APL-2018-112

Court of Appeals
of the
State of New York

ADIRONDACK WILD: FRIENDS OF THE FOREST PRESERVE and PROTECT THE ADIRONDACKS! INC.,

Appellants,

-against-

NEW YORK STATE ADIRONDACK PARK AGENCY; LEILANI ULRICH, in her capacity as Chairperson of the New York State Adirondack Park Agency; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; and BASIL SEGGOS, in his capacity as Acting Commissioner of the New York State Department of Environmental Conservation,

Respondents.

BRIEF OF AMICUS CURIAE ADIRONDACK COUNCIL, INC. IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Section 500.1(f) of this Court's Rules of Practice (22 NYCRR § 500.1[f]), Adirondack Council, Inc. states that it does not have any parents, subsidiaries, or affiliates.

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PRELIMINARY STATEMENT

Snow-covered pines surround you as you hike in the Adirondack Forest Preserve. You approach a remote section of the upper Hudson River and are within the protected area of this "Wild River." This land along Chain Lakes Road South used to be privately owned, open only to the members of a club or their guests. Now, it's Forest Preserve land owned by the State, and protected as "Forever Wild." You see deer tracks in the newly fallen snow, hear birds sing from the nearby trees, and see the sun occasionally peek through the swaying pines. Bears and bobcats roam here, and moose have made a big comeback, all because New York has actively worked to keep these forests in their most primitive wilderness state. This is the Adirondack Park at its finest.

As you stand at the edge of the forest, the roar of 600-cc engines shatters the peaceful surroundings. Snowmobiles. This stretch of the road along the spectacular white-water Hudson Gorge is supposed to be forbidden to motor vehicles. After it was purchased by the State, the protected river corridor was required to be managed as "wilderness," and the State was obligated to remove and prohibit nonconforming uses, including motor vehicle uses of the land.

Public snowmobile use of Chain Lakes Road South was never permitted before State ownership. It certainly cannot be permitted now that the road is in the Forest Preserve and within the "river area" of a "Wild River." And for good reason: Article XIV of the New York Constitution provides that lands in the Adirondack Park Forest Preserve must be "forever kept as wild forest lands," and in implementing that directive, the Legislature has directed that lands classified as "wilderness" or within river areas of "wild rivers" are off limits to motor vehicles (NY Const art XIV, § 1). All prior uses of the now State-owned lands inconsistent with the Forever Wild clause of the State Constitution, as so implemented with respect to lands of that character, must be terminated. The Appellate Division's 3-2 holding to the contrary threatens the crucially important, constitutionally supported protections for the most remote and wild areas of New York's Forest Preserve lands.

Amicus curiae Adirondack Council, Inc. has long advocated to ensure the ecological integrity and wild character of the Adirondack Park and the Forest Preserve and thus submits this brief in support of the appeal of Appellants Adirondack Wild: Friends of the Forest

Preserve and Protect the Adirondacks! Inc. from the Opinion and Order of the Appellate Division, Third Department (Garry, P.J., McCarthy, Devine, Mulvey, and Rumsey, JJ.) entered May 3, 2018. For the reasons that follow, the Appellate Division order should be reversed.

STATEMENT OF INTEREST

The Adirondack Park is the world's largest intact temperate deciduous forest (*see generally* Adirondack Council, State of the Park 2018-2019, *available at* https://www.adirondackcouncil.org/vs-uploads/sop_archive/1539887704_SOP2018_FINAL.pdf). It contains six million acres (9,300 square miles) and covers one-fifth of New York State. Nearly half of the Park is publicly owned Forest Preserve, protected as "Forever Wild" by the New York Constitution since 1895. About 1.1 million acres of these public lands are protected as Wilderness, where non-mechanized recreation may be enjoyed, but motorized vehicles are not permitted. Most of the remaining public land (more than 1.4 million acres) is designated as Wild Forest, where motorized uses are permitted on designated waters, roads and trails.

The Adirondack Council, Inc. is a not-for-profit organization that advocates to ensure the ecological integrity and wild character of the

Adirondack Park and the Forest Preserve. Founded in 1975, the Adirondack Council has members in 47 states and offices in Elizabethtown in the Adirondack Park and in Albany. Through public education and advocacy for the protection of the Park's ecological integrity and wild character, the Adirondack Council advises public and private policymakers on ways to safeguard this great expanse of open space. The Council's vision is for the Adirondack Park to have clean air and water and large wilderness areas surrounded by farms, forests, and vibrant communities.

With strong partner organizations, collaboration with government officials, and citizen participation, the Council advocates for policies and funding that benefit the environment and communities of the Adirondack Park. Among the Council's chief initiatives was the "Be Wild New York" campaign in which it led a coalition of regional and national conservation organizations in promoting the expansion of the Adirondack High Peaks Wilderness to create more than 275,000 acres of contiguous wilderness. Using science, the Adirondack Council educates the public and policymakers; advocates for regulations, policies, and funding to benefit the Park's environment and communities; monitors

proposals, legislation, and policies impacting the Park; when necessary takes legal action to uphold constitutional protections and agency policies established to protect the Adirondack Park; and secures public and private actions that preserve this unique national treasure for future generations.

STATUTORY AND REGULATORY BACKGROUND

Adopted in 1895, the Forever Wild clause of the New York Constitution governs the use of state-owned land in the Adirondack Park. In particular, it provides:

> 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

(NY Const. art. XIV, § 1).

When it was first proposed during the 1894 Constitution Convention, the clause's preamble made clear the importance that it would play in preserving New York's pristine forest lands: "[t]he preservation of the forests and water-sheds of this State is of the greatest importance to all people, and to every interest within the borders of the State" (Journal of 1894 Constitutional Convention, No.

39, July 31, 1894, at 426). David McClure, a convention delegate and proposer of the Forever Wild clause, noted that the people of the state "had forgotten that it was necessary for the life, the health, and the comfort not to speak of the luxury of the people of this State, that our forests should be preserved" (Record of the New York State Constitution Convention, No. 113, September 8, 1894, at 2048). Additionally, McClure noted that the Adirondack forest "is vastly more valuable to the people of the State in its present condition than it can be by any change" (*id.* at 2049). Although there have been several efforts to amend the Forever Wild clause both by Legislature and by subsequent constitutional conventions, the clause has stood the test of time as the foremost protector of the State's forest lands. This Court has also repeatedly reaffirmed the importance of the Forever Wild clause (*see People v Adirondack Ry. Co.*, 160 NY 225, 228 [1899], *affd* 176 US 335 [1900]; *Association for Protection of the Adirondacks v Macdonald*, 228 App Div 73, 80 [3d Dept 1930], *affd* 253 NY 234 [1930]).

Although State-owned land in the Adirondack Park was governed by the Forever Wild clause of the Constitution, private land use in the Adirondack Park remained unregulated until 1971 when the

Legislature enacted the Adirondack Park Agency Act ("APA Act") and created the Adirondack Park Agency ("APA") to regulate private land use (*see* Executive Law § 801). The APA Act created two distinct land use plans to regulate the "intermingling of public and private land" in the Adirondacks (*id.*). The Adirondack Park Land Use and Development Plan was intended "to guide land use planning and development throughout the entire area of the Adirondack park, *except for those lands owned by the state*" (*id.* § 805[1][a] [emphasis added]). The second plan—the Adirondack State Land Master Plan (the "Master Plan")—authorized the Department of Environmental Conservation ("DEC"), in consultation with the APA, to "guide the development and management of state lands in the Adirondack park" by developing individual management plans that are consistent with the Master Plan (*id.* § 816[1]).

When the State acquires new lands for the Adirondack Park, the Master Plan requires that the DEC classify the land, and eliminate any nonconforming uses for the chosen classification. The Master Plan contains seven different land classifications: Wilderness, Primitive, Canoe, Wild Forest, Intensive Use, Historic, and State Administrative,

each of which provides differing intensities of permitted land uses (A.584). The Master Plan defines a "nonconforming use" as "a structure, improvement or *human use or activity* existing, constructed or conducted on or in relation to land within a given classification that does not comply with the guidelines for such classification specified on the master plan" (A.587 [emphasis added]).

In wilderness areas, the Master Plan provides that "non-conforming uses resulting from newly-classified wilderness areas will be removed as rapidly as possible and in any case by the end of the third year following classification" (A.589). The Master Plan prohibits the use of motor vehicles, including snowmobiles, in wilderness areas (A.592). Indeed, the Master Plan sets forth specific steps to ensure that "[a]ny non-conforming roads, snowmobile trails or state truck trails resulting from newly classified wilderness areas . . . [are] phased out as quickly as possible" (A.593). Specifically, the Master Plan directs the DEC to "close such roads and snowmobile trails as may be open to the public; prohibit all administrative use of such roads and trials by motor vehicles; and block such roads and trails by logs, boulders or similar means other than gates" (*id.*).

Land use in the Adirondacks is also governed by the Wild, Scenic and Recreational Rivers System Act (the "Rivers Act"), which created a system to protect the rivers of the State, including those in the Adirondack Park (*see* Environmental Conservation Law [ECL] § 15-2701). Consistent with the Forever Wild clause, the Rivers Act seeks to preserve the state's rivers "in free-flowing condition" and protect "their immediate environs" "for the benefit and enjoyment of present and future generations" (*id.* § 15-2701[3]). The Legislature determines which rivers to include within the rivers system and designates each included river area as "Wild," "Scenic," or "Recreational," again with different standards applying to each (*id.* §§ 15-2713, 15-2714). Wild rivers are "[t]hose rivers or sections of rivers that are free of diversions and impoundments, inaccessible to the general public except by water, foot or horse trail, and with river areas primitive and undeveloped in nature and with development, if any, limited to forest management and foot bridges" (*id.* § 15-2707[2][a]).

Lands within one-half mile of a designated wild river are subject to the Rivers Act's requirements, in addition to the other land use regulations that may apply (*id.* §§ 15-2707[2][a][2], 15-2721; *see also* 6

NYCRR § 666.6[f]). Under the Master Plan, wild rivers and state-owned wild river areas under the Rivers Act that are located in the Adirondack Park are subject to the wilderness area management requirements (A.614). Like in wilderness areas, the use of motor vehicles, including snowmobiles, is prohibited in wild river areas on state land (ECL § 15-2709[2][a]).

The one-mile stretch of Chain Lakes Road South at issue here is within a one-half mile of a wild river, and thus the Rivers Act and the Master Plan command that all motor vehicles be prohibited within the "wild river area" (A.304). The Essex Chain Lakes Complex Unit Management Plan ("Chain Lakes UMP"), however, proposes use of that wild river area portion of the road as part of a snowmobile connector trail open to the general public between Indian Lake and Minerva. Simply put, the DEC seeks to circumvent the Rivers Act's and Master Plan's strict requirements designed to implement the Constitution's Forever Wild protections and authorize the use of motor vehicles where the law requires that they be prohibited. This Court, however, cannot rewrite that which the law commands.

THE APPELLATE DIVISION ORDER

In an opinion and order misconstruing the DEC's powers to disregard the strict requirements of the Rivers Act and the Master Plan, the Appellate Division, Third Department (Garry, P.J., McCarthy, Devine, Mulvey, and Rumsey, JJ.), with two Justices dissenting in part, held that the DEC properly approved the Chain Lakes UMP authorizing snowmobile access to the wild river area of Chain Lakes Road South (*see Matter of Adirondack Wild: Friends of the Forest Preserve v New York State Adirondack Park Agency*, 161 AD3d 169 [3d Dept 2018]). Straining to find statutory powers to support the DEC's attempt to get around the Rivers Act's and the Master Plan's joint mandate that snowmobiles be prohibited in wild river areas of the Adirondack Park, the Appellate Division majority held that ECL § 15-2705's grant of exclusive jurisdiction to DEC over river areas preempted the Rivers Act's conflict of laws provision in ECL § 15-2721 and afforded the DEC discretion to waive compliance with restrictions in the Rivers Act or Master Plan that do not fit its designs.

Based upon that erroneous interpretation, the Appellate Division majority then read the Rivers Act's preexisting use exemption (ECL

§ 15-2709[2]) out of its statutory context, which clearly signals that the preexisting use exemption does not apply to State-owned lands, and held that because private clubs and trespassers had previously used Chain Lakes Road South to snowmobile, the DEC rationally concluded that the general public should be permitted to expand upon the prior private use. To reach that conclusion, the Appellate Division majority improperly disregarded The Nature Conservancy's ("TNC") period of ownership from 2007 to 2013, which is the most relevant period for determining what uses continuously preexisted state ownership, and also erroneously considered the former occasional trespassory use of the road as if it had been a lawful preexisting use.[1]

The Appellate Division majority's opinion threatens the very protections for the Adirondack Park's most pristine wild river areas that the Constitution's Forever Wild Clause, the Rivers Act, and the Master Plan were enacted to cement in New York law. The Appellate Division order should be reversed, and the Chain Lakes UMP annulled.

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[1] The Appellate Division dissent also failed to reference the uses of the property during TNC's ownership immediately preceding the State's acquisition of the lands in 2013 (*see Adirondack Wild*, 161 AD3d at 179-181).

ARGUMENT

POINT I

THE FOREVER WILD CLAUSE OF THE NEW YORK CONSTITUTION, AS IMPLEMENTED BY THE MASTER PLAN AND RIVERS ACT, PROHIBITS SNOWMOBILE TRAILS AND THE OPERATION OF MOTOR VEHICLES IN WILDERNESS AND WILD RIVER AREAS OF THE FOREST PRESERVE

The "Forever Wild" clause of the New York Constitution provides:

> 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

(NY Const art XIV, § 1 [emphasis added]).

The Forever Wild clause has been "[t]he primary source of any powers regulating the use of State owned lands in the Adirondacks" (*Matter of Helms v Diamond*, 76 Misc 2d 253, 256 [Sup Ct, Schenectady County 1973]). The Forever Wild clause imposes a constitutional mandate upon the APA and DEC, elaborated by the Legislature and the Governor in the Rivers Act and Master Plan, to classify lands and waters based upon differences in their wild character and ensure that the land and rivers in the Adirondack Park are managed consistent

with management regime for the classification (*see Association for Protection of Adirondacks v MacDonald*, 253 NY 234, 238-239 [1930] [holding a reasonable construction must be given to the Forever Wild clause, in view of the "reasonable regulations" set by the Legislature]). Thus, when the DEC develops a unit management plan for newly acquired State-owned land in the Adirondack Park, the plan it adopts must comply not only with the Department's obligations under the Rivers Act, but also with the Master Plan and the strict requirements of the Forever Wild clause of the New York Constitution.

The DEC, however, has attempted to introduce nuance and administrative discretion to its constitutional and statutory obligations where none exists to permit snowmobile use through areas of the State-owned Adirondack Park that it has designated as a "wild river" area (A.614; *see also* ECL § 15-2709[2][a]). No rational interpretation of the Forever Wild clause, the Rivers Act, and the Master Plan affords the DEC discretion to permit snowmobiles to race across the one-mile wild river area portion of Chain Lakes Road South at issue here.

What the DEC has proposed is precisely what the People of this State intended to prevent when the Forever Wild clause was adopted in

1895 and then later implemented through the Rivers Act and the Master Plan. Indeed, by adopting the Master Plan for the "development and management of state lands in the Adirondack park," thereby giving it the force and effect of law (*see* Executive Law §§ 801, 816[1]), the Legislature has already implemented the reasonable management standards that the Constitution's Forever Wild clause requires for newly acquired state lands.[2] In particular, the Master Plan requires that all nonconforming uses on newly-acquired state lands—that is, any "structure, improvement or *human use or activity* existing, constructed or conducted on or in relation to land within a given classification that does not comply with the guidelines for such classification specified on the master plan" (A.587 [emphasis added])—must be discontinued. Most notably, the Master Plan expressly provides that "non-conforming uses resulting from newly-classified wilderness areas will be removed as rapidly as possible and in any case by the end of the third year following classification" (A.589).

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[2] As Governor Rockefeller noted in signing the APA Act, the development of the two land use plans "represent[ed] the culmination of 80 years of concern and continuous effort by the people of the State to maintain the priceless Adirondacks in prosperity" and struck "a sensible balance between the needs for preservation and development within our treasured Adirondack park" (Governor's Approval Mem, Bill Jacket, L 1973, ch 348, at 7).

Snowmobile trails are no exception. Under the Master Plan, snowmobile trails are strictly prohibited in areas classified as wilderness (A.591) or wild river (A.614). The Chain Lakes Road South section here is a wild river area (A.543).[3] The Master Plan sets forth specific steps to ensure that "[a]ny non-conforming roads, snowmobile trails or state truck trails resulting from newly classified wilderness areas . . . [are] phased out as quickly as possible" (A.593). Specifically, the Master Plan directs the DEC to "close such roads and snowmobile trails as may be open to the public; prohibit all administrative use of such roads and trails by motor vehicles; and block such roads and trails by logs, boulders or similar means other than gates" (*id.*). That is what the Legislature has determined that the Forever Wild clause of the Constitution requires.

The Master Plan contains several examples demonstrating that the DEC has consistently required non-conforming roads and snowmobile trails in newly-classified State-owned wilderness areas to

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[3] Under the Master Plan, "[w]ild rivers and their river areas will be managed in accordance with the guidelines for wilderness areas" (A.614). The Master Plan requirements for wilderness areas plainly states: "Public use of motor vehicles . . . will be prohibited," and "no new . . . snowmobile trails . . . will be allowed" (A.592). Rather, DEC must "close such . . . snowmobile trails . . . as may be open to the public" (A.593).

be discontinued in accordance with its constitutional duty under the Forever Wild clause. For example, in the Ha-De-Ron-Dah Wilderness, the Master Plan required removal of "2.3 miles of snowmobile trails" and certified that the area "now fully complies with Wilderness standards" (A.627). In the Hoffman Notch Wilderness, "[t]hree fairly extensive [DEC] snowmobile trails totaling 17.5 miles were removed" (A.631) and, in the Round Lake Wilderness, foot trails that provided access to Trout Pond "were *closed to snowmobile use* after the area was reclassified from Wild Forest to Wilderness" (A.639 [emphasis added]).

It is not within the DEC's province to attempt to amend the Master Plan's requirements that all snowmobile trails be removed from wild river areas and all motor vehicle use be prohibited by adopting a local unit management plan that conflicts with them, as it has done here (*see* Executive Law § 816[1] [individual "management plans shall conform to the general guidelines and criteria set forth in the master plan"]). Instead, the DEC must abide by the Legislature's designated amendment procedures if it desires to change the Master Plan's classification of snowmobile trails as nonconforming uses that must be removed (*see id.* § 816[2] ["Amendments to the master plan shall be

prepared by the agency, in consultation with the department of environmental conservation, and submitted after public hearing to the governor for his approval."]).[4]

When the State acquired the Essex Chain Lakes Complex in 2013, the plain language of the Forever Wild clause, as implemented through the Master Plan, required the DEC to manage the wild river area portion located on Chain Lakes Road South "in accordance with the guidelines for wilderness areas" (A.614). Thus, the DEC was required to remove any existing snowmobile trails and prohibit snowmobile use. Even if the Forever Wild clause's mandate was not as clear as the Legislature's implementation would indicate, the DEC's practical application of the requirement by consistently removing the nonconforming snowmobile trails in wilderness and wild river areas of the Adirondack Park made the State's obligations here abundantly clear (*see Matter of Lezette v Board of Educ., Hudson City School Dist.*, 35 NY2d 272, 281 [1974] ["It is a cardinal principle of construction that, (i)n case of doubt, or ambiguity, in the law it is a well-known rule that

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[4] An amendment to the Master Plan alone would not be sufficient to grant the DEC authority to permit the proposed snowmobile trail to run through the wild river area of Chain Lakes Road South, however, because the Rivers Act similarly prohibits motor vehicle use in wild river areas (*see* ECL § 15-2709 [2] [a]).

the practical construction that has been given to a law by those charged with the duty of enforcing it, as well as those for whose benefit it was passed, takes on almost the force of judicial interpretation" (quotation marks omitted)]). The DEC nevertheless failed to abide by that unambiguous constitutional and statutory command. The Appellate Division order, therefore, should be reversed and the Chain Lakes UMP annulled.

POINT II

THE RIVERS ACT AND MASTER PLAN DO NOT PERMIT THE PROPOSED PUBLIC SNOWMOBILE TRAIL IN THE WILD RIVER AREA ON CHAIN LAKES ROAD SOUTH

Although the constitutional commands of the Forever Wild clause provide strong support for the conclusion that a snowmobile trail and motor vehicles may not be permitted on wild river areas in the Adirondack Park, this Court may also decide this case solely on non-constitutional statutory grounds. No complete and rational reading of the Rivers Act and Master Plan, entirely apart from any constitutional mandate, supports the Appellate Division majority's conclusion that the DEC has discretion to allow snowmobiling on Forest Preserve lands

designated as wild river areas that must "be managed in accordance with the guidelines for wilderness areas" (A.614).

Respondents nevertheless argue that the Rivers Act provides the DEC with "independent authority" to allow snowmobile use by the general public over the one-mile wild river area stretch of Chain Lakes Road South. The prohibition against any motor vehicle use in that area doesn't apply, Respondents claim, for two main reasons: (1) because the DEC possesses independent authority under the Rivers Act to disregard the land use commands of the Master Plan, and (2) because the Rivers Act's preexisting use exemption allows the continuation of the prior snowmobile use on the State-owned land, and the proposed snowmobile use of Chain Lakes Road South by the general public as part of the "community connector" trail system is not an expansion or alteration of the prior use.

Respondents, however, misconstrue the Rivers Act to provide the DEC with authority that it simply does not possess, and mischaracterize the fundamental intent and expanse of the Rivers Act's preexisting use exemption. Simply put, the DEC remains bound by the mandates of the Rivers Act and the Master Plan to prohibit all motor

vehicles and remove all existing roads and snowmobile trails in the wild river areas of the Adirondack Park.

A. The DEC Does Not Possess Independent Authority under the Rivers Act to Disregard the Commands of the Master Plan.

Respondents argue that the proposed snowmobile trail should be permitted to run across the one-mile stretch of wild river area on Chain Lakes Road South because the Rivers Act and the Master Plan recognize that the DEC has "independent" and "exclusive" authority to regulate wild river areas (*see* Resps' Brf, at 24-30). The DEC's authority under the Rivers Act is not as unlimited as Respondents suggest.

First, ECL § 15-2705, from which the Appellate Division majority derived this independent authority, merely divides the power to regulate wild river areas between the APA and the DEC. Its text makes that crystal clear: the APA has jurisdiction over wild river areas on private land in the Adirondack Park, while the DEC has "exclusive jurisdiction" over all other wild river areas, including on State-owned lands in the Adirondacks (ECL § 15-2705). It does not grant the DEC the right to ignore the commands of the Master Plan when adopting local unit management plans (*see* Executive Law § 816[1]). Indeed, to

adopt the Appellate Division's and Respondents' contrary construction would bring section 15-2705 into conflict with the command of Executive Law § 816 that local unit management plans must conform to the Master Plan, a result that should be avoided under settled statutory interpretation principles (*see e.g. Kaslow v City of New York*, 23 NY3d 78, 88 [2014] [rejecting statutory interpretation that would conflict with other provision of law]).

Second, the language in the Master Plan acknowledging the DEC's authority "independent of Master Plan" is not an admission that the Rivers Act preempts the Master Plan, as Respondents argue. Instead, it is an acknowledgement that the DEC has multiple sources of authority to regulate State land in the Adirondacks in addition to the provisions of the Master Plan, such as the Rivers Act (*see* ECL § 15-2705; *see also* ECL § 15-2721). Understanding that the DEC's multiple sources of power may, at times, conflict, the Legislature has already provided a solution to that problem. The conflicts provision of the Rivers Act provides that the strictest requirement will control (*see* ECL § 15-2721). Respondents' alternative construction, which would grant the DEC virtually limitless power to ignore the requirements of the Master

Plan in wild river areas, would render the Rivers Act's conflicts provision meaningless, a result that this Court should avoid (*see Artibee v Home Place Corp.*, 28 NY3d 739, 749 [2017] ["all parts of a statute are intended to be given effect and . . . a statutory construction which renders one part meaningless should be avoided" (quotation marks omitted)]).

Instead, DEC's multiple sources of authority over wild river areas on State-owned land in the Adirondacks should be read together to the extent possible. Indeed, both the Rivers Act and the Master Plan require the DEC to prohibit motor vehicle use in the wild river area on Chain Lakes Road South (*see* ECL § 15-2709[2][a]; 6 NYCRR § 666.13; A592, A614; *see also* ECL § 15-2703[7] [snowmobiles are motor vehicles under the Rivers Act]). The requirements only diverge if the Rivers Act's preexisting use exemption applies, because the Master Plan expressly rejects the notion that non-conforming uses may continue after the State acquires ownership (A.589). As demonstrated below, the Rivers Act preexisting use exemption does not apply to State-owned land (*see* Point II [B], *infra*). Thus, the Rivers Act and the Master Plan

require the DEC to do the same thing: prohibit the use of snowmobiles on the one-mile wild river area stretch of Chain Lakes Road South.

Even if the Rivers Act's and the Master Plan's requirements conflicted, however, the strictest requirement must control (*see* ECL § 15-2721). Applying the strictest requirement here means that no exceptions may undermine the rule prohibiting motor vehicle use in wild river areas. That is the only interpretation that gives meaning to all of the statutory provisions that govern land use on State-owned lands in the Adirondacks, and should be adopted by this Court.

B. The River Act's Preexisting Use Exemption Does Not Apply to State-Owned Land.

Both parties argue over whether the Rivers Act's preexisting use exemption allows DEC to open a State-owned wild river area of the Adirondack Park to public use for recreational snowmobiling. Respondents argue that it does. Petitioners contend that it does not. Respondents, however, miss the critical threshold issue: can the Rivers Act's preexisting use exemption even apply to State-owned land in the Adirondack Park. The text of the Rivers Act and the exemption's clear purpose show that it cannot.

Starting with the text of the statute, the words that the Legislature chose in crafting the Rivers Act's preexisting use exemption plainly establish that the Legislature intended only to grant an exemption for preexisting uses on *privately owned* land, not on State-owned land (*see Matter of Anonymous v Molik*, 32 NY3d 30, 37 [2018]). In particular, the Legislature provided:

> Notwithstanding anything herein contained to the contrary, existing land uses within the respective classified river areas may continue, but may not be altered or expanded except as permitted by the respective classifications, unless the commissioner or agency orders the discontinuance of such existing land use. *In the event any land use is so directed to be discontinued, adequate compensation therefor shall be paid by the state of New York either by agreement with the real property owner, or in accordance with condemnation proceedings thereon*

(ECL § 15-2709[2] [emphasis added]).

Although Respondents do not mention the sentence that the Legislature included following the preexisting use exemption, reading it together with the exemption, as this Court should (*see People v Silburn*, 31 NY3d 144, 155 [2018] ["An inquiry into the purpose of the statute requires examination of the statutory context of the provision as well as its legislative history" (quotation marks omitted)]), shows that the Legislature intended that the preexisting use exemption apply only to

private lands. Only private property may be condemned and the State can only agree with private property owners to pay compensation when a preexisting use of land that becomes subject to the Rivers Act must be discontinued. The State cannot condemn its own land or pay itself when the Rivers Act, as implemented through the Master Plan, commands that the State discontinue *all* preexisting non-conforming uses on State-owned lands. The only interpretation that comports with the Legislature's chosen text and the statutory context in which the preexisting use exemption is found is that the exemption cannot apply when, as here, the State owns the land.

That interpretation is consistent with this Court's recognition that the purpose of preexisting use exemptions generally is to protect against takings of the vested property rights of private owners (*see Glacial Aggregates LLC v Town of Yorkshire*, 14 NY3d 127, 135 [2010]). Unlike for private lands, private users of State-owned land cannot acquire any vested rights to continue preexisting uses over the constitutional and statutory commands that the State must eliminate all prior uses within the wild rivers areas of the Adirondack Park upon acquiring title to the lands (*see generally Haher's Sodus Point Bait*

Ship, Inc. v Wigle, 139 AD2d 950, 950 [4th Dept 1988] [holding that the petitioner could not obtain a vested right to continue certain docking activities in water that was owned by the State]). Thus, no vested property rights exist for a preexisting use exemption to protect when the State owns the land.

The only reported case to address this issue agrees that a preexisting private use of State-owned land cannot confer vested rights to continue the use thereafter. In *Matter of Helms v Diamond*, the petitioners, the owner and employee of an air taxi service on Long Lake, challenged a provision of the Master Plan that prohibited the landing of seaplanes on bodies of water wholly bounded by the State-owned land within the Adirondack Park (76 Misc 2d 253, 254 [Sup Ct, Schenectady County [1973]). The petitioners argued, among other things, that they should be permitted to continue landing seaplanes on these bodies of water because they had been operating the air taxi business for over 27 years and their present nonconforming use was exempted from agency review under Executive Law § 811.

Supreme Court, Schenectady County disagreed. Although the court noted that Executive Law § 811 provides that "[a]ny pre-existing

land use and development shall not be subject to review by the agency," it concluded that that provision "must be deemed to apply only to privately-owned land within the park, and not public land owned by the State" (*id.* at 257). In so holding, the court held that "[i]t is impossible under the Constitution for individuals to acquire vested rights in the forest preserve by means of adverse possession, long use, or a prescriptive right" (*id.* at 257-258).

Matter of Helms is directly on point and is strongly persuasive authority for the interpretation urged here. Despite Respondents' attempt to read the preexisting use exemption outside of its statutory context, the general public cannot acquire any vested right to continue a use that was permitted on private property previously, but that the Constitution, the Rivers Act, and the Master Plan command be forbidden in the Forest Preserve once the State acquires the property.

The State's duty here is clear. When it acquires property that is designated as a wild river area of the Adirondack Park, it must discontinue all preexisting uses that conflict with the Rivers Act and Master Plan requirements for wilderness areas and forbid all motor vehicles, without exception. That is what the Master Plan and the

Rivers Act commands. The Rivers Act's preexisting use exemption simply does not apply to the State-owned land at issue here. The Appellate Division holding to the contrary should be reversed.

C. Any Preexisting Use of the Wild River Area Portion of Chain Lakes Road South was Abandoned During The Nature Conservancy's Ownership and May Not be Reestablished.

Although Respondents have made much of the Schachner Report to attempt to demonstrate that snowmobiling was a preexisting use of the wild river area portion of Chain Lakes Road South, they and the Appellate Division below improperly disregarded the six-year period of TNC's ownership of the lands immediately before the State acquired title in 2013 (A.278). To qualify as a preexisting use of land, however, the alleged use must have been continuously maintained and not abandoned for any stretch of time before the State acquired the property (*see e.g. Matter of Toys R Us v Silva*, 89 NY2d 411, 421 [1996]).

For private lands, by analogy, the DEC has set the time limitation for abandonment of a preexisting use at one year. The DEC's table of use guidelines for private lands under the jurisdiction of the Rivers Act specifically provides that uses "lawfully existing" on the date when the wild river classification is first applied may be continued (6 NYCRR

§ 666.13[A][1]). A use that has been "discontinued for one year," however, may not be reestablished unless it can comply with the mandates of the Rivers Act and the Master Plan (*id.* § 666.13[A][3]). Even the DEC's regulations thus acknowledge that a discontinued private use in a wild river area cannot qualify as a preexisting use that may be reestablished under the Rivers Act's preexisting use exemption.

The most relevant period for determining what uses preexisted the State's acquisition of the land is from 2007 to 2013 when TNC owned the property. Both the Appellate Division majority and dissent, however, improperly ignored this period of time immediately before the State's ownership, and focused instead on the uses that existed on the land well before TNC owned the property (*see Adirondack Wild*, 161 AD3d at 176-177, 179-181). That was clear error. If the purported preexisting snowmobile use was not continuously maintained during the six years that TNC owned the property, then it cannot qualify as a preexisting use for purposes of the Rivers Act's exemption, even assuming, arguendo, the exemption applies to State-owned land.

Because any use of Chain Lakes Road South for snowmobiling by the general public was unquestionably terminated during the *six years*

that TNC owned the land, the prior private snowmobile uses should be deemed abandoned and cannot qualify as preexisting uses that could be reestablished. The lease agreements between TNC and the Gooley Club demonstrate that, regardless of the extent of the prior use of Chain Lakes Road South, the road certainly was not open to the public during TNC's ownership (A.725-751). Although the TNC lease permitted the use of motor vehicles on Chains Lake Road for a variety of purposes, including accessing the club's camp and removing game, it clearly limited that use solely to members of the lessee club (A.730-731). Specifically, the lease mandated that the Gooley Club provide a list of its members, including their names, titles, addresses, and phone numbers to TNC so that TNC knew who was "authorized to access the Lease Property" (A.734). Further, the club agreed "to legally post the Lease Property against trespass" (A.732). Certainly, it wouldn't have been necessary to keep a list of authorized members or post the property for trespass if the road was truly open to the public (*see generally People v Barnes*, 62 NY2d 986, 989 [2015] ["when a property is 'open to the public' at the time of the alleged trespass the accused is presumed to have a license and privilege to be present" (cleaned up)]).

Any preexisting public snowmobile use had, thus, been abandoned by the time the State took ownership of the Chain Lakes tract in 2013. Consequently, the DEC's proposed community connector snowmobile trail open to the public generally is a new use, not a preexisting one, and the Rivers Act's exemption for preexisting uses simply does not apply.

D. Opening the Wild River Area Portion of Chain Lakes Road South to Snowmobile Use by the General Public Constitutes an Expansion and Alteration of a Preexisting Use in Violation of the Plain Language of the Rivers Act.

Even assuming the Rivers Act's preexisting use exemption applies to State-owned land, and the preexisting snowmobile use has not been abandoned, the Appellate Division still erred in concluding that changing the use from private to public and vastly increasing the volume of snowmobile traffic on the wild river area of Chain Lakes Road South was not an expansion or alteration of the prior use, in violation of the Rivers Act.

Resolving this issue depends only on the plain meaning of the terms "altered" and "expanded" set forth in the Rivers Act (*see* ECL § 15-2709[2]), not any special expertise of the agency that would require this Court to defer to the DEC's interpretation (*see Matter Raritan Dev.*

Corp. v Silva, 91 NY2d 98, 102 [1997]). Indeed, turning a private road into a public one is a material alteration by definition, no matter the volume or nature of prior traffic (*see* Merriam-Webster Online Dictionary, alter [defining "alter" as "to make different without changing into something else"] [https://www.merriam-webster.com/dictionary/alter]).

Similarly, the DEC has admitted that the conversion of Chain Lakes Road South into a public community connector snowmobile trail will vastly expand the volume of snowmobiles that regularly traverse it (A.543; *see* Merriam-Webster Online Dictionary, expand [defining "expand" as "to increase the extent, number, volume, or scope of"] [https://www.merriam-webster.com/dictionary/expand]). That concession alone establishes that the DEC's proposed use violates the Rivers Act's prohibition on expansion of prior uses. Thus, the Appellate Division majority erroneously determined that the creation of the proposed community connector snowmobile trail that would be open for general public use was neither an "alteration" nor an "expansion" of the prior use by a private lessee of the property (and perhaps an occasional trespasser). The Appellate Division order should be reversed.

CONCLUSION

The Adirondack Council respectfully requests that this Court reverse the Appellate Division order and annul the DEC's approval of the Essex Chain Lakes UMP permitting the establishment of a snowmobile trail on the wild river area of Chain Lakes Road South.

Dated: January 7, 2019
Albany, New York

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CERTIFICATION PURSUANT TO RULE 500.13(C)(1)

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of this Court (22 NYCRR § 500.13[c][1]), I hereby certify that this brief was prepared on a computer using Microsoft Word 2016 and complies with the word count requirement of Rule 500.13(c)(1) because the total word count for all printed text in the body of the brief is 6,935.

Dated: January 7, 2019

Robert S. Rosborough IV

COURT OF APPEALS
STATE OF NEW YORK

ADIRONDACK WILD: FRIENDS OF THE FOREST PRESERVE and PROTECT THE ADIRONDACKS! INC.,

Petitioners-Appellants,

-against-

NEW YORK STATE ADIRONDACK PARK AGENCY; LEILANI ULRICH, in her capacity as Chairperson of the New York State Adirondack Park Agency; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; and BASIL SEGGOS, in his capacity as Acting Commissioner of the New York State Department of Environmental Conservation,

Respondents-Respondents.

AFFIDAVIT OF SERVICE

Albany County Index
No. 106-2016

Appeal No. 2018-112

STATE OF NEW YORK)
) ss:
COUNTY OF ALBANY)

MICHELLE GOLINSKI, being duly sworn, deposes and says as follows:

I am over 18 years of age and am not a party to the above-entitled action.

On February 14, 2019 I served two copies of the Brief of Amicus Curiae at the addresses designated by said attorneys for receipt of papers, by depositing true copies thereof in a postage-paid envelope in an official depository under the exclusive care and custody of the United States Postal Service at One Commerce Plaza, Albany, New York 12260, upon the following:

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Sworn to before me this
14th day of February 2019

Notary Public

Lisa D. Rice
Notary Public, State of New York
Qualified in Rensselaer County
No. 01RI4805553
Commission Expires May 31, 20 21