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COURT OF APPEALS

STATE OF NEW YORK

ADIRONDACK WILD: FRIENDS OF THE
FOREST PRESERVE, et al.,

Appellants,

-against-

No. 69

NEW YORK STATE ADIRONDACK PARK
AGENCY, et al.,

Respondents.

20 Eagle Street
Albany, New York
September 5, 2019

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
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.
2 The first appeal on this afternoon's calendar is number 69,
3 Matter of Adirondack Wild: Friends of the Forest Preserve
4 v. New York State Adirondack Park Agency.

5 Counsel?

6 MR. AMATO: Good morning. May it please the
7 court, my name is Christopher Amato. I represent the
8 petitioners-appellants in this matter. With the court's
9 permission, I'd like to reserve two minutes of my time for
10 rebuttal.

11 CHIEF JUDGE DIFIORE: Of course, sir.

12 MR. AMATO: This is a case of first impression
13 arising under New York's Wild, Scenic, and Recreational
14 Rivers System Act. At issue here is respondents' decision
15 to open a wild river corridor located in the Adirondack
16 Park on Forest Preserve lands to public motor vehicle use,
17 despite the fact that both the Rivers Act itself and the
18 Adirondack Park State Land Master Plan specifically
19 prohibit the use of the motor vehicles in wild river areas.

20 JUDGE FEINMAN: To rule in your favor, do we have
21 to determine that the Master Plan is the equivalent of a
22 legislative enactment?

23 MR. AMATO: No, Your Honor, because there is,
24 within the Rivers Act itself, a specific prohibition
25 against the use of motorized vehicles in wild river areas.



1 And right now, as things stand, there's a conflict between
2 respondents' attempt to use the existing-use provision to
3 allow such use to occur in a wild river area and the Act's
4 specific prohibition against motor vehicle use in wild
5 river areas.

6 JUDGE STEIN: Help me understand why we should
7 not defer to the APA's conclusion that there is no
8 conflict, that this is permitted, where there - - - they
9 drafted the Master Plan, they expressly reserve the right
10 to interpret it, they - - - it is - - - they work with the
11 DEC to - - - to do the plan for this area, and - - - and
12 they approve it. Why - - - why doesn't that, sort of, end
13 the inquiry there?

14 MR. AMATO: Well, because, Your Honor, this is a
15 matter of pure statutory interpretation. The complex - - -

16 JUDGE STEIN: Well, let me just interrupt you for
17 one second.

18 MR. AMATO: Sure.

19 JUDGE STEIN: And I apologize for doing that.
20 But the - - - the statute would be the Environmental
21 Conservation Law. I'm not asking you - - - my question
22 isn't about whether we should defer to the DEC about
23 interpreting that law. I guess my question is more
24 directed at the APA says that there's no conflict with its
25 Master Plan, and - - - and - - - and that determination.



1 MR. AMATO: But that determination lacks a
2 rational basis, because the Rivers Act specifically
3 requires that, in the event of a conflict between the
4 multiple management restrictions that apply to river areas
5 that are located on Forest Preserve lands, the more
6 restrictive provision must apply.

7 Here the more restrictive provision, as it exists
8 in both the Rivers Act itself and in the Master Plan,
9 specifically prohibit the use of motor vehicles in Wild
10 River areas.

11 CHIEF JUDGE DIFIORE: Counsel, why doesn't a
12 plain reading of the Master Plan, where it says - - - I
13 think the words are DEC has exclusive jurisdiction and
14 authority independent of the Master Plan. Why doesn't that
15 avoid the conflict issue?

16 MR. AMATO: Because the conflict is not only
17 between the existing-use provision and the Rivers Act and
18 the Master Plan; there's a conflict between the existing-
19 use provision and the Rivers Act itself.

20 The Rivers Act specifically prohibits the use of
21 motor vehicles in wild river areas, just like the Master
22 Plan does. And the Rivers Act also has the conflicts
23 provision which specifically mandates that, in the event of
24 a conflict between different management prescriptions for
25 river areas, the more restrictive one is to apply.



1 JUDGE GARCIA: But isn't there a "notwithstanding
2 anything else in this act" provision in the continuing or
3 existing-use provision itself? Wouldn't that seem to
4 override anything else in the Rivers Act?

5 MR. AMATO: No. Because it doesn't state
6 "notwithstanding anything else in this act", it says
7 nothing - - - "notwithstanding anything contained herein",
8 and it's clearly - - - that provision is clearly referring
9 to subdivisions (a), (b), and (c) within that provision,
10 which set forth all of the uses - - - use restrictions and
11 development restrictions that apply in different river
12 areas.

13 JUDGE STEIN: What is your support for that
14 interpretation as opposed to the interpretation that - - -
15 that Judge Garcia just suggested?

16 MR. AMATO: Well, there are several portions of
17 the Rivers Act in which the legislature intended to apply
18 to the - - - refer to the entire act. And in those cases
19 the legislature used this title.

20 JUDGE STEIN: But it's not consistent, is it? I
21 mean, I looked at various provisions, and it - - - it just
22 appeared to me that it used different phraseology in
23 different situations but that it wasn't necessarily
24 consistent across the board.

25 MR. AMATO: Well, it - - - it does have an



1 inherent logic to it because, in the existing-use
2 provision, the subdivisions (a), (b), and (c) lay out, here
3 are the uses that are allowed within these specific river
4 areas. So it makes sense for an existing-use exemption to
5 say, notwithstanding what's in here later on about what you
6 can and can't do in a river area, you can continue an
7 existing use. In other parts of the act - - -

8 JUDGE STEIN: But wouldn't it also make - - - I
9 mean, the statute is much broader than that, and wouldn't
10 it also make sense that it - -- it could apply to the
11 broader context as well?

12 MR. AMATO: Not really, Judge, because it would
13 effectively write the conflict provision out of the Rivers
14 Act. The legislature understood very clearly that there is
15 a distinction between private lands and public lands.

16 JUDGE STEIN: Well, it would take the existing-
17 use provision away from the conflicts provision, but it
18 doesn't mean that the conflicts provision wouldn't apply to
19 other things.

20 MR. AMATO: Well, the conflicts provision is key
21 to the decision in this case because - - -

22 JUDGE FAHEY: But wait; slow down. Couldn't we
23 rule in your favor without reaching that issue? Couldn't
24 we simply say that it's irrational to conclude that opening
25 up land to public snowmobiles would constitute an expansion



1 and violate on the pre-existing use and avoid the conflict
2 of law as a question entirely?

3 MR. AMATO: Yes, absolutely. And that's one of
4 the arguments that we make that the fact that - - -

5 JUDGE FAHEY: So it isn't necessary for this
6 court to resolve that conflict of law as a question and
7 really - - - and going back to Judge Feinman's original
8 question, declare the Master Plan; similar to a legislative
9 enactment, we could simply say that this was an irrational
10 act, that adding the public to the snowmobile trail
11 constitutes a simple expansion.

12 MR. AMATO: Absolutely, because the prior use was
13 limited to the - - -

14 JUDGE FAHEY: And then we really would be
15 avoiding and limiting our decision to - - - to its
16 immediate effects in this particular area.

17 MR. AMATO: Absolutely, Judge. And - - - and,
18 you know, this is absolutely an expansion of a use because,
19 previously, snowmobiling was limited to the landowner, its
20 contractors, and to certain - - -

21 JUDGE RIVERA: So then what would have been an
22 expansion? Let's assume for one moment we disagree on the
23 first part and we're focused on what Judge Fahey's focused
24 on. What would not have constituted an expansion? What
25 would have been a prior use, within the meaning of the



1 statute, as applied here?

2 MR. AMATO: As applied to Forest Preserve lands
3 there cannot be an existing use.

4 JUDGE RIVERA: No, as applied in this case on the
5 facts of this case.

6 MR. AMATO: There isn't one, Judge. There's - -
7 - our position is that a reading of the Master Plan - - -

8 JUDGE FAHEY: There was some discussion, though,
9 on the record about a preexisting use that may - - - may
10 have constituted more than the members of the club and the
11 - - - the company that used to run the log - - - logging
12 down there. I think there may have been - - - and some of
13 the - - - some of the - - - some of those pre-existing uses
14 were characterized as trespasser - - - trespassers in the
15 dissent and just users in the majority. Are you familiar
16 with that part?

17 MR. AMATO: I am, Judge.

18 JUDGE FAHEY: Okay.

19 MR. AMATO: And that does not address anything
20 that happened in the ownership in the six years between
21 when The - - - The Nature Conservancy purchased the land -
22 - -

23 JUDGE FAHEY: Um-hum.

24 MR. AMATO: - - - and when the State purchased
25 the land. That all comes out of the so-called Schachner



1 report which doesn't address at all what transpired on
2 these lands for the six years immediately preceding its
3 purchase by the State and its conversion into Forest
4 Preserve lands. And that's a key point.

5 With regard to existing use, there is - - - there
6 is no place for existing uses on Forest Preserve lands, and
7 that's made clear by the fact that the Master Plan's
8 dominant theme is that any uses that do not conform to the
9 specific land classification must be discontinued within a
10 certain period of time.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 MR. AMATO: Thank you.

13 CHIEF JUDGE DIFIORE: Counsel?

14 MS. ETLINGER: Good afternoon, Your Honors. May
15 it please the court, Laura Etlinger for the State
16 respondents.

17 As the court recognized - - - recognizes, what's
18 at issue in this appeal is the continued seasonal use of
19 motor vehicles on a one-mile segment of an existing road,
20 Chain Lakes Road South - - -

21 JUDGE FAHEY: Well, let me stop you. The
22 argument is that this is just a little expansion, that this
23 is a small use, that this isn't really much, and it's not
24 something for the court to be concerned with. And see the
25 - - - the problem with that approach - - - and there's - -



1 - it's a two-fold problem. First, it's sort of a reverse
2 adverse-possession argument that you can continue to - - -
3 to turn land that's "forever wild" into land that's
4 partially open to the public by improper uses that had
5 taken place. That's one - - - and you can address these; I
6 just want to clarify them for you.

7 But - - - but the second one is a larger question
8 which is that this land and this Forest Preserve represents
9 a jewel that is unique in American history as we all - - -
10 all of us here agree on that. And it's, frankly, unique in
11 the world. It created a worldwide - - - it helped create a
12 worldwide environmental movement. It represents some of
13 the finest decisions that have ever been made in New York
14 State government.

15 So the strictness with which we look at the
16 State's actions here in that context make it more than a
17 simple balancing act. And normally that's what we engage
18 in here, but this is much more than that because of the
19 nature of the land involved here, setting aside the
20 environmental situation that - - - that we're in right now
21 and just - - - just looking at this particular crown jewel,
22 really, in New York State's long and illustrious history.

23 So I don't think that we can simply say it's only
24 a one-mile piece of land. The point is is that "forever
25 wild" should mean forever wild. And even though the



1 Constitutional issue hasn't been brought up, whether or not
2 an erosion of that principle, by an action of either a
3 state agency or by any court, represents a direct threat to
4 that, I think, unique and special treasure.

5 MS. ETLINGER: Well, you know, I think what we're
6 looking at there is the question of whether there is an
7 expansion. And DEC - - -

8 JUDGE FAHEY: That's right; I agree.

9 MS. ETLINGER: - - - rationally determined that
10 there wouldn't be an expansion here.

11 JUDGE FAHEY: Okay. So if it's rational, then
12 what would be the numerical basis upon which you would say
13 or - - - forget the numerical, any quantifiable basis that
14 you're comfortable with - - -

15 MS. ETLINGER: Well - - -

16 JUDGE FAHEY: - - - to say that this would not
17 constitute an expansion?

18 MS. ETLINGER: Because in the previous use by a
19 major paper company, there was heavy commercial use and
20 recreational use on this segment of the road twelve months
21 out of the year, and there were many, many types of
22 vehicles, including heavy trucks, ten-wheeler tractor
23 trailers, excavation vehicles, regular use of motor
24 vehicles and snowmobiles and ATVs, many types of vehicles
25 twelve months out of the year. What D - - -



1 JUDGE RIVERA: Was that during the period the
2 Conservancy had owned the property?

3 MS. ETLINGER: Yes, there still was continued
4 use. First I'd like to address a couple things about the
5 abandonment, and I'll get back to the expansion.

6 JUDGE FAHEY: Yeah, because I didn't think it was
7 during the period the Conservancy had it - - -

8 MS. ETLINGER: Yes - - -

9 JUDGE FAHEY: - - - that use wasn't there.

10 MS. ETLINGER: While the Conservancy owned it,
11 Finch Pruyn still had permission to do its commercial
12 timbering operations through 2012. There were leases that
13 continued the - - - the recreational use through September
14 2018. The - - - The Nature Conservancy itself had
15 permission to use motor vehicles on the property through
16 2020. So the use didn't - - - the use did continue. There
17 was no abandonment. And to the extent the record is not as
18 fully developed on that issue - - -

19 JUDGE FAHEY: So - - -

20 MS. ETLINGER: - - - as it might have been - - -

21 JUDGE FAHEY: No, no, I understand that, but the
22 question is: when you say it's open to the public, this
23 one-mile area of the road, and it's not going to be an
24 expansion, isn't it your burden to show us how it will not
25 be an expansion by pointing to some quantifiable report



1 that's looked at similar situations?

2 MS. ETLINGER: Well, I think there - - - I think
3 DEC could make a rational determination on this record.
4 And I think the record does support it.

5 The - - - it was going from twelve-month-of-the-
6 year use to limited seasonal use, only for hunting access,
7 from October to the first week in December, about a two-
8 month period, and then only snowmobiles during the winter.
9 And there were a change, as I was saying before, from all
10 these different kinds of motor vehicles to only personal
11 vehicles and snowmobiles. And that - - - DEC, on that
12 record, could rationally determine that there would not be
13 an expansion of use. You had heavy commercial use, on a
14 regular basis, twelve months out of the year. And it - - -
15 because this - - -

16 JUDGE RIVERA: Is that an expansion or a
17 different kind of use?

18 MS. ETLINGER: Either one.

19 JUDGE RIVERA: Which raises a different issue,
20 obviously.

21 MS. ETLINGER: Yes, the issue about whether
22 there's an alteration. Their argument - - - their only
23 argument, really, is that we're going from primarily
24 private users, who were there with the permission of the
25 owner, to members of the public. And that's simply not a



1 legal - - - that issue - - - that criteria does not have -
2 - -

3 JUDGE RIVERA: Yes, but you're also changing what
4 - - - what kind of use, right, because it's only - - - as
5 you yourself are saying, only the snowmobile.

6 MS. ETLINGER: Only snowmobiles and personal
7 vehicles to access for hunting. And that use is a
8 diminishment of use.

9 JUDGE RIVERA: It's not like the vehicles used
10 for logging or the - - -

11 MS. ETLINGER: No, exactly.

12 JUDGE RIVERA: - - - the Conservancy used, right?
13 So they're different in that way?

14 MS. ETLINGER: They're different in that way.

15 JUDGE RIVERA: So it's altered in that way?

16 MS. ETLINGER: Well, it's not altered within the
17 meaning of the statute.

18 JUDGE RIVERA: Well, isn't there already some
19 evidence in this record that obviously, if you're going to
20 open it up to the public, as opposed to the more limited
21 individuals who had access, that it would be a greater use?

22 MS. ETLINGER: No, I don't think the record
23 supports that it's a greater use.

24 JUDGE RIVERA: And there won't be a bigger tire
25 print or a - - -



1 MS. ETLINGER: No, I think - - -

2 JUDGE RIVERA: - - - snowmobile print?

3 MS. ETLINGER: I think DEC rationally determined
4 that there would not be a bigger tire print, as you're
5 saying.

6 JUDGE RIVERA: Did they make that determination,
7 or they weren't sure and they were going to take a wait-
8 and-see approach?

9 MS. ETLINGER: No, I think going from twelve
10 months out of the year with heavy commercial use and trucks
11 and regular use on a regular basis - - -

12 JUDGE RIVERA: But didn't they say there may very
13 well be, and isn't that a wait-and-see approach, which
14 would - - -

15 MS. ETLINGER: No, I think - - -

16 JUDGE RIVERA: - - - perhaps not make this a
17 rational decision?

18 MS. ETLINGER: No, because I - - - I don't agree
19 with that, Your Honor, respectfully, because the - - - the
20 reference to a potential expansion only in snowmobile use,
21 which is what that was talking about, was made in the SEQRA
22 determination where the SEQRA requires that the Agency
23 consider hypothetical and potential uses.

24 But what we're talking about here, for the
25 expansion under the Rivers Act existing-use exception, is



1 motor vehicle use, because the use that the statute talks
2 about, that would otherwise be prohibited if it were not
3 for the existing-use exception, is motor vehicle use. And
4 if you look at the motor vehicle use in the "before"
5 situation, which was commercial use throughout the year and
6 all different kinds of vehicles, and you look at the motor
7 vehicle use that DEC is allowing, they're allowing only
8 limited use in a limited time period.

9 JUDGE RIVERA: Could we turn now to the question
10 of conflict - - -

11 MS. ETLINGER: Yeah.

12 JUDGE RIVERA: - - - between the Master Plan and
13 the statute?

14 MS. ETLINGER: Yes.

15 JUDGE RIVERA: How do you overcome this conflict
16 provision that says - - -

17 MS. ETLINGER: Because - - -

18 JUDGE RIVERA: - - - the more restrictive
19 provisions would apply?

20 MS. ETLINGER: We don't believe the conflicts
21 provision comes into play here because of other language in
22 both the Rivers Act and the Master Plan. First, as the
23 court noted, the Rivers Act contains the existing-use
24 exception, clearly allows existing-use exceptions that
25 would otherwise be prohibited under the Rivers Act. And it



1 says "notwithstanding" other provisions - - - other - - -
2 anything else - - -

3 JUDGE RIVERA: If we agree with the argument that
4 that "notwithstanding" refers just to that provision, not
5 to the full title, what's your other argument?

6 MS. ETLINGER: Then the other arguments are that
7 the Rivers Act recognizes that DEC's authority is exclusive
8 to regulate river areas, and most importantly, the language
9 in the Master Plan itself, which is at page 4 of the Master
10 Plan, at appellants' appendix 574, which recognizes that
11 DEC, quote, "has the authority, independent of the Master
12 Plan, to regulate uses of waters and uses of wild scenic
13 and recreational rivers".

14 JUDGE RIVERA: But isn't that merely recognizing
15 the existing authority?

16 MS. ETLINGER: It's recogni - - -

17 JUDGE RIVERA: Otherwise what's the point of the
18 Master Plan? Your position means they could completely
19 ignore, no one needs to follow it?

20 MS. ETLINGER: No, because the only exception
21 here is the very limited exception - - -

22 JUDGE RIVERA: No, no, but the logical conclusion
23 of this argument is that the Master Plan is completely
24 nullified and has no import.

25 MS. ETLINGER: No, it's - - - I don't think so.



1 I think what it's saying is that when there is something in
2 the Master Plan that addresses also what would be in the
3 Rivers Act - - -

4 JUDGE RIVERA: Okay.

5 MS. ETLINGER: - - - DEC has primary authority
6 under the Rivers Act.

7 JUDGE WILSON: What is the legal force of the
8 Master Plan?

9 MS. ETLINGER: Well, it has been held by lower
10 courts to have the force and effect of legislation; that's
11 the language that's been used. It's clearly not an actual
12 law that has been enacted by the legislature, but it has -
13 - - it has been held to have the force and effect of
14 legislation.

15 JUDGE RIVERA: No, but there was a statutory
16 amendment post the Master Plan, so indeed, by implication,
17 the legislature has recognized and adopted this plan.

18 MS. ETLINGER: Well, the legislature has
19 referenced the Master Plan in Section 816 of the executive
20 law.

21 JUDGE RIVERA: Right, and it says there has to be
22 compliance with the Master Plan.

23 MS. ETLINGER: And the important thing is that
24 the APA is - - - is tasked with that responsibility to
25 determine whether DEC's proposal here was consistent with



1 the Master Plan. And the APA, which drafted the Master
2 Plan - - -

3 JUDGE RIVERA: But if you have another statute
4 that says - - -

5 MS. ETLINGER: I'm sorry?

6 JUDGE RIVERA: If you have another statute that
7 says something else, an agency's determination cannot, in
8 any way, overcome the statutory mandate, right?

9 MS. ETLINGER: No.

10 JUDGE RIVERA: So I'm still - - - I'm still not
11 understanding the argument about the conflicts provision
12 that is in a statute.

13 MS. ETLINGER: Well, there is no conflict is - -
14 - is our position, because the - - -

15 JUDGE RIVERA: If we disagree with you - - - if
16 we disagree with you - - -

17 MS. ETLINGER: If you disagree and find that
18 there is a conflict here and that the - - -

19 JUDGE RIVERA: Yes.

20 MS. ETLINGER: - - - Master Plan is a law within
21 the meaning of the conflicts provision, that is the
22 opposite of our argument.

23 JUDGE FAHEY: Let me just - - -

24 JUDGE RIVERA: Which results in what outcome?

25 MS. ETLINGER: A reversal here.



1 JUDGE RIVERA: Thank you.

2 JUDGE FAHEY: Let me just go back to what we were
3 talking about before. So the way I understand the
4 petitioners' argument is that they argue that there - - -
5 there will be an increase in volume, and that's the key
6 analysis that needs to take place; whatever the type of
7 vehicle is, there will clearly be more of them as a result
8 of this decision.

9 So the way I understand, your burden there is to
10 say no - - - your burden is - - - and you can correct me if
11 you think I'm wrong; tell me why you think I'm wrong.
12 Isn't it your burden to say that no, there will not be an
13 expansion in volume, and this is what we point to to show
14 that there will not be an expansion in volume?

15 There's a large amount of anecdotal evidence in
16 what's referred to the Schachner Report, which is a report
17 that was basically from nineteen different interviews that
18 - - - that a law firm from Clinton Falls did, which is in
19 the record, and the DEC can certainly draw on that. But
20 beyond that, is there any numerical basis for that
21 decision?

22 MS. ETLINGER: Well, there isn't a numerical
23 basis, and there - - - there wouldn't ordinarily be one in
24 this kind of case because you're talking about property
25 that was privately owned. No one was keeping track of the



1 number of vehicles that were transported on - - -

2 JUDGE FAHEY: So I grant you that. So what would
3 be then the basis for that rational decision, if it was
4 rational?

5 MS. ETLINGER: I think the question is whether it
6 was rational, and the answer is that they were going from
7 twelve months of heavy use, commercially and
8 recreationally, to a limited period of use and a limited
9 number of type - - - a limited types of vehicles.

10 And on this record - - - the question is, on that
11 record, could DEC rationally determine that there wouldn't
12 be an expansion, and we believe DEC made that
13 determination.

14 JUDGE FAHEY: I guess, you know what I think of?
15 There's too many people everywhere. Wherever you go - - -
16 and we all have this experience, I think, wherever you go
17 on a tour, or anywhere you go, it's just immensely crowded.
18 You can't walk through Venice at 4 o'clock in the
19 afternoon, if someone goes on the trip of a lifetime,
20 because it's overwhelmed with people.

21 The Joshua Tree has practically been destroyed
22 and had to be isolated because so many people come to
23 everything. The Adirondacks is the same way. And is it
24 rational to conclude that, if you open up a section like
25 this to the public for snowmobiling, that you will be



1 overwhelmed with volume? Isn't that a much more rational
2 decision?

3 MS. ETLINGER: But the question isn't how many
4 users will there be a on a particular day. I actually have
5 two answers, if I may.

6 JUDGE FAHEY: Okay, go ahead.

7 MS. ETLINGER: The question isn't whether there
8 will be too many visitors on a single day. The question is
9 was the use beforehand going to be expanded from the use
10 that's allowed now. So even if there are more on a certain
11 day, the overall question under the Rivers Act, which looks
12 to motor vehicle use, is whether that motor vehicle use
13 before, for example, on an annual basis, will be more than
14 - - - will be expanded beyond what it was beforehand. And
15 I think it is also important that DEC will be monitoring
16 because DEC can - - - has administrative mechanisms.

17 JUDGE FAHEY: But the problem with that argument
18 - - - let me just jump in. The problem with that argument
19 is is you yourself have said that you don't know exactly
20 what Finch Pruyn - - - is that the name of the company?

21 MS. ETLINGER: Yeah.

22 JUDGE FAHEY: Yeah, you don't know what their
23 volume of use was.

24 MS. ETLINGER: But you - - -

25 JUDGE FAHEY: Let me finish.



1 MS. ETLINGER: I'm sorry.

2 JUDGE FAHEY: So if you don't know what their
3 volume of use is, and you can't predict the public volume
4 of use, except any rational person would think it's going
5 to increase during the period that it's open, then how can
6 you make this call?

7 MS. ETLINGER: Because - - -

8 JUDGE FAHEY: What's the - - - what's the
9 reasonable basis upon which you can rely on your decision
10 here?

11 MS. ETLINGER: Well, it - - - we believe the
12 reasonable basis is the record here that shows that there
13 was twelve month regular use. If you read the Schachner
14 Report, it's very clear that cars and trucks and ATVs and
15 all types of vehicles were going through this area on a
16 very regular basis, twelve months out of the year.

17 JUDGE RIVERA: That includes the six years of the
18 Conservancy? Is that true for those - - -

19 MS. ETLINGER: Well - - -

20 JUDGE RIVERA: - - - six years?

21 MS. ETLINGER: There was still continued use, and
22 if this case comes down to - - -

23 JUDGE RIVERA: No, no, but I'm asking. What - -

24 -

25 MS. ETLINGER: Well - - -



1 JUDGE RIVERA: The record has to say something -
2 - -

3 MS. ETLINGER: The record - - -

4 JUDGE RIVERA: - - - according to you, right?

5 MS. ETLINGER: Well, that issue wasn't raised by
6 petitioners, so it's not a preserved issue in this case,
7 which is why, to the extent the record - - -

8 JUDGE RIVERA: You mean how far back one goes?

9 MS. ETLINGER: Well, the question under the
10 Rivers Act is whether it was a continuing use at the time
11 the river was designated, which is 1972.

12 JUDGE RIVERA: Right, so then we don't look - - -

13 MS. ETLINGER: And the record very - - -

14 JUDGE RIVERA: - - - at that moment as opposed to
15 - - -

16 MS. ETLINGER: Yes, if you - - - you do - - -

17 JUDGE RIVERA: - - - seventy years prior?

18 MS. ETLINGER: Yes, you look at - - - you look at
19 1972, and there was an existing - - -

20 JUDGE RIVERA: So what's the evidence on that
21 moment?

22 MS. ETLINGER: In the Schachner Report it - - -

23 JUDGE RIVERA: Yes, but what is it?

24 MS. ETLINGER: That there was regular daily use
25 of this by trucks, by cars, by ATVs, and that - - -



1 JUDGE RIVERA: By the company and the
2 Conservancy?

3 MS. ETLINGER: By the company and by the - - -
4 the regular, consistent, recreational use by the
5 individuals who had permission to be there under leases
6 with Finch Pruyn. Finch leased large tracks of their
7 property to recreational clubs and individuals. There were
8 camps in this very location. There was a farmhouse, outer
9 buildings, a garage. It was clearly regularly used.

10 JUDGE GARCIA: Chief, may I just follow up, just
11 one question, and a basic one, and there may be an easy
12 answer to this but the Rivers Act applies to private and
13 public land - - -

14 MS. ETLINGER: Yes.

15 JUDGE GARCIA: - - - if it falls within the
16 definitions and all. So going back to the
17 "notwithstanding" clause and the interpretation given to it
18 by your adversary, under that view that the
19 "notwithstanding" clause only applies to this internal
20 section - - -

21 MS. ETLINGER: Um-hum.

22 JUDGE GARCIA: - - - and then the other section
23 says "no motor vehicles", would the existing use itself, by
24 the private entity, violate the Rivers Act?

25 MS. ETLINGER: Well, an existing use does violate



1 - - - by a private user or on private land, does violate
2 the Rivers Act, unless DEC or the APA, if it's in the state
3 park and it's private land, allows that use to continue - -
4 -

5 JUDGE GARCIA: I think you're missing - - -

6 MS. ETLINGER: I'm sorry.

7 JUDGE GARCIA: My question would be: is any use
8 of a motorized vehicle on private land, that falls within
9 this category under the Rivers Act, would be a violation,
10 despite the fact that - - - that it was existing or not?

11 MS. ETLINGER: No, it could be continued, but
12 it's - - - it's up to DE - - -

13 JUDGE GARCIA: But not under his interpretation.

14 MS. ETLINGER: Oh, under his interpretation,
15 right, yes, I agree with that.

16 JUDGE GARCIA: It would always be a violation.

17 MS. ETLINGER: It would always be - - -

18 JUDGE GARCIA: So any land - - -

19 MS. ETLINGER: It would write the exception out
20 of the statute.

21 JUDGE GARCIA: So when they put this land within
22 the parameters of the Rivers Act, at least this
23 classification, all of that would have been prohibited use,
24 and it would have been a compensation or a takings issue at
25 that point?



1 MS. ETLINGER: Yes. Yes, exactly. I'm sorry I
2 didn't understand.

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 MS. ETLINGER: Thank you.

5 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?

6 MR. AMATO: Thank you. With respect to the claim
7 that this - - - that these lands were subject to twelve
8 months of heavy industrial use, that's simply not the case.
9 Once The Nature Conservancy purchased the land from Finch
10 Pruyn, there was a drastic reduction in the forest
11 management activities that took place on that land, and
12 there was a - - - a different ethos being applied to the
13 management of those lands because The Nature Conservancy's
14 ultimate goal was to do exactly as it did, which was to
15 sell those lands to the State of New York in order for them
16 to be added to the State's Forest Preserve.

17 JUDGE GARCIA: But is it your position that the
18 existing use here, the use of snowmobiles on this land, was
19 a violation of the Rivers Act?

20 MR. AMATO: No, it's not. Our - - - our position
21 is that the existing-use provision simply doesn't apply to
22 Forest Preserve lands. Once this - - - once these lands
23 became part of the New York State Forest Preserve existing
24 uses - - -

25 JUDGE GARCIA: That's a different argument, I



1 think.

2 MR. AMATO: - - - just don't - - -

3 JUDGE GARCIA: Because I think in that language,
4 though, it references both entities that have jurisdiction
5 over the lands. One is the one that controls private, one
6 is public. So I don't think you can read it to support
7 that. But I thought that your point was that the "no
8 motorized vehicle" provision trumps the "notwithstanding".

9 MR. AMATO: It does because the - - - first of
10 all, because the "notwithstanding" language applies only to
11 the provisions within that particular section of the Rivers
12 Act. And that section lays out: here are the uses that
13 are allowable and prohibited in these specific river areas.
14 And so - - -

15 JUDGE GARCIA: So when that act was passed, and
16 they were using snowmobiles on this land, although it was
17 private, aren't they violating the act, under that view?

18 MR. AMATO: Yes, they would be.

19 JUDGE GARCIA: And anyone else who's doing that
20 right now on private land, within this category under the
21 Rivers Act, under your - - - if we went with your
22 interpretation, would be violating the Rivers Act.

23 MR. AMATO: Well, again, I think it depends on
24 the facts, Your Honor, because it's not a - - - a clear-cut
25 question when you're talking about private lands because



1 the existing-use provision does apply to private lands. So
2 if snowmobiling had been occurring within that wild river
3 area during - - - by Finch Pruyn, at the - - -

4 JUDGE GARCIA: But that seems inconsistent with
5 your point that that doesn't matter because it's trumped
6 the "notwithstanding" provision anyway by the "no motorized
7 vehicles" provision.

8 MR. AMATO: Because it's now state land. Because
9 the - - - the conflicts provision applies to river areas
10 that are located on state lands, so in other words, Forest
11 Preserve located in the Adirondack park, Forest Preserve
12 located in the Catskill park. The legislature, number one,
13 in that provision, specifically acknowledged that river
14 areas that are located on Forest Preserve lands are subject
15 to a suite of regulatory controls. Those regulatory
16 controls and restrictions are imposed not only by the
17 Rivers Act but by the Master Plan and by Article XIV of the
18 New York State Constitution, the "Forever Wild" clause.

19 And the legislature then went a step further and
20 said, in the event that there's an inconsistency or a
21 conflict between these multiple regulatory schemes that
22 apply on Forest Preserve lands, the more restrictive one is
23 to apply. And that's entirely consistent with the
24 overarching purpose of both the Master Plan and the Rivers
25 Act, both of which are geared towards protecting and



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preserving these incredibly unique natural areas.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. AMATO: Thank you.

(Court is adjourned)



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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Adirondack Wild: Friends of the Forest Preserve v. New York State

Adirondack Park Agency, No. 69, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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