# NEW YORK COURT OF APPEALS ROUNDUP

# TRAIL CONSTRUCTION VIOLATES 'FOREVER WILD' PROVISION OF STATE CONSTITUTION

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We note with profound sadness the passing of Judge Paul G. Feinman at the end of March. Judge Feinman was an excellent jurist, a trailblazing champion of LGBTQ rights, and a thoroughly decent human being. He will be greatly missed.

With Judge Feinman's passing, Judge Leslie E. Stein's upcoming retirement next month and Judge Eugene M. Fahey's retirement at the end of the year, the Court of Appeals is faced with three vacancies for the first time since 1972 and the first time ever in the era in which judges are appointed by the governor rather than standing for election.

As of the date we are writing this column, Governor Andrew Cuomo has not selected a candidate for the seat to be vacated by Judge Stein from the slate of seven candidates recommended by the Commission on Judicial Nomination. Once Cuomo announces his nomination, the candidate will proceed to the State Senate for confirmation.

The Commission on Judicial Nomination also recommended seven candidates to fill the vacancy created by Feinman's passing and will develop a slate for Fahey's seat. Cuomo must nominate one of the candidates for Feinman's seat by May 29, 2021. Regardless of who is selected for the remaining two seats, the Court of Appeals in January 2022 will look substantially different than it did in January 2021.

## Snowmobile Trains and 'Forever Wild'

The Court of Appeals recently considered a unique provision of the New York State Constitution—the "Forever Wild" provision found in Article XIV, §1—in a case involving the construction of 27 miles of snowmobile trails in the Adirondack State Park. The Adirondack State Park consists of approximately six million acres of public and private land. The Forest Preserve is part of the Adirondack State Park and consists of approximately 2.5 million acres of State-owned land.

In 2006, the New York State Department of Environmental Conservation (DEC) and the New York State Office of Parks, Recreation and Historic Preservation adopted a plan to create a new system of snowmobile

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trails that would connect communities within the Adirondack Park and to re-designate certain existing trails as non-motorized. In 2009, the DEC developed a guidance document to implement the snowmobile trail plan.

An organization called Protect the Adirondacks! brought a combined declaratory judgment action and article 78 proceeding against the DEC among others alleging, in part, that the construction of the snowmobile trails violates the Forever Wild clause found in Article XIV, §1 of the New York State Constitution. That clause provides "[t]he 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."

A bench trial was conducted before the Supreme Court, Albany County and the court found that the construction of the snowmobile trails did not violate the Constitution. Plaintiff appealed and the Appellate Division, Third Department, reversed with one justice dissenting. The majority found that the construction of the trails in the Forest Preserve did not violate the Forever Wild clause because it would not impair the wild forest nature of the Preserve, but that the attendant destruction of timber did violate the clause. Because the case involved issues of constitutional construction, defendants appealed, and plaintiff cross-appealed, as of right.

In an opinion written by Judge Jenny Rivera and joined by Judges Fahey, Michael Garcia and Rowan Wilson, the Court of Appeals affirmed the Third Department's decision and ruled the snowmobile trail construction unconstitutional. The majority examined the history of the Forever Wild provision and explained that the Constitutional Convention of 1894 was assembled to address concerns about the ongoing destruction of the Adirondack forest including as a result of the actions of the commercial lumber industry.

The constitutional amendment now known as the Forever Wild provision received the unanimous support of the Convention delegates and was approved by a vote of the New York electorate. Accordingly, any use of the Forest Preserve contrary to the Forever Wild provision requires a constitutional amendment approved by the electorate. The majority noted that since the Forever Wild provision became law in 1895, the people of the state of New York have voted to amend the provision to authorize specific encroachments on the Forest Preserve 19 times.

Turning to the snowmobile trails at issue here, the majority relied on the court's prior decision in *Association for Protection of Adirondacks v. MacDonald*, in which the court ruled that a statute authorizing the construction of a bobsled run in preparation for the 1932 Winter Olympics in Lake Placid was unconstitutional. 253 NY 234, 242 (1930). The majority found that, from a constitutional standpoint, the proposed snowmobile trails at issue here did not differ from the bobsled run at issue in *Macdonald*. Like the *MacDonald* bobsled run, the snowmobile trails would benefit the public.

They also would require the clearing of 27 miles of trail representing approximately 27 acres of land, the destruction of 6,184 trees with a diameter of three inches or greater and 25,000 trees in total, and the removal of rock and grading of forest land. The *MacDonald* bobsled run, on the other hand, required the clearing of only 4.5 acres and the destruction of many fewer trees along with the blasting and removal of 50 cubic yards of rock and the construction of the bobsled track structure.

The majority accordingly found that the snowmobile trails violated the express language of the Forever Wild provision and that, if the people of the state of New York supported the construction of the snowmobile trails in the Forest Preserve, they could vote in favor of a constitutional amendment approving the plan as they had done 19 times since the provision was enacted in 1894.

Judge Stein, joined by Chief Judge Janet DiFiore, issued a strong dissent that did not significantly dispute the majority's interpretation of the Forever Wild clause but took issue with its application to the facts of this case. The dissent focused on, among other issues, the fact that the snowmobile plan would actually result in the closure of existing trails further in the interior of the Forest Preserve in favor of the construction of the new trails that would be closer to the forest periphery and, accordingly, would decrease the impact on wildlife and reduce conflicts with non-motorized users of the Adirondack Park in the more remote areas of the Forest Preserve.

In the view of the dissent, the snowmobile trail plan was consistent with the Forever Wild provision's interlocking goals of protection and public use of the Forest Preserve. The dissent argued that the *MacDonald* court rejected an absolutist view of the Forever Wild provision and they contrasted the blasting, clearcutting and construction of a structure that altered the vista of the Sentinel Range at issue in *MacDonald* with the trail construction here that, in the dissent's view, was far more harmonious with the Forest Preserve's natural surroundings.

The majority/dissent split in this case illustrates the problem created by unfilled vacancies on the court. If one of the judges who joined in Judge Rivera's opinion had instead joined with Judge Stein and Chief Judge DiFiore, there would have been a 3-3 split requiring submission of the case for reargument. Hopefully, the Senate, Governor Cuomo and the Commission on Judicial Nomination will move expeditiously to fill the remaining upcoming vacancies.