NO. APL-2019-00166

Court of Appeals

of the

State of New York

PROTECT THE ADIRONDACKS! INC.,

Respondent-Appellant,

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND ADIRONDACK PARK AGENCY,

Appellants-Respondents,

BRIEF FOR *AMICUS CURIAE* EMPIRE STATE FOREST PRODUCTS ASSOCIATION, INC.

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Supreme Court, Albany County Index No. 2137-13
Third Department No. 527256

CORPORATE DISCLOSURE STATEMENT

Proposed *Amicus Curiae* Empire State Forest Products Association, Inc. (“ESFPA”), a non-profit Corporation, hereby states, pursuant to Rule 500.1(f), that it has no parent corporations or subsidiaries but is affiliated with the non-profit New York Logger Training, Inc. and the non-profit Empire State Forestry Foundation, Inc.

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PRELIMINARY STATEMENT

I. BACKGROUND

It can be said that the concept of "timber" is a stand alone idea, a word that connotes and embodies a commercial view of trees where there is value to the trees standing in the forest as potential wood products. This interpretation has been applied in similar Northern Forest States like Maine and Michigan. Nash v. Drisco, 51 Me. 417, 1864 ["…that the word timber, in its etymological sense, might embrace nothing but materials for building or manufacturing purposes;" "not a question of fact, but one of law."] Bearce v. Dudley, 88 Me. 410, 1896 ["…the word 'timber' as used in commerce refers only to large sticks of wood…the numerous uses to which wood has come to be applied, and the general employment of all kinds of trees for some valuable purpose…"] Balderson v. Seeley, 160 Mich. 186, 1910, ["Timber in its primary meaning as given by Webster is that sort of wood which is proper for building"; "The timber reserved was the timber then having a market value and suitable for use, i.e. large enough for use as timber." "…the words therein is not a question of fact, but one of law. Nash v. Drisco, 51 Me. 417."]

Following this commonly known definition of timber, for almost a half a century the Respondent Department of Environmental Conservation (hereinafter "DEC") has provided the

public and the private forestry community with the “Stumpage Price Report” (the “Report”). The Report contains a standard glossary of forest terms used in the Report and begins the definition of timber at 4 inches dbh (“Pole timber-trees 4 to 10 inches dbh”). It also defines two other kinds of timber (“Sawlog – a log large enough to be sawed economically on a sawmill. Sawlogs are usually at least 8 inches in diameter at the small end”, and “Sawlog tree – a tree at least 11 inches dbh and suitable for conversion to lumber.”)(See Appendix A-32 & A-33; see also https://www.dec.ny.gov/lands/5259.html) The dimensions for timber trees used by DEC in the Report are the historical standards used by the forest industry.

Unlike others before it, this case squarely presents to the Court the question of: What is the meaning of “Timber” in Article XIV, Section 1 of the New York Constitution? Earlier cases have not had to deal with this direct question, although at least one Appellate Court has recited an opinion of the Attorney General to the effect that “…seedlings being only a half-inch diameter were not timber…” while at the same time referring to the cutting of 2,600 trees “…which must unquestionably be regarded as ‘Timber’ size…” The Association for the Protection of the Adirondacks v. Alexander MacDonald, 1930, 228 A.D. 73., 81-82. (“MacDonald”)

In context, the facts and circumstances at the time of MacDonald in 1930 do not compare to the matters now before the Court, for it appears that MacDonald was more in the nature of a clearcutting case. Otherwise, the Adirondack Park has changed over the last 91 years and is a different place today. In terms of size, at the time of the creation of the Park in 1892 the Park contained 2,800,000 acres, expanding to 4,054,000 acres in 1912, further expanding to 5,600,000 acres in 1931 (after MacDonald), and being fully expanded in 1972 to its present 5,927,600 acres. See The Forest Preserve of New York State in the Adirondack and Catskill Mountains: A Short History by Norman J. Van Volkensburgh, 1983.

Similarly, within the perimeter of the Park – the historical "Blue Line" – from 1885 when the Forest Preserve was first established the acreage of the preserve has grown from 681,000 acres to today's more than 2,600,000 acres, almost quadrupling the size of the Forest Preserve land inside the Park and now nearing 44% of the entire Park lands. (http://www.dec.ny.gov/lands/4960.html) Another difference from the time of MacDonald is that beginning in 1973 the Adirondack Park Agency Act put in place its statutory Land Use and Development Plan, a plan that classified the private lands of the Park and then, like a super planning and zoning ordinance, assigned compatible uses to each area and restricted and

curtailed non-confirming development. Relative to trees, the Land Use and Development Plan begins its regulation at 6" dbh for both the clearcutting of timber and the protection of shorelines. On shorelines, anything under 6" dbh is considered to be vegetation. See Executive Law, Article 27, §802(15), §806(1)(a)(3). To say the least, the cumulative effect of a larger Park, more Forest Preserve Land, and strict private land use regulation, results in a much different environmental background than what was in place at the time of MacDonald.

And, of course, the MacDonald case itself was triggered by a major international event – the 1932 Olympics – and a legislative act passing a law to construct and maintain a bobsleigh run or slide on Forest Preserve lands. The Association for the Protection of the Adirondacks v. Alexander MacDonald, 253 N.Y. 234,236. [1930] ("MacDonald"). The facts of the instant case do not resemble those in MacDonald in any respect, which now gives the Court the opportunity to revisit MacDonald and address its language and unresolved questions. The open and not answered question of MacDonald is: "What may be done in these forest lands to preserve them or to open them up for the use of the public, or what reasonable cutting or removal of timber may be necessitated in order to properly preserve the State Park, we are not at this called to determine." MacDonald, 253 at 240. With the above question in mind, this Court can now

reexamine the language of MacDonald within the framework of the words of the Constitution and it prohibition against selling, removing or destroying "timber."

With all due respect to the MacDonald Court, the Constitution's prohibitions relate to timber, not trees, but in the Olympic heat of the moment back in 1930, the Court stated the Plaintiff's objection as follows: "One objection, and one only – the Constitution of the State, which prevents the cutting of trees." MacDonald at 237. It is noted, however, that the words "cutting of trees" are not in the Constitution. Nevertheless, the Court then transformed the word timber into trees, that is: "…we have the command that the timber, that is, the trees, shall not be sold, removed or destroyed." MacDonald 253 at 238. The dictionary meaning of timber put into the record in this case (R.579.), however, indicates that the "ordinary meaning" of timber does not include all trees. Strangely, in contradiction of its own rule that the "words of the Constitution, like those of any other law, must receive a reasonable interpretation, considering the purpose and object in view," the MacDonald Court did not interpret the word timber in its ordinary meaning but modified it to "trees and timber." MacDonald at 238. This interpretation was contrary to the 1915 proposed amendment to the Constitution that attempted to expand "timber" to "trees and timber", an amendment that was rejected

by the people at the polls. (See Appellant-Respondent's Reply Brief at pp. 14-17.)

The Plaintiff Respondent herein is now attempting to exploit MacDonald and wants to amend the New York Constitution through the judiciary by the ploy of "reasonable interpretation" whereby the word "timber" becomes "trees and timber." It is clear that the Plaintiff has planned an end run around the normal process and procedures of Constitutional Amendment whereby a proposed change must be first approved and passed by two successive sessions of the Legislature before being submitted to the people for a vote. It remains a mystery why Supreme Court did not see through Plaintiff's plan, especially because in contradiction to its holding, Supreme Court offered an inconsistent explanation of timber in its footnote 3: "Such holding does not constitute a finding that the word 'Timber', whenever used, refers to all trees of any age; it is beyond cavil that one of the uses of the word Timber is to refer to a merchantable wood product." Supreme Court Decision. (R.Xiii. p.10)

Common sense and common understandings draw the line between timber trees and all trees both yesterday in 1894 and today in 2021, for the concept of timber has not changed that much. Looking backward, the learned delegates to the 1894 Convention would certainly have known or should have known the

meaning of timber, because throughout the 19th century New York's Legislature had passed a number of acts declaring Adirondack Rivers public highways for the purpose of floating logs, timber or other products of the forest to market. For example, as early as 1850 the Legislature declared the Racket River a public highway "for the purpose of floating logs and lumber" (L.1850, Chap. 264.); the same in 1851 for the Moose River "a public highway for the purpose of floating logs and timber" (L.1851, Chap.207.); the same in 1893 for the Ausable River "a public highway for the purpose of floating logs, timber and lumber down the same" (L. 1893, Chap. 363.); and the same in 1892 for the Beaver River a public highway for "floating of logs, timber or other products of the forest." (L. 1892, Chap. 437) It can be observed that these acts used the terms "logs," "timber," "products of the forest" and "lumber," but said nothing about seedlings, saplings or trees in general.

With respect to the Racket River this Court acknowledged the Act and recited that many streams were capable of floating to market single logs or sticks of timber and that these "valuable products would have had no avenue to market" absent a public easement in the streams. See Morgan v. King, 35 N.Y. 454, 457-459 (1866). More than a century later this Court then repeated the rule of Morgan and held that there is a public right of way in those streams that are capable in their natural

state "…of transporting, in a condition fit for market, the products of the forest or mines… Because 'valuable products', namely timber, 'would have no avenue to market' otherwise." Adirondack League Club Inc. v. Sierra Club, 92 N.Y. 2D 591, 601. It can be concluded from the referenced legislation, Morgan, and Adirondack League Club that the common understanding of 1894 was that certain waterways were declared public highways for the passage of logs and timber, because getting timber to market was vital to the commercial and economic development of the state. Significantly though, there is no mention in these acts that the declared rivers would be used to float seedlings and saplings to market.

II. HISTORICAL BACKGROUND

A. Dr. Terrie Timber

Giving the Delegates of the 1894 Constitutional Convention the benefit of the doubt, and assuming that they were well informed, it must also be assumed that they would have been aware of what timber was and what it looked like by viewing the illustrations and artwork of the period, the same as has been found by Dr. Philip G. Terrie in his research, writings and many publications referred to in the record (e.g. Forever Wild: Environmental Aesthetics and the Adirondack Forest Preserve [1985,reprinted 1994,-"Forever Wild"]and Contested Terrain: A New History of Nature and People in the Adirondacks [2008, 2nd

Edition, Adirondack Museum and Syracuse University Press,-"Contested Terrain,"]R.3183-3184.) In these works Dr. Terrie displays a number of photographs from relevant periods of timbering in the Adirondacks, namely:

1. "Lumbering in the Adirondacks: The Choppers" in the year 1888 by Seneca Ray Stoddard (Forever Wild p.116, Fig 9 – photo at Appendix A-1);
2. "Lumbering in Winter" by Winslow Homer in 1871 (Contested Terrain, p. 79 –photo at Appendix A-2);
3. "Loggers using a cross-cut saw for the Santa Clara Lumber Company, ca 1900." (Contested Terrain, p. 85 –photo at Appendix A-3);
4. "Logs cut for pulp near Tupper Lake, ca. 1900." (Contested Terrain, p. 109 –photo at Appendix A-4);
5. "Logjam on the Moose River, 1940s." (Contested Terrain, p. 153 –photo at Appendix A-5).

B. Barbara McMartin Timber

Dr. Terrie has not been alone in his depictions of timber. He was of assistance to Barbara McMartin, the author of "The Great Forest of the Adirondacks, North Country Books, 1994 ("Great Forest"), as she acknowledged him as being involved in the plan for the book,[1] so he certainly would have been aware of

[1] McMartin – Acknowledgement: "Philip G. Terrie, Adirondack historian, discussed the general plan for the book."

the many photographs published by her that depict logging and lumber, such as:

1. "River driving on the Hudson" (Great Forest p. 60 –photo at Appendix A-6);
2. "Hauling six sleds of logs" (Great Forest p. 57 –photo at Appendix A-7).
3. "Pulp logs piled at the jackworks at Carter Station on the north branch of the Moose" (Great Forest p. 207 – photo at Appendix A-8 and note the size of the pulp logs).

C. William F. Fox Timber

Additionally, in his book, Forever Wild, Dr. Terrie referenced a number of relevant books at footnote 1 on page 183: (1) "A History of the Adirondacks" (2 vols, New York: Century, 1921) by Alfred Lee Donaldson; (2) "A History of the Lumber Industry in the State of New York" by William F. Fox ("Fox History"), New York's Superintendent of Forests at the time of the 1894 Constitutional Convention, which was printed in the "Sixth Annual Report of the Forest, Fish and Game Commission" for the year 1900 published on January 21, 1901 (Quarto Edition); (3) "Lumberjacks and Rivermen in the Central

Adirondacks, 1850-1890" by Harold K. Hochschild, Adirondack Museum 1962.

In his chapter on "Lumbering" Donaldson mentions the Fox History and tells the reader that it "…tells everything about a tree, from its home in the forest to its distant destiny in the sawmill", and also tells the reader that there "…are a number of excellent and enlightening pictures…" (Donaldson, Chap XLVII "Lumbering" p. 150) The photos published by Fox to illustrate and depict various aspects of logging and timbering again tell the story of what the perception of logging and timber would have been in the 19th century. Referring to the Fox History in the Sixth Annual Report the following photos are telling:

1. "Log Driving on the Ausable River, Essex County, N.Y." p. 254 (photo at Appendix A-9);
2. "Raquette Pond, on Raquette River, Near the Village of Tupper Lake, Franklin Co., N.Y." p. 261 (photo at Appendix A-10).

Notably, both Fox and Donaldson chronicled that the market standard of count for logs in the Adirondacks "was a log 13 feet long and 19 inches in diameter at the top" (Donaldson, Volume II, p. 153; Fox 256). This standard count was the unit of measurement for timber logs and was called a "standard" or "a market." Fox reported: "The market or standard log is 19 inches in diameter at the small end and 13 feet long, and is generally

referred to as a ‘market’ by the lumbermen of the eastern Adirondacks.” Fox p.256. These commercial terms are repeated later in this Brief.

D. Hochschild Timber

Harold K. Hochschild (“Hochschild”), the founder of the Adirondack Museum at Blue Mountain Lake, a former employer of Dr. Terrie, wrote “Lumberjacks and Rivermen in the Central Adirondacks 1850-1950”, 1962, Adirondack Museum (“Lumberjacks”). In Lumberjacks, Hochschild tells the story of the lumber industry and logging practices in vogue in the 19th century which were, in the main, characteristic of the forest bordering the headwaters of the Hudson River. Lumberjacks provides a “Glossary of Logging Terms,” relating to the industry, together with a number of photos that show examples of timber extracted from the woods and put into the rivers for floating to market, some of which are listed below in order to provide an additional visual sense of what 19th century timber looked like:

1. “Logjam, Moose River” Lumberjacks p.18 (photo at Appendix A-11);
2. “Breaking up a logjam, Moose River” Lumberjacks p.19 (photo at Appendix A-12);
3. “Logs at the Big Boom, Glens Falls,” Lumberjacks p.26 (photo at Appendix A-13).

Although trucks are used to haul timber logs to the mills and markets today, Hochschild has written that the sole means of conveying logs from the forest of the Upper Hudson Watershed to the mills at Glens Falls "…was to draw them to the nearest sizable stream tributary to the Hudson and drive them down the current of the spring floods." (Hochschild p.8) It is unfortunate that neither the Plaintiff nor the Defendants called at trial witnesses who could have informed the lower Courts about what kind and size of logs were historically known as timber for conversion to lumber and pulp.

E. Winslow Homer Timber

Long before Dr. Terrie's time many artists of the day were moved to paint the essence of timber in the Adirondacks. Winslow Homer, the iconic Adirondack painter and water colorist, was at the forefront of depicting timber in art and produced a number of lasting images of what captured his artistic eye:

1. "Hudson River Logging," 1891-1892 (artwork at Appendix A-14);
2. "Old Friends," 1894 (artwork at Appendix A-15).
3. "Hudson River at Blue Ledge, Essex County (Logjam)", 1889 (artwork at Appendix A-16).

F. Timber Conclusion

The photographs selected by the Adirondack Historians – Dr. Terrie, Barbara McMartin, William F. Fox, Harold K. Hochschild –

and the artwork of Winslow Homer speak for themselves and show timber, a word that stands for the kind of tree to be taken to market and converted for useful purposes. The Constitution was written to protect timber, not trees, from the depredations of the loggers and lumbermen, so nothing more than the word timber was needed to be stated in the Constitution. Obviously, the historical photos and artwork do not show any seedlings and saplings floating down the rivers or sliding down the chutes, which if attempted would most likely be an exercise in economic futility, as well as an effort that would be resisted by the laws of physics and gravity.

III. DEC TRIAL TESTIMONY

Robert Ripp
Testimony on Timber

Robert Ripp, a Senior Forester employed by DEC with degrees in Professional Forestry and Ecological Forest Management, also experienced in the private sector as a procurement forester, testified that "Timber is a saleable, marketable, forest product." (R. 4671, 4675, 4676.) Ripp testified that the minimum size of tree that he marked for sale was "Eight to Ten - inches dbh for pulpwood ("Ripp Pulpwood"), which would be for paper production, and 14 to 15 inches for sawlogs…" (R. 4677.) Referring to the sawlogs, Ripp testified that "it becomes inefficient to not only harvest and transport the product" when

the trees are below the fifteen-inch dbh range, but that “the volume per stem becomes is too low” to create a finished product. (R. 4676) In his 12 years as a forester, Ripp never marked a tree smaller than three-inches dbh for timber, and that it was his opinion that trees under three-inches dbh do not fall within the forestry industry understanding of timber because they are not marketable or saleable, in other words, “There is not enough volume per stem.” (R.4677-4678) Based on Ripp’s testimony it can be concluded that the small timber trees at 8 inches dbh are used for pulp and the large timber trees in the 15 inch range are used for sawlogs and lumber, yet both are timber because a minimum size threshold has been met. Ripp’s testimony for a marketable pulp tree at 8 inches dbh (4-1/2 feet above the ground) can be compared to the Plaintiff’s 1” stem protocol of a tree cut at ground level (R. 3405.) and also with the DEC’s conservative policy of bringing the definition of a timber tree down to 3 inches dbh (particularly conservative in view of DEC’s longstanding definition of timber beginning at 4” dbh stated in the “Stumpage Price Report”). Visual comparisons can be made by viewing the sketch in the Appendix identified as Figure 1 where the diameters and radii of the disputed tree sizes are shown to scale. (See Appendix Figure 1)

As can be seen on Figure 1, the size differential between a Ripp Pulpwood timber tree and Plaintiff's notion of a 1" tree as timber is dramatic, quite shocking to the point where the Plaintiff's assertions of small seedlings and saplings being timber are not only incredible but beyond belief. Considering Ripp's testimony, it can be concluded that the difference between smaller timber trees used for pulp and larger timber trees used for saw logs and lumber is a relative measurement with a minimum size threshold; trees under 3" dbh do not qualify.

Aside from the visual, however, as shown on the Timber Definition Table relating to timber set forth at Appendix A-17, A-18, A-19 and A-20, Ripp's testimony is in alignment with the historical understandings and current definitions of timber, whereby a timber tree is not less than 4 inches to 6 inches dbh. To be sure, the perceptions of the 19th century and the science of today lead to the conclusion that a timber tree in a general sense is not a seedling or a sapling smaller than 4 inches dbh, and as evidenced by the testimony of Ripp and the definitions contained in the Timber Definition Table, there are minimum and measurable standards for timber. For those in the timber products industry, the meaning of timber is almost a constant, so the meanings of 19th century timber, 20th century timber, and 21st century timber, are substantially the same and did not and

does not include seedlings or small saplings. Surprisingly, these common understandings did not prevent the Plaintiff from taking Dr. Terrie down a path of speculation in an attempt to conjure up and bring into existence as if by magic the notion that all trees including seedlings and saplings are timber.

ARGUMENT

POINT I
DR. TERRIE'S TESTIMONY AND WRITINGS PROVE THAT 1895 TIMBER FITS WITHIN A COMMERCIAL MEANING BUT DOES NOT PROVE THAT ALL TREES ARE TIMBER.

Before Dr. Terrie was prompted to recite his beguiling testimony that swayed the lower courts into supporting the Plaintiff's extreme notion of timber and loose construction of the Constitution to the effect that all trees were considered timber, he demonstrated that he did know the reasoning behind much of the 19th century legislative activity. More particularly, he testified that the creation of the Forest Preserve in 1885 was in reaction to "widespread belief that commercial logging was destroying the Adirondacks and all its values" (R. 3195, R. 3201.), which he supported by admitting that while the statute of 1885 that created the Forest Preserve prohibited leasing and selling of land, it permitted logging (R.3202.), which in turn caused the Forest Commission to be accused of "colluding with corrupt loggers, of presiding over destruction of State lands." (R.3203-3204) Consistent with the

photos and art in the Appendix that show long saw logs and shorter pulp logs floating on Adirondack rivers, Dr. Terrie testified that the logging practice was to cut the trees "…and run them down the rivers to pulp mills in places like Glens Falls, Lyons Falls or Potsdam. (R.3204) In Dr. Terrie's judgment, "…the degree of devastation increased enormously once the pulp industry became a part of the Adirondack logging picture…"(R. 3204) Dr. Terrie's testimony on these commercial points reflects his writing in Forever Wild (See Appendix at A-34 through A-50) where he relates that "…a logger would purchase timber land, cut all the marketable pine and spruce, and abandon the site…" (A-35); "Sargent…had been active…in trying to save the Adirondack Forests from ruthless lumbermen…" (A-39); "…the ravages of irresponsible lumbering." (A-40); "…the lumbermen, almost without exception, was a ruthless, arrogant, greedy destroyer of the bounty of nature." (A-40); "…cut and run loggers…" (A-42); "…control the lumber industries appetite." (A-42); New York Times headline: "Despoiling the Forests – Shameful Work Going on in Adirondacks – Everything Being Ruined by the Rapacious Lumbermen – State Employees Engage in the Business." Dr. Terrie stated that the New York Times "utterly condemned lumbermen as unscrupulous rapers of the landscape who were driven by an arrogant commercial instinct." (A-43); "…rapacious lumbermen, pirates of the forest, lumber thieves and poachers"

(A-43); "…the interests of the people were opposed by the commercial greed of private enterprise and the incompetence or corruption of public officials" (A-50). To be sure, Dr. Terrie makes the case that timber was a commercial commodity, the kind of tree that could be cut and sold for a profit; otherwise he would not have used the words set forth above like "marketable," "greedy," "appetite," "rapacious," "commercial instinct," and "commercial greed." Notwithstanding what he knew from the photographs and his background knowledge about the greedy lumbermen of the 19th century, Dr. Terrie, a self-proclaimed "talking head" (R.3185-3186.) with no credentials in forestry or the business of forestry, testified ("I think") "that pulp loggers often took very small trees to be used in their operation." (R. 3204)

Plaintiff's counsel then asked Dr. Terrie the question: "When you say very small, can you tell us how small, or don't you have any idea?" (R. 3204) Dr. Terrie never answered the question, which would indicate that he truly had no idea. Instead, he diverted the attention of the trial court and referred to an excerpt from his book Forever Wild that quoted Verplanck Colvin, an Adirondack land surveyor. (R. 3207, R. 622 - ex 27) Plaintiff's one page Exhibit 27 says nothing about timber size or specifications, but by reading the full page it does reveal a lot about the 1890's timber industry and the

rationale behind the word “destroy” in Article XIV. Above the Colvin quote contained in Ex. 27 (R.622.) from which Dr. Terrie based his speculations on the size of timber, there is another reference to Colvin where Dr. Terrie relates how Colvin “encountered shocking evidence of the threat to nature posed by private enterprise” when he saw that the shores of Ampersand Lake were “marred by the existence of a logging dam,” and that great forests of white cedar along the shores of the lake “were drowned and killed by water.” (R. 3207; R. 622.) This selection goes to Mr. Goodelle’s point of why the word “destroy” was added to Article XIV, Section 1. It was Mr. Goodelle who at the 1894 Constitutional Convention lamented the construction of a dam on the Beaver River that backed up the water and flooded the trees and resulted in “a ruined scene to look upon” (R. 600). Dr. Terrie affirmed that the word “destroy” was added to the Constitution on the argument that it was “significantly common in those days for logging companies to build dams at the outlets of lakes throughout the Adirondacks which often flooded land that they didn’t own,” including other peoples land and the Forest Preserve. (R. 3228-3229) Doubtless to say, the word “destroy” was aimed at the practice of both private timber companies and the State of constructing dams and flooding trees, and with respect to private enterprise, to deter the lumbermen from impounding waters on lakes, rivers and streams which were

used to provide a water means of transportation for their logs to market.

Returning to Verplanck Colvin and pulling from Exhibit 27 (p. 89 from his book, Forever Wild), Dr. Terrie quotes that Colvin was told by an agent of the lumber company that "chutes were to be constructed far up towards the summit of the high peaks, so that not only logs fit for lumber could be sent down the skidways, but even the small softwood spruce timber would be thoroughly cut for pulpwood." (R. 622) Whether large or small, Colvin was talking about timber, not trees. On the topic of chutes, Fox in particular incorporated in his history a number of photographs showing chutes and how they were used in the Adirondacks for transporting pulp timber, as well as showing the size of the pulp logs that were cut. Examples of timber chutes, engineering feats and scientific marvels that utilize water and the law of gravity to transport timber to a larger standing or flowing body of water, have been provided by the Fox History and are shown as follows:

1. "Water Slide for transporting logs," Adirondack Forest, Essex Co., N.Y. Fox History p.278 – (photo at Appendix A-21)[Identified by McMartin as J. and J. Rogers Company flume on Spruce Hill, circa 1900, Great Forest, p.156]
2. "Caught Napping," Fox History p.282 –(photo at Appendix A-22)

3. “Terminus of Water Slide, logs falling into the Ausable River” Fox History p. 281 (photo at Appendix A-23);

By viewing the photos of the chutes and discerning therefrom the size of the logs sliding down them, it can be concluded that the chutes were not built for the conveyance of seedlings and saplings or other small trees having no commercial value. Dr. Terrie’s testimony does not tell the Court how long the chutes may have been, how much money was needed to construct them, and what size timber logs for lumber or what size timber logs for pulp would be carried by them. Instead, he gave testimony about camping and bushwhacking all over the Seward Range over 100 years later and seeing stunted trees an inch through at breast height, testimony that has no relevance and cannot be linked to Colvin’s observations. (R. 3209) Accordingly, no conclusion can be reached from Dr. Terrie’s testimony to the effect that “very small trees” constituted timber and were run down the chutes.

In Forever Wild, Dr. Terrie has a chapter on “romantic travelers and sportsmen” (chapter III – Not included in the Appendix) in which he references Joel T. Headley, a protestant minister, who wrote a book published in 1849 entitled “The Adirondack; or Life in the Woods” Forever Wild p.44 Dr. Terrie characterized Headley’s book as “a prime example of one of the nineteenth century’s most popular genre, the illustrated volume

of romantic travel literature." Forever Wild p. 44 In his testimony, Dr. Terrie characterized Headley as a "protestant minister who became a travel writer and popular historian" and "because of a nervous breakdown or something went camping in the Adirondacks in the 1840s…" (R.3241) Referring to Headley's book, Plaintiff's counsel asked whether it contained a passage of significance to the definition of timber?", and then introduced into evidence Plaintiff's Exhibit 6 (R. 3243-3244; R. 576.) Obviously, the purpose of the question was to get into the record 15 words taken out of context: "…where the timber is so thick you cannot see an animal more than 15 rods…" (R.576)

Along with the other tall tales and hyperbole found in Exhibit 6 involving panthers, wolves, Daniel Boone, and glaring eyes, can the Plaintiff be serious about the quoted language having any relevance to the meaning of timber at the 1894 Constitutional Convention? Would any delegate to the 1894 Constitutional Convention connect Headley's "timber is so thick" phrase with the legal prohibition contained in the Constitution against selling, removing or destroying timber? If the instant case were not so important to the wood products industry, Headley's story would be laughable.

But not to Dr. Terrie, who did not even know that the measure of a rod is 16.5 feet, not 16 feet (R.3245.), at 247.5 feet (15 x 16.5)almost the length of a modern day football field – a long

distance through the woods. But that lack of knowledge did not prevent Dr. Terrie, the non-forester, the non-scientist, from leveraging the 15 words from a sentence in a tall tale and formulating an opinion that the timber in the story is not marketable logs but "means a lot of little trees." (R.3245) No conclusion about the meaning of timber can be based on a tall tale.

Lastly, it is rare that one would reach for the dictionary to undefine a word that has common meaning and understanding, but this was done in this case when Plaintiff reached for Webster's International Dictionary of the English language, 1864, 1879, 1884, 1892. (R.577) Plaintiff then proceeded to use the dictionary not for what it does say about timber but for what it doesn't say about timber, then digressed into a word game irrelevant to the meaning of Constitutional timber by dwelling on the word "stem." However, all six of the definitions for timber set forth in Plaintiff's Exhibit 7 are in accord with the common understanding of timber; that is to say, that timber is a commercial term relating to the wood from trees being transformed into useful products and materials. The Court does not need Dr. Terrie's help to read the dictionary, although the dictionary definition of timber entered into the record can by itself lead to the conclusion that timber means the commercial use of a tree.

POINT II

THE DELEGATES TO THE 1894 CONSTITUTIONAL CONVENTION KNEW THE MEANING OF TIMBER

The Delegates to the 1894 Constitutional Convention (the "Delegates") were informed people who knew what they were doing. They knew the difference between the words "timber" and "trees." In pursuit of their goal to secure the watersheds of the Adirondacks for present and future water supply they did not worry about the trees, there was no economic demand for trees, but they did worry about the timber, because they knew that the lumbermen coveted the timber trees, the kind of trees that could produce a profit along various points of the economic chain from the woods to the mill to the consumer of wood products. In short, timber trees could be turned into money, seedlings and saplings could not.

The Delegates also knew that with the creation of the Adirondack Park in 1892 that the Forest Commission had the authority to purchase lands that would be "advantageous to the State," but if such lands could not be bought on terms including the timber the Forest Commission could nevertheless purchase the lands subject to the timber right of removal retained by the owner, provided "no lands shall be so purchased subject to any right to remove hard wood timber, or any trees of soft wood with a diameter of less than ten inches at the height of three feet

from the ground… or the right to remove any timber after the period of ten years from the date of conveyance.” L. 1892, Ch.707, § 3. It is clear from this statute that the Legislature identified timber trees as being 10” dbh. This measure is in accord with Mr. Ripp’s testimony.

The Delegates would have also have known that one year after the creation of the park later in 1893 that the Forest Commission could sell any spruce and tamarack timber from forest preserve lands, “which is not less than 12” in diameter at a height of 3’ above the ground, standing in the forest preserve…” L. 1893, Ch. 332, § 103. And by the same statute, they would have known that the Legislature increased the threshold for soft wood timber by keeping the ten year removal period but increased the size of the trees to a diameter of no less “then 12” at the height of 3’ from the ground.” L. 1893, Ch. 332, § 121 Before the 1894 convention then, the Legislature had pegged hard wood timber at 10” dbh and soft wood timber at 12” dbh, the implication being that only trees of a certain diameter were considered to be timber. The Legislature said nothing about seedlings, saplings, small trees, or trees in a general sense.

The Delegates would have also known about the laws of 1894, Ch. 317, § 84 relating to “persons having discovered mines upon state lands, whereby such persons were not authorized to cut or destroy any timber except those necessary to make a road to the

mine, in which case each tree cut “measuring 4” or more in diameter at a height of 1’ from the ground” required a payment to the State of one dollar. Once again the Legislature quantified the concept of timber, that is, timber = 4” dbh. No payment to the State was required for the cutting of seedlings and saplings below 4” dbh.

The Delegates also would have known about the many timber trespasses that reputedly had been taking place on forest preserve lands since 1890, for after the fact of the effective date of what is now Article XIV, Section 1, the Legislature appointed a five person special committee “to investigate the depredations of timber in the forest preserve.” The special committee undertook the examination of witnesses across the Adirondacks and focused on “trespasses committed on State lands during the last five years” (i.e. 1890-1895)and intended to obtain from the witnesses information relative to the trespasses, the acreage cut, “and the number of markets of timber cut or taken in each case…” (Remember, a market is a log 13’ long and 19” at the small end) “Report and Testimony of the Special Committee appointed to Investigate The Depredations of Timber in the Forest Preserve, 1895,” assembly document #67 (hereinafter “The Special Report”)

The Special Report spans 922 pages but summarizes its findings on trespass in the first 28 pages for 74 different

instances of trespass, most of which summaries refer to "merchantable timber," or "standards," "marketable timber," "markets," "cut about 100 standards," "stripped marketable timber," etc. (Representative pages of The Special Report are set forth at Appendix A-24 through A-31.) The point is that the 1894 Delegates would not have been naïve about what required protection so their goal with respect to Forest Preserve lands was to shut out the timber industry and take away all methods of allowing the timber industry to profit from the wood on State lands. There is no evidence in the record that they were concerned about seedlings and saplings that provided no money incentive to the lumbermen.

To the contrary, the commercial aspect of timber jumps off the pages of the record from the debates at the 1894 Constitutional Convention beginning with Mr. McClure. The language of the debates is such that there is no question but what timber is a tree in commercial condition, a commodity that could be bought and sold. Indeed, it is revealed at least 23 times in the record of the Constitutional debate that the Delegates were talking about the sale of timber, the removal of it, and the destruction of it by dam building. These references appear in the record and are expressed by the key Delegates, McClure, Goodelle, Mereness, McIntyre, McLaughlin and Brown (R. 582 – R.615.) Based on the constitutional record and the

language used in the debates (i.e., “sold,” “lumbering enterprises,” “lumbermen,” “sale of the trees,” “selling to the lumbermen,” “lumbermen cutting the woods,” “lumber camp,” “timber culture,” “valuable timber,” “to peddle out, to sell”), the historical record makes it clear that timber is the kind of tree that has value and could be sold, but not a tree that falls short of such an economic idea. A non-economic tree regardless of age is part of and resides with the overall vegetation of the forest. Like the Supreme Courts of Maine and Michigan, this Court can conclude that the definition of timber is a matter of law and that the word embraces trees that can be converted to useful purposes and products. Nash v. Drisco, 51 Me. 417. (1864)

CONCLUSION

The word timber contained in Article XIV, Section 1, taken in the context of 19th century history and 21st century forestry, is a word that has meaning by itself and has no need for judicial interpretation. It has meaning as a matter of law – a tree that possesses marketability for transformation into a forest product for commercial use. In this case it could mean a tree beginning at 4” dbh based on the Timber Definition Table (A-17 – A-20), but in all likelihood and in accordance with Mr. Ripp’s testimony it means trees 8” dbh and greater.

Rather than interpret the meaning of trees to be 3” dbh, a reasonable but possibly liberal interpretation of the meaning of

timber should begin at 4” dbh, thus reducing the number of trees in the instant case to be counted for purposes of measuring the trees cut against the Constitutional prohibitions.

Whatever the interpretation of the facts and law in this case, it is clear that the Defendant DEC did not sell any timber or trees, did not remove any timber or trees, and assuming the rationale of the Constitutional Convention, did not destroy any timber or trees by flooding and killing them.

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CERTIFICATION OF COMPLIANCE WITH RULE 500.13(c) (1)

Dennis J. Phillips, an attorney for the Empire State Forest Products Association, Inc. in support of Appellants-Respondents, hereby certifies as follows: the foregoing brief for Amicus Curiae was prepared on a computer word-processing system. A monospaced typeface was used, as follows:

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