counsel?

12 MR. CAFFRY: Yes, Your Honor.

13 JUDGE GARCIA: I find some guidance perhaps in
14 this language from MacDonald to get at the issue, I think,
15 Judge Wilson and I were - - - were asking about, which is:
16 "therefore, all things necessary were permitted, such as
17 measures to prevent forest fires, the repairs to roads and
18 proper inspection, or the erection and maintenance of
19 proper facilities for use by the public which did not call
20 for the removal of timber to any material degree."

21 And doesn't that kind of sound like you can take
22 reasonable measures to prevent forest fires; you can do
23 maintenance; or you can erect these facilities for use, as
24 long as you don't destroy timber to any material degree?

25 MR. CAFFRY: Yes, Your Honor. That's the



1 sentence I was trying to refer to. And you could, I think,
2 read it either way, frankly.

3 Does the don't cut more than a substantial number
4 of trees apply to the whole sentence or just to the public
5 access projects? The first couple of items in the sentence
6 are intended, really, to protect the preserve for itself.
7 The others having to do with public access, again, the
8 material standard comes in at that point.

9 And again, we do not believe that anything that
10 Balsam Lake or in this case will prevent the State from
11 providing reasonable access to the forest preserve, they
12 can create hiking trails or they can maintain the trails
13 they have. There's no evidence to the contrary that would
14 - - - that would dispute that.

15 CHIEF JUDGE DIFIORE: Thank you, Counsel.

16 MR. CAFFRY: Thank you.

17 CHIEF JUDGE DIFIORE: Counsel?

18 MS. CLARK: Thank you, Your Honors.

19 So I just want to pick up on - - - on a point
20 that was just being discussed, which is this question about
21 context and this numbers-only approach. And what we can -
22 - - what we can see from MacDonald is that, you know, this
23 idea of a numbers-only approach has - - - has already been
24 rejected. It is a material degree and a substantial extent
25 are relative terms, and we've acknowledged that a

1 constitutional assessment simply can't be made in a vacuum.

2 And that also is borne out by sort of the
3 examples that were being discussed earlier. If you have,
4 you know, ten trees that are cut down for some kind of
5 forest fire prevention or - - - or maintenance versus ten
6 trees that would be cut down to be sold off to a company,
7 then we would have two very different situations.

8 So context and purpose do, in fact, matter. So
9 the - - - the test that we are - - - that applies here, the
10 test that was laid out in MacDonald, the prohibition on
11 timber cutting is not absolute. It's a - - - it's a
12 contextual prohibition. And this is a fact-based inquiry.
13 This is the kind of fact-based inquiry that courts
14 routinely undertake.

15 So - - - so no, there's not going to be, you know
16 - - - this is not going to cause a change in - - - in
17 litigation, because MacDonald has been on the books for - -
18 - for ninety years, and that has been administered. We're
19 asking for a continuation of - - - of MacDonald.

20 JUDGE RIVERA: Counsel?

21 MS. CLARK: And the court has to - - -

22 JUDGE RIVERA: Counsel?

23 MS. CLARK: Yes?

24 JUDGE RIVERA: Yes, hi. So let me just - - - if
25 - - - if your focus is on purpose with respect to access,



1 yeah, if - - - if we're talking about access, I'm a little
2 unclear. This is somewhat in line with some other
3 questioning you - - - you and your adversary have already
4 dealt with.

5 Why - - - what's the point of the - - - the
6 mechanical, as Judge Garcia calls it - - - the mechanized
7 route? You really want access. Isn't that just about a
8 pedestrian trail, one that might allow for disabled access,
9 of course, in a particular way. But the - - - what - - -
10 the access that you provided is for a very limited number
11 of the population.

12 Why - - - why isn't that something that we can
13 consider when we're thinking about purpose, if your purpose
14 is access of the public?

15 MS. CLARK: So I - - - I - - - Your Honor, these
16 are - - - these are multi-use, multi-season trails. They
17 are not designed to - - -

18 JUDGE RIVERA: No, I understand that.

19 MS. CLARK: - - - very small part of the - - -

20 JUDGE RIVERA: Yes, no, I understand that - - -

21 MS. CLARK: - - - population.

22 JUDGE RIVERA: Counsel, I understand that. That
23 was not my point.

24 MS. CLARK: Okay.

25 JUDGE RIVERA: The point is that you would not



1 have to build them this way, they would not be constructed
 2 this way but for the accommodation to - - - again what
 3 Judge Garcia called - - - the mechanized - - - I think
 4 that's the word he used - - - the - - - the machine. It's
 5 because you're accommodating machine as opposed to access
 6 by the general public.

7 MS. CLARK: So I just - - - I wanted to highlight
 8 the - - - and I - - - and I may be repeating myself from
 9 before, and I'm sorry. But this idea that these trails are
 10 - - - are somehow different in nature from other trails on
 11 the forest preserve is, in fact, not only not borne out by
 12 the record, but we, in fact, have affirmed findings of fact
 13 amply supported by record evidence, going in the other
 14 direction, regarding the forest canopy, regarding the
 15 trails that are marked as hiking trails, regarding the
 16 trail construction techniques that were used, that minimize
 17 the impacts on the environment.

18 So the idea that these trails - - -

19 JUDGE GARCIA: How about the width of the trail -
 20 - -

21 MS. CLARK: - - - are, in their nature - - -

22 JUDGE GARCIA: What about the - - -

23 MS. CLARK: - - - somehow different from the
 24 other trials is - - - is not accurate. And you know, we're
 25 not asking for - - - yes?



1 JUDGE GARCIA: What about the width of the trail?

2 MS. CLARK: So Your Honor, these trails are - - -

3 JUDGE RIVERA: Especially on the curves, Counsel.

4 MS. CLARK: - - - are nine feet in width - - -

5 JUDGE RIVERA: Counsel, especially on the curves?

6 JUDGE GARCIA: Yeah, on the curves, especially.

7 JUDGE RIVERA: Counsel, especially on the curves?

8 MS. CLARK: On the curves that - - - on the
9 curves, there are some spots where the trails are - - - are
10 twelve feet in width to potentially accommodate snowmobile
11 traffic. That is - - - that is true.

12 But I - - - to focus on that seems to be sort of
13 missing the point, which is that the forest canopy remains
14 intact. That was - - - there's evidence in the record from
15 our expert, and plaintiff's expert ultimately agreed and
16 signed an affidavit, saying the forest canopy remains
17 intact throughout.

18 JUDGE STEIN: Counsel, can I - - - can I
19 interrupt you for a second?

20 MS. CLARK: So - - - yes?

21 JUDGE STEIN: Counsel? So I'm a little confused
22 here, okay? So I think the - - - the questioning relates
23 to: aren't we just building this to accommodate
24 snowmobiles. My question is, what is the purpose of the
25 snowmobiles? I mean, we know some people like to just go



1 out and ride around in the woods and have fun with them.
2 But does it have anything to do with providing access to
3 people who might not otherwise be able to enjoy the forest
4 preserve in any way?

5 MS. CLARK: Yes. Yes, Your Honor, it does. You
6 know, the - - - the goal of the provision was to protect it
7 for future access by all New Yorkers, and all New Yorkers
8 are not necessarily able to hike along rocky foot trails.
9 So having trails that accommodate differently abled
10 individuals and individuals with - - - with different
11 abilities to traverse the forest floor, to help fulfill the
12 purpose of protecting the preserve for access by - - - by
13 all New Yorkers.

14 JUDGE GARCIA: So would a road, wouldn't it? I
15 mean, if you built a road through there, you could get more
16 people into the forest. But when we build roads, we get
17 constitutional amendments.

18 So the idea that you're going to get people who
19 wouldn't be able hike in through a road, I don't think, is
20 justification for building bigger trails. I mean, it might
21 be a justification for building it in some way, but it
22 seems to me, then, you would have to get the same authority
23 you'd get to build a road, which lets you get people in, in
24 cars.

25 That opens the park up for many, many more people



1 who wouldn't be able to get to the park. The more roads
2 you build the more people are going to have access,
3 particularly people who have difficulty getting around and
4 may have physical challenges to get into the park.

5 But that doesn't answer the question of whether
6 or not it's a forever wild problem.

7 MS. CLARK: No, that - - - that does not answer
8 that question, Your Honor. But I - - - this is not a - - -
9 a question of - - - of balancing access against
10 preservation. What we have here are trails that allow
11 individuals to enjoy the wild forest nature in a - - - in a
12 way that, you know, quite frankly is different from looking
13 at it from a window of one's car on a highway and - - -

14 JUDGE RIVERA: But - - - but Counsel, the - - -

15 MS. CLARK: - - - allows still - - -

16 JUDGE RIVERA: - - - reality - - - Counsel, if I
17 can just - - - I'm sorry to interrupt you there. Well, I'm
18 trying to interrupt you, but the - - - you say sort of
19 "access", but the point is access to "forever wild".

20 MS. CLARK: Yes.

21 JUDGE RIVERA: It's - - - otherwise, you can have
22 access to the park across the street. But that's not what
23 the constitution is talking about. It's access to the
24 preserve in a particular state. So it - - - it's a
25 circular response it seems to me, to simply say well, it's



1 access to the preserve, when the point is, is - - - is the
2 preserve being maintained in the way the constitution
3 requires, given the way you're trying to provide access?

4 MS. CLARK: So - - - okay. So yes, I mean, it
5 is. And I - - - and - - - you know, there - - - there was
6 some discussion before about deference and whether you were
7 asking for deference. No. There was a thirteen-day trial
8 here where evidence was - - - was put forth and - - - and
9 findings were made about whether or not the wild forest
10 nature was being maintained. And the answer to that
11 question was yes.

12 And of course, this court can come to a different
13 legal conclusion, but the point being that there was ample
14 evidence offered that showed that it wasn't simply about
15 increasing access and that these trails managed to do that,
16 which is one of the constitutional goals - - - goals of the
17 constitutional provision, while preserving the wild forest
18 nature.

19 So it's not an either/or. And of course, there
20 would be some point at which, you know, you would cross a
21 line. But that is not - - - that is not where we are here.
22 And we know that because we have the context of these
23 trails which are, you know, situated in the exterior forest
24 land areas throughout the park and - - -

25 JUDGE RIVERA: If - - - if you cut - - - Counsel?



1 MS. CLARK: Yes.

2 JUDGE RIVERA: If you cut every seedling and
3 sapling along those trails, did you cross - - - would that
4 have crossed the line? Every single one?

5 Since your argument is they're not timber - - -

6 MS. CLARK: If the - - -

7 JUDGE RIVERA: - - - so they're not protected - -

8 -

9 MS. CLARK: Right.

10 JUDGE RIVERA: - - - in - - - in terms of the
11 second sentence?

12 MS. CLARK: In terms of the - - - the first
13 sentence that you - - - yeah. So if you were to go through
14 and - - - and cut every seedling and sapling, then
15 certainly there would be an - - - an argument, of course,
16 that that would impair the wild forest nature. You are
17 impacting the future of the preserve, and I - - - I don't
18 know kind of what the - - - what the purpose was. I don't
19 know what the - - - the project would be that you would be
20 doing that for.

21 But that would - - - that's very different from
22 what we have here. And you know, it has never been the
23 State's argument at all that - - - that seedlings,
24 saplings, anything that's smaller than timber size, is
25 somehow unprotected or not - - - doesn't get constitutional



1 protection. It does, through the first sentence.

2 And if you go back and look at the - - - the
3 record evidence from trial, there are - - - there are many
4 stages at which the consideration of impacts on all forms
5 of vegetation were considered. And decisions were made
6 ahead of time and on the ground as trails were being sited
7 and - - - and actually put in place, to move this way, move
8 that way, to make decisions on the ground that would
9 minimize impact on all forms of vegetation.

10 CHIEF JUDGE DIFIORE: Thank you, Counsel. Thank
11 you.

12 MS. CLARK: Thank you.

13 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Protect the Adirondacks! Inc. v. New York State Department of Environmental Conservation and Adirondack Park Agency, No. 21 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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