

HIGHWAY CONSTRUCTION ON THE NEW YORK STATE FOREST PRESERVE: PERMISSIBLE LIMITS AND ARBITRARY RESTRICTIONS

INTRODUCTION

The New York State Forest Preserve may be the most completely protected wilderness area in the United States. The forest preserve is protected by a state constitutional clause which is the strongest environmental law in the country. The preserve, composed of about 2.4 million state-owned acres in the Adirondack Mountains and half a million state-owned acres in the Catskill Mountains, is constitutionally mandated as "forever wild" land.¹ Lands within the forest preserve also may not be sold or exchanged by the state.² This protection is especially significant in the Adirondack Park, which is composed of more than six million acres of public and private land.³ The Adirondacks, located between the Mohawk River valley and the Canadian border, include the highest mountains in the state, several extensive lake systems, and numerous isolated ponds and rivers. The region is one of the few remaining wilderness areas east of the Mississippi River.

The strict provisions of the forever wild clause, incorporated into New York's constitution in 1895, have led to considerable debate over permissible uses of the forest preserve. The debate is complicated by the nature of the preserve—a patchwork of various sized parcels of land intermingled with privately held lands throughout the two mountainous areas.

1. N.Y. CONST. art. XIV, § 1.

2. *Id.*

3. The Adirondack Park and the state forest preserve are not coextensive, although the two often overlap. The park includes all lands, public and private, within described boundaries. For the precise boundaries, see N.Y. ENVTL. CONSERV. LAW § 9-0101(1) (McKinney 1984). The forest preserve includes only the state-owned lands within the enumerated forest preserve counties. N.Y. ENVTL. CONSERV. LAW § 9-0101(6) (McKinney 1984). The original legislation creating the park included only the state-owned lands within the park's boundaries. 1893 N.Y. Laws chap. 332. However, in 1912 the boundaries of the park were extended and private lands were included within the definition of the park. 1912 N.Y. Laws chap. 444, § 51.

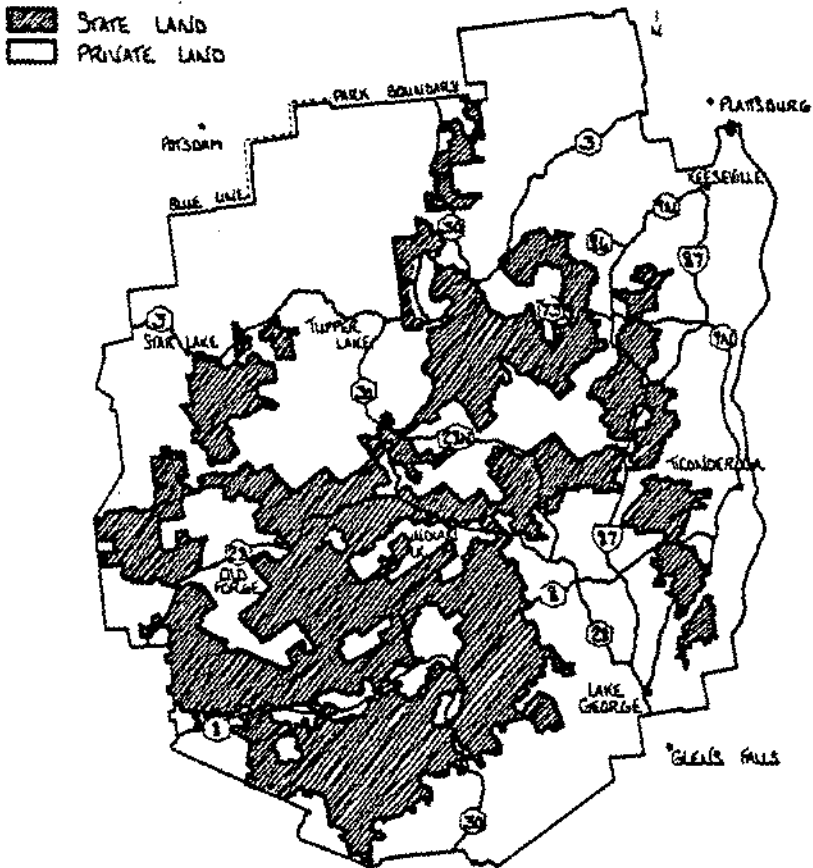


Figure 1. State-owned Land in the Adirondack Park*

* From Liroff and Davis, *Protecting Open Space: Land Use Control in the Adirondack Park*, Copyright 1981, Environmental Law Institute. Reprinted with permission from Balingier Publishing Company.

This aspect of the preserve exacerbates the difficulties inherent in protecting a wilderness area. The tension created by non-contiguous wilderness parcels can be seen in the slow evolution of legal rules concerning roads and highways that cross forest preserve lands. Because of the nature of the forest preserve many roads in the Adirondacks must cross both wilderness and non-wilderness parcels. The highways, many laid out before 1895, are necessary to the residents of the forest preserve counties and to the thousands of visitors who utilize the wilderness areas each year. At

the same time, improving, maintaining and building these highways may violate the state constitution, and more importantly, threaten the wilderness character of portions of the forest preserve.

This note examines the restrictions on building and maintaining highways which cross New York's forest preserve lands. The historical context of the forever wild clause of the state constitution and the resulting highway restrictions are examined, and current state policy in regulating highway work is critiqued. The major focus of the note is the differing rules regarding work on state highways and town and county highways and the reasons those rules are inconsistent. The note concludes that current state policy toward construction of town and county highways is not required by the constitution and should be changed.

I. THE FOREST PRESERVE AND THE FOREVER WILD CLAUSE

The state forest preserve was created by the New York State legislature in 1885.⁴ The forest preserve legislation also created the Forest Commission, the forerunner of the present State Department of Environmental Conservation, to oversee use of the preserve.⁵ The 1885 law was largely the result of pressure from downstate business interests which feared that destructive lumbering practices would damage the valuable Adirondack watershed.⁶ The law provided that the "lands now or hereafter constituting the Forest Preserve shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private."⁷ The lands constituting the forest preserve were those "now owned or hereafter acquired by the State

4. 1885 N.Y. Laws chap. 283.

5. *Id.* The agency responsible for the forest preserve went through a number of incarnations. At various times in its hundred year history it has been known as the Forest Commission; the Forest, Fish and Game Commission; the Conservation Commission; and the Department of Environmental Conservation. For the sake of simplicity, the agency will be referred to as the conservation department in this note. The department has the authority to "[e]xercise care, custody, and control" of the forest preserve. N.Y. ENVTL. CONSERV. LAW § 9-1015(1) (McKinney 1984).

6. F. GRAHAM, JR., *THE ADIRONDACK PARK: A POLITICAL HISTORY* 100 (1978). The State Chamber of Commerce and the New York Board of Trade and Transportation became active in supporting preservation of the Adirondack forests after a severe drought in 1883. The Adirondack region is the source of five major water basins: the Black River Basin, the Lake Champlain Basin, the Mohawk River Basin, the St. Lawrence River Basin, and the Hudson River Basin. Booth, *The Adirondack Park Agency Act: A Challenge in Regional Land Use Planning*, 43 GEO. WASH. L. REV. 612, 613 (1975).

7. 1885 N.Y. Laws chap. 283.

of New York within the counties of Clinton . . . Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster, and Sullivan."⁸

Statutory protection of the forest preserve proved inadequate in the ensuing decade. In 1887, the legislature authorized the conservation department to sell the smaller, separate parcels of preserve lands.⁹ The department was thus able to evade the prohibitions of the original legislation, and it began selling timber rights to lumber companies.¹⁰ In addition, the prohibition against cutting was openly ignored in some instances and mistakenly violated because of poorly marked property lines in others.¹¹ In 1893, the legislature authorized the conservation department to sell timber from any part of the forest preserve.¹² That law brought together the diverse interests which had objected to the legislature's handling of the preserve and resulted in the adoption of the forever wild clause.¹³

In 1894, a constitutional convention was called to revise the state constitution. Although there were no plans to discuss forest preserve issues at the convention, the same interests which had lobbied for the establishment of the preserve ten years earlier—frustrated at the ease with which the legislature amended the forest preserve legislation—succeeded in establishing a Committee on Forest Preserves at the convention.¹⁴ The committee drafted the forever wild clause which survives intact today. The clause, unanimously approved by the convention, was inserted into the new state constitution as article VII, section 7.¹⁵ In 1938, the state constitution was again revised and the clause renumbered as article 14, section 1, but otherwise left unchanged.

8. *Id.* The boundaries of the forest preserve are codified in N.Y. ENVTL. CONSERV. LAW § 9-0101(6) (McKinney 1984). Greene, Ulster and Sullivan Counties are in the Catskill Mountains and the other counties in the Adirondack region. State lands in the towns of Altona and Dannemora in Clinton County are excepted from the preserve because of the state prison in Dannemora. State lands within the limits of incorporated villages are also excepted from the preserve. *Id.*

9. 1887 N.Y. Laws chap. 639.

10. F. GRAHAM, JR., *supra* note 6, at 108. There were allegations of corruption against the members of the Forest Commission, especially Theodore Basselin, a Lewis County lumberman who may have sold lumber rights to his own company.

11. *Id.* at 109-10.

12. 1893 N.Y. Laws chap. 332.

13. See F. GRAHAM, JR., *supra* note 6, at 126.

14. *Id.* at 127.

15. *Id.* at 131.

The forever wild clause provides that:

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.¹⁶

The clause has been amended to provide a private right of action to any citizen who believes that the clause is being violated;¹⁷ to reserve a specific amount of preserve land for use as canals and reservoirs;¹⁸ and to allow forest preserve parcels of less than ten acres and entirely separate from other preserve lands to be used for specified non-wilderness purposes if those parcels are outside the Adirondack or Catskill Parks.¹⁹ The clause has also been amended a number of times to provide for specific exceptions to the dictates of the constitution, but these amendments have altered neither the wording nor the basic intent of the clause.²⁰ Included in these amendments are provisions for specific state highways across forest preserve lands²¹ and creation of a 400 acre "land bank" to allow "relocating, reconstructing and maintaining a total of not more than fifty miles of existing state highways for the pur-

16. N.Y. CONST. art. XIV, § 1. The forever wild clause differs from the 1885 statute in that the sale, removal or destruction of timber on preserve lands is prohibited by the constitution. The prohibition against selling or removing timber was a response to the legislature's end run around the statutory prohibition against selling or leasing preserve lands by authorizing the sale of timber rights with the state retaining actual possession of the land. F. GRAHAM, JR., *supra* note 6, at 125. The "destroyed" prohibition was added to the clause just prior to passage because of the lumbermen's practice of damming rivers to float logs to the saw mill. As a result of this practice, the backed-up water often flooded acres of forest land and killed thousands of trees. *Id.* at 130.

17. N.Y. CONST. art. XIV, § 4.

18. N.Y. CONST. art. XIV, § 2.

19. N.Y. CONST. art. XIV, § 3.

20. A proposed amendment to the New York Constitution must be passed by majority vote in each house of the legislature in two successive sessions, then approved by a majority of voters in a statewide referendum before becoming effective. N.Y. CONST. art. XIX, § 1. In 1941, the clause was amended to allow construction of a ski area on Whiteface Mountain; in 1947, it was amended to allow construction of ski areas on Belleayre Mountain and Gore, South, and Pete Gay Mountains. Constitutional amendments in 1963, 1965, 1979, and 1983 allowed the state to exchange specified forest preserve lands for non-state wilderness lands within the forest preserve counties.

21. In 1918 voters approved construction of a highway from Old Forge to Saranac Lake; in 1927, construction of a highway to the summit of Whiteface Mountain was approved; in 1933, construction of a highway from Indian Lake to Speculator was approved; and in 1959 voters approved construction of the Adirondack Northway, an Interstate highway running from Albany to the Canadian border.

pose of eliminating the hazards of dangerous curves and grades."²²

II. INTERPRETING THE FOREVER WILD CLAUSE

Although the forever wild clause has rarely been interpreted by the courts,²³ the practical effect of the clause has been to preclude both cutting timber on the forest preserve and transferring forest preserve lands. Perhaps this is because the language is clear and unambiguous. Early cases concerning the clause addressed whether a particular tract fell within the ambit of the provisions, not whether a particular use of the preserve was permissible under the constitution.²⁴ Permissible uses of the forest preserve were generally interpreted by the state attorney general.²⁵ The attorney generals' interpretations of permissible highway uses of preserve lands went through two distinct phases before the New York Court of Appeals had an opportunity to interpret the meaning of the clause.

22. N.Y. CONST. art. XIV, § 1 (as amended 1957).

23. In 1930 the Appellate Division of the New York Supreme Court complained that "[t]here is but little aid given to us by previous judicial discussion of the constitutional provision in question." *Association for the Protection of the Adirondacks v. MacDonald*, 228 A.D. 73, 80, 239 N.Y.S. 31, 38 (1930). Almost fifty years later the Hamilton County Supreme Court echoed this complaint, stating that "[t]here is almost a total absence of court decisions construing this important provision in our State Constitution . . ." *Helms v. Reid*, 90 Misc. 2d 583, 586, 394 N.Y.S.2d 987, 992 (1977).

A possible reason why forest preserve disputes are infrequently litigated is that, because control of the preserve is given to a state agency, most use controversies occur internally—either within the conservation department itself or between various state agencies. Those internal disputes are settled within the executive branch, either informally or through attorney general opinions.

24. *See, e.g., People v. Adirondack Ry. Co.*, 160 N.Y. 225, 54 N.E. 689 (1899), *aff'd*, 176 U.S. 335 (1900) (A lien on property filed by a railway company is ineffective to prevent the state from acquiring that property as part of the forest preserve); *People v. Brooklyn Coöperage Co.*, 187 N.Y. 142, 79 N.E. 866 (1907) (The forever wild clause does not apply to a 30,000 acre tract of forest land because legal title to the land has not yet vested in the state); *People v. Fisher*, 190 N.Y. 468, 83 N.E. 482 (1908) (Wild forest lands acquired by the state within the forest preserve counties are part of the forest preserve even though acquired under statutes relating to canals).

25. Attorney general opinions are not binding authority on New York courts. *American Telephone and Telegraph Co. v. State Tax Commission*, 61 N.Y.2d 393, 404, 462 N.E.2d 1152, 1157, 474 N.Y.S.2d 434, 439 (1984). The rule is codified by the following proscription: "Courts should not blindly follow the rulings of executive or administrative officers in construing statutes." N.Y. STATUTES § 129(b) (McKinney 1971). A practical construction of a law by such an officer is entitled to great weight, particularly if followed for a long period of time, but it is not binding. *Ferraiolo v. O'Dwyer*, 302 N.Y. 371, 98 N.E.2d 563 (1951), *reh. denied*, 302 N.Y. 841, 100 N.E.2d 39 (1951). Thus, attorney general opinions on the forest preserve issues are entitled to consideration if cited to a court, but would be minimal authority since few have been followed for long.

During the first phase of interpretation, the attorney general opinions held that highway construction was not permitted under the constitution. This meant that new highways could not be built on forest preserve lands;²⁶ that existing highways could only be improved within the limits of the right of way;²⁷ and that materials could not be taken from preserve lands in order to repair or improve existing rights of way.²⁸ The common threads running through the opinions were that destruction of so much as a single tree on preserve lands would be unconstitutional,²⁹ and that local governments could not acquire rights of way across the preserve because the constitution forbade transfer of forest preserve lands to both public and private corporations.³⁰

A 1907 opinion by the attorney general is representative of this early phase of interpretation.³¹ In that opinion the attorney general responded to a request from the state highway engineer regarding the procedure for building highways across forest preserve lands by ruling that such construction was impermissible.³² He relied on general highway law in rendering his opinion.³³ However, he also cited the constitution as support for his conclusion, stating that the forever wild clause prohibited construction of new highways across the preserve.³⁴ The attorney general admitted in the opinion that existing statutes authorized the conservation department to "lay out paths and roads" within the preserve, but stated that the power was limited by the constitution.³⁵ He also expressed concern that allowing highway rights of way to be acquired across the preserve would open the door to misappropriation of preserve lands.³⁶ In addition, the attorney general believed highway construction might undermine the wilderness character of the preserve.³⁷ Therefore, according to the opinion, a constitutional amendment was required before a new highway could be built us-

26. Op. Att'y. Gen. 327, 335 (1907).

27. Op. Att'y. Gen. 190, 191 (1915).

28. Op. Att'y. Gen. 766, 768 (1910).

29. Op. Att'y. Gen. 327, 335 (1907).

30. Op. Att'y. Gen. 663, 665 (1909).

31. Op. Att'y. Gen. 327, 334 (1907).

32. *Id.* at 335-36.

33. *Id.* at 333.

34. *Id.* at 334-35.

35. *Id.* at 334 (citing 1892 N.Y. Laws chap. 707).

36. *Id.* at 335.

37. *Id.*

ing preserve lands.³⁸

The early attorney general opinions, although not binding authority, were important because they articulated the state's policy toward highway construction on the preserve. In addition, the 1907 opinion led to the 1918 and 1927 amendments authorizing construction of specific highways across preserve lands. The New York Court of Appeals would later treat these amendments as a "fair conclusion" that the constitution had to be amended before new roads could be built across the preserve.³⁹ Thus the early opinions effectively established an interpretation of the forever wild clause which exists today.

The second phase of interpretation began in 1919 when the attorney general ruled that the constitution did not limit the conservation department's authority to allow improvement of existing roads through the preserve even though several trees would have to be cut in the process.⁴⁰ He based his opinion upon forest preserve legislation enacted both before and after the preserve was cloaked in constitutional protection.⁴¹ The opinion began by examining the legislation which preceded the 1894 constitutional convention. The attorney general pointed to the original forest preserve legislation and noted that the conservation department could not "prevent the free use of any road . . . heretofore used or as may be required in the prosecution of any lawful business."⁴² The opinion also noted that the 1892 Adirondack Park legislation empowered the conservation department to "*lay out paths and roads.*"⁴³ According to the attorney general, the 1893 legislation revising the department's powers preserved these two provisions.⁴⁴ The issue, therefore, was whether the constitution denied this power to the legislature and the conservation department. The attorney general argued that it did not because the constitutional prohibition against cutting applied only to commercial lumbering, not to cutting for road building.⁴⁵ The attorney general reasoned that if such cutting had been prohibited by the forever wild clause, the depart-

38. *Id.*

39. *Association for the Protection of the Adirondacks v. MacDonald*, 253 N.Y. 234, 240, 170 N.E. 902, 904 (1930).

40. *Op. Att'y Gen.* 266, 276-77 (1919).

41. *Id.* at 267-71.

42. *Id.* at 268 (quoting 1885 N.Y. Laws chap. 283).

43. *Id.* at 269 (quoting 1892 N.Y. Laws chap. 707).

44. *Id.* at 270 (quoting 1893 N.Y. Laws chap. 332).

45. *Id.* at 274.

ment's road building power would have been expressly revoked.⁴⁶ Thus, although the forever wild clause prohibited local governments from acquiring highway rights of way across the preserve, the legislature retained the power to permit the department to construct highways across preserve lands.⁴⁷

The 1919 opinion then cited a number of post-1895 legislative enactments dealing with forest lands, none of which expressly revoked the power from the department.⁴⁸ The attorney general, reasoning that in the absence of judicial interpretation of the constitution the legislature's interpretation was entitled to great deference,⁴⁹ concluded that the planned project was permissible.⁵⁰

This interpretation of the forever wild clause has never been tested in court. If the interpretation had been challenged, however, it would likely have been rejected. The argument hinges on whether the drafters of the clause intended to remove the power to construct highways across the preserve from the legislature. The records of the constitutional convention indicate that the drafters had such an intention.⁵¹ Even if the attorney general could succeed with his argument that legislative interpretation is as important as the drafters' intent, his conclusion that the legislature thought it retained the power to authorize the department's road building power does not withstand close scrutiny. The post-1895 legislation cited in the opinion does not expressly authorize the department to exercise such power. Rather, it merely consolidates the department's existing powers, with no indication by the legislature that the power to build roads was among those existing powers. The legislative history argument advanced by the attorney general is not, of itself, sufficient to overcome the intent of the drafters and the constitutional interpretation expressed during the first phase of attorney general opinions.

Two years later, the legislature passed a law expressly authorizing the state highway department to use forest preserve lands to

46. *Id.*

47. *Id.*

48. *Id.* at 275-76.

49. *Id.* at 276-77 (citing *People v. Green*, 2 Wench. 274, 275 (1829)).

50. *Id.* at 277.

51. REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, MAY 8, 1894 TO SEPTEMBER 29, 1894 140 (1900) [hereinafter cited as RECORDS]. Convention Chairman Joseph Choate asked Committee on Forest Preserves Chairman David McClure whether the scope of the clause would prevent the legislature from authorizing a railroad or a highway across the preserve. McClure replied that it would, even in the case of necessity.

construct or repair specified state and county highways.⁵² The law provided that:

In order that the forest preserve of the state shall be made more accessible to all of the people of the state, that it be protected from destruction by forest fire, that better means of communication be provided for such fire protection and for policing such preserve for the protection of wildlife and the general safety, the state commission of highways and its duly authorized agents are hereby authorized to occupy a right of way over such state lands in the forest preserve as are necessary to construct or improve the state and county highways . . . designated.⁵³

The preamble of the law expressed what came to be known as the "public use" doctrine of permissible activities on the preserve.⁵⁴

This law would have provided an excellent opportunity for authoritative interpretation of the forever wild clause. The validity of the law has been questioned in three recent articles,⁵⁵ and the

52. 1921 N.Y. Laws chap. 401. The law explicitly authorized the construction and repair of highways designated in 1921 N.Y. Laws chap. 18 which ran across the forest preserve. Five state and five county highways designated in chapter 18 were incorporated into chapter 401. *See id.*

53. *Id.*

54. The public use principle has been traced to the Court of Appeals' statement in *People v. Adirondack Ry. Co.*, 160 N.Y. 225, 247, 54 N.E. 689, 696 (1899), that the preserve was for the use and enjoyment of the people of the state. Note, *Permissible Uses of New York's Forest Preserve Under "Forever Wild"*, 19 SYRACUSE L. REV. 969 (1968). The author criticized the legislature's use of the doctrine in the 1921 statute because the law was an indirect application of the principle: Highways transport people to and through the preserve, but do not necessarily involve the actual use of the preserve by the public. *Id.* at 978. The principle has been used to justify construction of campsites and pedestrian trails on the preserve, but other public uses, such as ski areas, have required constitutional amendments. *Id.* at 978-80.

Another commentator has addressed the 1921 highway law within the rubric of the inconsistent purposes doctrine. *See* Glennon, *State Acquisition in the Adirondacks: The Inconsistent Purposes Doctrine and Related Legal Issues* (Dec. 4, 1982) (unpublished manuscript presented to the Colloquium on Historic Preservation Issues in the Adirondack Park, Union College, Schenectady, N.Y.) (copy on file at Vermont Law Review Office, Vermont Law School, South Royalton, Vt.). Under the inconsistent purposes theory, the state may use lands which would otherwise become part of the forest preserve for non-wilderness purposes if, in acquiring the land, the state specified the precise inconsistent use intended. Thus, the state might acquire highway rights of way by specifying that it intended to use the land for a highway. However, Glennon argues that the inconsistent purposes doctrine does not exist. *Id.* at 14-32. Even if the courts did accept the inconsistent purposes doctrine, the argument would not be very useful with respect to highways because the state must specify its intentions when it acquires the land. Since most highways would be built over land the state already owns, the doctrine is of little use.

55. Glennon, *supra* note 54, at 25-26; Note, *supra* note 54, at 978; VanValkenburgh,

plain meaning of the clause, as well as the debate at the constitutional convention,⁵⁶ provide a foundation for an argument that the law was invalid under both the spirit and the letter of the constitution.⁵⁷ Unfortunately, no legal challenge was forthcoming in 1921. Instead, the conservation and highway commissioners turned to the attorney general for an opinion on the law's validity.⁵⁸

The attorney general ruled that the law was constitutional because the purposes of the law were consistent with the purpose of the forever wild clause—preservation of the wilderness character of the preserve.⁵⁹ The attorney general listed the three purposes of the statute as making the forest preserve more accessible to the people of the state, for whom the area was preserved;⁶⁰ protection of the preserve from forest fires;⁶¹ and protection for owners of private property within the forest preserve counties.⁶² The opinion also emphasized a basic tenet of constitutional interpretation: a law is presumed valid and will be upheld by the courts unless it cannot be reconciled with the constitution.⁶³ Because the purpose of the forever wild clause was to prevent the destruction of the forest preserve, the attorney general concluded that a law which protected the preserve was consistent with the constitution, and therefore valid.⁶⁴

The attorney general acknowledged that previous attorney general opinions took an opposing view toward highway construction and repair, but stated that those opinions were not binding.⁶⁵

Right of Way Acquisitions in Forest Preserve Areas 5 (Feb. 2, 1973) (unpublished manuscript presented to a meeting of town highway superintendents) (copy on file at Vermont Law Review Office, Vermont Law School, South Royalton, Vt.).

56. See *supra* note 51 and accompanying text.

57. The argument is that the forever wild clause denied the legislature the authority to regulate the preserve. The legislature's remaining discretion with regard to the forest preserve must be exercised within the narrow limits of the clause. Thus, even if the public use doctrine gives the legislature some flexibility, extensive tree cutting is prohibited no matter what use is sought. See Note, *supra* note 54, at 988. In *Association for the Protection of the Adirondacks v. MacDonald*, 253 N.Y. 234, 170 N.E. 902 (1930), the New York Court of Appeals adopted a similar argument by implying that highway maintenance was permissible so long as trees were not removed to a material degree. See *infra* notes 75-89 and accompanying text.

58. Op. Att'y. Gen. 130 (1921).

59. *Id.* at 132-34.

60. *Id.* at 133.

61. *Id.* at 133-34.

62. *Id.* at 134.

63. *Id.* at 134-35.

64. *Id.* at 138.

65. *Id.* at 143-44.

He concluded that the early attorney general opinions were erroneous because they adopted an overly strict construction of the forever wild clause.⁶⁶ According to the attorney general, the purpose of the forever wild clause was to prevent the "wholesale destruction of living trees . . . not such incidental cutting . . . necessary . . . in establishing a system of highways in the forest preserve."⁶⁷ Because he thought the roads were necessary to protect the forest, the attorney general concluded that the early interpretations would result in "absurd or evil consequences" and therefore must be wrong.⁶⁸

The opinion also sought to explain why the 1918 amendment authorizing construction of a highway from Old Forge to Saranac Lake was necessary if the legislature had retained the power to build such highways. According to the opinion, that amendment was a precautionary measure taken because of the erroneous early attorney general opinions.⁶⁹ Finally, the attorney general stated that if the legislature could delegate authority over the preserve to the conservation department, it could also delegate such authority to the highway department.⁷⁰

Unlike the legislative history argument posed in the 1919 attorney general opinion, the consistent purposes rationale is persuasive. The plain purpose of the forever wild clause is to preserve the state's wild forest lands. If those lands were preserved for the use of the people,⁷¹ it is difficult to argue that roads which both protect the preserve and make it more accessible cannot be built, even if some trees have to be removed to do so. In one sense, highways are inconsistent with the notion of a wilderness area. However, the Adirondack forest preserve cannot be considered a true wilderness area because of the non-contiguous nature of preserve parcels. The key to the argument in the 1921 attorney general opinion is the implicit rationale that however laudable the drafter's desire to forbid highways across preserve lands, that intention was frustrated by the intermingling of private and public lands. This implicit rationale is supported by evidence that in 1895 there was hope that the then sparsely populated private lands in the forest preserve

66. *Id.* at 144.

67. *Id.*

68. *Id.* at 145.

69. *Id.* at 147-48.

70. *Id.* at 135.

71. *People v. Adirondack Ry. Co.*, 160 N.Y. at 247-48, 54 N.E. at 696.

counties could be acquired by the state and the forest preserve made into a unified wilderness area.⁷² However, that hope was extinguished by 1921.⁷³ Therefore, the drafters' intent with regard to highways could not operate to prohibit highway construction. Instead, the limits to highway construction must be determined by reference to the underlying purpose of the forever wild clause. Because the purpose of the clause is to preserve the state's wilderness regions, a law which protects those regions is not invalid simply because it is inconsistent with an intent that has already been frustrated. In addition, a forever wild clause was adopted before the automobile became the prevalent mode of transportation in this country.⁷⁴ Once past the initial step of neutralizing the drafters' statements regarding highway construction, it requires no great logical leap to conclude that safe highways ought to be provided for travelers.

The 1921 attorney general opinion is noteworthy because it heralded the switch from the drafters' intent to the underlying rationale of the clause as the starting point for interpreting the clause. By the end of the decade the state's highest court adopted such a view when addressing the clause.

III. *MacDonald* AND THE MATERIAL CUTTING DOCTRINE

The next development regarding the permissible uses of the forest preserve was brought about by the 1932 Winter Olympics in Lake Placid. In 1929, the legislature passed a law authorizing the conservation department to construct a bobsled run on forest preserve lands in Essex County.⁷⁵ The preamble to the law alluded to the public's use of the forest preserve, stating that the law was enacted "[t]o induce the people to visit and enjoy the wild forest lands of the state, to stimulate public interest in preserving them for the scenic and recreational purposes for which they were set

72. The 1885 forest preserve legislation was undertaken with the idea that the state could acquire from one million to four million acres for a unified forest preserve. F. GRAHAM, JR., *supra* note 6, at 99-103. Such proposals presaged the effort for constitutional protection for the forest preserve in the 1890's. *See id.* at 121-22. The idea of a unified park weakened after the turn of the century as the legislature decreased appropriations for acquisition of forest preserve land. *Id.* at 150.

73. *Id.* at 150-51. Realists at the conservation department knew that a unified park was impossible at the turn of the century. *Id.*

74. The first automobile did not reach the central Adirondacks until 1906. F. GRAHAM, JR., *supra* note 6, at 144.

75. 1929 N.Y. Laws chap. 417.

apart as wild forest lands"⁷⁶ Shortly after the law was enacted, the attorney general, without explanation, ruled that the law did not violate the constitution.⁷⁷ The Association for the Protection of the Adirondacks⁷⁸ brought suit against the conservation commissioner to enjoin construction of the bobsled run.⁷⁹ The trial court held the statute unconstitutional because a bobsled run was inconsistent with the wilderness character of the preserve.⁸⁰ The conservation department then appealed the decision to the New York Court of Appeals.⁸¹

The Court of Appeals began its discussion of the case by stating that the constitution should be interpreted in light of the drafters' purpose, and not with regard to the particular words they used.⁸² The court noted that the purpose of the forever wild clause was to protect the forest preserve, not to prohibit the cutting of so much as a single tree.⁸³ With these considerations in mind, the court stated that necessities such as "repairs to roads" were permitted by the constitution if such repairs did not result in "removal of timber to any material degree."⁸⁴ However, the court cited the two highway amendments to the forever wild clause as evidence that the power to construct new highways was conferred by the people, not the legislature.⁸⁵ The court concluded that it

76. *Id.*

77. Op. Att'y. Gen. 203 (1929). The attorney general stated that "[u]nfortunately there has been little or no judicial discussion of the questions involved and I regard {the} inquiry as affording an excellent opportunity for . . . obtaining . . . a judicial interpretation of this section of the [c]onstitution." *Id.* Thus, the attorney general ruled the statute valid for the express purpose of getting the question before the courts. *Id.* at 204.

78. The group, founded in 1902, was regarded as the watchdog of the Adirondacks. F. GRAHAM JR., *supra* note 6, at 107.

79. *Association for the Protection of the Adirondacks v. MacDonald*, 228 A.D. 73, 239 N.Y.S. 31 (1930).

80. *Id.* at 82, 239 N.Y.S. at 240.

81. *Association for the Protection of the Adirondacks v. MacDonald*, 253 N.Y. 234, 170 N.E. 902 (1930).

82. *Id.* at 238, 170 N.E. at 904. *MacDonald* has been cited as often for its statement on constitutional interpretation as for its discussion of forest preserve issues; a point that emphasizes the paucity of judicial interpretation of the forever wild clause. *See, e.g.*, *People v. Fine*, 173 Misc. 1010, 1011, 19 N.Y.S.2d 275, 278 (1940); *Canteline v. McClellan*, 258 A.D. 314, 316, 16 N.Y.S.2d 792, 795 (1939), *aff'd* 282 N.Y. 166, 25 N.E.2d 972 (1940); *Matter of Fay*, 291 N.Y. 198, 207, 52 N.E.2d 97, 98 (1943); *Zimmerman v. State*, 76 Misc. 2d 193, 197, 48 N.Y.S.2d 727, 728 (1973); *Alacqua v. Baudanza*, 110 Misc. 2d 774, 780, 443 N.Y.S.2d 792, 796 (1981).

83. *MacDonald*, 253 N.Y. at 239, 170 N.E. at 904.

84. *Id.* at 238, 170 N.E. at 904.

85. *Id.* at 240, 170 N.E. at 904. Although the court did not dwell on the issue, a possible explanation for requiring an amendment before a new highway may be built is David Mc-

was not necessary to determine which highway repairs were permissible and which were not.⁸⁶ With regard to the specific issue before it, the court held that the bobsled run could not be constructed on preserve lands without violating the constitution because such construction would infringe on the forest preserve to a material degree and might open the door to other abuses in the name of sport.⁸⁷

The court thus modified the strict construction of the forever wild clause without entirely adopting the liberal interpretation advocated in the 1921 attorney general opinion. The decision permitted the legislature to authorize public uses of the park, subject to the limitations imposed by the constitution. Specifically, trees could not be cut to a "material degree" in pursuit of an otherwise permissible public use. The court's discussion of golf, lawn tennis and other sports indicates that "material degree" ought to be determined in conjunction with the public use sought.⁸⁸ Thus, while a certain amount of cutting for a golf course might be material, removal of the same number of trees in that same area for a highway might not be material. However, the limits of legislative discretion would have to be considered on a case-by-case basis. For all practical purposes, the determination of permissible uses was returned to the attorney general's office.⁸⁹

One year after *Association for the Protection of the Adirondacks v. MacDonald*⁹⁰ the attorney general was asked whether forest preserve lands could be used in the reconstruction of an Essex County highway.⁹¹ The attorney general determined that in light of

Clure's statement at the constitutional convention that the forever wild clause would prohibit the legislature from building new highways across preserve lands. See *supra* notes 71-74 and accompanying text.

86. *Id.* at 240, 170 N.E. at 904-05.

87. *Id.* at 242, 170 N.E. at 905.

88. *Id.* at 241-42, 170 N.E. at 905.

89. After *MacDonald*, various attorneys general applied the decision allowing reconstruction of an existing highway in Essex County, Op. Att'y. Gen. 142, 145 (1931); disallowing the same on an existing highway in Essex County, Op. Att'y. Gen. 394, 396-97 (1933); allowing construction of a road on existing trail near Long Lake, Op. Att'y. Gen. 369, 371 (1933); allowing construction of ski trails on forest preserve lands, Op. Att'y. Gen. 267, 270 (1934); allowing removal of trees to open up scenic vistas on pedestrian trails, Op. Att'y. Gen. 274, 275 (1935); barring public use of truck trails constructed for fire prevention, Op. Att'y. Gen. 300, 301 (1935); and allowing removal of sand and gravel from preserve lands so long as no trees were cut and the character of the terrain was not seriously marred. Op. Att'y. Gen. 251, 253 (1936).

90. 253 N.Y. 234, 170 N.E. 902 (1930).

91. Op. Att'y. Gen. 142 (1931).

MacDonald the lands could be used. He stated that use of small areas of state-owned land and cutting of a reasonable number of trees was permissible "to eliminate dangerous curves or secure favorable grades."⁹² According to the opinion, the legislature was permitted to "do all proper and reasonable things necessary to open up the forest preserve for the use and safety of the public."⁹³ Therefore, the attorney general concluded, repairing a highway pursuant to the 1921 highway law was constitutional.

This opinion is significant because it directly addressed the interests of the Adirondack residents and permissible uses of the forest preserve for the first time. The opinion stated that:

For many years the Adirondack region was sparsely populated. The people living within its boundaries were engaged principally in lumbering the forests and only ordinary dirt highways were built. This type of highway was sufficient to meet the traffic demands of the time. They were narrow and little attention was given to avoiding curves and unfavorable grades. Conditions existing at that time are radically changed. Where a few years ago there was only a small number of settlements there are now many towns and villages and there is also a considerable population covering the whole area. A large number of permanent homes have been built and are occupied throughout the year and a much larger number of permanent summer homes which are occupied several months each year. There are also numerous hotels to accommodate visitors. Many improved state and county highways have been constructed by means of which nearly every point of consequence can be reached. Hundreds of thousands of people visit the Adirondacks annually. Travel is almost entirely by automobile.⁹⁴

However, the same attorney general who wrote the above opinion disregarded the notion of public convenience when faced with a similar question one year later.⁹⁵ Asked if the 1921 highway statute enabled the highway department to reconstruct and relocate portions of the highway from Lake Placid to Saranac Lake, the attorney general responded that the work was not permitted under the forever wild clause because material cutting was in-

92. *Id.* at 144.

93. *Id.*

94. *Id.* at 143.

95. *Op. Att'y. Gen.* 394 (1933).

volved.⁹⁶ This opinion is objectionable not because of its result, but because the author did not address the issue in terms of the material cutting doctrine evolving from *MacDonald*. The opinion did not examine the reasonableness of the number of trees removed relative to the end sought, but instead took a strict numerical view of how much cutting was material. The attorney general assumed that the work was impermissible without referring to the end sought, stating that "expediency or desirability play no part" in determining constitutionality.⁹⁷ This was a narrow application of the material cutting doctrine and the result was almost as onerous as the strict interpretation of the forever wild clause.

Subsequent attorney general opinions meandered back and forth between broad and narrow interpretations of *MacDonald*. One approved construction of a ski trail because "what would amount to a material infraction . . . for commercial or business purposes might not amount to material infringement" for public purposes.⁹⁸ Another rejected the use of three miles of preserve land for relocating a state highway without even asking how many trees would need to be cut.⁹⁹ The unfortunate result was that a coherent test for determining the constitutionality of any particular highway project did not evolve and the attorney general continued to decide each case on an *ad hoc* basis. This practice continued until the conservation department, using a 1937 amendment to the 1921 highway law,¹⁰⁰ began to take matters into its own hands in determining whether town and county highways across the preserve could be repaired or improved.¹⁰¹ The interpretive difficulties with respect to state highway repair were resolved in 1957 by the land bank amendment to the forever wild clause.¹⁰²

IV. CURRENT FOREST PRESERVE HIGHWAY POLICY

The 1957 amendment to the forever wild clause created a 400 acre land bank to allow "relocating, reconstructing and maintaining a total of not more than fifty miles of existing state highways for the purpose of eliminating the hazards of dangerous curves and

96. *Id.* at 397 (citing *MacDonald*, 253 N.Y. at 242, 170 N.E. at 905).

97. *Id.* at 396.

98. Op. Att'y. Gen. 267, 269 (1934).

99. Op. Att'y. Gen. 166 (1948).

100. 1937 N.Y. Laws chap. 488.

101. See VanValkenburgh, *supra* note 55, at 5.

102. N.Y. CONST. art. XIV, § 1 (as amended 1957). See *supra* note 22.

grades."¹⁰³ This amendment clarified the requirements for state highway construction and repair on forest preserve lands. *MacDonald* had already established that an amendment is required before new roadways may be built using preserve holdings.¹⁰⁴ Although *MacDonald* indicated that highway repairs were permitted so long as a material number of trees were not cut, there was considerable confusion over the application of the material cutting doctrine.¹⁰⁵ The land bank amendment is important in that it eliminated the material cutting doctrine as a factor in determining the constitutionality of any state highway repair project. In its stead, the amendment created a reserve to insure that road work would not unduly encroach on preserve lands. The state highway department need not use the lands set aside by the amendment when making repairs within an existing right of way,¹⁰⁶ but if the work takes place outside the right of way the acreage used in the work must be deducted from the land bank.¹⁰⁷ Thus, state highways may be widened at the discretion of the highway department, but relocations of portions of the highway to avoid curves and grades requires an offsetting reduction in the allotment. The highway department must therefore be judicious in planning highway work. While this may result in the retention of some curves and grades that might otherwise be removed, it results in careful consideration of the need for reconstruction. In this way, truly dangerous areas will be repaired or replaced without threatening the forest preserve as a whole. More than a quarter century after the amendment was adopted, approximately half the original allotment remains unused.¹⁰⁸

The land bank amendment strikes a balance between protecting the forest preserve's wilderness character and allowing needed highway repair. By sidestepping the material cutting prohibition, the highway department can maintain state highways which cross the preserve without worrying about violating the constitution. The end result is a coherent policy that protects both the wilderness character of the preserve and the traveler using the highways which cross it.

103. *Id.*

104. *MacDonald*, 253 N.Y. at 239-40, 170 N.E. at 904.

105. See *supra* notes 90-101 and accompanying text.

106. Telephone interview with Joseph LaSpisa, General Park Superintendent, New York State Department of Environmental Conservation (Oct. 10, 1984).

107. *Id.*

108. *Id.*

The policy toward town and county highways that cross the preserve, however, is neither coherent nor rational. If a town or county owns fee title to the strip of land containing the highway, the forever wild clause dictates do not apply because the land is not part of the forest preserve.¹⁰⁹ When the municipality holds the highway strip by easement or prescription, however, the conservation department regulates repairs and reconstruction of such highways under the 1937 highway statute.¹¹⁰ The statute provides that:

In the event that it is feasible or necessary to maintain, reconstruct or improve county roads and town highways now existing in the forest preserve, the county or town superintendent of highways . . . [is] hereby authorized to occupy a right of way over such state lands as may be required in the maintenance and/or reconstruction or improvement of such county roads and town highways, subject to the approval of the superintendent of public works and the conservation commissioner.¹¹¹

The conservation department has interpreted this edict to mean that local governments cannot use preserve lands outside the existing rights of way.¹¹² Local governments may perform routine repairs, such as repaving, ditch clearing and culvert replacement, within the existing road surface without a conservation department permit, but any work done beyond the road surface and within the existing right of way requires a permit from the department.¹¹³ The rationale behind this policy is that the state holds the forest preserve lands, and the trees on those lands, in trust for the people of the state.¹¹⁴ Although the land may be encumbered by an easement, the land and trees remain the property of the people, and are thus subject to the dictates of the forever wild clause.¹¹⁵

The permit process requires an application to the regional conservation department office by the town or county desiring to do road work.¹¹⁶ The regional forester will inspect the site and attempt to limit intended tree cutting wherever possible.¹¹⁷ The ap-

109. VanValkenburgh, *supra* note 55, at 8.

110. *Id.* at 5.

111. 1937 N.Y. Laws chap. 488.

112. *Flacke v. Town of Fine*, 113 Misc. 2d 56, 60, 448 N.Y.S.2d 359, 362 (Sup. Ct. 1982).

113. *Id.* at 59, 448 N.Y.S.2d at 361.

114. VanValkenburgh, *supra* note 55, at 9.

115. *Id.*

116. *Flacke*, 113 Misc. 2d at 59, 448 N.Y.S.2d at 362.

117. *Id.*

plication is then forwarded to Albany for final approval.¹¹⁸ Thus the permit process serves one of the functions of the land bank amendment—minimum tree removal through carefully considered planning of highway repairs. The permit process differs from the land bank concept, however, in that the towns and counties are not permitted to go beyond the existing rights of way in making highway repairs.

The conservation department's authority to regulate repair of town and county highways in this manner was tested in *Flacke v. Town of Fine*.¹¹⁹ The town, located in St. Lawrence County, refused to apply for a permit to do maintenance beyond the surface of a town road that crossed preserve land. The conservation department sought a permanent injunction enjoining the town from doing the proposed work without a permit. The town argued that because state highway law required it to maintain its highways at a width of three rods the conservation department could not regulate that maintenance.¹²⁰ The department contended that the 1937 law authorized the permit process.¹²¹ Reasoning that the 1937 law, a specific statute, took precedence over the state highway law, a general statute, the court held that the permit process was valid and the town could not begin the proposed work without a conservation department permit.¹²²

The point left unresolved in *Flacke* was whether the conservation department can deny local governments the ability to go beyond existing rights of way in making highway repairs. The point was argued in *Flacke* but not decided because the issue in that case dealt with work within the existing right of way.¹²³ The town contended that the 1937 statute allowed local governments to occupy a right of way over the preserve as necessary.¹²⁴ Therefore, even if the state could regulate the taking of such rights of way, it could not totally forbid it.¹²⁵ The department responded that because the 1937 law referred only to existing highways, the reference to rights of way was limited to existing rights of way.¹²⁶ Therefore,

118. *Id.*

119. *Id.* at 56, 448 N.Y.S.2d at 359.

120. *Id.* at 57, 448 N.Y.S.2d at 360-61.

121. *Id.* at 57-61, 448 N.Y.S.2d at 360-62.

122. *Id.* at 61, 448 N.Y.S.2d at 363.

123. *Id.* at 60-61, 448 N.Y.S.2d at 362.

124. *Id.* at 59, 448 N.Y.S.2d at 362.

125. *Id.*

126. *Id.* at 60, 448 N.Y.S.2d at 362.

the 1937 law authorized the department to approve highway repairs only within the existing rights of way.¹²⁷ The department contended that either a specific amendment or a land bank amendment similar to the 1957 amendment must be approved by the electorate before reconstruction outside the existing rights of way can be permitted.¹²⁸

The conservation department's interpretation of the 1937 statute is tenuous at best. The statute plainly authorizes towns and counties to occupy "a right of way over such state lands as may be required" to repair town or county highways.¹²⁹ The reference to existing town and county highways indicates that local governments cannot build new highways across preserve lands under the statute; it does not indicate that use of preserve lands for highway repair is limited to those within the existing right of way. The primary means of determining legislative intent from a statute is to give words their plain meaning.¹³⁰ The plain meaning of the phrase "such state lands as may be required," is that state lands can be used for repairing and reconstructing existing town and county highways regardless of whether those lands are outside an existing right of way. If the legislature had intended to limit the use of state lands to those lands within existing rights of way, it would have expressly stated that in the statute.

A second argument the department could advance to support its interpretation of the statute is that the 1937 law allows maintenance, reconstruction, and improvement of existing town and county highways, but does not refer to the relocation of those highways. Therefore, such highway relocations would, in effect, be construction of a new highway requiring a constitutional amendment. This argument can be supported by the language in the land bank amendment, which permits use of the forest preserve for "relocating, reconstructing and maintaining" existing state highways.¹³¹

The language of the land bank amendment, however, is simply not sufficient support for the argument. Neither the scant case law nor the attorney general opinions relating to highways draw a distinction between the various terms. Attorney general opinions from

127. *Id.* at 61, 448 N.Y.S.2d at 362.

128. *See id.* *See also* VanValkenburgh, *supra* note 55, at 7.

129. 1937 N.Y. Laws chap. 488.

130. *Tompkins v. Hunter*, 149 N.Y. 117, 123, 43 N.E. 532, 534 (1896).

131. N.Y. CONST. art. XIV, § 1 (as amended 1957).

even the early phase of interpretation view highway relocation as the equivalent of highway improvement.¹³² The post-*MacDonald* opinions also treated relocations as improvements.¹³³ Therefore, an argument based on the technicalities of usage is not persuasive.

Support for the department's argument that the 1937 statute does not authorize work beyond existing rights of way, however, can be found in three post-*MacDonald* attorney general opinions. In 1933, the attorney general ruled that several short deviations from an existing highway running between Saranac Lake and Lake Placid would be tantamount to a new highway.¹³⁴ The opinion cited the 1933 constitutional amendment authorizing the construction of a highway from Indian Lake to Speculator and concluded that "the Legislature cannot allow such broad encroachments upon the preserve, when the electorate is required to register its consent to a few miles from Indian Lake to Speculator."¹³⁵ In 1948, the attorney general ruled that three miles of forest preserve land could not be used for relocating portions of an existing highway in Essex County because a "considerable" number of trees would be cut in the process.¹³⁶ The opinion cited the 1933 opinion as authority.¹³⁷ Finally, in 1954 the attorney general cited the 1933 and 1948 opinions as authority for determining that relocation of portions of highways between Aiden Lair and Newcombe was not permitted.¹³⁸

There are two responses to the argument that these opinions support the department's position. The first is that attorney general opinions are not binding.¹³⁹ Second, the opinions, even as persuasive authority, do not establish a per se rule against relocating portions of an existing highway outside an existing right of way. Although the rationale for the three opinions is less than explicit, the common basis for each decision is that the contemplated relocations would violate the material cutting doctrine. The 1933 and 1954 opinions cite the number of trees that would be cut in con-

132. See, e.g., Op. Att'y. Gen. 663, 664 (1907).

133. See, e.g., Op. Att'y. Gen. 157, 157 (1954); Op. Att'y. Gen. 394, 395 (1933). In both cases, the proposed projects were deemed unconstitutional because a material number of trees would have been removed. See *supra* notes 94-96 and accompanying text.

134. Op. Att'y. Gen. 394, 396 (1933).

135. *Id.*

136. Op. Att'y. Gen. 166, 167 (1948).

137. *Id.*

138. Op. Att'y. Gen. 157, 159 (1954).

139. See *supra* note 25.

nection with the respective projects,¹⁴⁰ and the 1948 opinion assumes that a considerable number of trees would be cut in connection with the project.¹⁴¹ Thus the opinions do not establish cogent support for the conservation department's rule prohibiting relocation of existing town and county highways outside existing rights of way.

The opinions do, however, lend support to the opposite view: Highway relocation outside existing rights of way is permissible within the limits of the material cutting doctrine. That doctrine clearly contemplates that preserve lands may be used for non-wilderness purposes if the purpose is to enhance the public's use of preserve lands and if trees are not cut to a material degree in connection with such use.¹⁴² According to the *MacDonald* opinion, highway repair is a permissible public use of preserve lands.¹⁴³ Thus, the 1937 statute embodies the doctrine by authorizing the conservation department to determine which highway projects involve material cutting. However, under the department's interpretation of the statute, any work on forest preserve lands outside existing rights of way is per se material, regardless of the number of trees which would be removed. In effect, this interpretation nullifies the material cutting doctrine with regard to town and county highway relocation. Because such a result is prohibited under New York law,¹⁴⁴ the department's interpretation of the 1937 law is untenable.

If the department's interpretation of the 1937 law is deemed invalid, the department may assert that the law itself is unconstitutional. The department could argue that the 1937 law violates the forever wild clause if interpreted to allow use of preserve lands outside existing rights of way. One basis for such an argument is an analogy between the land bank for state highway repair to the town and county highway situation. The department could argue that because it was considered necessary to amend the forever wild clause to allow forest preserve lands to be used for relocating ex-

140. Op. Att'y. Gen. 394, 395 (1933); Op. Att'y. Gen. 157, 157 (1954).

141. Op. Att'y. Gen. 166, 167 (1948).

142. See *supra* notes 75-88 and accompanying text.

143. *MacDonald*, 253 N.Y. at 238, 170 N.E. at 904.

144. "The power to grant a license carries with it a discretion on the part of the licensing authority to refuse to grant one. However, that discretion must be exercised in conformity with the express or clearly implied standard, policy or purpose of the licensing law." *Wnek Vending & Amusement Co., Inc. v. City of Buffalo*, 107 Misc. 2d 353, 360, 434 N.Y.S.2d 608, 614 (1980).

isting state highways, a similar amendment is required before towns and counties may use preserve lands under the aegis of the 1937 statute.

This argument is flawed, however, because it misstates the purpose behind the land bank amendment. That amendment was not a necessity enabling relocation of existing state highways, but a convenience sidestepping the material cutting prohibition.¹⁴⁶ The key to the amendment is that it circumvents the material cutting prohibition on forest preserve lands by giving the state the authority to remove any amount of timber when relocating state highways so long as the 400 acre limit is respected. The 1937 law, on the other hand, merely operates to compel local governments to recognize the material cutting limits on each highway relocation project. Further, enforcement of the material cutting limits are strengthened because that law places the determination of material cutting in the hands of the conservation department.

This position is supported by *D'Angelo v. State*, a pre-land bank decision by the state court of claims.¹⁴⁶ In *D'Angelo*, the court rejected an argument that the state was not liable for losses sustained by a contractor when the contractor was prohibited from salvaging timber cut in connection with a highway project across forest preserve lands.¹⁴⁷ One defense to the claim offered by the state was that the contractor should have known that the forever wild clause prohibited the salvage of any timber cut for the project.¹⁴⁸ The court rejected the defense, stating that construction of the highway was a "proper exercise of [the state's] authority" under the 1921 highway statute.¹⁴⁹ The court held that the forever wild clause was not violated by the project because "the plans did not call for removal of timber to any material or unreasonable degree."¹⁵⁰ Thus, prior to the land bank amendment, the state itself was allowed to use preserve lands outside existing highway rights of way if such use did not involve cutting to a material degree. Therefore, *D'Angelo* supports the view that the land bank amendment was not necessary to allow such construction; the amendment was only necessary to avoid the limitations of the material cutting

145. See *supra* notes 102-07 and accompanying text.

146. *D'Angelo v. State*, 200 Misc. 657, 662, 106 N.Y.S.2d 350, 355 (1951).

147. *Id.* at 664, 106 N.Y.S.2d at 356.

148. *Id.* at 662, 106 N.Y.S.2d at 355.

149. *Id.*

150. *Id.*

prohibition.

The conservation department could also argue that in the 1937 statute the legislature delegated to the conservation department powers denied the legislature by the constitution. One such denied power is authority to cut trees from preserve lands.¹⁵¹ However, *MacDonald* held that the legislature was denied only the power to authorize *material* cutting of trees.¹⁵² Thus, the 1937 statute is valid so long as it respects the material cutting prohibition. As has been shown, the statute incorporates the material cutting restriction.

A second power denied the legislature by the forever wild clause is the authority to lease, sell or exchange forest preserve lands to a public corporation.¹⁵³ Therefore, the conservation department could argue that the 1937 law is invalid if it permits transfer of additional highway rights of way to local governments. Such an argument, however, is undermined by the department's position that it can regulate highway repairs within existing rights of way because it retains possession of such rights of way.¹⁵⁴ Therefore, a new highway right of way granted under the 1937 statute to facilitate highway relocation is not an actual transfer of preserve lands, but merely the granting of an easement across such lands.

For the foregoing reasons, the conservation department's interpretation of the 1937 law as it applies to relocating existing town and county highways is invalid as an arbitrary restriction.¹⁵⁵ A legal challenge to that interpretation may well succeed. Such a challenge is preferable to a land bank amendment for town and county highways that has been advocated.¹⁵⁶ A land bank for those highways is not practical. The 1957 amendment operates fairly simply because it only applies to state highways. Therefore, a single entity, the State Department of Transportation, determines when it will use forest preserve lands to facilitate highway work. A land bank amendment for town and county highways, however, would involve highway departments from fourteen forest preserve counties and hundreds of forest preserve towns. The likely result would be an administrative nightmare.

151. N.Y. CONST. art. XIV, § 1.

152. *MacDonald*, 253 N.Y. at 238, 170 N.E. at 904.

153. N.Y. CONST. art. XIV, § 1.

154. VanValkenburgh, *supra* note 55, at 9.

155. *See supra* note 143.

156. VanValkenburgh, *supra* note 55, at 7.

A town and county highway land bank might operate efficiently if a comprehensive survey of all eligible highways crossing the preserve determined the foreseeable requirements of each town and county for forest preserve land. Then local governments would be restricted to an allotment commensurate with their needs. The cost of such a survey, and of putting such an amendment before the state's voters, however, is simply not justified by the relatively small need for forest preserve land. It would be more practical for the department to allow use of forest preserve lands consistent with the material cutting prohibition.

CONCLUSION

Although the development of legal rules regarding repair and reconstruction of highways across the forest preserve describes a somewhat imperfect arc, the rules strike a practical balance between protecting the wilderness character of the preserve and serving the safety and needs of Adirondack residents and visitors. Those rules are vulnerable only as they relate to relocation of town and county highways. The conservation department's ban on such relocation is susceptible to a legal challenge. More importantly, the ban could be replaced by a common sense application of the material cutting doctrine without undermining the wilderness character of the preserve.

The forever wild clause and the wilderness areas that it protects have survived intact for almost a century. Forever wild is established as a fundamental policy of the state, but it is entirely consistent with the constitution to allow minimal use of forest preserve lands for relocating short portions of town and county highways when reasonable need exists. The present conservation department, unlike its nineteenth century predecessor, has been a zealous guardian of the forest preserve. The modification of the department's rule regarding town and county highways proposed in this note is consistent with New York's constitution. Moreover, under this proposal towns and counties can achieve needed highway improvements without threat to the wilderness character of the entire preserve.

Peter Racette