

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

In the Matter of the Application of JB NICHOLAS,

Petitioner,

— against —

Index No.

ERIK KULLESEID, Acting Commissioner, New York State
Office of Parks, Recreation and Historic Preservation;
JAMES F. HALL, Director, Palisade Interstate Park
Commission; BASIL SEGGOS, Commissioner, New York
State Department of Environmental Conservation,

Respondents,

For Judgment Pursuant to Article XIV, § 5 of the New
York State Constitution and Articles 30 & 78 of the New York
Civil Practice Law and Rules.

MEMORANDUM OF LAW

Statement of the Facts

The great forests of the Catskills and Adirondacks were decimated in the 19th Century. Mining, logging, tanning, charcoal-making and forest fires destroyed what had been a vast, primeval wilderness. Unless action was taken to save what was left, "the ruthless burning and destruction of the forest" would continue, and "vast areas of naked rock, arid sand and gravel will alone remain," Verplanck Colvin, the State Surveyor, warned in [a 1874 report](#) for the State Legislature, *Report on the Topographical Survey of the Adirondack Wilderness of New York for the year 1874*.

In response, New York created the Forest Preserve. Signed into law by Governor David B. Hill, Chapter 283 of the laws of 1885 mandated that "All the lands now owned or which may hereafter be acquired by the State of New York within" 14 counties, including Ulster, "shall constitute and be known as the Forest Preserve." *Id.* § 7. Forest Preserve lands, the law said, "shall be forever kept as wild forest land. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private." *Id.*

But the new statute proved incapable of actually preserving the forest. That's largely because the Legislature itself weakened the law by subsequently passing other laws that authorized "leasing, timbering, and ***the building of new roads*** on preserve lands." *The New York State Constitution*, by Peter J. Galie & Christopher Bopst (New York: Oxford University Press, 2d ed. 2012), at 310 (emphasis added). "In the decade after 1885, despite the Forest Commission's oversight, 100,000 acres of forest were logged unlawfully in the Adirondacks." [The Conservation Article in the State Constitution](#), New York State Bar Association, Committee on the State Constitution, at 10. All this and more lead to "public demands for enhanced protection." *Id.*

Delegates to the New York State Constitutional Convention of 1894 answered the call by proposing an amendment called the "forever wild clause."

The Forever Wild clause constructed a veritable constitutional fortress around the Forest Preserve. Building on language from the original 1885 law that created the Forest Preserve in the first place, the proposed amendment constitutionally required that all state-owned Forest Preserve land, "now owned or hereafter acquired," must "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." It was adopted "by a vote of 122 to 0, which made it the only amendment to be unanimously embraced at that Convention or any prior Convention." *The Conservation Article in the State Constitution*, at 9. The People ratified it the following November in the general election. See former N.Y. Const., Art. VII, § 7 (1894).

The Forever Wild clause is an American first.

The amendment, in effect, stripped both the Legislature and the Executive Branch of the power to alter the Forest Preserve by law or executive action. Henceforth the fate of the Forest Preserve would be decided directly by the People. It "has stood the test of time, enjoying widespread public support since its enactment." *The Conservation Article in the State Constitution*, at 3. Voters "have defeated all efforts to dilute it," *id.*, but have approved on a case-by-case basis small land swaps "of land from the Forest Preserve to permit clearly defined developments." *Id.*, at 17. See N.Y. Const., Art. XIV, § 1 (Formerly § 7 of Art. VII. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people Nov. 8, 1938; further amended by vote of the people Nov. 4, 1941; Nov. 4, 1947; Nov. 5, 1957; Nov. 3, 1959; Nov. 5, 1963; Nov. 2, 1965; Nov. 6, 1979; Nov. 8, 1983; Nov. 3, 1987; Nov. 5, 1991; Nov. 7, 1995; Nov. 6, 2007; Nov. 3, 2009; Nov. 5, 2013).

Courts too scrutinize attempts to circumvent Forest Preserve protections. The Forever Wild clause authorizes lawsuits to enforce its substantive protections, by both

the State Attorney General or ordinary citizens with permission from the Appellate Division. N.Y. Const., Art. XIV, § 5. This ensures that laws or executive action affecting the Forest Preserve passes "the test of constitutionality," according to [History of the Catskill Park and Forest Preserve](#), published by the Catskill Mountain Keeper on its website. Indeed, the intent of the People in ratifying the Forever Wild clause "was to remove the Forest Preserve from the control of the legislature and to vest oversight of its mandates within the powers of the judiciary." *The Conservation Article in the State Constitution*, at 21; accord 3 Charles Z. Lincoln, *The Constitutional History of New York York*, 433-34 (1906)("By including these subjects in the Constitution they are withdrawn from legislative control, and this withdrawal is in most cases the chief reason for constitutional interference.").

New York's courts have zealously defended the Forest Preserve ever since.

For example, an early legal challenge by a corporation that claimed the legal right to build **a railroad** through the Forest Preserve was rejected by both New York's highest court and the U.S. Supreme Court. Not a single judge on either court dissented. See People v. Adirondack Railway Co., 160 N.Y. 225 (1899) (upholding enforcement of Article VII), aff'd Adirondack Realty v. New York State, 176 U.S. 335 (1900). For the Supremes, it was enough that "lands taken for the park were thereby dedicated to a public use regarded by the state as of such vital importance to the people that they were expressly put by the constitution beyond the reach of any other destination." Id. at 349.

After creating the greater Forest Preserve, Lawmakers carved from it Adirondack Park in 1892 then Catskill Park in 1904. The parks were based on the recommendation

of an official commission headed by Harvard botanist Charles Sprague Sargent, according to [*Birth of the Blue Line*](#), published on Respondent DEC's website. The parks "include ALL lands, both public and private, within the 'Blue Line.' This term is commonly used today, as blue is the color used on state maps to delineate the two parks." Id.

The parks were "intended to delineate the boundary within which future forest preserve acquisitions should be focused," says *Birth of the Blue Line*. Some Forest Preserve advocates recommended that the state use eminent domain to make those acquisitions, but the Sargent Commission said no. Instead, the commission recommended purchasing the land. "Nobody imagines that this commission, or any other representative of the State, can call an Adirondack Park into existence by the wave of a magic wand. Its formation must necessarily be progressive and the acquisition of lands gradual." Id.

44 years later, the People explicitly authorized the Legislature to make appropriations funding the purchase of additional lands within Forest Preserve counties, but outside of both Catskill and Adirondack parks. See N.Y. Const., Art. XIV, § 3 (1938), *formerly* Art. VII § 7 (1894), *renumbered and amended by Constitutional Convention of 1938, approved by vote of the people*, Nov. 8, 1938. The Legislature did so "in order to facilitate increasing the land area of the Forest Preserve." *The Conservation Article in the State Constitution*, at 14. There was, however, one crucial difference. Forest Preserve lands outside the parks lack Forever Wild protection. Id. § 3(1). Still, "such

lands shall not be leased, sold or exchanged, or be taken by any corporation, public or private." Id.

Today, New York law continues to mandate that any land acquired by "the state" in Ulster County "shall" be Forest Preserve. N.Y. ENV. § 9-0101(6). And the Constitution continues to command that **all** Forest Preserve land "shall not be leased, sold or exchanged, or be taken by any corporation, public or private." N.Y. Const. Art. XIV, § 3(1); see also id. ("Forest and wild life conservation are hereby declared to be policies of the state ..."); N.Y. Const. Art. XIV, § 4 ("The policy of the state shall be to conserve and protect its natural resources ..."). Far from being mere lofty pronouncements, the law makes the transfer or lease of Forest Preserve land illegal. N.Y. ENV. § 9-0303(5). Also illegal is injuring, cutting, removing or destroying "any trees or timber or other" Forest Preserve property. N.Y. ENV § 9-0303(1).

Minnewaska, although within a Forest Preserve county, is outside Catskill Park. Thus Minnewaska is not covered by the Forever Wild clause. It is, however, covered by the 1938 constitutional commandment that "such lands shall not be leased, sold or exchanged, or be taken by any corporation, public or private." N.Y. Const. Art. XIV, § 3(1).

Enter Robert Moses. "Those who can, build," Moses once said [according to his New York Times obituary](#). "Those who can't, criticize."

Besides building, Moses' other notable ability was manipulating sovereign power minus democratic process, as documented by journalist Robert Caro in his masterwork, *The Power Broker*. On paper, one of Moses' many titles during his career was Chair of

the New York State Council of Parks; in the real world, Moses' actual power exceeded that which the law officially granted him. Moses, for example, drafted the bill that created the parks council in 1922 and then, two years later, he convinced the Legislature to pass it and Gov. Alfred E. Smith to sign it. Baked into the bill was an ambitious park-building plan and \$15 million in public bonds to fund it.

Three years after Moses' law created the new parks council, Moses was made its chair --- a position he occupied until 1962.

Moses alone is "responsible for more changes to the physical surroundings of New Yorkers than any other individual in New York State's history," according to [Fifty Years. New York State Parks, 1924-1974](#), an official 1975 report by the New York State Office of Parks and Recreation. Between 1924 and 1968, Moses headed dozens of commissions and authorities and agencies that built two hydroelectric dams, 13 bridges, 35 highways, 658 playgrounds, Lincoln Center and Shea Stadium. He also changed the courses of the St. Lawrence and Niagara Rivers, "filled in thousands of acres of marshland around New York City and filled the new lands with houses and roads," according to [Environmental Affairs in New York State](#), a report prepared for the New York State archives by Brad Edmondson.

Moses' parks council was created to oversee all of New York's parks and historic sites *outside of the Forest Preserve*, but Moses' will to power made him covet constitutionally-protected Forest Preserve lands. "When State Parks were crowded to capacity, some Council members saw the vast tracts of the Forest Preserve as suitable for relieving the pressures," says *Fifty Years, New York State Parks*. Moses, the report

discloses, "frequently complained about the 'fanatical minority' who insisted on a strict interpretation of the 'Forever Wild' clause in the State Constitution. The Council regularly supported legislation to allow recreational development in the Forest Preserve."

Moses resigned as parks chief in 1962, but that didn't stop "a decade of unmatched expansion from 1963 through 1973," according to *Fifty Years, New York State Parks*.



From left to right, Robert Moses, Gov. Nelson A. Rockefeller and Laurance S. Rockefeller. Photo courtesy of New York State archives, Office of State Parks and Recreation, Fifty Years, New York State Parks, 1924-1974.

Among the numerous state agencies that Moses' had controlled and shaped was the Palisade Interstate Park Commission, or PIPC. PIPC was originally created in 1937 to preserve the Palisades cliffs on the west bank of the Hudson River north into Rockland County, New York. Lawmakers expanded its jurisdiction repeatedly. Then, in 1967, they granted PIPC the legal authority to acquire land in Ulster County outside

Catskill Park. L.1967, c. 665, § 13 (*amending former N.Y. Conservation Law § 672[8]*); L.1967, c. 665, § 134 (*amending former N.Y. Conservation Law § 747*), *superseded* N.Y. PRHPL § 9.07 (L. 1972, c.660 § 1).

However, PIPC's new power came with a proviso. Instead of containing broad language sweeping aside previous enactments that might conflict with the new law, as Lawmakers routinely do, see, e.g., N.Y. PRHPL § 13.01 ("Notwithstanding the provisions of any other law"), the new statute explicitly affirmed previously-existing laws. N.Y. ENV § 9.07. PIPC, it said, could acquire land in Ulster County "unless other provided by law." Id.

PIPC's new power was also constrained by the chain-of-command PIPC was subject to. PIPC was within the Division of Parks, which was under the overall command of the Conservation Department. But the Conservation Department's first love appears to have been the Forest Preserve. Notwithstanding Moses, under the Conservation Department and its predecessor agencies New York State acquired no less than 134 parcels of land in Ulster County outside of Catskill Park that it made Forest Preserve, according to Respondent DEC's [2008 Catskill Park State Land Master Plan](#) (listing 134 "detached parcels" of Forest Preserve in Ulster County); Pet.'s Ex. B.

Then in 1970 Gov. Nelson A. Rockefeller and the Legislature rebranded the Conservation Department the Department of Environmental Conservation.

They also extracted from the newly-created DEC the state-wide parks infrastructure Moses' had created. Instead of being under DEC's overall authority, parks "was elevated to full agency status in recognition of the role parks and recreation play in

our society," says *Fifty Years, New York State Parks*. Called the Office of Parks and Recreation, the agency had its own commissioner, and it's own priorities. Parks' priorities put active recreation first, preservation second. "Once a means of preserving a scenic area. Parks then became places for occasional recreation. Now they were becoming an adjunct of family life for millions of New Yorkers." *Id.*

The Office of Parks and Recreation, not DEC, controlled PIPC after 1970. The move freed PIPC to acquire land in Ulster County that, if acquired by the DEC, would be Forest Preserve if past state conservation practice had been followed. It wasn't.

Instead, PIPC acquired the first parcel of Minnewaska land in 1971, according to [federal court records](#); Pet.'s Ex. C. PIPC paid \$1.5 million for 7,000 acres. *Id.* Respondent DEC filed an application with the federal government for a federal matching grant to help fund the purchase, according to [a database of grantees](#) compiled by watchdog journalists at InvestigateWest. Pet.'s Ex. D. But it was PIPC's president and [Moses' protege Laurance S. Rockefeller](#) who made a personal appeal to Walter Hickel, President Richard M. Nixon's Secretary of the Interior, according to [Catalyst for Conservation](#), Laurance Rockefeller's biography.

Hickel gave Rockefeller the money, from the Federal Land and Water Conservation fund, and PIPC got Minnewaska.

Laurance Rockefeller became a PIPC commissioner in 1939, vice-president in 1960 and president in 1970. He was also Moses' vice-chair of the parks council. Gov. Nelson A. Rockefeller, Laurance's brother, appointed him to Moses' old job as parks council chief in 1967. Laurence was "Bob Moses' greatest disciple," Gov. Rockefeller

once said of his brother, according to *The Power Broker*. "New York State is fortunate to have Laurance Rockefeller following in the footsteps of Robert Moses," he added.

PIPC has continued to collect parcels of Minnewaska land since 1971.

Today, PIPC holds title to about 23,000 acres, [according to Respondent OPRHP's website](#). PIPC calls its holdings the "Minnewaska State Park Preserve." With some exceptions, the so-called preserve spans the width of the northern Shawangunk Ridge between Route 52 to the south, Routes 44/55 to the north and the Rondout Valley/Route 209 corridor to the west. The [2016 New York State Open Space Conservation Plan](#) calls for the State to create the "Shawangunk-Catskill Greenway" by acquiring a swath of land to the west, traversing the Rondout Valley/Route 209 corridor and marrying Minnewaska with the southern Catskills via the Vernooey Kill State Forest.

This, the conservation plan repeatedly says, should be a "priority."

PIPC acquired Minnewaska's keystone in 1987: the glacial Lake Minnewaska itself and 1,200 surrounding acres. The State deployed its sovereign power of eminent domain to do it, legally prying the land from private interests and paying \$6.7 million in compensation, [the New York Times reported](#) on June 3, 1987; Pet.'s Ex. E. Once the deal was done, then-Gov. Mario Cuomo went to Minnewaska and personally took possession of the deed. *Id.* Explaining why the State had made the extraordinary effort, Gov. Mario Cuomo said "this beautiful and fragile land" was an "environmental heirloom" worth protection. *Id.*



Gov. Mario Cuomo taking possession of the deed to Lake Minnewaska and 1,200 surrounding acres on June 2, 1987. New York Times, June 3, 1987.

More than a quarter century later, Mario Cuomo's son, Gov. Andrew Cuomo, visited Minnewaska in 2015 to promote tourism to the Catskills. But [his speech took a solemn turn](#) when Cuomo the younger mentioned "my father who stood almost where we are standing today 30 years ago." Pet.'s Ex. F. The Marriott Corporation had won approval to build a conference center around the lake, but "because it is so special and it is so beautiful," Gov. Andrew Cuomo said, "**my father added it to the state park system**. He called it an 'environmental heirloom' at that time. And he was exactly right." Id. (emphasis added).

Then he added: "So we wouldn't be here today without that legacy and it is our obligation to take that gift, take that legacy and advance it for the next generation." Id.

Petitioner agrees.

Argument

I. **'AND THEREUPON THE CONSTITUTION SPOKE': ALL STATE-OWNED LAND AT MINNEWASKA BELONGS TO THE FOREST PRESERVE**

New York State owns Minnewaska. Because "the state" owns Minnewaska, it's part of the Forest Preserve by operation of law and the Court should so declare. That's because Minnewaska is within Ulster County and, with four exceptions not applicable here, the law creating the Forest Preserve mandates that it "shall include the lands owned or hereafter acquired by the state within" Ulster county. N.Y. ECL § 9-0101(6). As the Court of Appeals eloquently stated in 1899: "The moment the title passed, said land became a part of the forest preserve, and thereupon the Constitution spoke and commanded that it should not 'be taken by any corporation, public or private.'" People v. Adirondack Railway Co., *supra*, 160 N.Y. at 235.

While the deeds to Minnewaska's land are in PIPC's name, "the state" is the land's owner. See N.Y. PRHPL § 9.07. The Commission is just an "instrumentality of the State." Mercado v. State of New York., 29 A.D.2d 579 (3d Dep't 1967); Conklin v. Palisades Interstate Park Comm'n, 282 App.Div. 728 (2d Dep't 1953). That's why lawsuits against PIPC are heard in the New York State Court of Claims. N.Y. Ct. C. Act § 8. That's why "STATE OF NEW YORK" is listed on an application with the federal government for a matching grant to help fund acquisition of Minnewaska land in 1979. Pet.'s Ex. D. And that's why James Hall, PIPC's current executive director, called Minnewaska "state owned land" in an official document. Pet.'s Ex. G. "If the state, at any time and by any method, became the lawful owner, whether legal or equitable, of the

land in question, *eo instanti*," the land is Forest Preserve, which "rendered unlawful every effort" to treat it as anything other than Forest Preserve. People v. Adirondack Railway Co., *supra*, 160 N.Y. at 235.

Stated another way, the Constitution deprives every state officer and every state agency of the power "to dispose of, or in any manner deprive the People of their title to the lands." People ex rel. Turner v. Kelsey, 180 N.Y. 24, 26 (1904); *see, e.g., People v. Douglass*, 217 A.D.2d 328 (3d Dep't 1926). That means Respondents' placement of PIPC's name on Minnewaska's deeds "was an unauthorized act or omission on the part of one of its officers or agents." *Id.* at 330. So long as the State Constitution guarantees protection of Forest Preserve lands, "no power exists on the part of the Legislature or of any officer or department of the State to dispose of, or in any manner deprive the People of their title to the lands." Douglass, 217 A.D.2d at 333.

Further, PIPC's possession of title to Minnewaska Forest Preserve land is expressly prohibited by the State Constitution. PIPC is "a joint corporate municipal instrumentality," [according to the interstate treaty](#) that created it. But the State Constitution bars all corporations, "public or private," from owning Forest Preserve. N.Y. Const., Art. XIV, § 3(1). In fact, the law authorizing PIPC to purchase land in Ulster County outside of Catskill Park recognizes this constitutional limitation on its power because the law so empowering it comes with a condition: "unless other provided by law." N.Y. ENV § 9.07.

Finally, in addition to being unconstitutional, Respondents' exclusion of Minnewaska from the Forest Preserve is irrational.

That's because, before Minnewaska, Respondents and their predecessor agencies acquired no less than 134 parcels of land in Ulster County outside of Catskill Park that are Forest Preserve, [according to Respondent DEC's 2018 Catskill Park State Land Master Plan](#) (listing 134 "detached parcels" of Forest Preserve in Ulster County alone); Pet.'s Ex. B. If these 134 parcels of land are Forest Preserve then Minnewaska's lands are Forest Preserve too. Given the identical material factors --- same constitution, same state law, same county, same stated conservation purpose for acquiring the land --- the result of Minnewaska's acquisition by the state should have been the same: Forest Preserve. No rational basis exists for treating Minnewaska differently.

Indeed, the case for Minnewaska being constitutionally-protected Forest Preserve is even stronger than it is for any of the 134 other parcels. That's because both Gov. Mario Cuomo, and his son, Gov. Andrew Cuomo, publicly stated that Minnewaska is an imperiled "environmental heirloom" that must be preserved. Pet.'s Exs. E & F.

Respondents' failure to act consistently given identical, material factors, is irrational. See Encino Motorcars, LLC v. Navarro, ___ U.S. ___, 136 S. Ct. 2117, 2125-26 (2016) (holding that when an agency changes existing policy or position it must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy."); FCC v. Fox TV Stations, Inc., 556 U.S. 502, 515 (2009)("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."); Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 41-2 (1983)(agency may

not change policy without reasoned explanation: the "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to."); see, e.g., Matter of Riverkeeper, Inc. v. Seggos, 60 Misc.2d 462, 479-80 (Sup. Ct. Albany Co. 2018)(annulling agency's determination because it "offered no explanation for its change of heart.").

Looking at the big picture, Respondents are squandering precious conservation resources on road-building through wilderness generations of New Yorkers have fought to preserve. They should instead be focusing their resources on acquiring the land necessary to make the Catskill-Shawangunk Greenway a reality, before further development makes it cost prohibited, as called for by the 2016 Open Space Conservation Plan. Doing that would preserve a crucial conservation corridor between the largest remaining blocks of wilderness left in the Hudson Valley, "mitigate the impacts of flooding," and "stimulate local economies," the plan says.

Therefore, the Court should declare Minnewaska Forest Preserve.

II. THE CONSTITUTION PRECLUDES RESPONDENTS FROM BUILDING A ROAD THROUGH THE 140-ACRE FOREST PRESERVE TRACT ADJACENT TO MINNEWASKA

Even if Respondents have properly excluded most of the state-owned land at Minnewaska from the Forest Preserve, PIPC's planned construction of a new road traverses a 140-acre parcel of existing and constitutionally-protected Forest Preserve. Forest Preserve land outside Catskill Park "shall not be leased, sold or

exchanged, or be taken by any corporation, public or private." N.Y. Const. Art. XIV, § 3(1). Because PIPC is a corporation and the new road amounts to a "taking" under Art. XIV, § 3(1), the Constitution prohibits Respondents from building the road through the Forest Preserve. Id.; see also id. ("Forest and wild life conservation are hereby declared to be policies of the state ..."); N.Y. Const. Art. XIV, § 4 ("The policy of the state shall be to conserve and protect its natural resources ...").

The 140-acre Forest Preserve parcel lies on the west side of the Shawangunk Ridge, facing Ellenville. It's sandwiched between Witch's Hole State Forest and the Minnewaska State Park Preserve. Pet.'s Ex. A. Because the parcel is neither inside Catskill Park nor attached to it, it's known as a "detached parcel." There were 189 detached parcels totalling 6,736-acres of Forest Preserve in the four Catskill Forest Preserve counties as of August 2008, according to Respondent DEC's [2008 Catskill Park State Land Master Plan](#). 134 of them were in Ulster County. Only two are larger than 100 acres; one is the 140-acre parcel at issue. Pet.'s Ex. B.

The People approved the sale of detached parcels smaller than 100-acres, N.Y. Const., Art. XIV, § 3(2), but not those larger than 100 acres. The People explicitly decided that parcels larger than 100-acres deserved to be preserved, and constitutionally protected. Id.

Half of the 140-acre Forest Preserve parcel at issue is split down the middle by the remains of the Smiley carriageway. Verified Pet. ¶ 2; Pet.'s Ex. A. The abandoned carriageway itself, in its present condition, has unique, historical significance. Verified Pet. ¶¶ 23-9, 29. It's been impassible to vehicles at least since 1955. Id. ¶ 29. It was

rewilded when Respondents took possession of Minnewaska. *Id.* Only those traveling by foot, ski or snowshoe could traverse its length. *Id.* Respondents' new road, which is half completed, follows the path of the old Smiley carriageway. Verified Pet. ¶ 30; Pet's Ex. H. If completed, the new road would amount to an unconstitutional "taking" in violation Art. XIV § 3(1).

Diligent research by Petitioner did not yield a court decision directly interpreting "taking" as used in Art. XIV § 3(1). But "taking" is a legal term used in other Constitutional provisions and it has acquired a generally defined and accepted meaning. The Constitution's generally defined and accepted meaning of "taking" includes building a road through property. For example, "physical occupations have been ruled takings requiring compensation 'no matter how minute the intrusion, and no matter how weighty the public purpose behind it.'" Gazza v. New York State Dep't of Env'tl. Conservation, 89 N.Y.2d 603, 616 (1997)(citations omitted); see also, e.g., State v. Sour Mountain Realty, Inc. 276 A.D.2d 8, 13 (2d Dep't 2000) (interpreting "taking" as used in the Environmental Conservation Law to prohibit physical "habitat modification").

A constitutionally-cognizable "taking" can also occur "without a complete ouster, or a total assumption of possession." Long I. R. Co. v. Garvey, 159 N.Y. 334, 337 (1899). In other words, the constitution recognizes constructive takings as well. "Whatever physical interference annuls this right, takes property," is a taking, "although the owner may still have left to him valuable rights in the subject, but of a more limited and circumscribed nature." *Id.*; see, e.g., Griggs v. Allegheny County, 369 U.S. 84 (1962)(overflights "taking"); United States v. Causby, 328 U.S. 256 (1946) (same);

Portsmouth Co. v. United States, 260 U.S. 327 (1922) (military installations' repeated firing of guns over claimant's land is a "taking"); United States v. Cress, 243 U.S. 316 (1917) (repeated floodings of land caused by water project is a " taking").

Therefore, Respondents' planned road through the Forest Preserve is an unconstitutional taking. N.Y. Const., Art. XIV, § 3 (mandating that Forest Preserve "lands shall not be leased, sold or exchanged, or be taken by any corporation, public or private."); see also, e.g., Association for Protection of Adirondacks v. McDonald, 253 N.Y. 234, 237-38 (1930)("The lands and trees proposed to be taken for the toboggan slide are within the Forest Preserve and covered by this provision of the Constitution. Taking the words of section 7 in their ordinary meaning, we have the command that the timber, that is, the trees, shall not be sold, removed or destroyed. To cut down 2,500 trees for a toboggan slide, or perhaps for any other purpose, is prohibited."); People v. Adirondack Railway Co., supra, 160 N.Y. at 248 (prohibiting construction of railroad through Forest Preserve);

Lastly, Article XIV, § 3's mandate that Forest Preserve "lands shall not be leased, sold or exchanged, or be taken by any corporation, public or private" makes it illegal for Respondents to injure, cut, remove or destroy "any trees or timber or other" Forest Preserve property. N.Y. ENV § 9-0303(1). Construction of the planned road will necessarily involve injuring, cutting, removing or destroying trees, timber and "other" Forest Preserve property. Because these laws, id., enforce the Constitution, Respondents' planned road is unconstitutional.

CONCLUSION

All state-owned lands at Minnewaska belong to the constitutionally protected Forest Preserve. Therefore, the Court should temporarily restrain and enjoin Respondents preliminarily and permanently from any further construction at Minnewaska. Alternatively, Respondents' planned road through the already-existing 140-acre Forest Preserve parcel violates the State Constitution, and the Court should temporarily restrain and enjoin Respondents preliminarily and permanently from building roads along the former Smiley and High Point carriageways.

Respectfully submitted,

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