Matter of Protect the Adirondacks! Inc. v New York State Dept. of Envtl. Conservation
2017 NY Slip Op 33544(U)
December 1, 2017
Supreme Court, Albany County
Docket Number: Index No. 2137-13
Judge: Gerald W. Connolly

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of PROTECT THE ADIRONDACKS! INC.,

Plaintiff,

For a Judgment Pursuant to Section 5 of Article 14 of the New York State Constitution, and CPLR Article 78,

-against-

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

Defendants.

DECISION AND ORDER
Index No.: 2137-13

(Supreme Court, Albany County)

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Connolly, J.:

A bench trial was held in this action in which plaintiff Protect the Adirondacks! (hereinafter, "PTA" or Plaintiff) alleges that the actions of the defendants New York State Department of

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Environmental Conservation (hereinafter, "DEC") and the Adirondack Park Agency (hereinafter, "APA") in the construction and development of Class II Community Connector Snowmobile Trails and any similar trails violate New York Constitution, Article XIV, §1. Plaintiff seeks a declaratory judgment and a permanent injunction enjoining "defendants from constructing, in the Forest Preserve, Class II Community Connector snowmobile trails, and other trails having similar characteristics or requiring like amounts of tree cutting, trails requiring construction techniques that are not consistent with the wild forest nature of the Forest Preserve, or trails that result in the creation of a man-made setting for the sport of snowmobiling"; and ordering defendants to rehabilitate the damage done to the Forest Preserve by the construction of said trails. By decisions dated October 15, 2015 and January 25, 2017, the proofs in the instant action were limited to Class II trails that had been planned or approved as of October 15, 2015.

Standard

> Article 14, §1 of the New York State Constitution provides, in pertinent part, as follows:
>
> The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.

The Court of Appeals has held that this provision must receive a reasonable interpretation, and accordingly such provision has been construed as "prohibiting [the] cutting or [the] removal of *** trees and timber to a substantial extent" (*Balsam Lake Anglers Club v Dept of Environmental Cons.*, 199 AD2d 852, 853 [3d Dept 1993]; *see also, Assoc. for the Protection of Adirondacks v MacDonald*, 253 NY 234 [1930]).

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In *Balsam Lake Anglers Club v DEC*, 199 AD2d 852 [3d Dept 1993], the Third Department held that the construction of five new parking lots, designation of two existing campsites as lawful campsites, relocation of existing trails, construction of a new hiking trail, and the construction of a cross-country ski trail loop on lands subject to NY Constitution, article XIV, §1, which construction called for certain specific amounts of tree-cutting and additional unknown amount of further tree-cutting for the proposed new trail and parking lots, was not constitutionally prohibited as the Court was unpersuaded that such proposed activities constituted improper uses of the forest preserve and/or involved unconstitutional amounts of cutting (*Id.* at 854).

Specifically, the Third Department provided, regarding Article XIV, § 1, as follows:

> "Although this provision would appear, as petitioner argues, to prohibit *any* cutting or removal of timber from the forest preserve, the Court of Appeals, noting that the words of the NY Constitution must receive a reasonable interpretation, has construed this provision as 'prohibiting [the] cutting or [the] removal of * * * trees and timber *to a substantial extent*' (*Association for Protection of Adirondacks v MacDonald*, 253 NY 234, 238, 170 N.E. 902 [emphasis supplied]). Thus, the court has indicated that only those activities involving the removal of timber 'to any material degree' will run afoul of the constitutional provision (*id.*, at 238). Although petitioner may question the soundness of this interpretation, particularly in view of what it has characterized as the unambiguous and absolute prohibition contained in NY Constitution, article XIV, § 1, we elect, absent authority to the contrary, to follow the interpretation advanced by the Court of Appeals in *Association for Protection of Adirondacks v MacDonald (supra)*. ...".

Balsam Lake, supra at 853.

In determining whether the cutting/removal of trees that has occurred and is contemplated has breached the prohibited "substantial extent" or "material degree" barrier, there is scant authority that can be easily applied to the within facts. As referenced above, the cases of the higher courts addressing this issue directly do not specifically set a number of trees per identified area of Preserve

which would or would not breach such barrier, though certain tree counts are provided in such decisions and the challenged underlying decisions.

As referenced in the Court's decision on the cross-motions for summary judgment in this matter, the stated requirement in Article 14 that the lands "be forever kept as wild forest lands" provides a separate Constitutional stricture to that regarding the timber of the Preserve; this dual test is referenced in *Balsam Lake*, *supra. at* 852: "[w]e are similarly unpersuaded that the addition of five new parking areas and the relocation and construction of certain trails as proposed in the unit plan are improper uses of the forest preserve *and/or* involve unconstitutional amounts of cutting" (emphasis added).

As referenced by the Court of Appeals in *MacDonald*, *supra*, any action which constitutes an improper use of the forest preserve impairing such wild forest lands to an unconstitutional extent (e.g, the creation of an Olympic Bobsled run; the building of a golf course) cannot be countenanced. It therefore remains for the Court to determine whether the proposed usage, including the timber cutting involved, violates such test; in so doing, the Court also relies upon the affirmed Appellate Division Decision in *MacDonald*, which compares the proposed clearing for the bobsleigh run to the construction of "public automobile race tracks, toboggan slides, golf courses, baseball diamonds, tennis courts and airplane landing fields, all of which are out of harmony with forest lands in their wild state" (228 App. Div 73, 82 [3d Dept 1930] [emphasis added]).

In so determining, the Court, however, cannot consider the fact that the usage will involve the use of snow mobiles in the park, as the plaintiff has waived such argument in the context of the instant action (*see*, Court ruling in Trial Transcript, pp. 343-349). Moreover, the Court must note

that, to the extent such were considered, the trails are not an improper use as a separate sport pursuant to *MacDonald* and *Balsam Lake*, as the trails are for the use of such machines to access the park, and are also used for other (biking/hiking) purposes.

The standard to be applied in this case is whether the construction of trails at issue: (i) results in the cutting or removal of trees to an unconstitutional extent (i.e. to a substantial extent or any material degree), and/or (ii) constitutes an "improper use []" of the forest preserve impairing such "wild forest lands" to an unconstitutional extent *(see MacDonald, supra; Balsam Lake v DEC*, 199 AD2d 852, 853).

Background

The Adirondack Park consists of approximately six million acres of public and private lands, of which approximately 2.5 million acres are Forest Preserve ("Preserve") land. The Adirondack Park State Land Master Plan directs the APA regarding classification of lands and development of unit management plans ("UMPs"). As of May of 2014, slightly less than half of the Adirondack Forest Preserve was classified as Wild Forest; snowmobile trails are permitted in areas so classified, but prohibited in areas classified as Wilderness, Canoe and Primitive; these areas combined also make up slightly less than half the Adirondack Forest Preserve.

In 2009, DEC, along with the APA, developed the 2009 Snowmobile Guidance governing the construction and maintenance of, *inter alia*, the trails at issue herein. The Guidance directed that such trails (which can be utilized for various other hiking/biking activities at all times of the year) be located on the periphery of the Wild Forest or other Preserve areas and could be maintained to a 9 foot cleared trail width, except on sharp curves and steep running slopes where they could be

maintained to a 12 foot cleared trail width, as well as pruning of such cleared area to a 12 foot height. The Guidance also called for some trails to be abandoned or designated for non-motorized use and for the relocation of some trails from remote interior areas, and directed that new and rerouted trails be sited with an objective to avoid environmentally sensitive areas. Further, the Guidance provided that "[c]utting of overstory trees will be avoided in order to maintain a closed canopy wherever possible. Large and old growth trees should be protected." (Guidance, p. 10 (1)). Prior to the Guidance, the maximum trail width in the Preserve for Class II trails was 8 feet on straight or gently curving trails and 12 feet on curves and steep grades.

The Preserve also contains hiking, skiing, biking, and horse trails that range in approved maximum tread width from approximately 3 to 8 feet, though such widths can be widened as a result of use. The construction of the trails herein did not increase the total mileage of snowmobile trails in the Preserve due to the above-referenced closure of certain trails to snowmobile use.

Initial Determinations

DEC Employee Transcripts

The court finds and holds that the disputed deposition transcripts of DEC employees and one APA employee read into evidence at trial by plaintiff are properly admitted as evidence herein. Such DEC employees were designated as witnesses by DEC for purposes of such depositions and the topics of the transcript depositions provided fell within the realm of their authority within DEC. As to Mr. Linck, such testimony is accepted as falling within the realm of his authority at the APA.

Review of Trails

As set forth in the plaintiff's proposed Findings of Fact and Conclusions of Law, the Plaintiff

herein espouses the position that the alleged negative effects of the construction of the Class II trails at issue herein occur on each of the Class II snowmobile trails (¶147, 148). Based upon the Court's finding that the Guidance has been faithfully followed, as discussed below and particularly demonstrated by the credited testimony of the DEC Foresters in charge of trail construction in the different trails, and in the absence of any significant proof that the effect of construction on any of the areas at issue was particularly unique[1], the determination of constitutionality will be made solely upon the overall trail construction process concerning the trails at issue herein.

The Adirondack Park Agency

The defendants have moved for a directed verdict with regard to the Plaintiff's allegations regarding the Adirondack Park Agency on the grounds that the plaintiff has as a matter of law failed to meet their burden of demonstrating liability on the part of such defendant. The test to be applied is whether, taking the evidence and all inferences in the light most favorable to the non-moving party, the finder of fact could by any rational process find for such party.

Defendants argue that plaintiff has not met its burden with regard to demonstrating that the APA had a role in the construction of the trails at issue herein. Taking the evidence as required, the

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[1] The Court recognizes the arguments of plaintiff to the effect that the Seventh Lake Mountain and Newcomb to Minerva Trails were routed through stands of old growth trees; however, there was little, if any, evidence presented of such trees being cut. The tree identified in Plaintiff's exhibit 121 as old growth was demonstrated by the defendants to have not been cut down as part of the construction process, and the alleged detrimental effect of the routing through such alleged old growth areas was not significantly differentiated from that of the other wooded areas that the trails traversed, as the most serious effects (projected tree deaths) upon such old growth forests were premised upon the effects of an open canopy and Dr. Sutherland did not establish such phenomenon in such areas.

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Court finds and holds that, while APA staff does not participate in the construction of the trails, and DEC foresters decide which specific trees to cut, the individual Unit Management Plans (UMPs) governing the construction of each of the trails herein must be approved by the APA pursuant to the Memorandum of Understanding ("MOU") between DEC and the APA, which requires that the APA review such plans to determine whether they conform to the Adirondack Park State Land Master Plan ("APSLMP"). As the interplay of the APSLMP and MOU give the APA authority in determining whether the proposed trails herein may be constructed as planned, the Court finds that the defendants motion must be denied.

Tree Cutting

The following information regarding, *inter alia*, trees cut or to be cut on the Class II trails at issue herein were stipulated as factual assertions not subject to objection by the parties at trial. Ct. Ex. 1 ¶14:

Trail Name	**Unit Name**	**Approximate Mileage of Trail**	**Tree 3" DBH or larger approved to be cut**	**Estimated Construction Time Period (per Work Plan)**
Perkins Clearing-Lewey Lake trail	Jessup River Wild Forest	40-50 feet (remainder of the trail was existing)	3	10/1/14 - 10/15/14
Steam Sleigh trail	Watson's East Triangle Wild Forest	750 feet	43	6/1/13-9/30/13
Mt. Tom East trail	Independence River Wild Forest	1.15 mile	124	7/2013-9/2013

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Taylor Pond to Wilmington Connector	Taylor Pond Wild Forest	0.25 mile	133	7/7/2013-1/15/2013
Gilmantown trail	Jessup River Wild Forest	2.4 (.3 new construction/2. 1 old roads)	127	12/2012-1/2013
Wilmington Trail Segment 3	Wilmington Wild Forest	2.96 miles	482	6/2012-7/31/2014
7th Lake Mountain Trail	Moose River Plains Wild Forest	11.9	2085	9/4/2012-2/15/2013
Santanoni to Lake Harris	Vanderwhacker/ Camp Santanoni/Lake Harris Campground	2.2 miles	363	6/1/2014-2/31/2016
Hyslop to Roosevelt Truck Trail (Segment 6)	Vanderwhacker Wild Forest	2.9 miles	1148	8/15/2015-12/31/2016
Boreas River to Stony Pond (Segment 9)	Vanderwhacker Wild Forest	5.3 miles (1.85 miles new trail)	1253	6/1/2016-12/31/2018
Stony Pond to Minerva (Segment 11)	Vanderwhacker Wild Forest	2.9 miles	423	6/1/2016-2/31/2018

For all of the trails listed above, all "approved-to-be-cut trees 3 inches dbh or greater" have been cut *except* those on the Boreas River to Stony Pond (Segment 9) and the Stony Pond to Minerva (Segment 11), on which most have not been cut. (*see* Ct. Ex. 1 ¶15). Totaling all of the cutting at issue herein results in a number of approximately 6,000[2] trees of 3" dbh or greater. The land area cleared or to be cleared is at an approximate ratio of slightly more than one acre per mile of trail,

[2] Some of the proposed trail clearance areas have not yet been counted.

such that a mile of constructed trail would result in the clearing of trees from approximately one acre of area. Such cutting averages less than 200 trees of 3" dbh or greater per constructed trail mile.

The evidence elicited before the Court was largely undisputed with regard to the substantive facts, that is, the method and parameters of the tree cutting and trail creation in the affected areas. The evidence differed relatively sharply with regard to proffered expert opinion as to whether the actual and proposed cutting constitutes "material degree" or "substantial extent".

Initially, the Court finds and holds that Dr. Philip Terrie, called as an expert witness by the plaintiffherein, is qualified by both education (including his dissertation) and experience (including, but not limited to, his research and publications) to testify to those statements made, and largely credits such testimony on the issues of the history of the Adirondack Forest Preserve and the Adirondack Park. Based on such testimony, particularly with regard to pulp logging operations, as well as to the historical use of the terms "tree" and "timber" interchangeably, the Court finds that the reference to "timber" in the constitutional provision at issue herein[3] refers to all "trees", the definition of which includes any independent growth of a species that is biologically identified as a tree, no matter the size (*see* testimony of defendant's expert Dr. Howard).

In applying the constitutional standard, however, the Court will take into account all factors, including the size of the trees cut. It is axiomatic that the cutting of a seedling will not have the same weight as that of a full grown tree in determining the degree of cutting, and to attempt to count all

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[3] Such holding does not constitute a finding that the word "timber", whenever used, refers to all trees of any size; it is beyond cavil that one of the uses of the word is to refer to a merchantable wood product.

of the thousands of seedlings that grow (and, typically, die) each year in a forest area would be an impossibility. The use of the 3" dbh minimum for counting purposes by DEC is accordingly not improper, and an acceptable starting point for comparison of the cutting proposed herein to that in *MacDonald* and *Balsam Lake*, which, as referenced in the Court's prior opinions, largely utilized such threshold for purposes of reported tree counts.

The Court generally accepts the tree counts (which included trees of less than 3" dbh) proffered by the plaintiff, including those counted by Mr. Bauer, Executive Director of plaintiff. The Court credits the testimony of both plaintiff's expert Mr. Signell, a forest ecologist, and Mr. Bauer with regard to the counting methods utilized and use of the "Fulcrum" application, and does not find that Mr. Bauer, who had extensive experience in the Adirondacks and has taken a number of courses towards a Masters Degree in Ecology, was unqualified to follow the directions of, and thereby gather and provide specific information to, Mr. Signell. In so accepting, the Court notes that Mr. Signell incorrectly counted some trees as "to be cut" which were marked instead by DEC Foresters to show the proposed direction/location of a planned trail, but finds that the number of such trees insufficient to effect the within determination or, generally, Mr. Signell's credibility. Though the possibility further exists that some of the counted (by both Mr. Bauer and Mr. Signell) stumps were not from trees, the Court further finds and holds that such number would not have been significant enough to effect the within determination generally crediting the numbers provided.

The circumstances and effect of the cutting are, in addition to the amount of cutting, relevant issues to the constitutional "substantial extent" question. For instance, a "clear cut" of a stand of hundreds of Aspens of a dbh of less than 3" covering a large area may well be unconstitutional; on

the other hand, cutting the same number of seedlings in an old growth forest (while leaving all of the standing old growth timber untouched) may not.

No trees were "removed" from the Forest Preserve in the construction of the trails; all cut trees were dispersed to the woods adjacent to the trails. Where possible, tree cutting was minimized by situating the Community Connector trails utilizing previously existing routes such as logging roads and older snowmobile trails.

In siting the trails, DEC foresters followed the guidelines faithfully; the Court fully credits the testimony of DEC foresters with regard to the number of trees of 3" DBH or greater counted and their efforts to minimize the cutting of trees, particularly large and old growth trees, and any impact on the canopy. As elicited at trial, DEC foresters individually assessed and marked each tree to be cut in order to minimize the impact upon the forest; the plaintiff did not prove that more than a *de minimus* number of "old growth" trees had been cut in the construction herein.

With regard to the issue of canopy openings, the Court, as discussed further below, finds that plaintiff's expert Dr. Sutherland's testimony was not well supported by an analysis of the entire construction or of the entire construction process on any individual trail, that it was impeached by his prior admission that most of the canopy on the trail areas remained intact, and generally was conclusory with regard to the probability of any created openings filling in as part of the natural regrowth process.

Based on the testimony of Dr. Sutherland, the individual DEC Foresters, and a review of the pictures presented, the Court finds and holds that the construction herein did not have a substantial effect on the canopy of the Preserve in the specific construction areas and accordingly that the

potential detrimental effects testified to regarding such canopy openings has not been demonstrated.

The Court also largely credited the testimony of the Defense expert Dr. Howard as a forest ecologist with regard to the ecological issues surrounding "clearcutting" of a forest area. While Dr. Howard stated that, with regard to a definition in the ecological literature of "clearcutting" "it's not really there", he referenced the practice of "taking out all the trees" [in an area] resulting in increased light penetration to such area and the creation of a forest edge. He also testified that in a clearcut there is no forest canopy. He testified to studies regarding the ecological effect of a clear cut, including temperature differences, differences in vegetation, and the creation of the "forest edge". Plaintiff conceded (Trial Transcript, p. 1312, L. 14-17), that it was not their position that "...this is some sort of forestry clearcut under timber management standards."

Based upon the above facts as credited, the Court finds and holds that the number of trees cut herein is not so "substantial" under the within circumstances as to render the actions violative of the Constitution. In particular, the Court, applying the law as set forth in *Balsam Lake*, finds that the cutting of the trees herein, which was not for commercial purposes, resulted in the "clearing" of approximately one total acre per linear mile of trail. The cutting did not significantly effect the canopy of the Preserve, as discussed above. Moreover, any opening of the canopy is likely to refill in the relatively near future based upon the narrowness of the cleared trail width.

The Court also finds the area involved to be particularly relevant herein, and substantially more akin to that found acceptable in *Balsam Lake* to that of *MacDonald*. In *MacDonald*, the proposed cutting, as described, seems (in addition to being for an unpermitted use) to have had more of the attributes of a "clearcut" as defined at Trial herein than those of *Balsam Lake* and the within

challenged actions. Both here and in *Balsam Lake*, the contemplated projects and attendant tree cutting involve the creation of a narrow trail through a wooded area. While the trail created herein is, of course, significantly longer (taken as a whole) than that in *Balsam Lake*, and accordingly will involve the cutting of more trees to accomplish the goal of creating this trail, the essential concept is, to the Court, sufficiently similar to render the contemplated actions herein constitutional under *Balsam Lake*. Such tree cutting, though more than that contemplated in *Balsam Lake*, will be spread over a much greater forested area, will involve the creation of significantly more trail for usage by the public, and has not been demonstrated to be significantly more substantial (in context) than that approved in *Balsam Lake*. Accordingly, the Court does not find that the tree-cutting herein has or will occur to a substantial extent or material degree.

Improper Use and Impairment

In *MacDonald*, the Court stated that "[w]hat may be done in these forest lands to preserve them or to open them up for the use of the public, or what reasonable cutting or removal of timber may be necessitated in order to properly preserve the State Park, we are not at this time called upon to determine." (*Supra* at 240). Later, the Court, in rejecting the proposed rationale (the creation of an Olympics bobsled run) for the cutting, noted that such plea on behalf of a sport, if accepted, would create an open door through which abuses (*e.g.*, golf courses) as well as benefits could pass.

Such rationale discussion, which differentiates between cutting for access purposes and cutting for sport purposes, would appear to have been utilized by the Third Department in the *Balsam Lake* case. There, though the issue of use/access as opposed to pure sport is not specifically discussed, the Court found that the proposed project "*[a]ppear[s] compatible with the use of forest*

preserve land, and the amount of cutting necessary is not constitutionally prohibited." (*Supra*, at 854 [emphasis added]). This Court finds particularly relevant the fact that, at the time of such determination, the appellate court apparently had no evidence before it regarding the amount of cutting for a significant segment of the planned actions; "(the amount of cutting needed for the proposed new trail and parking lots has not yet been determined)" (*Id.*). Such holding arguably indicates that the purpose of the cutting shares at least equal importance with the extent of cutting in determining whether a constitutional violation has occurred. In like fashion, the holding therein authorizing the construction of, *inter alia*, parking lots would appear to be inconsistent with many of plaintiff's developed arguments regarding the impairment of the wild forest nature of the Preserve.

The Court finds the nature of the use, that is, the use of the trails to experience the Preserve, consistent with the opening up of the Preserve for the use and access of all the public, particularly those whose physical limitations might otherwise prevent access to anything but the areas where roads bisect the park. Further, as set forth in the testimony of the State, the newly created trails at issue herein are for the use of the public in accessing the relevant Preserve areas at all times of the year, not just during snowmobile season, as the trails are envisioned to be used in hiking, biking and for other similar access/use of the Park purposes. Simply put, these are trails, and trails for access would appear to be the quintessential example of an appropriate use of the Preserve.

Plaintiff raised numerous issues in support of the position that construction of the Class II trails impairs the wild forest nature of the Preserve to an unconstitutional extent. There was extensive testimony by plaintiff's witnesses concerning the impacts to the Forest Preserve as a result of such construction, including, *inter alia*, the effect of forest roads, effect upon old growth trees, of grading,

leveling and flattening of the trail surface, widening of the trail surface, construction of bridges, opening of the Forest's tree canopy, bench cutting, alteration to ecosystem due to proliferation of grasses on the trail surface, increased risk for invasive or non-native plant and animal species within the trail corridor, soil erosion problems, and the use of signage within the Preserve. Those issues will be discussed below.

Many of the plaintiff's arguments are premised upon the proposition that the trails are so constructed as to have the same effect on the Preserve as forest roads. It is clear to the Court from the evidence presented that the trails at issue herein do not share the identical essential characteristics of foot trails or forest roads, but rather fall somewhere between the two. The constructed trails, like foot trails, are not crowned, do not utilize linear ditching, are less wide than forest roads (which are described generally by Dr. Sutherland as having sufficient space for two vehicles to "get around each other if they dance a little bit" (Trial transcript pg. 341, Lns.10-12) and are not constructed using materials brought in from outside the immediate location. On the other hand, the trails are clearly wider and more groomed (e.g., by the removal of rocks and stumps and by a greater degree of topography change such as bench cuts) than the average foot trail, which often go around obstacles such as trees, stumps or rocks and is typically significantly less wide than the width of the trails constructed herein. However, as noted by the defense, many of the more aggressive techniques used in the construction, such as bridging and bench cuts, decrease the potential future damage to habitat and area caused by the completed trail through erosion.

The Court largely credits the testimony of Mr. Amadon, a witness for the plaintiff who is the Stewardship Coordinator for Champlain Area Trails. Mr. Amadon's testimony regarding his

experience and expertise in building and maintaining trails, in the Court's opinion, qualifies him to render opinion testimony on such issues. The Court credits Mr. Amadon's testimony to the effect that the Community Connector trails are substantially larger and, even discounting tree cutting, involve more invasive techniques (grading, root/rock removal, bridge building) than constructed Preserve foot trails. Moreover, the Court also accepts Mr. Bauer's testimony with regard to his observations and photographs of the created Community Connector trails, including his observations of bridges, bench cuts, grading, and construction equipment.

Dr. Sutherland, a well-qualified expert in the field of Environmental Science, testified for the plaintiff to the effect that the trails herein were much more akin to forest roads than hiking type trails and accordingly had a significant impact on animal habitat and the canopy. Dr. Sutherland testified, and the Court accepts, that roads can have a significant effect on the forest ecology, including animal life such as insect population in soil and salamander population. Nevertheless, the Court, as discussed further below, finds that the trails herein were and are more akin to hiking trails (or the cross-country ski trails contemplated in Balsam Lake) than forest roads. In particular, as pointed out in the cross examination of Dr. Sutherland, the "roads" he studied for his conclusions about edge effects on forest fauna were graveled, which is not the case herein.

The Court rejects the plaintiff's argument that the trails being created herein are unconstitutional as akin to "woods roads"; to the extent that such term has a definition, it implies the use of such feature to drive trucks or automobiles through woods (*see, e.g.*, testimony of Dr. Sutherland at trial transcript pg. 340, ln. 19); the trails as planned and completed do not contemplate and are not constructed to sustain such usage. In addition, the plaintiff, via the testimony of Dr.

Sutherland, did not adequately differentiate between the effects of utilized (by automobiles) woods roads on the surrounding flora and fauna and that of a trail that is consistent with a woods road in physical characteristics but without the automobile utilization. This concern effected Dr. Sutherland's testimony, wherein he specifically stated that one reason that his woods road studies did not include trails was that the impact of motorized vehicles on the roads did not occur in trail usage. Such differentiation is, in the Court's view, important as the Court is constrained to consider solely the physical characteristics of the trails and the effects of such characteristics on the Preserve.

Moreover, the Court credits the testimony of DEC Forester Tate Connor to the effect that significant portions of the 7th Lake Mountain Trail, which was constructed around 2012 and thereafter, has now commenced the naturalization and regeneration process contemplated by defendants in their sustainable trail planning, a process inconsistent with characterization or utilization of such trails as woods roads.

The issue of tree-cutting, as well as the effect of the cutting herein on the integrity of the canopy, is discussed above. Because the extent of cutting is also potentially relevant to the impairment analysis, however, the Court further holds that the number of trees cut and the extent of the area impacted herein do not differ sufficiently from the *Balsam Lake* construction to violate the "wild forest" test. The area and number of cut trees, averaging less than 200 (of 3" dbh or greater) per mile, have not been shown to be of particular unique character (for instance, constituting an isolated stand of old growth trees; constituting the only treed area in an area where, due to topographical features, trees were not prevalent) in the great expanse of the Preserve. Moreover, as demonstrated on Defendant's exhibit CK, the proposed trails, though substantial, are a minimal

portion of such expanse. The Court finds that such trail construction, in addition to being similar to *Balsam Lake* as to use of the Preserve (though on a larger scale both in distance and for greater usage) is similar to *Balsam Lake* as a relatively narrow trail cut into a wooded area, as opposed to *MacDonald*, which appears to have envisioned the clear cutting of a swath of trees from the side of a mountain.

With regard to the allegations that the canopy has been opened, based upon the testimony, including the pictures presented into evidence, the court finds that plaintiff has not demonstrated a substantial breach of the canopy by the construction of the trails herein under the guidelines.

As noted above, plaintiff's expert Dr. Sutherland, a Conservation Scientist with the Wildlands Network, testified to the ecological effects, including desiccation and non-native plant invasion (as well as different native flora and fauna habitating in an uncanopied or edge area), of an open canopy. However, Dr. Sutherland admitted that, despite his testimony and photos presented into evidence demonstrating some canopy openings at the trail construction sites, he had stated in a submitted affidavit that, with regard to the 7th Lake Mountain Trail, the trail had retained a closed canopy for much of its length. Such information was largely consistent with that of defense experts Mr. Connor (a DEC forester), Mr. Ripp (a DEC forester) and Dr. Howard, a Director of Science with the New York Natural Heritage Program (a program of the Research Foundation for the State University of New York College of Environmental Science and Forestry) to the effect that the already-constructed trail areas observed by them overall, including the 7th Lake Mountain Trail, demonstrated a closed canopy. In addition, the Court found Dr. Sutherland's testimony generally conclusory on the issue of potential regrowth filling in openings. Moreover, as testified to by Mr.

Connor, a portion of the trail referenced by Dr. Sutherland in demonstrating some open canopy conditions was located on a pre-existing logging road.

The fact that the Court has found that the trails as planned and completed did not cause a significant opening in the Canopy of the effected areas to a large degree obviates those aspects of Dr. Sutherland's testimony regarding the effects of forest fragmentation, ecological impact of open canopies and damage to "old growth" forests, as such testimony was largely factually predicated upon the contemplated effects of open canopies.

Alleged fragmentation of the Preserve via the creation of these new trails, as well as alleged reductions in the amount of fragmentation as a result of the closure of certain interior trails to snow mobiles as part of the plan for the new trails, was also the subject of significant testimony at the trial.

Dr. Sutherland discussed the effects of the trails in question herein on "forest fragmentation" by roads which would impair the functioning of the ecosystem; in so doing, Dr. Sutherland testified that roads have significantly more effect on fragmentation of forest ecologies based upon direct wildlife mortality, which was not demonstrated herein, and on the edge effects that can occur when a canopy is opened, which (canopy opening) was also not demonstrated to any significant extent herein.

There was also scant evidence presented herein to the effect that such fragmentation (wherein the Court cannot consider the particular effect of snow mobiles) would be substantially more significant than that created by the process utilized (and approved) in *Balsam Lake*. In any event, based upon the testimony of Dr. Howard with the map analysis, the Court finds that the net effect of forest fragmentation herein would be, at worst neutral.

The construction of the trails undoubtedly involves the construction of bridges which, as noted above, are more substantial than those to be expected of standard foot or even horse trails. As per the testimony of Mr. Connor, the bridge widths herein are approximately 12 feet. The Court further finds that the signage on the community connector trails also is not akin to that of foot trails, and is, in certain areas, more akin to road signs. Nevertheless, taking all of the factors into account, including particularly the reference in *MacDonald* to "what may be done in forest lands to preserve them *or to open them up for the use of the public" (supra* at 240), the Court finds that any impingement on the wild forest nature of the Preserve by the limited bridges and signage is not unconstitutional. This holding is based upon the narrow corridor involved and the positive effect upon preservation of the wild forest nature accomplished by: i) the bridging as depicted in the photos and described, which the Court finds strikes the proper balance between safety, protection of the wet areas over which they cross, and appropriate minimization of artificial appearance, and ii) proper signage keeping the use of the trails limited to the approved trail area while protecting the members of the public utilizing such trails from the dangers of trees, rocks and unseen water hazards in non-trail areas.

With regard to the grass planting/infiltration and potential invasive species infiltration, the Court finds that plaintiff has not demonstrated invasive species infiltration as a result of the construction. In particular, the Court credits the testimony of Ms. Regan of the Adirondack Park Agency to the effect that Japanese Knotweed was already present in the Santanoni area, and of Dr. Howard to the effect that Ragweed is not an invasive species in the Adirondacks. In addition, the Court credits the testimony of the DEC to the effect that grasses shown on some portions of the

newly completed trails can be expected to recede and disappear as sunlight in such limited areas is blocked by the trees filling in any created canopy openings.

The Court heard extensive testimony on the use of "Bench Cuts"[4] (and other trail construction methods, including "turnpiking" (utilizing rocks from the area to try to raise a portion of a trail), and the effect that such techniques had on the Preserve. Though such techniques, specifically the use of bench cuts on the sides of slopes, are clearly more substantial that those normally required for a foot trail, the Court finds that such techniques, as testified to by Mr. Connor, are proper erosion control or other trail protection and maintenance methods which will have the overall sustainability effect of minimizing the environmental impact of the creation of the trails, and, thus, preserving the use of the Preserve for the future; in point of fact, plaintiff also argues at points that the erosion created by the trails will impair the wild forest nature of the Preserve. Dr. Sutherland, when testifying about the erosions that can occur when a bench cut is utilized, or identifying certain erosion conditions around particular bench cuts, did not compare such erosion to that which would have occurred had such a cut not been utilized. Further, it was undisputed that the bench cut technique is a method of minimizing the environmental impact without including road features such as retaining walls.

While the Court generally agrees with plaintiff's position that the closing of certain interior trails to snowmobile use as part of the Plan/Guidance is largely irrelevant to the assessment of whether the tree cutting herein violates the Constitutional clause, as such clause does not authorize

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[4] Bench cutting involves the construction of a trail across the side slope of a hill which might require cutting into a slope and removal of the cut material.

destruction of trees if such trees are later replaced, the undisputed closing of some interior trails may be a relevant factor to be considered in determining whether the wild forest nature of the Preserve has been unconstitutionally impaired. While such closings, which will eventually allow regrowth, increase the wild forest nature of such areas and can serve to offset some of the new trail construction in such analysis, the Court finds that a large portion of the trails closed were only closed to snowmobile usage (as opposed to other usage); as the defendants, like the plaintiff, have taken the position that snowmobile usage is not a relevant issue in this case, the Court will not consider such usage closures and the contemplated effects proposed by the defendants, which are, for the most part, effects that would result from this terminated usage, as an offset to the actions taken herein. The Court credits the testimony of Mr. Clagure, a DEC employee, with regard to the closure of the trails at issue herein and the demonstration of such closure on the submitted maps. Nevertheless, based upon the evidence adduced, the Court finds that the effect on forest fragmentation of the trail closures, was not in and of itself significant. In particular, the Court notes the lack of evidence from the defendants on the re-vegetation of such trails which has occurred since or as a result of the trail closures.

The Court finds and holds that, though the trails herein are generally larger than foot or ski trails in the Preserve, they do not constitute an improper use of the Preserve which impairs the wild forest lands to an unconstitutional extent. In so holding, the Court must reiterate that the case does not challenge the use of snowmobiles in the Preserve. The trails, then, are generally of the nature and appearance of typical Preserve foot or biking/horseback riding trails, while being somewhat larger and more roadlike (via greater straight lengths, grading, removal of obstacles such as rocks,

bridging and bench-cutting) than typical[5] non-snowmobile use trails. The Court finds that the contemplated and completed construction is akin to that in *Balsam Lake*, wherein both parking lots and cross country ski trails (which the Court takes notice cannot, by their nature, simply circumvent all trees in a wooded area but require some straight stretches, and also which require, by their nature, some bridging) were constructed and found not violative of the constitution. The Court recognizes and accepts the arguments that much of the disruption caused by the construction process has been and will continue to be alleviated by the regrowth contemplated in the planning process. In sum, the Court finds that the trails in and of themselves are constructed for the proper use of and access to the Preserve, and are no more out of harmony with forest lands in their wild state than the foot, horse and bicycle trails throughout the Preserve.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Based upon the foregoing, it is hereby

ORDERED that the Plaintiff has failed to meet its burden of proof herein and accordingly, the relief requested via the first cause of action is denied in its entirety; and it is further

ORDERED, ADJUDGED and DECLARED that construction in the Forest Preserve of the Class II trails that were planned and approved as of October 15, 2015 does not violate Article XIV §1 of the New York State Constitution.

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[5] The Court accepts defendants' position that some foot trails, particularly those in difficult terrain or those which utilize older woods or skid roads, are as large (or larger) and as artificially-developed (e.g. by terrain changing maintenance such as water-barring, turnpiking or laddering) as the Community Connector trails herein.

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This constitutes the decision and order of the Court. The original decision and order are being returned to the attorney for the defendants. A copy of this decision and order and all other original papers are being delivered to the Albany County Clerk's Office. The signing of this decision and order and delivery of a copy of the decision and order shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED
ENTER

Dated: December 1, 2017
Albany, New York

Gerald W. Connolly
Acting Supreme Court Justice