

COURT OF APPEALS
STATE OF NEW YORK

PROTECT THE ADIRONDACKS! INC.,

Respondents-Appellants,
-against-

**AFFIDAVIT OF
DAVID H. GIBSON**

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

APL-2019-00166

Appellants-Respondents.

STATE OF NEW YORK)
) SS.
COUNTY OF SARATOGA)

DAVID H. GIBSON, being duly sworn, deposes and says:

1. I am a co-founder and the Managing Partner of Adirondack Wild: Friends of the Forest Preserve, Inc. (“Adirondack Wild”), proposed amicus curiae in this appeal. I submit this affidavit in support of Adirondack Wild’s motion for permission to appear as amicus curiae.

2. I earned a Masters Degree in Environmental Science from Yale School of Forestry and Environmental Studies, and have long been an avid conservationist. Protecting the Adirondacks, a large part of which is constitutionally protected Forest Preserve, has been a personal and professional interest of mine since 1987. To date, I have worked for three different

environmental organizations focused on protecting the Adirondacks: the Association for the Protection of the Adirondacks, Protect the Adirondacks!, and Adirondack Wild: Friends of the Forest Preserve. I was a member of the New York State Department of Environmental Conservation's Snowmobile Focus Group from 2001-2004. I am currently a member of NYSDEC's Forest Preserve Advisory Committee.

3. Adirondack Wild: Friends of the Forest Preserve is a not-for-profit membership organization whose mission is to safeguard the legal protections governing New York's Forest Preserve lands in the Adirondack and Catskill Parks, and to promote public and private land stewardship in those parks that is consistent with wild land values through education, advocacy and research. Adirondack Wild is on the wild's side and considers itself a conscience of the Forest Preserve. The organization and its 900 members take very seriously their role in defending Article XIV, Section 1 of the New York Constitution and in monitoring the snowmobile community connector trails and related management actions of the NYSDEC in the Adirondack Park, as well as serving as a watchdog to ensure that the Constitution, laws, and regulations protecting the Park's wild lands, natural resources, and scenic beauty are not violated.

4. Adirondack Wild is particularly interested in this proceeding because the State's construction of the Class II Community Connector snowmobile trails

has resulted in an unconstitutional destruction of timber in the State's Forest Preserve within the Adirondack Park. A picture of one of the locations where the State intends to build the trails is included as Figure 1.

5. The proposed amici brief offers this Court a number of issues or arguments that might otherwise escape this Court's consideration or may otherwise be of assistance to the Court in resolving this appeal.

6. In particular, the proposed amici brief focused on the requirements of the New York State Constitution's Forever Wild clause, as evidenced in its plain language and the constitutional history underlying its adoption, and how the Forever Wild Clause does not permit the type of balancing of competing policy interests that the State urges this Court to adopt here.

7. The proposed amici brief also asks this Court to correct the Appellate Division majority's erroneous reading of the Forever Wild clause as separate provisions, rather than as a whole, and erroneous holding that the State's tree cutting for the Class II trails does not impair the wild forest character of the Forest Preserve in violation of the Forever Wild clause of the New York Constitution.

8. A brief summary of the arguments of the proposed amici brief follows.

The Forever Wild Clause of the New York Constitution Does Not Permit a Balancing of Policy Interests to Determine Whether it has been Violated

9. The “Forever Wild” clause of the New York Constitution mandates that all State-owned land within the Adirondack Park “now owned or hereafter acquired” shall be “forever kept as wild forest lands.” NY Const art XIV, § 1.

10. The mandatory plain language of the Forever Wild clause portends its strength. These mandatory commands written into our State’s Constitution do not permit a balancing of interests to decide if trees may be cut to make way for an economic development project or a recreational snowmobile corridor.

11. Nor does a reasonable construction of the Forever Wild clause permit a balancing of competing policy interests in determining whether the cutting of trees in the Forest Preserve passes constitutional muster, and this Court so held over 90 years ago in *Association for Protection of Adirondacks v MacDonald* (253 NY 234 [1930]).

12. The State nevertheless attempts here to re-introduce a similar balancing of interests to that which this Court expressly rejected in *MacDonald*. In particular, the State argues that the Court must undertake a “contextual analysis” of a number of policy considerations to determine whether the proposed tree cutting runs afoul of the mandatory prohibition on tree cutting in the Forever Wild clause (State Appellants-Respondents’ Opening Brf, at 52-63).

13. The balancing of policy considerations that the State asks this Court to undertake is precisely what the People of this State intended to prevent when the Forever Wild clause was adopted in 1895. Indeed, one of the foremost purposes of enshrining the protections for the Forest Preserve in the Constitution was to protect them from the discretion of the political branches.

14. Although the State may wish to have flexibility to determine the total amount and sizes of timber that can be removed or destroyed in the Preserve and substitute a balancing test that could be used to “contextualize” any extent of the removal of trees for a project that the State believes in in the public interest, based on considerations of public access, economic development, and trail maintenance, that simply is not permitted under the plain text and constitutional history of the Forever Wild clause.

15. Although the parties ask this Court to pass on the proper constitutional definition of timber in the Forever Wild clause, it is respectfully submitted that this Court need not do so to resolve this appeal. Under either standard advocated by the parties, the cutting of at least 6,000 trees in the Forest Preserve is substantial and material under this Court’s standard in MacDonald, and therefore violates the constitutional prohibition on the destruction of timber, as the Appellate Division properly held.

16. Thus, rather than adopting a specific constitutional definition of timber that could thrust the courts in the middle of every dispute about tree cutting in the Forest Preserve, this Court should simply reaffirm the long-standing *MacDonald* formulation that a proposed project's tree cutting violates the Forever Wild clause of the New York Constitution when it "call[s] for the removal of the timber to any material degree" (*MacDonald*, 253 NY at 238).

The Appellate Division Majority Erroneously Considered Clauses of the Forever Wild Provision of the New York Constitution Separately

17. Although the Appellate Division correctly held that the State's tree cutting was an unconstitutional destruction of trees, it erred in considering the first and second sentences of the Forever Wild clause of the Constitution separately and concluding that the tree cutting did not impair the wild forest qualities of the Forest Preserve.

18. It is well established that when construing a provision, especially a constitutional one, the provision should be read as a whole. Indeed, in light of the constitutional history of the Forever Wild clause's adoption, it is clear that the clause was organized with the protection of the Forest Preserve as forever wild forest lands as the overarching rule, and the second sentence prohibiting the sale or lease of state lands and the sale, removal, and destruction of timber as expressly stated implementing principles of the forever wild rule.

19. A violation of the second sentence of the Forever Wild clause, therefore, is a violation of the first, by operation of constitutional construction. The Appellate Division majority, however, failed to recognize that principle, and erred in holding that the tree cutting for Class II snowmobile trails did not violate the first sentence of the Forever Wild clause.


20. No one can truly understand these impacts of the State's position better than Adirondack Wild and its members, who have committed themselves to maintaining the wild character of the Park.

21. Thus, the participation of Adirondack Wild will provide this Court with a different interpretation of the Forever Wild clause and its underlying constitutional history so that it can get a full picture of the legal landscape surrounding the Adirondack Park and the critical rights at stake.

22. Moreover, Adirondack Wild's participation as amicus in this matter will not adversely impact the rights of the parties or in any way delay resolution of this appeal.

23. No party's counsel to this appeal has participated in preparation of or contributed content to the proposed amicus brief. Nor has any party, party's counsel, person, or entity other than the Adirondack Council and Adirondack Wild contributed money that was intended to fund the preparation or submission of the proposed amicus brief.

24. Accordingly, I respectfully request that this Court grant Adirondack Wild permission to appear as amicus curiae in this action.



DAVID H. GIBSON

Sworn to before me this
28 day of January 2021



Notary Public

HAI Y. TSANG
NOTARY PUBLIC IN THE STATE OF NEW YORK
QUALIFIED IN SARATOGA COUNTY, NO. 01TS6331741
MY COMMISSION EXPIRES OCTOBER 18, 2023

Figure 1, Affidavit of David H. Gibson
Site of Proposed Cedar River steel snowmobile bridge
Photo by David Gibson, Adirondack Wild

