

1 STATE OF NEW YORK
2 SUPREME COURT

COUNTY OF ALBANY

3 In the Matter of the Application of
4 PROTECT THE ADIRONDACKS!, INC.,

Plaintiff-Petitioner,

5 -against-

Index No. 2137-13

6 NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
7 CONSERVATION and ADIRONDACK PARK AGENCY,

Defendants-Respondents.

8
9 Volume IX

- N O N - J U R Y T R I A L -

10 BEFORE: HON. GERALD W. CONNOLLY
11 Acting Justice of the Supreme Court

12
13 Transcript of the Proceedings held on the record
14 on March 22, 2017, at the Albany County Courthouse, Albany,
15 New York.

16 APPEARANCES:

17 For the Plaintiff:

18 JOHN W. CAFFRY, ESQUIRE
19 CLAUDIA K. BRAYMER, ESQUIRE

20 For the Defendants:

21 LORETTA SIMON, ESQUIRE
22 MEREDITH G. LEE-CLARK, ESQUIRE
23 Assistant Attorneys General
24

Protect the Adirondacks! v. NYS DEC & APA

1 THE COURT: Good afternoon, ladies and gentlemen.
2 Sorry for the delay.

3 This is the matter of Protect the Adirondacks!
4 Incorporated against the State Department of
5 Environmental Conservation and the Adirondack Park
6 Agency.

7 Counsel, all set to proceed?

8 MS. BRAYMER: Yes, your Honor.

9 THE COURT: Counsel, all set?

10 MS. LEE-CLARK: Yes, your Honor.

11 THE COURT: Mr. Bauer, you can come up and sit
12 down. You are still under oath.

13 MS. BRAYMER: I want to put on the record that we
14 did provide to the defendants copies on computer disk of
15 the audio field notes from Mr. Signell.

16 THE COURT: So noted. Have you had an opportunity
17 to review them, Counsel?

18 MS. SIMON: We just got them.

19 THE COURT: So the answer is no. No it is.

20 You will let us know by the end of the day tomorrow
21 whether you are going to ask that Mr. Signell be
22 directed to return and complete the cross-examination,
23 correct?

24 MS. SIMON: Yes.

Protect the Adirondacks! v. NYS DEC & APA

1 THE COURT: Good enough.

2 All set?

3 MS. BRAYMER: Yes.

4 THE COURT: Go ahead, Miss Braymer.

5 THEREUPON,

6 PETER BAUER,

7 called as a witness, having been previously duly sworn, was examined

8 and testified as follows:

9 DIRECT EXAMINATION Continued

10 BY MS. BRAYMER:

11 Q We had just finished talking about the Newcomb to
12 Minerva Trail and now I'm going to switch gears to the
13 Wilmington Class II community connector trail. When did you
14 or did you visit that trail?

15 A Yes, I did.

16 Q When did you do your field work to count stumps,
17 trees cut on that trail?

18 A In August 2016.

19 Q Did you follow the protocol developed by Mr.
20 Signell?

21 A Yes, I did.

22 Q Approximately how many days were you out counting
23 trees? Tree stumps, excuse me.

24 A Two days.

(Peter Bauer - Direct by Ms. Braymer)

1 Q Were you able to count the total number of trees
2 cut on this trail?

3 A There were areas that had been graded where it
4 appeared, based on the forest on both sides of the trails,
5 that there should have been more stumps there.

6 MS. LEE-CLARK: Objection.

7 THE COURT: Sustained.

8 A There were areas that --

9 THE COURT: Hang on. Hang on.

10 Ask your next question.

11 Go ahead.

12 BY MS. BRAYMER:

13 Q Was the Wilmington Trail graded?

14 MS. LEE-CLARK: Objection.

15 THE COURT: Overruled.

16 You may answer.

17 A Yes, parts of it.

18 Q Was it graded to the same extent as the Newcomb to
19 Minerva Trail that you just testified about?

20 A Part of it had significant grading. That made
21 counting stumps more difficult in those situations.

22 Q What was your purpose in visiting the Wilmington
23 Trail?

24 A It was to count stumps, trees that were cut, in

(Peter Bauer - Direct by Ms. Braymer)

1 order to get an independent tally of large and small trees
2 cut on the Wilmington Trail.

3 Q On the Wilmington Trail did you observe any bench
4 cuts?

5 A Yes.

6 Q And was that to the same extent as you testified to
7 earlier regarding the Newcomb to Minerva Trail?

8 A Not to the same extent of the Harris Lake section
9 of the Newcomb to Minerva Trail.

10 Q Thank you for clarifying that section. Let's look
11 at your work on the Gilmantown Class II community connector
12 snowmobile trail. Did you visit that trail?

13 A Yes, I did.

14 Q And did you undertake fieldwork to count tree
15 stumps on that trail?

16 A Yes, I did.

17 Q Did you follow the protocol developed by Mr.
18 Signell?

19 A Yes, I did.

20 Q Approximately how many days were you out counting
21 tree stumps on the Gilmantown Trail?

22 A One day.

23 Q Did you observe any grading on this trail?

24 A Only on small sections and around one bridge.

(Peter Bauer - Direct by Ms. Braymer)

1 Q Did you have any difficulty counting the total
2 number of trees that were cut on this trail?

3 A No.

4 Q Did you observe any bench cuts on this trail?

5 A Very few.

6 Q Turning to the Coney Mountain Trail, did you
7 perform a stump count on the Coney Mountain Trail?

8 MS. LEE-CLARK: Objection.

9 THE COURT: What's the objection?

10 MS. LEE-CLARK: Relevance. It's outside the scope
11 of this case.

12 THE COURT: Counsel?

13 MS. BRAYMER: We have already heard testimony from
14 Mr. Signell that was based on Mr. Bauer's field visits
15 to Coney Mountain. So I think it's appropriate to have
16 his underlying data confirmed.

17 THE COURT: Did I allow it over objection?

18 MS. BRAYMER: I can't remember if there was an
19 objection, but it was allowed and there is evidence
20 admitted.

21 THE COURT: From Mr. Signell with regard to --
22 spell the mountain. Coney you say?

23 MS. BRAYMER: Right. It was one of the foot
24 trails.

(Peter Bauer - Direct by Ms. Braymer)

1 THE COURT: Oh. What's the purpose of the proffer?

2 MS. BRAYMER: To provide the underlying --

3 THE COURT: The context for the comparison between
4 a foot trail?

5 MS. BRAYMER: Right.

6 THE COURT: The objection is overruled.

7 I do believe I heard and ruled on it already for
8 the same reasons I overruled the objection.

9 So you can answer the question. If you want to
10 hear the question again after all that dialogue, you are
11 more than welcome to hear it again.

12 A I did count stumps on the Coney Mountain Foot Trail
13 using the Fulcrum program under the direction of Mr. Signell.

14 Q Approximately how many days did you spend doing
15 this?

16 A A half day.

17 Q And to confirm, you followed the same protocol we
18 discussed previously?

19 A Yes, I followed the same protocol used in the
20 Fulcrum program.

21 Q Did you provide that information to Mr. Signell in
22 the same way that you did for the other Class II community
23 connector snowmobile trails? Not for the other, but for the
24 Class II community connector snowmobile trails?

(Peter Bauer - Direct by Ms. Braymer)

1 A Yes.

2 Q Moving to a different subject. Are you able to
3 identify terrestrial invasive species on the forest preserve?

4 A Yes, I am.

5 Q Have you observed any terrestrial invasive species
6 on any of the Class II community connector snowmobile trails
7 that you visited?

8 MS. LEE-CLARK: Objection.

9 THE COURT: What's the objection?

10 MS. LEE-CLARK: They haven't established that he's
11 an expert. He may be certified as a layperson standard
12 is able to identify plants, but not for expert
13 testimony.

14 THE COURT: I'm inclined to agree, Miss Braymer.

15 MS. BRAYMER: I'm not proffering it as expert
16 testimony. He's testifying to his observations and I
17 wanted to clarify that he would be able to identify an
18 invasive from a native species.

19 THE COURT: That sounds like expert opinion
20 testimony to me.

21 MS. BRAYMER: This subject matter is not one that
22 requires expert knowledge and the witness is qualified
23 to give this lay opinion testimony.

24 THE COURT: Lay opinion with regard to invasive

(Peter Bauer - Direct by Ms. Braymer)

1 terrestrial species?

2 MS. BRAYMER: Yes.

3 THE COURT: Overruled. The objection is sustained.

4 MS. BRAYMER: It's sustained?

5 THE COURT: It's sustained. The objection is
6 sustained.

7 MS. BRAYMER: Okay.

8 THE COURT: Let me say this. If he can identify a
9 plant species by sight, without telling me whether they
10 are invasive or whether they are native or not, that may
11 well fall into a lay opinion can be given.

12 MS. BRAYMER: Okay. Understood.

13 THE COURT: All right.

14 BY MS. BRAYMER:

15 Q I have handed you what's been marked for
16 identification as Plaintiff's Exhibit 161. Do you recognize
17 what's in that exhibit?

18 A Yes, I do.

19 Q Without telling me any specifics, just what is
20 that?

21 A This is a photograph that I took.

22 Q Where is it? Which trail?

23 A This is on a section of a Newcomb to Minerva Class
24 II community connector trail on the section from Santanoni to

(Peter Bauer - Direct by Ms. Braymer)

1 Harris Lake and this is a newly constructed section around
2 the Camp Santanoni parking area.

3 Q Did you take that photo?

4 A Yes, I did.

5 Q Does it fairly and accurately depict the scene at
6 the time you took the photo?

7 A Yes, it does.

8 MS. BRAYMER: I move Exhibit 161 into evidence.

9 THE COURT: Counsel?

10 MS. LEE-CLARK: I object on the basis that it's not
11 relevant and we already have several -- and also
12 cumulative. We already have several pictures of plants
13 on the Newcomb to Minerva.

14 THE COURT: All right. With regard to cumulative,
15 your objection is overruled.

16 Do you want to tell me more about your objection
17 that it's not relevant?

18 MS. LEE-CLARK: I don't believe that it goes to any
19 of the constitutional claims that plaintiff is making
20 without any further information.

21 THE COURT: Overruled, 161 is received into
22 evidence.

23 (Plaintiff's Exhibit 161 received in
24 evidence.)

(Peter Bauer - Direct by Ms. Braymer)

1 BY MS. BRAYMER:

2 Q As far as the plant species, Mr. Bauer, what is it?
3 Are you able to identify any of species in that photograph,
4 161?

5 A Yes.

6 Q What do you see?

7 A In photograph 161 I took this picture because it
8 shows a section of the trail where the trail corridor has
9 been overgrown with the invasive species.

10 MS. LEE-CLARK: Objection.

11 THE COURT: The objection is sustained. I'm going
12 to have the question read back to you and I want you to
13 listen carefully to the question and answer only the
14 question that has been asked, not why you did anything.

15 In addition, the objection is sustained because to
16 the extent he's about to identify some species, he has
17 not given the basis for the ability to identify such
18 species. Even as a lay person, he still needs to give
19 his ability to do so.

20 So let's start over again. I won't have the
21 question back. I will let you reask the question.

22 BY MS. BRAYMER:

23 Q You testified that you are able to identify certain
24 species of plants in the forest preserve. Can you describe

(Peter Bauer - Direct by Ms. Braymer)

1 to the Court how it is that you are able to do that? What
2 kind of background do you have in identifying plant species?

3 A In three ways. In my previous position at the RCPA
4 I commented on and helped to advocate for the creation of a
5 terrestrial invasive species management program by the DEC on
6 the forest preserve. So I had experience in the development
7 of that program.

8 Secondly, in a previous position when I worked
9 at the Fund for Lake George, I administered permits for
10 eradication programs for invasive species, such as including
11 Japanese knotweed and common phragmites. Common phragmites
12 is the invasive.

13 Thirdly, I live in Blue Mountain Lake. Blue
14 Mountain Lake was a test project by the State Department of
15 Transportation for eradication of Japanese knotweed and two
16 of my neighbors had knotweed on their property, which were
17 part of that DOT project. And my mother-in-law was one of
18 the key volunteers in that DOT project for the eradication of
19 knotweed in the Blue Mountain Lake area.

20 Q With respect to the Fund for Lake George project,
21 did you do any implementation or fieldwork of that program?

22 A Not other than visiting the contractors while they
23 were mapping the extent of the invasive species and
24 performing the actual treatments on the locations.

(Peter Bauer - Direct by Ms. Braymer)

1 Q You observed them. Did you observe them doing the
2 treatment?

3 A Yes.

4 Q And with respect to the Blue Mountain Lake project,
5 did you observe or implement or have any other connection
6 with the project itself?

7 A Not other than watching it over the last few years.

8 Q Do you have any other experience treating invasive
9 species infestation, such as Japanese knotweed?

10 MS. LEE-CLARK: Objection, your Honor.

11 THE COURT: What is the objection?

12 MS. LEE-CLARK: I believe that this was just -- the
13 line of questioning was just about identifying plants,
14 not identifying invasive species.

15 THE COURT: That was where my ruling was, but
16 obviously I wasn't going to step in on you,
17 Miss Braymer, if you were attempting to qualify him as
18 an expert with an ability to identify invasive species,
19 though I have serious doubts about that with regard to
20 what you have thus far elicited from him.

21 I thought your questioning was to elicit from him
22 his ability to identify specifically certain species
23 without going to whether or not they were invasive,
24 which, again, from what I have heard thus far, he has

(Peter Bauer - Direct by Ms. Braymer)

1 not evinced sufficient expert ability or background or
2 education or experience in order to apply that.

3 MS. BRAYMER: I would like to ask the Court if --

4 THE COURT: You can ask.

5 MS. BRAYMER: If he can at this point testify to
6 the identification of Japanese knotweed.

7 MS. LEE-CLARK: Objection.

8 THE COURT: I think he has established sufficient
9 ability and background to testify to the identification
10 of certain of the species that he's already testified
11 about, about his experience. Yes.

12 MS. BRAYMER: Thank you.

13 THE COURT: Okay.

14 BY MS. BRAYMER:

15 Q Mr. Bauer, just answering my specific question, are
16 you able to observe any Japanese knotweed in the photograph
17 in Exhibit 161?

18 A Yes.

19 Q Can you describe the trail conditions where this
20 photograph was taken?

21 A This photograph was taken in the late summer of
22 2016. There is in the background of this picture you can see
23 an open grassy area.

24 MS. LEE-CLARK: Objection.

(Peter Bauer - Direct by Ms. Braymer)

1 THE COURT: Overruled.

2 Go ahead.

3 A In the foreground you can see that the trail is
4 overgrown with primarily Japanese knotweed.

5 Q Did you observe this area before the Japanese
6 knotweed was growing there?

7 A Yes, I did.

8 Q And can you describe the trail conditions at that
9 time -- first of all, when were you there previously?

10 A The first time I walked this part of the newly
11 constructed trail was in the fall of 2015. I counted stumps
12 on this section of the trail in the late spring of 2016.

13 Q Did you observe any Japanese knotweed growing in
14 2015?

15 A No.

16 Q Did you observe any in the spring of 2016?

17 A No.

18 Q What were the trail conditions in the spring of
19 2016?

20 A The trail had been cut out and it had -- there
21 was -- the trail had been cut out and there was straw on some
22 parts of it.

23 Q Did you visit this section after the summer of 2016
24 when you took this photo?

(Peter Bauer - Direct by Ms. Braymer)

1 A Yes, I did.

2 Q What did you observe at that time?

3 A I returned in early December because I wanted to
4 verify that the knotweed at this location was still present.

5 Q And did you observe the Japanese knotweed at that
6 time?

7 A Yes.

8 Q Moving to a different topic. I'm going to hand you
9 some exhibits.

10 Turning to Exhibit 51, did you visit the Rock
11 Dam Trail?

12 A Yes, I did.

13 Q Do you recognize what is shown in Exhibit 51?

14 A Yes, I do.

15 Q What is it?

16 A This is a section of the Rock Dam Trail in the
17 Moose River Plains Wild Forest a few hundred yards from the
18 road on the forest preserve that connects the main hall roads
19 through Moose River Plains and the eastern boundary of the
20 Adirondack League Club.

21 Q Did you take that photo?

22 A Yes, I did.

23 Q And does it fairly and accurately depict the scene
24 at the time that you took it?

(Peter Bauer - Direct by Ms. Braymer)

1 A Yes, it does.

2 MS. BRAYMER: Your Honor, would you like me to move
3 that again?

4 THE COURT: No. That was already -- just to be
5 clear, that was already received in evidence pursuant to
6 Mr. Signell's testimony subject to connection.

7 BY MS. BRAYMER:

8 Q Did you visit the Squaw Lake Trail?

9 A Yes, I did.

10 Q And when was that?

11 A This was in the fall of 2016.

12 Q Looking at Exhibit 54, do you recognize what's in
13 that exhibit?

14 A Yes, I do.

15 Q Can you describe what that is?

16 A This is a foot bridge on the Squaw Lake Trail.

17 Q Did you take that photo?

18 A Yes, I did.

19 Q And that was at the time that you visited or when
20 did you take that?

21 A I took this on the date that I visited in the fall
22 of 2016. I believe I took this photo using the Fulcrum app.

23 Q Can you give us a narrowed down description as to
24 where that was on the trail?

(Peter Bauer - Direct by Ms. Braymer)

1 A Yes. This is the Squaw Lake Trail. It accesses
2 and connects Squaw Lake to the Indian Lake Trail in the Moose
3 River Plains Wild Forest in the southwest corner of the Moose
4 River Plains Wild Forest area.

5 Q Does this photo fairly and accurately depict the
6 scene at the time you took the photo?

7 A Yes, it does.

8 Q Did you visit the Indian Lake Trail?

9 A Yes, I did.

10 Q When did you do that?

11 A On the same day in the fall of 2016.

12 Q The same day as when you went to the Squaw Lake
13 Trail?

14 A Yes.

15 Q And turning your attention to Exhibits 41 and 42,
16 do you recognize those?

17 A Yes, I do.

18 Q What do those depict?

19 A This depicts different sections of what is referred
20 to as the Indian Lake Trail in the Moose River Plains Wild
21 Forest.

22 Q Did you take those photos?

23 A Yes, I did.

24 Q And starting with 41, can you give us a more

(Peter Bauer - Direct by Ms. Braymer)

1 precise location for where you took that photo?

2 A I can. The Indian Lake Trail is several miles
3 long. Squaw Lake is accessed fairly far down the trail.
4 Exhibit 41 shows a section at the far end of the Indian Lake
5 Trail.

6 Q Do these photos fairly and accurately depict the
7 scene at the time that you took them?

8 A Yes, they do.

9 Q And did you provide that, those photos to Mr.
10 Signell through the Fulcrum app?

11 A Yes, I did.

12 Q Did you also do that for Exhibits 51 and 54?

13 A Yes, I did.

14 Q Did you visit the Helldiver Pond Trail?

15 A Yes, I did.

16 Q And when was that?

17 A Also in the, at the same time period the fall of
18 2016.

19 Q Was anyone with you?

20 A Mr. Signell.

21 Q He was with you when you went to the Helldiver Pond
22 Trail?

23 A Yes. That was one trail, because it's quite short,
24 that we both walked down together.

(Peter Bauer - Direct by Ms. Braymer)

1 Q Turning to Exhibit 39, do you recognize that?

2 A I do not have Exhibit 39.

3 Q Now that you have it, do you recognize Exhibit 39?

4 A Yes, I do.

5 Q What does that depict?

6 A A section of the Helldiver Pond Trail that I
7 photographed on that day.

8 Q You photographed that. And what's the second part
9 of your answer?

10 A That I photographed on that day in the fall of
11 2016.

12 Q You mentioned the segment or section. Which one
13 exactly of the Helldiver Pond?

14 A This is the section fairly close to the road, not
15 down at the lakeside. The entire stretch of the trail, I
16 believe, is only a third of a mile or so.

17 Q Does that photo fairly and accurately represent the
18 scene at the time you took the photo?

19 A Yes.

20 MS. BRAYMER: Your Honor, I move Exhibit 39 into
21 evidence.

22 MS. LEE-CLARK: Objection, your Honor. There is no
23 evidence, I believe, that this is on the forest preserve
24 or where exactly on the Helldiver Pond Trail this is.

(Peter Bauer - Direct by Ms. Braymer)

1 THE COURT: According to my notes, Miss Braymer, we
2 started on this photograph and this trail with Mr.
3 Signell and then we stopped, I think, for a similar
4 objection. Do you want to address that point now?

5 MS. BRAYMER: I'm not sure if -- I can't remember
6 the specific objection at that time, but I do recall
7 that Mr. Signell was not able to recall whether or not
8 he had taken that photo. So we stopped at that time.

9 THE COURT: Okay. The objection is overruled. I
10 will receive 39 subject to further connection with the
11 proof at the trial to whether the Helldiver Pond Trail
12 was part of the area that we are supposed to be
13 reviewing and the purposes for the submission. Mr.
14 Signell certainly did not testify --

15 MS. BRAYMER: He did not.

16 THE COURT: -- give opinion testimony of any sort
17 with regard to that trail, but I will receive it subject
18 to connection and subject to awaiting the evidence
19 presented in the context of the application.

20 Thirty-nine is received and can be marked.

21 (Plaintiff's Exhibit 39 received in
22 evidence.)

23 BY MS. BRAYMER:

24 Q Mr. Bauer, is this trail on the forest preserve?

(Peter Bauer - Direct by Ms. Braymer)

1 A Yes.

2 Q And which DEC administrative unit of land is this
3 located within?

4 A Moose River Plains Wild Forest.

5 Q Referring your attention to Exhibit 29, where there
6 was the list of trails in the Moose River Plains Wild Forest,
7 do you see that trail that we are talking about, the
8 Helldiver Pond Trail identified on this list?

9 A Under the listing of trails, under the heading
10 trail closures on page 113 and 114, item T, Helldiver Pond
11 Road, .35 miles.

12 Q That's on page 114?

13 A Yes.

14 Q And again, how long did you say this trail was that
15 you visited?

16 A About a third of a mile.

17 Q Can you please read what's identified there for
18 letter T?

19 A Helldiver Pond Road .35 miles from LLCRR to
20 dead-end.

21 Q Do you know what LLCRR stands for?

22 A I believe it's the Limekiln Lake Cedar River Road.

23 MS. LEE-CLARK: Objection, your Honor.

24 THE COURT: Sustained.

(Peter Bauer - Direct by Ms. Braymer)

1 MS. LEE-CLARK: Move to strike.

2 THE COURT: Stricken.

3 BY MS. BRAYMER:

4 Q What does Exhibit 39 depict?

5 A The Helldiver Pond Trail has been reconstructed to
6 provide access for --

7 MS. LEE-CLARK: Objection.

8 THE COURT: Sustained.

9 Q Mr. Bauer, what did you observe about the trail
10 surface when you visited?

11 A That there was a mix of boardwalk and gravel
12 pathways leading to a dock at Helldiver Pond.

13 Q Mr. Bauer, still on Exhibit 39, and from your
14 observations, how wide was the boardwalk?

15 A Around three feet.

16 Q Did you visit the Limekiln Lake Trail?

17 A I visited a trail that I referred to as the
18 Limekiln Lake Cutoff Trail that connected Limekiln Lake and
19 the Limekiln Lake Cedar River Road that runs through the
20 middle of the Moose River Plains Wild Forest area.

21 Q When did you do your visit?

22 A In the fall of 2016.

23 Q Do you recognize what's shown in Exhibit 32?

24 A Yes, I do.

(Peter Bauer - Direct by Ms. Braymer)

1 Q And just generally, what is it depicting?

2 A It depicts a bridge over a stream on a section of
3 that trail corridor.

4 Q Did you take that photo?

5 A Yes, I did.

6 Q Which section of the trail corridor?

7 A This is probably 500 yards from the Limekiln Lake
8 Cedar River Road that runs through the middle of the Moose
9 River Plains Wild Forest.

10 Q Does that photo fairly and accurately depict the
11 scene at the time you took the photo?

12 A Yes, it does.

13 MS. BRAYMER: I move Exhibit -- sorry, I do not.

14 THE COURT: I will ask now, Miss Lee-Clark, any
15 further objection to Exhibits 54, 51, 41, and 42, and 32
16 with regard to your previously expressed objection or
17 Miss Simon's previous objection at the time of Mr.
18 Signell's testimony?

19 MS. LEE-CLARK: I object to Exhibit 42. There
20 hasn't been sufficient foundation laid for where exactly
21 that is.

22 THE COURT: Miss Braymer.

23 MS. BRAYMER: She did have an opportunity to voir
24 dire him at this time and did not ask any questions.

(Peter Bauer - Direct by Ms. Braymer)

1 THE COURT: Miss Braymer, it's up to you whether
2 you want me to rule on that or whether you want to make
3 sure -- whether you want to argue it or whether you want
4 to ask a couple more questions of Mr. Bauer to remove
5 the issue if you can.

6 MS. BRAYMER: Yes.

7 Are there any other photos like that,
8 Miss Lee-Clark?

9 THE COURT: Pardon?

10 MS. BRAYMER: No. Okay.

11 BY MS. BRAYMER:

12 Q Referring back to Exhibit 41, Mr. Bauer.

13 THE COURT: I think she said 42. I could be wrong.

14 MS. LEE-CLARK: That is correct.

15 THE COURT: Forty-two.

16 MS. BRAYMER: Forty-two. Okay.

17 BY MS. BRAYMER:

18 Q Forty-two. Which trail was 42, Mr. Bauer?

19 A The Indian Lake Trail in the Moose River Plains
20 Wild Forest.

21 Q And you said you took this photo. What section of
22 the Indian Lake Trail was this photograph taken on?

23 A This is a section of trail that is fairly close,
24 within a quarter mile to a third of a mile from the beginning

(Peter Bauer - Direct by Ms. Braymer)

1 of the Indian Lake Road in the Moose River -- or the Indian
2 Lake Trail in the Moose River Plains Wild Forest where there
3 is a gate and I was on a bicycle and was riding down this
4 road and I stopped and took this photograph.

5 MS. BRAYMER: That's all I have.

6 THE COURT: Your objection to 42 is overruled.

7 Miss Lee-Clark, any other further objection?

8 MS. LEE-CLARK: Not with those photos.

9 THE COURT: Thank you.

10 BY MS. BRAYMER:

11 Q Mr. Bauer, going back to Exhibit 32, can you
12 identify on Exhibit 29 which trail this is referring to, the
13 Limekiln -- you said you called it the Limekiln Lake Cutoff?

14 A Yes. This could be shown very clearly on a map,
15 but I believe it's item A, what's referred to here as Fawn
16 Lake Trail, and then in parenthesis a/k/a Sump Trail.

17 Q Thank you. Do you have Exhibit 33 with you?

18 A Yes, I do.

19 Q Did you visit the Bear Pond Trail?

20 A Yes, we did. Yes, I did.

21 Q When was that?

22 A This was also the fall of 2016.

23 Q Was Mr. Signell with you at that time?

24 A Yes, he was.

(Peter Bauer - Direct by Ms. Braymer)

1 Q On the Bear Pond Trail?

2 A Yes.

3 Q Do you recognize Exhibit 33?

4 A Yes.

5 Q What is it showing?

6 A It shows a trail corridor through the forest.

7 Q Which trail?

8 A Of the Bear Pond Trail.

9 Q Did you take this photo?

10 A Yes.

11 Q And where more precisely were you located when you
12 took that photo?

13 A This is walking north, probably about a third of a
14 mile down the trail using -- I took this photograph in the
15 Fulcrum app.

16 Q Where did you -- so you went a third of a mile, but
17 where did you start?

18 A We started off a side road on the -- off of the
19 Limekiln Lake Cedar River Road, the main hall road through
20 the center of the Moose River Plains Wild Forest area. There
21 is a part in which there is a juncture and that road
22 separates.

23 Q Does this photo fairly and accurately represent the
24 scene at the time that you took it?

(Peter Bauer - Direct by Ms. Braymer)

1 A Yes, it does.

2 MS. BRAYMER: Your Honor, I move Exhibit 33 into
3 evidence.

4 MS. LEE-CLARK: I believe it's already in evidence.

5 MS. BRAYMER: My notes indicate I have not yet
6 moved this.

7 THE COURT: I'm taking a moment to check my notes,
8 but according to my clerk and my stenographer, they
9 don't have 33 in evidence.

10 MS. LEE-CLARK: No objection.

11 THE COURT: Okay. Thirty-three is received into
12 evidence.

13 (Plaintiff's Exhibit 33 received in
14 evidence.)

15 BY MS. BRAYMER:

16 Q What did you observe at the time that you took this
17 photo?

18 A This was a narrow corridor through the woods.

19 Q Referring to Exhibit 29, the list of trails, can
20 you identify which trail this is on the list?

21 A I believe this is item N.

22 MS. LEE-CLARK: Objection.

23 THE COURT: Sustained.

24 MS. BRAYMER: I will move on.

(Peter Bauer - Direct by Ms. Braymer)

1 THE COURT: Okay.

2 BY MS. BRAYMER:

3 Q I have handed you what's been marked for
4 identification as Plaintiff's Exhibit 165. Do you recognize
5 what's provided in 165?

6 A Yes, I do.

7 Q And just generally, what are those exhibits?

8 A These are photographs of signs and warning signs
9 and direction signs that I photographed on Class II community
10 connector trails.

11 Q Those trails were in the forest preserve?

12 A These trails were all in the forest preserve.

13 Q Looking at the -- you testified that you took all
14 these. Did you take them all in the same day?

15 A No.

16 Q Then let's go one by one. Looking at the first
17 photo.

18 A Yes.

19 Q Which trail is this?

20 A This is on the Wilmington Trail.

21 Q And which segment of the Wilmington Trail or where
22 more precisely did you take this photo? I don't believe
23 Wilmington has segments.

24 A Correct. This would -- this trail or this picture

(Peter Bauer - Direct by Ms. Braymer)

1 was taken on the north end of the trail.

2 Q And when did you take that photo?

3 A Late August 2016.

4 Q Now, looking at the second photo, you testified you
5 took this; is that correct?

6 A That is correct.

7 Q Which trail is this?

8 A This is also on the Wilmington Trail.

9 Q Where on the trail?

10 A This is taken very close to the previous picture on
11 the north end of the Wilmington Trail. You can see the
12 outline of the previous picture behind the large caution
13 sign.

14 Q Where in the photo? The second photo.

15 MS. LEE-CLARK: Objection.

16 THE COURT: What's the objection?

17 MS. LEE-CLARK: This photo speaks for itself.

18 THE COURT: Overruled.

19 You may continue.

20 BY MS. BRAYMER:

21 Q Where in the second photo is there a portion of the
22 first photo?

23 A To the immediate left of the caution sign you see a
24 white birch tree and you can see just a part of the

(Peter Bauer - Direct by Ms. Braymer)

1 directional arrow sign.

2 Q Turning to the third photograph, did you take this
3 photo?

4 A Yes.

5 Q Which trail is this?

6 A I believe this is also the Wilmington Trail.

7 Q When did you take that?

8 A This would have also been in late August 2016.

9 Q And where on the trail was this located?

10 A This is in the center of the trail.

11 Q And turning to the last photograph, which trail is
12 that?

13 A This is on an access road to the Seventh Lake
14 Mountain Trail.

15 Q Where were you when you took this photo?

16 A I was facing north at the intersection of that road
17 with Route 28.

18 Q How long is the Wilmington Trail?

19 Let me withdraw that question. I will refer
20 to the Court Exhibit.

21 Referring to Court Exhibit 1, how long is the
22 Wilmington Trail?

23 A 2.96 miles.

24 Q Do these four photographs fairly and accurately

(Peter Bauer - Direct by Ms. Braymer)

1 depict the scene at the time that you took the photos?

2 A Yes.

3 MS. BRAYMER: Your Honor, I move Exhibit 165 into
4 evidence.

5 MS. LEE-CLARK: Objection.

6 THE COURT: What's the objection?

7 MS. LEE-CLARK: Photograph number four is not taken
8 on a Class II community connector trail. It's on a
9 road.

10 THE COURT: Counsel?

11 MS. BRAYMER: May I ask to clarify?

12 THE COURT: Sure.

13 BY MS. BRAYMER:

14 Q Mr. Bauer, was the sign taken on the trail or was
15 it taken on the access road?

16 THE COURT: This is the last photo of the four
17 included in 165.

18 Go ahead.

19 A This was taken on the access road that is groomed
20 as a snowmobile --

21 MS. LEE-CLARK: Objection.

22 THE COURT: Overruled.

23 Finish your answer.

24 A It is groomed as a snowmobile trail for snowmobiles

(Peter Bauer - Direct by Ms. Braymer)

1 coming off of Seventh Lake, crossing Route 28, and they drive
2 on this road. I was there a month ago with a television
3 reporter.

4 MS. LEE-CLARK: Objection --

5 A -- we walked on this --

6 THE COURT: Hang on.

7 Sustained.

8 A We walked on this --

9 THE COURT: That one was sustained. That means
10 stop.

11 THE WITNESS: Okay.

12 THE COURT: I don't mean to hold it up on what he
13 saw or where people might be using it. The question
14 is -- the objection is, is it part of the Class II, that
15 it's not part of the Class II community connector
16 snowmobile trails.

17 MS. BRAYMER: Based on his testimony, my argument
18 is it is part of the system. It's one of the signs used
19 for directions leading to and from the Class II
20 community connector snowmobile trail.

21 THE COURT: All right. The objection is overruled.
22 Exhibit 165 is received into evidence in its entirety.

23 (Plaintiff's Exhibit 165 received in
24 evidence.)

(Peter Bauer - Direct by Ms. Braymer)

1 BY MS. BRAYMER:

2 Q Mr. Bauer, now that these are in evidence, I would
3 like to ask you what they are showing.

4 A Each of these signs are plastic yellow signs with
5 black lettering or --

6 MS. LEE-CLARK: Objection.

7 THE COURT: Overruled.

8 You may finish.

9 A Or directional markings providing warnings to
10 snowmobile operators.

11 MS. LEE-CLARK: Objection.

12 THE COURT: Sustained.

13 I should have been more clear. Objection with
14 regard to the statement providing warnings to snowmobile
15 operators, which is a conclusion, not a description of
16 what he observed.

17 So that portion of his testimony is stricken.

18 You may continue, Miss Braymer.

19 BY MS. BRAYMER:

20 Q Did you see these yellow plastic signs on other
21 Class II community connector snowmobile trails?

22 A Yes.

23 Q And are these signs typical of those on the other
24 trails that you observed?

(Peter Bauer - Direct by Ms. Braymer)

1 A No. These are typical for Class II community
2 connector trails. They are not typical for other foot
3 trails.

4 MS. LEE-CLARK: Objection.

5 THE COURT: What's the objection?

6 MS. LEE-CLARK: That he hasn't established that
7 he's been on every other or a vast majority of the
8 trails in the Adirondacks.

9 THE COURT: Miss Braymer, do you want to be heard
10 on that objection?

11 MS. BRAYMER: Well, early on he did testify about
12 hiking many --

13 THE COURT: He did. Give me a second. I may have
14 missed it. My recollection and notes reflect that he's
15 traversed hundreds of miles of snowmobile trails.

16 So you may have to elicit some further evidence in
17 order to have him compare them to the hiking trails that
18 he has seen.

19 So, for now the objection is sustained. You may
20 ask some more questions.

21 BY MS. BRAYMER:

22 Q Let me ask first, did you see these yellow signs on
23 other Class II community connector snowmobile trails?

24 A Yes.

(Peter Bauer - Direct by Ms. Braymer)

1 Q How many of these signs did you see, approximately?

2 A On the four Class II community connector trails
3 that I counted stumps on and photographed stumps, there were
4 probably two dozen of these types of signs.

5 THE COURT: Two dozen per trail or two dozen in
6 total?

7 THE WITNESS: Two dozen in total that I recollect.

8 THE COURT: I understand you are approximating.

9 BY MS. BRAYMER:

10 Q Mr. Bauer, how many miles of hiking trails do you
11 think that you have hiked in the Adirondacks?

12 A As I believe I testified earlier, I started hiking
13 in 1977 in the High Peaks. I have hiked 35 of the 46. I
14 have hiked many of the High Peaks many times. Total mileage
15 that I have hiked, hundreds of miles of individual trails,
16 thousands of miles of total hiking.

17 Q And when you said 35 of 46, what are you referring
18 to, just --

19 A The Adirondack High Peaks have 46 peaks over
20 4,000 feet. People that -- there is a group called the
21 46ers, people that hike all 46 can become a 46er. There is
22 ten or 12,000 of those so far. I have hiked -- I'm not there
23 yet. I have hiked 35.

24 Q In your hiking, have you seen signs like those in

(Peter Bauer - Direct by Ms. Braymer)

1 Exhibit 155 on hiking trails?

2 A No.

3 Q Exhibit 165?

4 A No.

5 MS. BRAYMER: Can I have a moment, please, to
6 confer?

7 THE COURT: Sure.

8 MS. BRAYMER: Thank you.

9 (Pause.)

10 MS. BRAYMER: Your Honor, no further questions for
11 this witness at this time.

12 THE COURT: All right.

13 Counsel, are you ready to cross-examine?

14 MS. LEE-CLARK: Can I have a moment to confer?

15 THE COURT: You may.

16 (Pause.)

17 MS. LEE-CLARK: Thank you.

18 Your Honor, I have no cross-examination for this
19 witness.

20 THE COURT: Thank you, Mr. Bauer. You may step
21 down.

22 All set, Mr. Caffry?

23 MR. CAFFRY: Yes, your Honor. I just have one more
24 item if you can just give me a moment.

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1 THE COURT: Of course.

2 (Pause.)

3 MR. CAFFRY: Ready, your Honor.

4 THE COURT: Okay.

5 MR. CAFFRY: The plaintiff would like to offer into
6 evidence what's been marked as Exhibit 164. It consists
7 of excerpts of the November 16, 2015, deposition
8 transcript of Walter W. Linck of the APA staff.

9 This excerpt consists of approximately 60 pages,
10 plus the correction sheets and the signature page from
11 that deposition transcript.

12 I gave a copy of this excerpt to the defendants'
13 attorney two days ago. We previously read parts of Mr.
14 Linck's transcript into evidence, I believe it was the
15 first day of this trial. And there may be a little
16 overlap with these pages, and if so, I apologize for
17 potentially overburdening the record, but Mr. Linck
18 testified pursuant to your order of October 20, 2015.
19 He was the only APA employee that we were allowed to
20 depose. He was the only one at the time that we were
21 allowed to depose who had knowledge of the Class II
22 community connector trails.

23 I don't intend to read this excerpt into the
24 record. It's rather lengthy.

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1 What I would like to do is offer it into evidence
2 pursuant to CPLR 3117(b)(2) as part of our direct case.
3 And it would be my intention to cite to it in our
4 posttrial memorandum. And with that I move that it be
5 admitted.

6 THE COURT: Counsel?

7 MS. SIMON: I object on multiple grounds.

8 Let me just clarify for the record. That was not
9 the only APA employee that they deposed.

10 MR. CAFFRY: Objection, your Honor. That's not
11 what I said.

12 THE COURT: Maybe I wasn't listening carefully
13 enough and maybe Miss Simon wasn't listening carefully
14 enough. That was my understanding of what you said.

15 MR. CAFFRY: He was the only APA staff person with
16 knowledge of the Class II community connector trails
17 that we were allowed to depose and that's why you
18 ordered that we be allowed to depose him.

19 THE COURT: Please continue, Miss Simon.

20 MS. SIMON: Your Honor, they did depose Matt
21 McNamara, who is an APA employee, so, in answer to that.

22 First of all, this is totally improper to put an
23 entire deposition transcript into the record.

24 First of all, it's highly redacted. I went through

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1 what they gave me and it's got all kinds of redactions
2 and missing page numbers and it's inappropriate to
3 introduce this, first of all, because Mr. Linck is
4 available and could be brought to the stand. That's the
5 first ground.

6 The second is that CPLR 4517(a)(3) says that only
7 if the witness is not available that they might be able
8 to introduce parts of a deposition transcript. He's
9 available.

10 In addition, there is no proffer here for what it
11 is they intend to prove or what material fact they would
12 bring his testimony in for what purpose.

13 THE COURT: Okay. Well, as a representative of a
14 party, 4517 does not apply in this civil action. They
15 can offer the deposition testimony under the CPLR of an
16 employee representative of one of the parties, unless
17 you have a further objection with regard to the status
18 as an employee.

19 MS. SIMON: That is correct. He's not a
20 supervisor. He's not one that could give testimony that
21 would bind the agency.

22 THE COURT: So your position is that he doesn't
23 have speaking authority for the agency --

24 MS. SIMON: Absolutely.

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1 THE COURT: -- on the matters --

2 MS. SIMON: On whatever matter it is that he's
3 trying to address.

4 THE COURT: Well, okay. He's giving you a
5 transcript, Mr. Caffry has presumably, which you have
6 seen, a redacted transcript with a number of statements
7 made in the deposition by the employee, yes?

8 MS. SIMON: Correct.

9 THE COURT: Okay. Have you had a chance to review
10 that fully?

11 MS. SIMON: Have I had a chance to review the
12 quote?

13 THE COURT: The transcript. The transcript of the
14 proposed proffer.

15 MS. SIMON: Yes.

16 THE COURT: Okay. If there are certain areas where
17 it is your position that he did not have speaking
18 authority, you are going to have to tell me what areas
19 those were and give me the argument for why he does not
20 have speaking authority, in order for me to seriously
21 consider your objection that this constitutes hearsay
22 rather than a statement on deposition of a party
23 employee.

24 So you are going to have to go through it and tell

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1 me exactly what areas he was not speaking for the or not
2 speaking within the scope of the authority as an agent
3 of the Adirondack Park Agency.

4 Do you understand what I'm saying?

5 MS. SIMON: It would take quite a bit of time.

6 THE COURT: I'm asking you because I feel like I
7 was a little bit rambling there.

8 MS. SIMON: This transcript -- Mr. Linck in this
9 transcript has not, because he's not a supervisor, he
10 didn't do any construction on this trail. There is no
11 basis to, and they haven't offered any issue of material
12 fact that he would speak to that would provide any basis
13 for putting his deposition into the record as an
14 exhibit. There is no opportunity here for me to
15 cross-examine. It's a Sixth Amendment issue on that
16 grounds. And this is not the best evidence. This is an
17 incomplete transcript. He sort of picked out the things
18 that he wants to choose to put in.

19 THE COURT: Whenever that is done in a civil trial,
20 you always have the ability to then -- the opposing
21 party always has the full ability to then proffer
22 immediately any portions of the same transcript that
23 they wish to.

24 So that objection is going to be overruled. You

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1 always have the ability to complete the record. In
2 fact, the ability is typically given immediately even
3 during the course of the other side's trial. If they
4 read some portion of the transcript, that they are
5 allowed to stand up immediately and complete the record,
6 even before their own presentation of evidence.

7 So that objection is overruled. If you want to
8 analyze it and have both sides give me letter briefs
9 tomorrow morning on this issue of whether I can accept
10 this and what portions of it I can accept with regard to
11 whether he has speaking authority or not, that would
12 certainly be something I would be interested to see from
13 both sides.

14 But it's going to -- it should be addressed to the
15 extent you believe this speaking authority exclusion
16 applies to the proffer of Mr. Linck's deposition
17 testimony. You are going to have to do a more
18 particularized analysis of exactly where you think it
19 applies and it doesn't.

20 And I understand, and I'm guessing, but I'm
21 guessing, I think, properly, that Mr. Caffry's position
22 is going to be that once I have authorized a deposition
23 of a party employee, the entire speaking authority issue
24 does not even come into play, but I would be interested

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1 to see that issue. I would take a look at it myself.

2 So I'm going to reserve on that. You certainly
3 made the proffer and I want to see some law on that
4 before I make a final decision.

5 MR. CAFFRY: May I respond now?

6 THE COURT: Sure.

7 MR. CAFFRY: Briefly?

8 THE COURT: Yes.

9 MR. CAFFRY: I purposely redacted this to remove
10 portions that I thought were not pertinent to the case
11 at this time.

12 THE COURT: Okay.

13 MR. CAFFRY: There was certainly, in any
14 depositions you explore, issues that turn out ultimately
15 not to be relevant, but that's allowable because it may
16 lead to relevant evidence at some point.

17 Contrary to what Miss Simon said, there is no
18 missing page numbers. I redacted parts of pages, but I
19 believe all of the page numbers survived. I personally
20 took a pair of scissors to the page and recopied them.
21 Maybe one disappeared. I don't think so.

22 I could put in the full transcript. I have a copy
23 here. I don't think it's necessary and I don't want to,
24 but I have got it.

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1 THE COURT: I think I have already dealt with that
2 issue.

3 Let me say this also. Given the change in
4 deposition rules, which you are all aware of from a few
5 years ago, it is not uncommon or untoward for objections
6 to be raised at this time with regard to general
7 objections with regard to anything that's being
8 proffered.

9 So I don't know if Miss Simon has had a chance to
10 look at that. She has that ability to look at that in
11 any event and to raise those objections.

12 MR. CAFFRY: I did give it to her two days ago so
13 that she could review it before I proffered it. And I
14 agree she has the right to add additional pages if they
15 think that something would clarify or I cut something
16 out that was prejudicial. I totally agree.

17 On the authority issue, again, we served -- we had
18 this same discussion quite a while ago when I read
19 portions of the deposition transcripts and I believe you
20 allowed it subject to briefing or something like that.

21 But in the particular case of Mr. Linck and the
22 APA, we served a deposition notice for multiple people
23 from the APA, very high up the food chain, and we were
24 not allowed to depose them under 3117(b), I believe.

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1 The defense offered us Mr. McNamara. He turned out to
2 not know anything or very little about the Class II
3 trails. You ordered that Mr. Linck be produced.

4 That was the only person we got. That's, to my
5 mind, the best we could do.

6 I think it's extremely prejudicial for them to now
7 argue that Mr. Linck didn't have authority, when they
8 denied us access to anybody higher up the food chain.

9 THE COURT: Well, why don't we take a look and see
10 where we are, okay? And for all -- you all know what's
11 in that transcript far better than I do. It may well be
12 that Mr. Linck's, the majority of Mr. Linck's testimony
13 is factual in nature and does not even fall under the
14 speaking authority issue. Maybe you already know that
15 answer, but I don't know.

16 But take a look and get -- on your own schedules.
17 It does not have to be first thing tomorrow morning if I
18 just said that. On your own schedules, because it's a
19 non-jury trial and we are proceeding on it. I would
20 like the two of you to figure out a way that you can
21 both at the same time give me letter briefs on the
22 subject. All right?

23 I'm reserving until that time.

24 MR. CAFFRY: At this time, what would you like me

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1 to do with the copy that I have proffered?

2 Should I hand it up to the clerk?

3 THE COURT: Have you had it marked?

4 MR. CAFFRY: It's been marked.

5 THE COURT: As long as it's been marked as
6 Plaintiff's number 164 and Miss Simon has a good copy of
7 the copy that you proffered, I do not need it at this
8 time.

9 MR. CAFFRY: I should hold onto it?

10 THE COURT: Yes, unless -- that's an extra?

11 MR. CAFFRY: I'm sorry?

12 THE COURT: That's an extra copy?

13 MR. CAFFRY: This is the copy that I intend to
14 proffer into evidence.

15 THE COURT: Why don't we make one more.

16 And with your permission, Counsel, I will take it
17 now so that I have it in my hands, rather than one of
18 you having to submit it to me along with your papers.

19 But it has not been received into evidence. It
20 will not be reviewed by the Court as evidence in the
21 case, though I may review it for the legal reason,
22 unless and until I tell you otherwise.

23 MR. CAFFRY: Would it be okay if we provided that
24 tomorrow?

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1 THE COURT: Sure. What I was implying was that you
2 could come down to my chambers and we could copy that.
3 But if you want to provide it tomorrow, that's fine.

4 MR. CAFFRY: We will accept your offer to copy that
5 in chambers. Thank you.

6 THE COURT: There we go.

7 Anything else, Mr. Caffry?

8 MR. CAFFRY: Your Honor, at this time the plaintiff
9 has no other witnesses or exhibits to offer into
10 evidence, with the exception of the completion of the
11 review of Exhibit 164.

12 THE COURT: So the plaintiff rests?

13 MR. CAFFRY: The plaintiff rests.

14 THE COURT: With the exception of the reserve on
15 164.

16 MR. CAFFRY: Yes.

17 THE COURT: Thank you.

18 Counsel?

19 MS. LEE-CLARK: Your Honor, at this time we would
20 like to move for a directed verdict.

21 THE COURT: Do you want to make argument on that?

22 MS. LEE-CLARK: We don't believe that plaintiff has
23 established all of the facts or arguments necessary to
24 establish -- to prove their constitutional claim in the

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1 first cause of action in the Petition and Complaint. So
2 we believe that a directed verdict is appropriate.

3 THE COURT: Counsel, do you want to be heard?

4 MR. CAFFRY: Yes, your Honor.

5 The motion should be denied. The plaintiff has
6 proven its case.

7 First, through Dr. Terrie we provided the
8 legislative history of Article XIV, including the then
9 current definition and usage of the word timber as it
10 was used in Article XIV to prove that it was not limited
11 to large trees.

12 Dr. Terrie's testimony also demonstrated the level
13 of concern at the time that the protection of the forest
14 preserve could not be entrusted to the Conservation
15 Commission, the predecessor to the defendant DEC.

16 Your decision of January 25th of this year set
17 forth several primary areas of proof to be addressed at
18 trial, on all of which we believe we have met our burden
19 of proof, although a couple of them were stipulated to,
20 such as trail mileage.

21 Through Mr. Signell we showed that the total number
22 of large trees to be cut or already cut is 6,600, which
23 is several hundred more than the defendants admitted to.

24 Mr. Signell also showed that over 17,500 small

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1 trees have been or will be cut, for a total of 24,100
2 trees.

3 Mr. Bauer and Mr. Signell, through their testimony,
4 demonstrated that, if anything, the number of small
5 trees that was cut was undercounted, because grading
6 destroyed the stumps before they could be counted, and
7 that some of those that did survive the grading were
8 obscured by the tall grass that had grown up on the
9 trails.

10 Mr. Signell, Mr. Amadon, and Dr. Sutherland have
11 testified as to how more trees have been damaged and
12 that some of them have already died since the trails
13 were built.

14 Thus, we have proven both for the trail system as a
15 whole, and on a trail-by-trail basis for the four trails
16 which were the subject of our witnesses' testimony, that
17 trees have been destroyed on the Class II community
18 connector trails to a material degree and a substantial
19 extent, clearly meeting the tests set forth in the
20 McDonald decision and in your decision on January 25th
21 of this year.

22 Through the testimony of Mr. Signell, Dr.
23 Sutherland, and Mr. Bauer, we have also proved that the
24 Class II community connector trails are impairing wild

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1 forest lands of the forest preserve to an
2 unconstitutional extent due to erosion and
3 sedimentation, habitat fragmentation, which causes
4 invasive species to invade the forest, causes other
5 impacts to wildlife, insects in the very forest floor
6 itself, opening up the canopy, and thereby allowing
7 nonnative grasses to invade.

8 We also showed that such grasses have dominated the
9 trail corridors, that the very shape of the land has
10 been irrevocably altered, and that rare old growth
11 forest has been damaged.

12 Through the testimony of Mr. Signell, Dr.
13 Sutherland, Mr. Amadon, and Mr. Bauer, we have also
14 demonstrated that the Class II trails at issue are quite
15 different from the foot trail that was at issue in the
16 Balsam Lake case and other Adirondack foot trails in
17 width, environmental impact, and many other ways.

18 Finally, the testimony of Mr. Signell and Mr. Bauer
19 proved that the State's claims to have offset the
20 impacts of the construction of new trails with the
21 closure of old trails to snowmobile use is false,
22 because the trails at issue either remain open as roads
23 or as mountain bike and hiking trails or else they were
24 abandoned long ago, so that their so-called closure is

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1 just a paper closure with no actual benefit to the
2 forest preserve.

3 We think the plaintiff has met its burden of proof
4 that these trails individually and collectively are an
5 improper use of the forest preserve under Article XIV
6 and that the motion should be denied.

7 THE COURT: Thank you. The Court will reserve
8 decision on the application.

9 MS. LEE-CLARK: Thank you, your Honor.

10 MR. CAFFRY: Thank you.

11 THE COURT: Counsel, do you want ten minutes?

12 MS. LEE-CLARK: Thank you.

13 THE COURT: Actually, we will take about 15
14 minutes. We will recommence at ten minutes before
15 three.

16 All right. Thank you, folks.

17 (Whereupon a recess was taken at 2:35 p.m.

18 to 2:56 p.m.)

19 THE COURT: All set, Miss Simon?

20 MS. SIMON: Yes, your Honor.

21 THE COURT: Please go ahead.

22 MS. SIMON: We would like to call Peter Frank to
23 the stand.

24 THE COURT: All right.

(Peter Frank - Direct by Ms. Simon)

1 THEREUPON,

2 PETER FRANK,

3 called as a witness, having been first duly sworn, was examined and
4 testified as follows:

5 DIRECT EXAMINATION

6 THE COURT: I'm Judge Connolly. Just a couple of
7 things before we begin. I don't know if you have been
8 watching or not so I will repeat.

9 Have you seen my instructions to other witnesses?

10 THE WITNESS: Yes, I have.

11 THE COURT: Then I won't repeat them.

12 All set, Miss Simon?

13 MS. SIMON: Yes, I am.

14 BY MS. SIMON:

15 Q Mr. Frank, could you please state your name?

16 A My name is Peter Frank.

17 Q Mr. Frank, where are you employed?

18 A I work for the New York State DEC here in Albany.

19 Q What is your title?

20 A I'm a Forester 4 Bureau Chief of the Bureau of
21 Forest Preserve for Conservation Easement Management.

22 THE COURT: Just slow down a little bit.

23 THE WITNESS: Okay.

24 THE COURT: Go ahead.

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1 BY MS. SIMON:

2 Q What is a Forester 4?

3 A A Forester 4 is a bureau chief level. Our forestry
4 series begins with Forester 1, a field level forester.

5 From there you go to Forester 2, which
6 supervise the field office or suboffice.

7 Then we have regional offices where we have
8 Forester 3s, which are regional foresters.

9 And above that then we have bureau chiefs,
10 Forester 4s.

11 Q How long have you been with DEC?

12 A I've been with DEC since 1986.

13 Q Do you hold an undergraduate degree?

14 A Yes.

15 Q What degree is that?

16 A I hold an Associate's Degree from Paul Smith's
17 College and I hold a Bachelor of Science Degree from the
18 College of Environmental Science and Forestry.

19 THE COURT: What was that?

20 THE WITNESS: From the College of Environmental
21 Science and Forestry.

22 BY MS. SIMON:

23 Q That's SUNY ESF?

24 A Correct.

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1 Q What was your course of study or degree in each of
2 those?

3 A At Paul Smith's College I have an Associate's
4 Degree in Forestry. And from the College of Environmental
5 Science I have a degree in -- it's basically a concentration
6 of forestry. The degree is Natural Resource Management.

7 Q Do you hold any other degrees?

8 A Yes. I also have a Master of Science degree from
9 Union College.

10 Q What was the subject of that?

11 A It's Computer Management Systems.

12 Q Thank you. Do you have any other training
13 involving forestry?

14 A Yes. I received numerous trainings over the years
15 working with the foresters and working with the DEC. Most
16 recently we had what we called wildlands training. It was
17 training that contracted with Dr. Chad Dawson from SUNY ESF
18 to put on for us. It was management of wilderness or wild
19 areas. It's a second part course that Dr. Dawson put on for
20 us.

21 Q Could you please state your job responsibilities?

22 A As a bureau chief I oversee management of the
23 Bureau of Forest Preserve Conservation Easements. I have
24 administrative duties, such as overseeing budgets,

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1 development of policies, overseeing and reviewing plans that
2 come into the office.

3 Within our bureau there are three sections.
4 There is the conservation easement section, which is
5 responsible for developing terms for conservation easements
6 the State is acquiring and developing recreation management
7 plans for those areas.

8 There is also a section, a unit management
9 planning section. That section oversees development of plans
10 for -- the forest preserve is broken up into management units
11 and they oversee development of management plans for those
12 units.

13 We have a stewardship section. The
14 stewardship section is responsible for overseeing
15 construction and maintenance of trails and developing
16 guidance documents that would guide those development of
17 facilities.

18 Q For clarification --

19 THE COURT: Hang on a minute.

20 MS. SIMON: I'm sorry.

21 THE COURT: You are speaking very quickly.

22 THE WITNESS: Okay. I will slow down.

23 THE COURT: I'm not even speaking for our
24 stenographer. I'm having a hard time following you.

(Peter Frank - Direct by Ms. Simon)

1 I'm sure it's natural to you, but take a deep breath and
2 try to make a concerted effort to speak slowly. Okay?

3 THE WITNESS: Yes.

4 THE COURT: Go ahead, Miss Simon.

5 BY MS. SIMON:

6 Q Are conservation easement lands forest preserve
7 lands?

8 A No.

9 Q What type of recreational activities are included
10 in your bureau on forest preserve lands?

11 A There is hiking, cross-country skiing,
12 snowmobiling, fishing, hunting, wildlife observation.

13 Q Does your oversight include Class II community
14 connector snowmobile trails?

15 A Yes.

16 Q I'm going to call them Class II trails for
17 shorthand.

18 A Okay.

19 Q Have you held any other positions with DEC?

20 A Yes. I started my career with DEC as a surveyor
21 assistant and moved up into a Forester 1 position, where I
22 worked on land acquisition projects under the 1986
23 Environmental Quality Bond Act. After that I was promoted to
24 a Forester 2 in Albany to serve as the State's Urban Forestry

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1 Coordinator.

2 Q Were you employed prior to working with the DEC?

3 A Yes.

4 Q Where were you employed?

5 A I had a number of different jobs. I worked for the
6 U.S. Forest Service in Idaho. I worked for a number of
7 private land surveyors, including John Demming, a land
8 surveyor in Elizabethtown in the Adirondacks. And I also
9 worked for Davey Tree Company as an arborist.

10 Q Do you hold any awards or honors?

11 A Yes. There are a couple of awards that I can think
12 of. One is the Friends of the Trail Award from the North
13 Country Scenic Trail Association. That award was for my
14 efforts helping to complete the plan for the North Country
15 Skiing Trail, which is a national trail running from North
16 Dakota to Crown Point in New York State. And the last
17 segment that needed to be completed was the segment crossing
18 the Adirondack Park.

19 The other award was the Group Excellence Award
20 from the Secretary of Agriculture for my work on Asian
21 long-horned beetle eradication.

22 Q Mr. Frank, have you read the Complaint in this
23 case?

24 A Yes.

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1 Q Are you familiar with the first cause of action
2 regarding the constitutionality of Class II community
3 connector snowmobile trails in the Adirondack Park?

4 A Yes.

5 Q Are you also familiar with Article XIV, Section 1
6 of the Constitution known as the Forever Wild Clause?

7 A Yes.

8 Q Thank you. Mr. Frank, I'm showing you what has
9 been marked for identification as Defendants' Exhibit A. Do
10 you recognize that document?

11 A Yes.

12 Q What is it?

13 A It's the Snowmobile Plan for the Adirondack Park
14 Final Generic Environmental Impact Statement dated
15 October 2006.

16 Q Are you familiar with this document?

17 MR. CAFFRY: Objection, your Honor.

18 THE COURT: What is the objection?

19 MR. CAFFRY: This document is not relevant to the
20 first cause of action of this action.

21 Any of the Department's or APA's policies, plans
22 and procedures that have been adopted in the last 50
23 years are not relevant to the interpretation of Article
24 XIV.

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1 During the discovery phase of this case Justice
2 Ceresia denied us discovery in relation to department
3 policies and procedures. This was his October 15, 2014,
4 decision, pages 23 to 24, in which he ruled that
5 similar -- documents related to a different department
6 policy were irrelevant.

7 In your decision of October 20, 2015, where also on
8 discovery issues you held, quote, to be clear, the
9 instant ruling does not serve to expand the law of the
10 case as set forth in the Ceresia decision. That being
11 that, quote, the review process leading up to the
12 development and adoption of the final plans of
13 construction is collateral to the main issues here. The
14 Court finds that discovery should be limited to physical
15 destruction of the forest preserve which has occurred in
16 the past and which will occur in the future in
17 connection with construction and maintenance of Class II
18 community connector snowmobile trails, close quote.
19 That was at page 4 of your decision.

20 And the defendant -- so we were denied access to
21 discovery, document discovery related to the development
22 of a variety of the Department's policies, plans,
23 procedures, and it's highly prejudicial for the
24 Department to deny discovery, which was then upheld by

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1 the Court, and then attempt to use these policies, plans
2 and procedures as part of their defense to the case.

3 THE COURT: Go ahead, Miss Simon.

4 MS. SIMON: Okay. I will quote from the same
5 decision of Judge Ceresia in which he said on page 8
6 with regard to the Class II trails, the Court will limit
7 document discovery to final plans, approvals, and
8 policies in effect as of January 1, 2012.

9 This is one of those policies.

10 In addition, the Complaint at page 15 takes
11 language directly from this plan and plaintiff has put
12 into play the issue of the network and the system that
13 this is creating. That is in this plan and it is
14 relevant. They put it into the case from their direct
15 case.

16 THE COURT: All right. The Defendants' A is
17 received into evidence over objection.

18 (Defendants' Exhibit A received in
19 evidence.)

20 THE COURT: To be clear, Defendants' A appears to
21 be extraordinarily extensive. Defendants' A is received
22 into evidence subject to any further specific objections
23 which you may assert with regard to individual areas
24 within Defendants' A.

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1 MR. CAFFRY: We don't recall that it was
2 actually -- there was actually a motion to have it
3 admitted yet.

4 THE COURT: Do you object? I think you threw me
5 off.

6 MR. CAFFRY: I'm sorry.

7 THE COURT: Are you objecting to any reference to
8 it whatsoever?

9 MR. CAFFRY: Yes, your Honor.

10 THE COURT: My apologies. I think you are right
11 now that I --

12 MS. SIMON: I didn't get to saying anything about
13 admitting it and he objected before I did that.

14 THE COURT: It's my fault. It's neither of your
15 fault. I extrapolated from Mr. Caffry's initial
16 objection.

17 Your objection is overruled. Defendants' A as of
18 now has been marked into evidence. I may revisit that
19 in a moment or two dependent upon what evidence is
20 proffered at this time to Mr. Frank.

21 Go ahead.

22 MS. SIMON: Thank you.

23 BY MS. SIMON:

24 Q Mr. Frank, you have given the full title of this

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1 document, but it's rather long. I'm going to refer to it as
2 the 2006 snowmobile plan if that is all right.

3 Could you explain the purpose of this plan?

4 A The 2006 snowmobile plan is a plan to -- it's a
5 conceptual plan for reconfiguration of snowmobile trail
6 system in the Adirondack Park.

7 Q Did you have any involvement in the creation of
8 this plan?

9 A Yes, I did.

10 Q When did that involvement start?

11 A I started working on the plan in 2003.

12 Q Was there any public process or comment period on
13 this plan?

14 A Yes. The draft plan was made available for public
15 comment.

16 Q Turning your attention to page 41 of the plan --

17 MS. SIMON: Your Honor, would you like a copy of
18 the plan?

19 THE COURT: No. Go ahead.

20 MR. CAFFRY: Objection, your Honor. It's not yet
21 clear to me that it is actually in evidence or not and
22 she's starting to ask him questions about it.

23 THE COURT: I agree. Let me be clear. As of
24 now --

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1 MS. SIMON: I misunderstood your statement then,
2 your Honor.

3 THE COURT: I'm not sure you misunderstood it,
4 Miss Simon. I'm not going to accuse you of
5 misunderstanding my, at best, unclear statement.

6 Let me be very clear right now. To the extent that
7 I have stated on the record that Defendants' A has been
8 received into evidence, that is withdrawn. Defendants'
9 A has not yet been received in evidence.

10 You may proceed with laying a foundation for your
11 proffer of Defendants' A or any part thereof if you wish
12 to do so.

13 Please strike that from the evidence, James and
14 Tracie.

15 (Defendants' Exhibit A not received in
16 evidence.)

17 THE COURT: All right?

18 MS. SIMON: Thank you, yes.

19 THE COURT: Thank you.

20 My apologies to all for the confusion.

21 Go ahead.

22 MS. SIMON: Thank you, your Honor.

23 This document is deemed authenticated by
24 stipulation and that is in Court's Exhibit 2.

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1 THE COURT: Okay.

2 MS. SIMON: So it's been identified. It's been
3 authenticated and I now move to admit the exhibit into
4 evidence.

5 THE COURT: All right.

6 Mr. Caffry, do you have any further objection over
7 that already stated?

8 MR. CAFFRY: I just would repeat my same objection
9 for the reasons previously stated.

10 THE COURT: Defendants' A is received into evidence
11 over objection.

12 (Defendants' Exhibit A received in
13 evidence.)

14 THE COURT: You may proceed.

15 MS. SIMON: Thank you.

16 BY MS. SIMON:

17 Q Mr. Frank, I will refer to this document as the
18 2006 snowmobile plan as a shortening name, because it's quite
19 long. Could you explain the purpose of this plan?

20 A The 2006 snowmobile plan is a conceptual plan that
21 envisions reconfiguring the snowmobile trail system in the
22 Adirondack Park.

23 Q Thank you. Did you have any involvement in this
24 plan?

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1 A Yes, I did.

2 Q And what was that involvement?

3 A I did the review of some of the alternatives in the
4 plan.

5 Q When did you start working on it?

6 A I started working on this in 2003.

7 Q Turning your attention to page 41, the first
8 paragraph.

9 A Okay.

10 Q Could you read that first paragraph regarding the
11 goals of this plan?

12 A Yes. The final plan, GEIS, is a conceptual plan
13 for the creation of a system of snowmobile trail connections
14 between communities in the park and criteria for locating,
15 developing, and maintaining this trail system in a manner
16 that mitigates potential adverse environmental and other
17 impacts on both the forest preserve, other public lands, and
18 private lands. The final plan, GEIS, outlines the concept of
19 creating community connections based on a set of criteria,
20 including the protection of sensitive resources on both
21 public and private lands.

22 Further, the final plan, GEIS, outlines
23 proposed guidelines and criteria for how snowmobile trails
24 and trail segments will be developed and maintained,

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1 particularly when and if they are located on forest preserve
2 lands within the park.

3 Q Mr. Frank, this plan, is it limited to the forest
4 preserve?

5 A No. It also envisions that some of the trails will
6 be located on private lands and municipal lands.

7 Q And that includes the network?

8 A Yes.

9 Q Did this --

10 MR. CAFFRY: Objection, your Honor. I'm not sure
11 there has been any testimony about the word network.

12 THE COURT: Sustained.

13 BY MS. SIMON:

14 Q Did this plan, this conceptual plan, anticipate any
15 system or network of trails on public and private lands?

16 A The trail proposes a system of trails or network
17 that would connect communities within the Adirondack Park by
18 snowmobile trails.

19 Q Thank you. Did this conceptual 2006 snowmobile
20 plan actually authorize construction of trails?

21 A No.

22 Q What would be required for the authorization to
23 construct a trail?

24 A In order to construct a trail on the ground, the

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1 first step would be approval of the relocation of the trail
2 in the unit management plan or an amendment to an existing
3 unit management plan. Then we would also have to prepare a
4 work plan, including consultation with the Adirondack Park
5 Agency, and publication of -- the UMP would also go through a
6 public process where there will be a chance for the public to
7 comment on the proposal.

8 Then, if that plan was approved or when it was
9 approved, we would move forward and develop a work plan and
10 consultation with the Adirondack Park Agency.

11 Q Is there any public notice required?

12 A Yes. When we develop a work plan, if any tree
13 cutting is involved, we are required to put notice in the
14 Environmental Notice Bulletin, which we refer to as ENB.

15 Q Is there any environmental review required?

16 A Yes.

17 Q What is that?

18 A Our unit master plans require SEQR review.

19 MR. CAFFRY: Objection, your Honor.

20 THE COURT: What's the objection?

21 MR. CAFFRY: SEQR is not at issue in this case.

22 This case involves Article XIV of the Constitution.

23 THE COURT: We can agree on that, but I'm assuming
24 this is background information leading up to his

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1 testimony. So I'm going to allow it.

2 Go ahead. Overruled.

3 A The unit management plan undergoes a SEQR
4 evaluation. State Environmental Quality Review.

5 Q Mr. Frank, I've shown you what has been marked as
6 Defendants' Exhibit B for identification. Can you identify
7 this document?

8 A Yes. This is the management guidance on snowmobile
9 trail siting, construction, and maintenance on forest
10 preserve lands in the Adirondack Park.

11 Q And the date?

12 A It's dated December 21st, 2009.

13 MS. SIMON: Your Honor, this document is deemed
14 authenticated by stipulation and that's in Court's
15 Exhibit 2 and I move to admit this document into
16 evidence.

17 MR. CAFFRY: We object, your Honor, for the same
18 reasons we objected to Exhibit A.

19 In addition, we presented no testimony related to
20 this document and we believe it's not properly part of
21 the case.

22 THE COURT: What is the relevance of the guidance?

23 MS. SIMON: It defines Class II trails. That's the
24 primary purpose of it. And all the parameters and plans

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1 that go with it.

2 THE COURT: All the what?

3 MS. SIMON: Parameters of construction and
4 standards for construction. And addresses closing of
5 trails and net benefit. Many of the issues that we have
6 discussed already in the direct case originate in this
7 document.

8 THE COURT: All right. Defendants' B is received
9 into evidence over objection.

10 (Defendants' Exhibit B received in
11 evidence.)

12 BY MS. SIMON:

13 Q Mr. Frank, I will refer to this document as the
14 2009 guidance.

15 A Okay.

16 Q Could you explain what this document is?

17 A The 2009 snowmobile guidance provides guidance to
18 DEC staff on implementation of the 2006 snowmobile plan. It
19 provides guidance in where trails should be located, how they
20 should be constructed, and also provides guidance on closure
21 of trails.

22 Q Does the 2009 guidance apply to forest preserve
23 lands?

24 A Yes.

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1 Q Does the 2009 guidance have a classification system
2 for snowmobile trails?

3 A Yes, it does.

4 Q Do you know what those classifications are?

5 A There are two classes of trails outlined in the
6 guidance, Class I trails and Class II trails.

7 Q Turning your attention to page 3, does the guidance
8 define Class II trails?

9 A Yes, it does.

10 Q Could you read that definition?

11 A Class II trails. Community connector trails.
12 Snowmobile trails or trail segments that serve to connect
13 communities and provide the main travel routes for
14 snowmobiles within a unit are community connector trails.
15 These trails are located in the periphery of wild forest or
16 other forest preserve areas. They are always located as
17 close as possible to motorized travel corridors, given
18 safety, terrain, and environmental constraints, and only
19 rarely are any segments of them located further than one mile
20 away from the nearest of these corridors. They are not
21 duplicated or paralleled by other snowmobile trails. Some
22 can be short, linking communities to longer Class II trails
23 that connect two or more other communities.

24 Q Mr. Frank, turning your attention to page 9 and

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1 into page 10, starting at the bottom of page 9, could you
2 tell us what width is allowed for Class I and Class II
3 trails?

4 A Class I trails --

5 MR. CAFFRY: Objection, your Honor.

6 THE COURT: Go ahead.

7 MR. CAFFRY: This document says it's a guidance.
8 It's my understanding guidance is not binding,
9 therefore, it's not a question of what's allowed. It's
10 not a regulation.

11 THE COURT: Sustained.

12 You may reask the question.

13 BY MS. SIMON:

14 Q Mr. Frank, turning your attention to page 9 at the
15 bottom, could you state what class trail width is listed
16 there?

17 A Class II trails may be maintained to a 9-foot
18 maximum cleared width, except on steep running slopes and on
19 curves where they may be maintained to a 12-foot maximum
20 cleared width.

21 Q Mr. Frank, what agency is responsible for
22 construction of Class II trails?

23 A The Department of Environmental Conservation is.

24 Q Could you turn your attention to page 2, the second

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1 paragraph, and tell us if the guidance addresses closing of
2 snowmobile trails?

3 A Yes.

4 Q What does it say?

5 A Do you want me to read the entire paragraph or pick
6 up where there is a reference to closures?

7 Q Just the reference to closures, please.

8 A Some existing snowmobile trails most likely within
9 the interior of wild forest areas or adjacent to private
10 inholdings will be redesignated for nonmotorized use or
11 abandoned as trails altogether. These actions will serve to
12 ensure available wintertime recreational opportunities in
13 wild forest areas that are not dominated by snowmobile use,
14 to the exclusion or near exclusion of passive recreational
15 uses.

16 Q Mr. Frank, turning your attention to page 6, are
17 there standards in this guidance for snowmobile trail siting
18 and construction?

19 A Yes.

20 Q Could you summarize what those standards are?

21 A Beginning on page 6 is a section standards and
22 guidelines for snowmobile trail siting, construction and
23 maintenance on the forest preserve, and it includes sections
24 on -- it has siting standards, route design, alignment and

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1 grade, trail width, tree cutting, trail surface grading, rock
2 removal, side slope management, drainage, wetlands, and
3 finally, motor vehicle use and guidelines.

4 Q Thank you.

5 Mr. Frank, I have shown you what has been
6 marked as Defendants' Exhibit AA marked for identification.
7 Can you identify this document?

8 A Yes. It's the memorandum of understanding between
9 the Adirondack Park Agency and the Department of
10 Environmental Conservation concerning implementation of the
11 State Land Master Plan for the Adirondack Park.

12 Q Does it have a date?

13 A Yes, revised March 2010.

14 MS. SIMON: Your Honor, this document is deemed
15 authenticated by stipulation, Court's Exhibit 2, and I
16 move to admit it into evidence.

17 THE COURT: Why don't you ask some more questions
18 of Mr. Frank in order to elicit the relevance, if you
19 will, please, of the document for me?

20 BY MS. SIMON:

21 Q Mr. Frank, what does this document say in terms of
22 Class II trails that is relevant here?

23 A This document contains the snowmobile guidelines.
24 The 2009 snowmobile guidelines is an appendix to the

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1 document.

2 The MOU between the DEC and the APA serves as
3 a document on how we consult on trail projects and
4 construction projects. It also has our procedures for
5 development of management plans.

6 Q Does it also have other appendices that you could
7 name here that would be relevant?

8 A There are appendices on terrestrial invasive
9 species and plants in particular. It has a section on
10 snowmobile bridge construction and design. And there is
11 something here on fisheries management also and on mountain
12 biking.

13 Q Does it have anything on the responsibilities of
14 each of the agencies with regard to facilities built, such as
15 Class II trails?

16 A Yes, it does. It outlines which types of work on
17 facilities require consultation between the agencies, which
18 ones require to be included in unit management plans, and
19 which ones are considered routine maintenance and may be
20 carried out without further consultation.

21 MS. SIMON: I move to admit it into evidence, your
22 Honor.

23 THE COURT: Mr. Caffry?

24 MR. CAFFRY: Your Honor, I have at least three

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1 objections.

2 The first is the same one I have made to all these
3 other policies and procedures, that they are not
4 relevant to the interpretation of Article XIV.

5 The next is that we were denied discovery with
6 regard to the development of these policies and
7 procedures and it would be prejudicial to allow us or to
8 allow the defendants to use them, regardless of what
9 Justice Ceresia may have said or not. If the State
10 refused to allow us discovery on that, again, I think
11 it's prejudicial that we can't -- that they would be
12 able to use them.

13 Third, this MOU, as I understand the witness's
14 testimony, is that it is basically bureaucratic
15 procedures, who consults with what, which is totally
16 outside the scope of this case. It has nothing to do
17 with physical damage to the forest preserve from the
18 Class II trails.

19 And I object to the appendices, which one of them
20 may have already been admitted, but the others appear to
21 be a wide variety of other policies for which no
22 foundation has been laid, and I don't think they should
23 be allowed into evidence based on foundation about this
24 MOU, without -- that doesn't lay a foundation for each

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1 one of those separate policies that are appended to it.

2 THE COURT: Okay.

3 Your objection is overruled.

4 Defendants' AA is received into evidence as well.

5 Let me be clear. I am bound by the decisions of
6 both Judge Ceresia and myself with regard to discovery
7 issues.

8 As I understand and recall those, not having looked
9 at them as recently, I don't think, as you have, those
10 went to, as you are alluding now in this objection to,
11 or to the development of those MOUs and policies and
12 procedures, rather than to the existence of them
13 themselves, which to my recollection have long been a
14 part of this case.

15 But I will accept further argument with regard to
16 both the admissibility of those documents, as well as
17 what if any weight should be accorded to anything that
18 the defendants are asking me -- any of the factual
19 issues that the defendants are asking me to receive
20 these pieces of evidence. I will accept further
21 argument on all of those issues in the context of your
22 submission of your proposed findings of fact and
23 conclusions of law.

24 But you have your exception, in any event, to each

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1 of those pieces of evidence, that is A, B, and double A
2 being received into evidence. Nevertheless, they are
3 received.

4 (Defendants' Exhibit AA received in
5 evidence.)

6 MR. CAFFRY: Your Honor, I know you admitted it,
7 but I have one other objection.

8 This is a policy for implementation of the State
9 Land Master Plan. The State Land Master Plan, by its
10 own terms, says it's not intended to make constitutional
11 determinations regarding unresolved issues under Article
12 XIV.

13 So I would renew my objection to this document on
14 that ground.

15 THE COURT: Are you paraphrasing?

16 MR. CAFFRY: I can read it if you would like.

17 MS. SIMON: We haven't moved to admit that yet.

18 THE COURT: Hold on. I think we are all agreed
19 that the determination as to whether the Class II
20 community connector trails fit within the mandates, the
21 restrictions of the Constitution, as mine first, not the
22 master plan. I think we can all agree on that. But if
23 you disagree, Miss Simon, please do so.

24 MS. SIMON: He's arguing about a document I haven't

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1 offered into evidence yet, the master plan. He's not
2 arguing about any of this.

3 THE COURT: Okay.

4 MS. SIMON: In any event, if you would like to
5 dismiss the Adirondack Park Agency from this case, we
6 can avoid putting all these documents in. Not all of
7 them, but --

8 THE COURT: Let's move forward.

9 Your objection and your position is noted for the
10 record, Mr. Caffry.

11 MR. CAFFRY: Thank you.

12 THE COURT: Double A is received.

13 Go ahead, Miss Simon.

14 BY MS. SIMON:

15 Q Mr. Frank, what projects are subject to this
16 memorandum of understanding?

17 A The development of unit management plans is subject
18 to the UMP. I mean to the MOU. Also, any construction of
19 new facilities we consult with our park agency according to
20 the MOU.

21 Q Does that include Class II trails?

22 A Yes, it does.

23 Q Pursuant to this memorandum, is construction of
24 Class II trail an activity that requires consultation with

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1 the Adirondack Park Agency?

2 A Yes, it is.

3 Q I have asked you about the attachments already to
4 this MOU. Are there any other, other than the 2009 guidance
5 which you mentioned, and the snowmobile bridge guidance, and
6 invasive species, are there other attachments?

7 A I believe the tree cutting policy is also a part of
8 appendices.

9 Q Did you --

10 THE COURT: What was the end of that?

11 THE WITNESS: The appendices to the MOU.

12 MR. CAFFRY: Again, your Honor, I renew my
13 objection to the tree cutting policy being admitted into
14 evidence. It is a separate document.

15 THE COURT: I have already ruled on this, Mr.
16 Caffry.

17 Go ahead, Miss Simon.

18 MS. SIMON: Thank you.

19 BY MS. SIMON:

20 Q Mr. Frank, I have shown you what's been marked as
21 Defendants' Exhibit C. Can you identify this document?

22 A Yes. It's Division Direction Policy LF91-2,
23 cutting, removal or destruction of trees and endangered,
24 threatened or rare plants on forest preserve lands.

(Peter Frank - Direct by Ms. Simon)

1 Q What is the date of this document?

2 A April 10th, 1991.

3 MS. SIMON: Your Honor, this is a document deemed
4 authenticated by stipulation pursuant to Court's Exhibit
5 2 and I move to admit it into evidence.

6 THE COURT: I think you need to elicit a little
7 more from Mr. Frank.

8 MS. SIMON: Okay.

9 BY MS. SIMON:

10 Q Mr. Frank, could you explain what this document is?

11 A This document establishes administrative procedures
12 on how tree cutting is handled on the forest preserve. It
13 requires certain procedural steps, administrative steps to
14 get approval for tree cutting, and it requires public notice
15 in the Environmental Notice Bulletin.

16 Q Does it also include any reference to the standards
17 DEC uses for the size of trees it will count and cut?

18 A Yes, it does. It refers to maintaining a tally of
19 trees three inches or greater diameter at breast height.

20 MS. SIMON: Your Honor, I offer it for that reason.
21 This is the standard for the three-inch DBH. I'm sorry,
22 diameter at breast height.

23 THE COURT: Go ahead, Mr. Caffry.

24 MR. CAFFRY: Yes. I would like to have a little

(Peter Frank - Direct by Ms. Simon)

1 voir dire about this document.

2 THE COURT: Sure.

3 VOIR DIRE EXAMINATION

4 BY MR. CAFFRY:

5 Q Mr. Frank, you mentioned something about tallying
6 trees of three inches or greater in diameter. Is that true?

7 A Yes.

8 Q Are you aware of any scientific basis for limiting
9 that to three inches?

10 A No.

11 MR. CAFFRY: Object to this document on relevancy
12 grounds, your Honor, as well as all prior grounds.

13 THE COURT: What's the relevancy ground?

14 MR. CAFFRY: He has no basis for this three-inch
15 policy and, therefore, I don't believe the document is
16 relevant. And, again, this is about administrative
17 procedures. It's not about the Constitution. It's
18 about the bureaucratic methods by which they keep
19 tallies and jump through all their hoops. It's not
20 about the Constitution.

21 THE COURT: Well, isn't the policy, the policies
22 that they put into place pursuant to A, B, double A, and
23 C, relevant for them to make their case to demonstrate
24 what they allege they are doing on the forest preserve?

(Peter Frank - Direct by Ms. Simon)

1 Or is that -- it's of by no means conclusive as to what
2 it is that they are doing on the forest preserve. But
3 isn't the policies that they put into place as a state
4 agency and that they are allegedly following and putting
5 in the Class II community connector trails, isn't that
6 one of the issues that we are looking at here at trial?
7 Isn't it relevant to what it is that they are doing and
8 what process they are following?

9 MR. CAFFRY: I don't believe so, your Honor.

10 Again --

11 THE COURT: Well, what is?

12 Go ahead. Finish your answer. I apologize for
13 breaking in on you.

14 MR. CAFFRY: Again, we don't believe these policies
15 are relevant, because that's just how they go about
16 making their work plans or whatever. It's not -- there
17 is no evidence that they have taken the Constitution
18 into account when they develop these policies or
19 anything else that's relevant to this case. It is just
20 not in there. They have not done that. And so they
21 haven't laid a foundation that these policies are
22 relevant to Article XIV.

23 They may be how they go about doing their business,
24 but they are not proven. There is no foundation for

(Peter Frank - Direct by Ms. Simon)

1 saying they are relevant to Article XIV.

2 THE COURT: The question with regard to Article XIV
3 is what exactly they are doing and what they have done
4 and what they -- I will limit myself to our discovery,
5 the discovery opinions and Judge Ceresia's discovery
6 opinion, which I'm not going to quote. That's the
7 question. These are the policies that they presumably,
8 they, Mr. Frank, is going to tell us they attempted to
9 follow in putting in the Class II community connector
10 trails.

11 MR. CAFFRY: We haven't challenged their policy and
12 procedure in developing these plans in how they have
13 gone about building the particular trails.

14 Our testimony presented by our witnesses has been
15 based upon the physical harm that's occurred to the
16 forest preserve, including the environment, not just the
17 dirt or the trees, but the broader environment. And we
18 are not questioning that they checked all the boxes on
19 their policies.

20 THE COURT: Understood.

21 Miss Simon, you are about to say something?

22 MS. SIMON: Yes, your Honor.

23 This all goes to the merits. All of these things
24 collectively are what both agencies have done over

(Peter Frank - Direct by Ms. Simon)

1 decades to try and meet their constitutional obligation.
2 They are totally relevant.

3 I agree that what happened on the ground is really
4 the ultimate question here, but all of these things are
5 relevant.

6 THE COURT: The Court will accept Defendants' C
7 over objection.

8 (Defendants' Exhibit C received in
9 evidence.)

10 THE COURT: Go ahead, Miss Simon.

11 BY MS. SIMON:

12 Q Mr. Frank, does this LF91 tree cutting policy
13 affect the construction of Class II trails?

14 A Yes. We followed this guidance, this policy during
15 the construction. When work plans were being developed, we
16 go out and do an inventory of the trees greater than
17 three-inches DBH, and then follow the procedures for getting
18 approval, public notice of the tree count in the ENB,
19 Environmental Notice Bulletin.

20 Q Mr. Frank, calling your attention to page 2 of
21 LF91, what does it say with regard to tree cutting on the
22 Adirondack Forest Preserve for Class II trails?

23 A So, it has requirements of a work plan. It has a
24 count by species and size class of all trees three-inch DBH

(Peter Frank - Direct by Ms. Simon)

1 and over to be cut and moved or destroyed.

2 Q Just for the record, how does DEC interpret DBH?

3 A DBH is the diameter of the tree stem. Measure the
4 diameter around the outside. It refers to breast height,
5 which is four and a half feet above the ground.

6 Q Thank you.

7 Calling your attention to also page 2 and into
8 page 3. Is there any requirement here for public notice of
9 that tree cutting?

10 A Yes. It requires that the tree cutting be noticed
11 in the Environmental Notice Bulletin, the ENB.

12 Q To the best of your knowledge, has this been DEC's
13 policy since enactment of the LF91-2?

14 A Yes.

15 Q Thank you.

16 Mr. Frank, I have shown you what has been
17 marked as Defendants' Exhibit J for identification. Can you
18 identify this document?

19 A Yes. It's ONR Policy 2. Snowmobile trails in the
20 Forest Preserve. ONR stands for Office of Natural Resources.

21 Q Does it have a date?

22 A September 2nd, 1998.

23 MS. SIMON: Your Honor, for the record, this is
24 also a document that's deemed authenticated by

(Peter Frank - Direct by Ms. Simon)

1 stipulation in Court's Exhibit number two, but I will
2 ask the next question with your permission --

3 THE COURT: Yes.

4 MS. SIMON: -- to show how it is relevant here.

5 BY MS. SIMON:

6 Q Mr. Frank, does this policy show anything with
7 regard to the width of snowmobile trails prior to the 2009
8 guidance?

9 MR. CAFFRY: Objection, your Honor.

10 THE COURT: Go ahead.

11 MR. CAFFRY: The document on the top says Catskill
12 Forest Preserve. It also says this no longer applies to
13 the Adirondack Forest Preserve. And I fail to see how
14 what happened prior to whatever date it was, 2008 or
15 2009 Miss Simon mentioned, would be relevant to the
16 Class II trails, which the concept didn't even exist
17 until 2009. And as I look at this document, it's only
18 relevant to the Catskills.

19 THE COURT: Okay. Two things.

20 First, with regard to the relevance issue, I am
21 going to require a response from you on that,
22 Miss Simon.

23 With regard to your issue in which you argue about
24 the content of the document I haven't yet seen, I think

(Peter Frank - Direct by Ms. Simon)

1 that's appropriate grounds for you to voir dire Mr.
2 Frank here and maybe elicit that it is not applicable or
3 relevant.

4 But let me hear Miss Simon with regard to the
5 relevance of the document first.

6 MS. SIMON: Thank you.

7 This document preceded the 2009 guidance, which I
8 believe Mr. Frank will testify to. And one of the
9 issues in this case is the width of trails. And in
10 numerous ways throughout the last three years plaintiffs
11 have argued that trails are limited in width and these
12 trails are too wide. These new trails, the Class II
13 trails are 9 feet, one foot wider than the widest
14 pre-existing trail, and that's what I'm trying to
15 demonstrate here.

16 THE COURT: The widest?

17 MS. SIMON: The widest trail allowed before that
18 was 8 feet, according to this document. That's all I'm
19 trying to show here, that there is a one-foot
20 difference. And I think it's relevant. It's a one-foot
21 difference than what was previously allowed.

22 THE COURT: All right.

23 Mr. Caffry, your objection with regard to relevance
24 at this point is denied, but if you want to question Mr.

(Peter Frank - Direct by Ms. Simon)

1 Frank and voir dire him on the document, you are more
2 than welcome to.

3 VOIR DIRE EXAMINATION

4 BY MR. CAFFRY:

5 Q Mr. Frank, can you read the title at the top of the
6 document, the full title? It's in bold print.

7 A Snowmobile trails, Catskill Forest Preserve ONR-2.

8 Q And then read the first paragraph.

9 A Note. When ONR-2 snowmobile trails forest preserve
10 was issued on September 2nd, 1998, it applied to forest
11 preserve lands in both the Adirondack and Catskill Parks.

12 On December 21st, 2009, then DEC
13 Commissioner, Alexander B. Grannis, rescinded ONR-2 as it
14 applied to the Adirondack Forest Preserve, and replaced it
15 with Management Guidance Snowmobile Trails Siting,
16 Construction and Maintenance on Forest Preserve Lands in the
17 Adirondack Park. ONR-2 still applies to forest preserve
18 lands in the Catskill Park.

19 MR. CAFFRY: Your Honor, I again renew my objection
20 based on the witness's testimony that this document has
21 nothing to do with Class II community connector trails.
22 And there is already in the 2009 guidance that you
23 admitted into evidence, a discussion of width of other
24 snowmobile trails in the Adirondack Park. So I again

(Peter Frank - Direct by Ms. Simon)

1 renew my objection to this on relevancy grounds.

2 THE COURT: All right.

3 Well, Miss Simon has already told us on the record
4 that she is proffering it solely to demonstrate her
5 position that there has not been a significant increase
6 in the size of these trails, as I understand it, and of
7 course I'm paraphrasing, I'm not taking her position.

8 I don't disagree that it would appear to be of
9 limited relevance with regard to the overall question to
10 be determined by the Court here, but the Court will
11 accept it and accord it the weight that it deserves.

12 So your objection is overruled and Defendants' --
13 that's J, correct?

14 MS. SIMON: J.

15 THE COURT: Defendants' J is received into
16 evidence.

17 (Defendants' Exhibit J received in
18 evidence.)

19 BY MS. SIMON:

20 Q Mr. Frank, turning your attention to page 6 of the
21 document, is there a reference to the maximum trail width for
22 snowmobile trails in this document?

23 A Yes.

24 Q What is that?

(Peter Frank - Direct by Ms. Simon)

1 A Trails may be kept cleared to a width of 8 feet on
2 straight or gently curved stretches, and to up to 12 feet on
3 curves and steep grades for Class A trails. And for Class B
4 trails the maximum cleared width is 8 feet.

5 Q Mr. Frank, was it your prior testimony that this
6 document was superseded by the 2009 guidance?

7 A Yes.

8 Q Thank you.

9 Mr. Frank, I'm showing you what has been
10 marked as Defendants' Exhibit I for identification. Can you
11 identify this document?

12 A Yes. This is a section from the Forest Preserve
13 Policy Manual. This is the snowmobile trails section of that
14 policy.

15 THE COURT: The what trail?

16 THE WITNESS: Snowmobile trail section of the
17 Forest Preserve Policy Manual.

18 BY MS. SIMON:

19 Q What is the date of the document?

20 A January 6th, 1986.

21 MS. SIMON: Your Honor, for the record, this
22 document is deemed authenticated by stipulation Court's
23 Exhibit 2. Shall I say -- I move to admit it into
24 evidence, but I will continue to put it into framework.

(Peter Frank - Direct by Ms. Simon)

1 THE COURT: Why don't you do that.

2 MS. SIMON: Okay.

3 BY MS. SIMON:

4 Q Mr. Frank, does this document reflect a limitation
5 on mileage of snowmobile trails in the Adirondack Park Forest
6 Preserve?

7 A Yes, it does.

8 MS. SIMON: Your Honor, I offer it for that
9 purpose. We want to show that there is a limitation on
10 mileage that was set back in 1972 and that we hope to
11 show in this trial in our case that this mileage is
12 under that limit and that is the purpose.

13 THE COURT: Understood.

14 Mr. Caffry?

15 MR. CAFFRY: I object to this document for the same
16 reason that I have objected to the prior exhibits, as
17 well as the mileage cap for snowmobile trails in the
18 forest preserve. It's not at issue in this case. There
19 has been no testimony regarding the mileage cap or that
20 it is -- the number of Class II trails is anywhere near
21 approaching whatever this mileage cap might be. And the
22 case is only about Class II trails. It's not about
23 snowmobile trails in general, therefore, we object to
24 this document.

(Peter Frank - Direct by Ms. Simon)

1 THE COURT: Well, there has been an issue within
2 the trial with regard to whether there should be or the
3 adequacy of whether there should be some sort of setoff
4 with regard to the snowmobile trails.

5 I agree, again, that it is at best of limited
6 relevance, but is being proffered, at least given what
7 Miss Simon has told us thus far, but Defendants' I is
8 received into evidence.

9 (Defendants' Exhibit I received in
10 evidence.)

11 BY MS. SIMON:

12 Q Mr. Frank, could you briefly explain what this
13 document is?

14 A This is the snowmobile policy that preceded the
15 previous document that I read in, the 1988 ONR-2 policy on
16 snowmobile trails.

17 Q Did this document then apply to snowmobile trails
18 at that time?

19 A Yes, it did.

20 Q Turning your attention to page 3, the last
21 paragraph. Is there a reference to snowmobile mileage in the
22 forest preserve?

23 A Yes.

24 Q What is that reference?

(Peter Frank - Direct by Ms. Simon)

1 A It says the public use of motor vehicles will not
2 be encouraged and there will not be any material increase in
3 the mileage of roads and trails open to motorized use by the
4 public and wild forest areas that conform to the master plan
5 at the time of its original adoption in 1972.

6 Q Thank you. Moving on.

7 Mr. Frank, for Class II trails for which
8 construction commenced January 1, 2012, through October 15,
9 2014, do you know the approximate number of miles of those
10 trails?

11 A Approximate --

12 MR. CAFFRY: Objection, your Honor.

13 THE COURT: What's the objection?

14 MR. CAFFRY: We know from the testimony that parts
15 of the trails that are at issue in this case were
16 constructed after 2014. I don't believe the
17 construction date is what is relevant. It's the
18 authorization date, and that the question therefore
19 asked for is irrelevant and it was an improper
20 foundation for the question.

21 THE COURT: Overruled.

22 You may answer.

23 A Approximately 27 miles.

24 BY MS. SIMON:

(Peter Frank - Direct by Ms. Simon)

1 Q Do you know the approximate acreage for Class II
2 trails, as I have asked you in the prior question?

3 A Yes, that would be --

4 MR. CAFFRY: Objection. Lack of foundation.

5 THE COURT: Overruled. He stated that he's in
6 charge of -- hang on.

7 He stated that his position is the Bureau Chief DEC
8 Forester 4, and I'm paraphrasing. That he's
9 functionally overseeing the Class II community connector
10 trails.

11 Is that your understanding of his testimony or no?

12 MR. CAFFRY: That's his duties. That doesn't
13 necessarily mean he has actual knowledge of anything.

14 THE COURT: Based on that you have an objection
15 that he has a lack of foundation?

16 MR. CAFFRY: Lack of foundation, yes.

17 THE COURT: Overruled.

18 You may answer if you can.

19 A Approximately 29 acres.

20 BY MS. SIMON:

21 Q Mr. Frank, are you aware of plaintiff's allegation
22 that Class II trails constitute clearcutting?

23 A Yes.

24 Q Mr. Frank, as a forester, what is a forester

(Peter Frank - Direct by Ms. Simon)

1 definition of clearcutting?

2 MR. CAFFRY: Objection. Relevance.

3 THE COURT: Overruled.

4 A Clearcutting is a civil cultural technique to
5 regenerate the forest end. The entire forest end is cut down
6 to allow for regeneration of tree species that require full
7 sunlight.

8 So in order to do that you need to cut all the
9 trees away to allow sunlight to reach the forest floor for
10 those seeds to germinate and the seedlings to grow.

11 Q Mr. Frank, did your study of forestry include the
12 definitions of merchantable trees?

13 A Yes.

14 Q What in your studies was considered merchantable
15 trees?

16 MR. CAFFRY: Objection.

17 THE COURT: Sustained.

18 BY MS. SIMON:

19 Q Are you familiar with forestry standards for
20 timber?

21 A Yes.

22 Q What's the basis for your familiarity of that?

23 A My training as a forester from Paul Smith's College
24 and the College of Environmental Science and Forestry.

(Peter Frank - Direct by Ms. Simon)

1 Q Did your coursework cover definitions of timber?

2 A Yes, it did.

3 Q In your forestry training, what is the definition
4 of timber size tree for the forestry --

5 MR. CAFFRY: Objection.

6 THE COURT: What's the objection?

7 MR. CAFFRY: She's asking him to testify as an
8 expert. He was not on their expert witness list. He is
9 merely a fact expert and anything that requires a
10 professional opinion is outside the scope of what he
11 should be allowed to testify to.

12 THE COURT: So you received no expert disclosure
13 with regard to Mr. Frank's proposed opinion testimony?

14 MR. CAFFRY: Correct. And nor do we have an
15 adequate foundation. Basically we received no
16 disclosure that he was going to be testifying as an
17 expert.

18 THE COURT: Miss Simon?

19 MS. SIMON: Mr. Frank is qualified to answer it.
20 We did not list him as an expert. He's testifying in
21 his capacity as a DEC employee at the highest level of
22 forestry.

23 THE COURT: All right. With regard to a challenge
24 to his qualifications, I'm not going to reach that,

(Peter Frank - Direct by Ms. Simon)

1 because if he's not been noticed as an expert, then the
2 defendants have not been given the notice that is
3 required.

4 The Third District Rules are clear that even if
5 they are a fact witness, for example, a physician in a
6 medical malpractice case, if there is an intent or a
7 wish to elicit any opinion testimony from them, they
8 must be -- the other side must be given notice so they
9 have adequate time to assess their capabilities and to
10 assess their expert opinion, and have their own experts
11 take a look at the expert opinion that's going to be
12 proffered so that they can respond to it and so they can
13 cross-examine on the issue. So I'm not going to allow
14 this question.

15 Mr. Caffry, I'm just going to ask you to be a
16 little bit more careful. When Miss Simon is asking
17 questions, wait until she's done before you object.

18 I know you want to get the objection in before the
19 witness starts answering, which is fine. Sometimes it's
20 a fine line, but try to give her an opportunity to
21 finish.

22 MR. CAFFRY: Yes, your Honor. There have been a
23 couple of times when the witness started to answer
24 before I can get my objection out. That's why I have

(Peter Frank - Direct by Ms. Simon)

1 perhaps jumped the gun.

2 THE COURT: I understand. When you can.

3 MR. CAFFRY: Could we ask the witness to wait just
4 a second?

5 THE COURT: I will ask him again to slow down a
6 little bit. I will do that.

7 But the objection is sustained with regard to the
8 expert opinion.

9 Mr. Frank.

10 THE WITNESS: Yes, your Honor.

11 THE COURT: If you can.

12 THE WITNESS: Okay.

13 THE COURT: Try to remember once more.

14 MS. SIMON: I have no further questions for this
15 witness.

16 THE COURT: All right.

17 Mr. Caffry, questions?

18 MR. CAFFRY: Could we have a short break, your
19 Honor?

20 THE COURT: How long do you need?

21 MR. CAFFRY: Your Honor, it's 4:00. I expect to
22 have extensive cross-examination for this witness. I
23 would suggest it might be appropriate to break for the
24 day.

(Peter Frank - Direct by Ms. Simon)

1 THE COURT: We are going to have to start then. If
2 you want a couple minutes before you begin, you can do
3 that, but I'm not going to break for half an hour.

4 MR. CAFFRY: Thank you.

5 THE COURT: My schedule is just too -- it's too
6 crushed.

7 Do you want a few moments?

8 MR. CAFFRY: I do want a few moments.

9 THE COURT: All right. We will give you five
10 minutes, okay? We will finish up at 4:30 today.

11 You can step down, sir.

12 (Whereupon a brief recess was taken.)

13 THE COURT: All set, folks?

14 MR. CAFFRY: Yes, your Honor.

15 THE COURT: Mr. Frank, you are still under oath.

16 THE WITNESS: Okay.

17 THE COURT: Go ahead, Mr. Caffry.

18 **CROSS EXAMINATION**

19 BY MR. CAFFRY:

20 Q Mr. Frank, do you recall previously having given a
21 deposition in this action?

22 A Yes.

23 Q And do you recall it was held at the Environmental
24 Protection Bureau in Albany on January 8th, 2015?

(Peter Frank - Cross by Mr. Caffry)

1 A Yes.

2 Q At the Office of the Attorney General?

3 A Yes.

4 Q Were you carefully preparing for that deposition?

5 MS. SIMON: Objection.

6 THE COURT: Sustained.

7 Q When you gave that deposition, did you swear an
8 oath to tell the truth?

9 A Yes.

10 Q Similar to the oath you gave today?

11 A Yes.

12 Q I have previously given you a document. Is that a
13 copy of the transcript of your deposition testimony with a
14 correction sheet and a signature page in the back? And take
15 your time to look through it, please.

16 A Okay.

17 MR. CAFFRY: Your Honor, I don't intend to
18 introduce it, but would you like it marked in anyway?

19 THE COURT: Let's see what you do. It's typically
20 not necessary.

21 A Yes, this looks familiar.

22 BY MR. CAFFRY:

23 Q Is that the transcript of your deposition
24 testimony?

(Peter Frank - Cross by Mr. Caffry)

1 A Yes, I believe it is.

2 Q And you signed the statement in the back agreeing
3 that it was an accurate transcript subject to the corrections
4 you noted?

5 A Yes.

6 Q I believe you just testified about the 2006
7 snowmobile plan; is that correct?

8 A Yes.

9 Q And that was Exhibit A; is that correct?

10 A I don't recall.

11 Q Would you like to take a look at that?

12 A Yes. Yes. It's marked A.

13 Q Could you turn to page 14 of the transcript?

14 A Okay.

15 Q Would it be fair to say that page 14, where it
16 refers to the 2006 Snowmobile Plan for the Adirondack Park,
17 is that the same document you just testified about today?

18 A Yes.

19 Q Turning now to page 18, at the bottom of the page,
20 do you see line 23?

21 A Yes. It's a question.

22 Q The question, yes. Could you start reading your
23 transcript at that point and continue to line 11 on page 20?

24 A Yes.

(Peter Frank - Cross by Mr. Caffry)

1 Q Out loud, please.

2 A

3 "Q Question. Can you look at page 11 of the
4 plan?

5 "A Answer. Witness complies with request.

6 "Q Question. And if you look at question number
7 9 on that page, do you see where the first sentence
8 says, the adoption of the plan must be implemented in
9 compliance with the New York State constitution?

10 "A Answer. Must be implemented in compliance
11 with the New York State Constitution State Laws, and
12 yes, I see it.

13 "Q Question. And did anybody make any, within
14 the department, make a determination as to whether or
15 whether or not this plan adopted in 2006 was in
16 compliance with the Constitution?

17 "A Answer. It underwent legal review from our
18 counsel's office.

19 "Q Question. Who at counsel's office would have
20 done that?

21 MS. SIMON: Objection, your Honor. Can we have a
22 proffer for why we are doing this?

23 THE COURT: Yes.

24 MR. CAFFRY: Your Honor, this document which you

(Peter Frank - Cross by Mr. Caffry)

1 have now admitted into evidence, contains statements
2 regarding compliance with the Constitution. It's our
3 intention to demonstrate through the witness's
4 deposition testimony that there is nothing in this
5 document that demonstrates compliance with the
6 Constitution, nor did the Department or APA, or whoever
7 it was that adopted this, undertake any review of its
8 constitutionality, and, therefore, any statements to
9 that effect in the document or any implication to that
10 effect from the document is simply incorrect, and we
11 believe that this witness's deposition transcript will
12 demonstrate that.

13 THE COURT: Miss Simon.

14 MS. SIMON: Your Honor, my understanding is you
15 already made a ruling on the 2006 Snowmobile Plan being
16 admitted and for the limited purpose, and that you would
17 take it for what it's worth in the context of all of the
18 policies that the agencies follow in their bigger
19 picture attempt to comply with the Constitution.

20 I don't see the relevance of reading deposition
21 testimony on the same thing we have already covered.

22 THE COURT: All right. To the extent that we are
23 going to go into what discussions were had among --
24 within DEC with regard to compliance with the

(Peter Frank - Cross by Mr. Caffry)

1 Constitution, I believe that's already been -- the
2 admissibility and the relevance of those discussions has
3 already been ruled upon by both Judge Ceresia and
4 myself.

5 Do you disagree?

6 MR. CAFFRY: I believe that that has been ruled
7 upon.

8 THE COURT: Okay. So where are you going with
9 this?

10 MR. CAFFRY: The point is that despite
11 statements -- well, first, your Honor, and since the
12 document has been admitted, I will read from it.

13 On the cover page memorandum, right inside the hard
14 cover, the plan is consistent with Article XIV, Section
15 1 of the New York State Constitution.

16 I don't think that that statement should go
17 unquestioned into evidence without proof that it had
18 no -- there was no basis for it.

19 I'm not asking about the discussions. I'm asking
20 whether or not there was any actual finding made or they
21 just stuck it in the document that you have now admitted
22 into evidence.

23 Unless you are going to rule that this document and
24 the others about which this witness is testifying are

(Peter Frank - Cross by Mr. Caffry)

1 strictly limited to the very one or two issues in each
2 one that he testified about, then I feel that we need to
3 establish the lack of a foundation for certain
4 statements in here, or else these will come back at us
5 in the defendants' memorandum of law and briefs, and
6 they will make the arguments based upon that. And we
7 feel very strongly that that would be inappropriate.
8 But unless you make a very narrow ruling on what they
9 are used for, we feel the need to reply to this
10 testimony.

11 THE COURT: Okay. Well stated. Let's go off the
12 record for a moment.

13 Step down, Mr. Frank.

14 Counsel, I want you to approach.

15 (Bench discussion.)

16 THE COURT: We will recommence at 9:30 tomorrow
17 morning, folks.

18 (Whereupon the proceedings were adjourned
19 at 4:19 p.m.)
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Protect the Adirondacks! v. NYS DEC & APA

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I N D E X

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PLAINTIFF'S WITNESSES

<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Peter Bauer	852	---	---	---

DEFENDANTS' WITNESSES

<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Peter Frank	902	949	---	---

PLAINTIFF'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>IDENT.</u>	<u>EVID.</u>
33	Photo - Bear Pond - Bauer	---	877
39	Photo - Helldiver Pond	---	870
161	Photograph - Newcomb to Minerva knotweed	---	859
165	Set of 4 photographs	---	882

DEFENDANTS' EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>IDENT.</u>	<u>EVID.</u>
A	2006 Snowmobile Plan for the Adirondack Park/Final Generic Environmental Impact Statement	---	910/914
B	Management Guidance, November 2009 (2009 Guidance)	---	919
C	1991 DEC Division of Lands and Forests Direction LF-91-2	---	934
I	1986 Van Valkenberg Policy on snowmobile trails	---	942
J	1998 DEC Office of Natural Resources Policy 2	---	939
AA	DEC/APA Memorandum of Understanding, revised 2010	---	927

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C E R T I F I C A T I O N

I, Tracie Pamela Hilton, C.S.R, R.P.R., a Senior Court Reporter for the Unified Court System, Third Judicial District of the State of New York, do hereby certify that I attended and reported the foregoing proceedings; that it is a true and accurate transcript of the proceedings had therein to the best of my knowledge and ability.

Tracie Pamela Hilton

Tracie Pamela Hilton
Certified Shorthand Reporter
Registered Professional Reporter

Dated: April 4, 2017

Tracie Pamela Hilton, CSR, RPR
Senior Court Reporter