STATE OF NEW YORK
SUPREME COURT COUNTY OF HAMILTON

FRIENDS OF THAYER LAKE LLC., et al.

Plaintiffs,

-against-

PHIL BROWN, et al.,

Defendants,

and

THE STATE OF NEW YORK and the
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

Intervenors-Defendants.

MEMORANDUM OF LAW

IN SUPPORT OF

PLAINTIFFS' CROSS- MOTION FOR SUMMARY JUDGMENT

AND IN OPPOSITION TO DEFENDANTS' MOTIONS

FOR SUMMARY JUDGMENT

Submitted by:

McPHILLIPS, FITZGERALD & CULLUM L.L.P.
DENNIS J. PHILLIPS, Of Counsel
EDWARD P. FITZGERALD, Of Counsel
Attorneys for Plaintiffs
288 Glen Street - P.O. Box 299
Glens Falls, NY 12801
(518) 792-1174

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

STATUTES

PRELIMINARY STATEMENT

Defendant Phil Brown admits to entering onto Plaintiffs' Mud Pond Parcel on May 21, 2009 without permission. At the time, Plaintiffs' boundary line across the narrows of Mud Pond was posted with no trespassing signs, which Defendant Phil Brown ("Defendant Brown") admits to seeing and disregarding. Plaintiffs' are thus entitled to have this Court enter a judgment as a matter of law on their intentional trespass claim against Defendant Phil Brown unless, as he claims, a public highway exists across the pond, brooks and walking path he used to traverse Plaintiffs' parcel. Intervenors-Defendants State of New York ("State") and Department of Environmental Conservation ("DEC") also claim that a public highway exists across Plaintiffs' Mud Pond Parcel and seek to prevent Plaintiffs' from lawfully posting and fencing their property boundaries and prosecuting trespassers.

Whether a public highway exists, depends on this Court's answer to a single question:

> Whether Mud Pond, its outlet brook and Shingle Shanty Brook—from its confluence with the Mud Pond outlet brook downstream to the property boundary with State land—are navigable-in-fact under New York's common law standard?

The parties do not materially disagree about the relevant facts–i.e., the character and history of use of the relevant lands and water bodies. As such, this Court needs to simply apply New York's well-developed common law standard for navigability-in-fact. The standard is rooted in the notion that society benefits when rivers necessary for promoting trade and commerce are open to public use. In doing so, this Court will properly reject Defendants' theory of navigability, under which all New York brooks capable of floating a canoe are open to public use even those–like Plaintiffs'–that are in private ownership. This has never been the law in New York. The choice is clear–to uphold or upset well-settled notions of private property law.

STATEMENT OF FACTS [1]

May 21, 2009, found Defendant Brown on Lilypad Pond, deep in the heart of the State-owned William C. Whitney Wilderness Area ("Whitney Wilderness"). He was two days into a wilderness canoeing and hiking trip that began at Little Tupper Lake and was scheduled to conclude at Lake Lila. Brown Aff. ¶ ¶ 27-40. Instead of remaining on the State-owned land and State-designated canoe 'path', Defendant Brown turned his canoe westward and paddled through a narrow channel, past no-trespassing signs which he admits to seeing, and continued onto the Plaintiffs' privately owned Mud Pond. Defendant Brown's trespass continued as he went to the far end of Mud Pond where he exited his canoe because he could not float down the pond's outlet. Brown Aff. ¶ ¶ 41-48. He then carried his canoe and gear across a hiking trail on Plaintiffs' land to a point approximately five hundred feet down the outlet brook. Brown Aff. ¶ 48.

After placing his canoe in the brook, he remained on Plaintiffs' land (the "Mud Pond Parcel") while he paddled down the narrow and winding Mud Pond Outlet Brook about three-quarters of a mile to its confluence with the Shingle Shanty Brook, which he then paddled downstream about one mile to where the trespass as he reentered the Whitney Wilderness Area. Brown Aff. ¶ ¶ 49-52. While paddling and walking this long stretch on Plaintiffs' property, Defendant Brown found himself going around Plaintiffs' Mud Pond Camp, first built in 1918. Donald B. Potter Aff. ¶ 55.

That Defendant Brown could find himself so deep in the woods on Lilypad Pond was

---

[1] The relevant facts are more fully set forth in the Affidavits of Dennis J. Phillips, Donald B. Potter, Colin I. Bradford, Judson S. Potter, Steven B. Potter, Robert MacDonald, Justin Potter and Marcus J. Magee submitted herewith (and the exhibits annexed to thereto), all prior Affidavits, Exhibits and Transcripts submitted by Defendant State and Defendant Brown, and the Verified Pleadings.

only made possible by the fact that in 1998 New York State spent $13,900,000 to purchase the 15,000 acres parcel containing the majority of his route. The fact that he could continue on to Lake Lila was possible because of the earlier purchase of the 7,200-acre parcel containing those lands in 1978. Phillips Aff. ¶ 12. The public can access both the 1,400-acre Lake Lila and the six-mile long and one-mile wide Little Tupper Lake by road, though a one-third mile walk is required from the parking lot at Lake Lila to the lake. Ex. E to Phillips Aff. To accomplish its goal of creating a wilderness recreational area, the State banned motorized vehicles in the Whitney Wilderness Area. (See rules on Ex. A to MacDonald Aff.) To create a wilderness canoeing and hiking experience allowing the public to access the far reaches of the parcel, the State marked hiking trails between various lakes, ponds and streams. The marking and promotion of this route was approved, in part, because Defendant DEC found that its design–in staying on the State-owned parcel–respected adjacent private ownerships. Phillips Aff. ¶ ¶ 51-53.

The day before reaching Lilypad Pond, Defendant Brown had started the State-marked Lila-Traverse by paddling down Little Tupper Lake, up the outlet to Rock Pond, carrying his boat around a rapids, paddling Rock Pond, and carrying his boat one and a half miles to Hardigan Pond where he camped. Brown Aff. ¶ ¶ 27-33. Defendant Brown should have continued on that day, or stopped short of Hardigan Pond, because in camping at the pond he was in violation of Whitney Wilderness regulations that require camping in designated sites to protect the wilderness for future generations. (Rules and camping sites are shown on Ex. A to MacDonald Aff.)

On day two, after paddling down Hardigan Pond, Defendant Brown was forced to exit his boat and carry past the pond's outlet four-tenths of a mile to where it joined Salmon Lake's outlet brook. Brown Aff. ¶ 34-35. (Where the first day he was paddling upstream, this second day

would find him floating downstream because he had crossed a drainage divide while carrying his boat to Hardigan Pond the day before. Donald B. Potter Aff. ¶ 19.) The Salmon Lake outlet brook led to Little Salmon Lake, whose size more resembles a pond, and another four-tenths of a mile carry brought him to Lilypad Pond on May 21, 2009. Brown Aff. ¶¶ 36-40; Potter Tr. p. 166. Instead of paddling and walking across Plaintiffs' land, Defendant Brown should have continued on the State-marked route to Lake Lila, by paddling Lilypad Pond and utilizing a portage specifically created by the State; but, instead, he had much earlier determined to deviate from the State-route and trespass across Plaintiffs' adjacent private lands. Brown Aff. ¶¶ 21, 41.

Prior to beginning the Lila-Traverse, Defendant Brown, an editor and writer at a newspaper with a readership of 40,000 people, had unilaterally decided that the waters he was about to paddle on Plaintiffs' land (Mud Pond, its outlet brook and Shingle Shanty Brook) were public highways under the common law doctrine of navigability-in-fact. Phillips Aff. ¶ 47; Brown Aff. ¶ 20. He made this 'legal conclusion' after reading the writings of and consulting with various individuals who happened to have one thing in common: They had all been trying unsuccessfully, in some cases for several decades, to utilize the Legislature and the Courts to expand the areas on private land where canoeists could paddle. Brown Aff. ¶¶ 11-17; Judson Potter Aff. ¶¶ 45-66. After this one-sided research, Defendant Brown decided to raise public awareness in his magazine of the fact that Plaintiffs' sought to keep using their private ownership as they had been doing for over a century. Brown Aff. ¶ 21. For reconnaissance in preparation for the newspaper article, Defendant Brown took this unannounced and uninvited scouting expedition across Plaintiffs' property. Subsequent to his trespass, Defendant Brown wrote and published an article boasting about his exploits and proclaiming that the waters he paddled on

Plaintiffs' land are a public highway and available for use by the public, thereby encouraging future trespass. Brown Aff. ¶ 55.

Plaintiffs' bring this action to confirm what they have always known and what Defendant Brown surely noted during his trespass–first, that the narrow, serpentine brooks Defendant Brown paddled on their property provide no practical utility for commercial trade or transport, and, second, that in fact, the brooks are barely suitable for recreational canoeing and kayaking (with substantial portaging). As such, when this Court applies the well-established common law standard (instead of the previously rejected theory advocated by Defendant Brown's advisors), it will naturally conclude that Mud Pond, its outlet brook and Shingle Shanty Brook are not public highways under the common law doctrine of navigability-in-fact and that a trespass occurred.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). The parties do not materially disagree about the relevant facts. Summary judgment is, therefore, appropriate here because a trial will not adduce any additional relevant facts.

SUMMARY OF ARGUMENT

Historically, a river was considered a public highway only if its use by the public was necessary for promoting measurable commerce and trade. Morgan v. King, 35 NY 454, 460 (1866); Adirondack League Club, Inc. v. Sierra Club, 92 NY2d 591, 601 (1998). Most recently, the Court of Appeals utilized the phrase 'practical utility for transport' to describe the standard, but clearly stated that its new description was not an expansion of the historic commercial standard. 92 NY2d at 603.

The evidence shows that Mud Pond is not practically useful for transport under the common law rule because it has only one potential point of public access. Mohawk Valley Ski Club, Inc., 304 AD2d 881, 883 (3d Dep't 2003). The evidence further shows that the small, serpentine brooks here are suitable, at most, for recreational canoeing (with substantial portaging). Though this Court can consider the evidence of recreational uses, it must do so only to determine whether the brooks satisfy the well-established commercial viability standard. Substantial case law demonstrates that this standard is not met merely by showing a waterway's ability to float the smallest shallow-draft boats available, such as canoes and kayaks. (See supra Point I.c.10) Because they are only capable of floating canoes and kayaks and are not necessary or suitable for commercial uses, this Court must conclude that these brooks are not navigable-in-fact public highways.

Defendants' theory–that evidence of a brooks' mere ability to float a canoe satisfies the common law standard–must be rejected by this Court because their theory, if adopted, would obliterate the common law and render practically every brook across New York State a public highway. A finding for Defendants would in effect overturn long-held and fundamental

principles of private property ownership that dictate that privately owned waterways remain exclusively private unless they are navigable-in-fact under the well-established commercially rooted standard. See Smith v. Rochester, 92 NY 463, 483 (1883). The Court of Appeals has clearly stated its reluctance to expand the common law because, as it stated, an expansion "would precipitate serious destabilizing effects on property ownership principles and precedents." Douglaston Manor, Inc. v. Bahrakis, 89 NY2d 472, 482 (1997). In applying the well-established commercially rooted standard, this Court will be properly rejecting the latest rendition of Defendant's three-decade long unsuccessful attempt to reclassify small privately owned streams as public highways.

Plaintiffs will next conclusively demonstrate that the small pond and brooks at issue here are not public highways. Afterwards, Plaintiffs will explain the genesis of Defendants' continuing attempts to expand the areas where recreational canoeists can paddle on private property. Lastly, Plaintiffs will show that all necessary parties have been joined as Plaintiffs. Plaintiffs will have, therefore, shown that this Court must grant their cross-motion for summary judgment by finding that Defendant Brown trespassed when he knowingly and intentionally entered onto Plaintiffs Mud Pond Parcel without permission.

ARGUMENT

I. NO PUBLIC RIGHT OF PASSAGE EXISTS ACROSS THE MUD POND WATERWAY BECAUSE MUD POND, ITS OUTLET BROOK AND SHINGLE SHANTY BROOK ARE NOT NAVIGABLE-IN-FACT UNDER THE WELL-ESTABLISHED COMMON LAW STANDARD.

a. Introduction and Statement of Law

As the private property owners of the fee title and the recreational rights to the Mud Pond Parcel, Plaintiffs' generally have the right to utilize the Mud Pond Waterway to the exclusion of the public. This fundamental right of exclusive use has been acknowledged by the U.S. Supreme Court and the New York Court of Appeals. "[T]he right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property." Nollan v. Cal. Coastal Com, 483 U.S. 825, 831 (1987). "As a general principle, if a river is not navigable-in-fact, it is the private property of the adjacent landowner." Adirondack League Club, Inc. v. Sierra Club, 92 NY2d 591, 601 (1998) [hereinafter sometimes referred to as, ALC].

Defendants contend that an exception to the general rule applies—that the pond and small brooks comprising the Mud Pond Waterway are navigable-in-fact and are "considered a public highway, notwithstanding the fact that [their] banks and bed are in private hands (Morgan v King, 35 NY 454)." Adirondack League Club, Inc., 92 NY2d at 601. The rights of the public in navigable-in-fact rivers "grew out of and was based upon the public benefits in promoting trade and commerce, supposed to be derived from keeping open navigable bodies of water as public highways for the common use of the people." Smith v. Rochester, 92 NY 463, 483 (1883). Not every waterway is navigable-in-fact. "[I]n order to be navigable-in-fact, a river must provide practical utility to the public as a means for transportation....[O]f paramount concern is the

capacity of the river for transport." Adirondack League Club, Inc., 92 NY2d 591, 603 (1998).[2] Therefore, whether the Mud Pond Waterway is navigable-in-fact under the common law remains the central question before this Court.

In this section, Plaintiffs will initially show that Mud Pond fails the common law test because it has no ability for transport since the public has only one potential point of access. Plaintiffs will then show that the mere ability to float a canoe does not make a waterway a navigable-in-fact public highway. Plaintiffs will, therefore, demonstrate that the pond and small, serpentine brooks at issue here are not navigable-in-fact public highways.

b. No Public Easement Exists Across Mud Pond Unless the Entire Mud Pond Waterway is Navigable-in-Fact.

After entering Plaintiffs' Property from the direction of Lilypad Pond, Defendant Brown first paddled across the shallow and often weed-choked Mud Pond. This first pond encountered by Defendant Brown is clearly not navigable-in-fact under the common law standard applicable to ponds because it lacks multiple points of access for the public. As will be shown in this section, no public easement could exist across Mud Pond, unless, as Defendants contend, the pond is transformed into a navigable-in-fact water body because of its linkage via an un-floatable

---

[2] While New York Courts have sometimes looked to federal law for guidance on issues of navigability-in-fact, much ambiguity has arisen because many Courts have indiscriminately cited to Federal navigability cases without regard to the context in which navigability was being considered. As was recently reiterated by the U.S. Supreme Court in PPL Montana, LLC, v. Montana, 132 S. Ct. 1215, 1228-29 (2012), the federal analysis can arise in the context of questions of title under the equal-footing doctrine, admiralty jurisdiction, federal regulatory authority, and federal commerce power. Each has its own analysis that is distinguishable individually and collectively from the common law of New York. While this Court may look to federal law for guidance, it should do so only after understanding the context in which questions of navigability arose in a particular case. Yet, it is worth noting that even the federal courts have refused to adopt a test that would "convert every pond and swamp capable of floating a boat into a navigable stream or lake." Toledo Liberal Shooting Co. v. Erie Shooting Club, 90 F. 680, 682 (6th Cir. 1898).

500-foot long outlet to two small, shallow brooks which connect to publicly owned property.

1. A Pond Suitable Only For Recreational Use, With Only One Point of Access, is Not Navigable-in-Fact.

In determining whether a waterway has capacity for transport, "courts have long considered the presence and nature of termini by which the public may enter or leave the waterway..." Mohawk Valley Ski Club, Inc. v. Town of Duanesburg, 304 AD2d 881, 883 (3d Dep't 2003) (citations omitted). "[T]he absence of multiple points of access can be 'evidence that a pond is not suitable for trade, commerce or travel' (Hanigan v State of New York, 213 A.D.2d 80, 85, 629 N.Y.S.2d 509 [1995])." Mohawk Valley, 304 AD2d 881, 883 (3d Dep't 2003).[3]

In Hanigan, the land under and around the pond was completely owned by a private party, but the Court assumed for the sake of its holding that lawful public access to the pond was available via a public road. Nevertheless, the Court held that the pond was not navigable-in-fact because the absence of a second means of access was evidence that the pond was not suited for transporting the public or their goods anywhere but the privately owned pond. See also Dale v. Chisholm, 67 AD3d 626 (2d Dep't 2009) (adopting Hanigan by rejecting the defendant's assertion that a lake could be navigable-in-fact merely because the public could utilize its surface for recreational canoeing and kayaking). Even the presence of motorized vehicles did not support the conclusion that a lake with no navigable outlet provided practical utility to the public as a means for transportation. Mohawk Valley Ski Club, Inc., 304 AD2d 881 (3d Dep't 2003).

---

[3] Attorney John Caffry and Charles Morrison, former DEC staffer and current Sierra Club operative (see Point II, below), seem to agree with this argument as evidenced by their discussion in Questions 7 and 8 of their article entitled, "Public Navigation Rights in New York State: Questions and Answers" attached as Ex. "F" to the Affidavit of Defendant Phil Brown.

2. Mud Pond Has Only One Point of Public Access.

Here, Mud Pond is not navigable-in-fact because the only public access to the pond is via a channel known as the "Mud Pond Narrows" where waters flow in from State-owned Lilypad Pond. Donald B. Potter Aff. ¶ 43. Plaintiffs own the fee title and recreational rights to the entirety of the land under and around Mud Pond, except at the Mud Pond Narrows. (See Infra Point III) No other means exist to exit the pond by boat because its outlet is blocked by an impassible bedrock ledge which is immediately followed by the 500-foot long Mud Pond Outlet Rapids. Caffry Aff. ¶ ¶ 49-51. These rapids cannot be floated by boat no matter the season or the size of the boat. Caffry Aff. ¶ 51; Donald B. Potter Aff. ¶ 46. Boaters entering from Lilypad Pond would be limited to going in circles around Mud Pond and back out the narrows because no secondary public access point exists either on land or by water. The fact that Plaintiffs, as the private owners, may have rowed building materials to the far shore of Mud Pond to build or rebuild the Mud Pond Camp does not alter the overlying fact that only one potential point of public access exists. Donald B. Potter Aff. ¶ 56. Therefore, Defendants are faced with the reality confronting the parties arguing for navigability in Hanigan and Mohawk Valley.

3. Defendants' Theories of Navigability for Mud Pond Would Require This Court to Ignore the Lack of Alternate Access.

Defendant Brown seems to recognize this access problem as evidenced by his assertions that Mud Pond and Lilypad Pond should be treated as one contiguous waterbody. (In truth, there are two definitive waterbodies. Phillips Aff. ¶ 60.) Even accepting Defendant Brown's premise, the combined water body would afford no greater usefulness for transport. First, this hypothetical larger water body has no additional boat access because the only inlet to Lilypad Pond is

impassable to canoes and kayak. Donald B. Potter Aff. ¶ 28; MacDonald Aff. ¶¶ 4-16. (A walk of 0.4 miles, or at least 0.2 miles as Defendant Brown asserts, is required to reach the next floatable water upstream. Caffry Aff. ¶ 45.) Second, the combined waterway offers the public no transportation options not already afforded by Lilypad Pond alone. Defendant Brown claims that three trails intersect at his hypothetical larger water body, but it is really two trails (see Exhibit A to MacDonald Aff.). More importantly, both trails intersect at Lilypad Pond, not Mud Pond. Caffry Aff. ¶¶ 31-46 and 57-61; Hamm Aff., Ex. D, pp. 2-3. A paddler could use Lilypad Pond to access both trails without ever entering onto Plaintiffs' Mud Pond. The simple fact is that Mud Pond fails to qualify as a navigable-in-fact water body under the common law standard.

4. Plaintiffs May Exclusively Use Mud Pond Unless it Becomes Navigable-in-Fact Because of Its Connection to Two Small, Serpentine Brooks Via a Portage Trail.

Mud Pond as an individual water body clearly fails the test for navigability unless the public can reach it from a second point other than the narrows. Unfortunately for Defendants, "[t]he public right to use navigable waters does not entitle the public to cross private land for access to navigable waters." Hanigan v. State of New York, 213 AD2d 80, 83 (3d Dep't 1995). Thus, the public cannot make the pond navigable by hiking over Plaintiffs' Mud Pond Parcel to reach Mud Pond from another direction. Defendants propose, however, to do exactly that, by paddling up two small brooks on Plaintiffs Mud Pond Parcel and then walking five hundred feet to reach the pond. According to Defendants, the Mud Pond Outlet brook and the Shingle Shanty Brook are navigable-in-fact waterways because they are suitable for canoeing and link to Mud Pond via a non-floatable rapids. In the next section, Plaintiffs will show why these two small

brooks fail to satisfy the well-established common law standard for rivers.

Because no public easement exists across Mud Pond, Plaintiffs as owners of the fee title and the recreational rights to the Mud Pond Parcel are lawfully entitled to exclusive use of the entire pond on their parcel. Adirondack League Club, Inc., 92 NY2d 591, 603 (1998); Dale v. Chisholm, 67 AD3d 626 (2d Dep't 2009); Mohawk Valley Ski Club, Inc. v. Town of Duanesburg, 304 AD2d 881 (3d Dep't 2003). This rule applies even though the boundary line between the Whitney Wilderness and the Mud Pond Parcel cuts across the Mud Pond Narrows. See Gouverneur v. National Ice Co., 134 NY 355; Commonwealth Water Co. v. Brunner, 175 AD 153, 158 (2d Dep't 1916); Waters of White Lake, Inc. v. Fricke, 282 AD 333 (3d Dep't 1953), *affd* 308 NY 899; and Tripp v. Richter, 158 AD 136. Distinguishing between State and private waters is easy here because the property line cuts in a perpendicular fashion straight across the Mud Pond Narrows. See Ex. A to MacDonald Aff. Plaintiffs may, therefore, post and fence their property line and retain exclusive use of the entirety of the waters on their parcel.

c. Shingle Shanty Brook and the Mud Pond Outlet Brook Fail to Satisfy the Well-Established Common Law Standard.

1. The Fundamental Right of Exclusivity and the Historic Navigability Standard.

"As a general principle, if a river is not navigable-in-fact, it is the private property of the adjacent landowner." Adirondack League Club, Inc. v. Sierra Club, 92 NY2d 591, 601 (1998). This well-established common law principle "grew out of and was based upon the public benefits in promoting trade and commerce, supposed to be derived from keeping open navigable bodies of water as public highways for the common use of the people." Smith v. Rochester, 92 NY 463,

483 (1883). Fundamental to this theory of law is the assumption that not every brook or waterway has practical utility to the public and that some brooks remain in the exclusive use of their private owners.

Those waterways that are navigable-in-fact have been so since the time the underlying private land was first sold by the State. As such, the answer to the central question before this Court–the navigable-in-fact status of Mud Pond, its outlet brook and the Shingle Shanty Brook–has not changed with time, and would have been determinable at the time of the original grant to Benjamin Brandreth in 1851. See e.g., LeBlanc v. Cleveland, 198 F.3d 353 (2nd Cir. 1999) (discussing New York's historic navigability standard and citing Adirondack League Club, Inc. v. Sierra Club, 92 NY2d 591 (1998)). In 1866, a few years after the grant to Brandreth, the Court of Appeals articulated a clear standard to answer the question of whether the brooks on his property were public highways under the common law. See Morgan v. King, 35 NY 454 (1866).

2. Morgan v. King's 'Liberal' New York Standard

In Morgan, the Court of Appeals had its first opportunity to squarely address how the English common law principles enunciated by Lord Hale in his seminal treatise *De Jure Maris* (published posthumously about 1786 in London) would be adopted to New York State. Lord Hale had explained that under the English common law "a river is, in fact, navigable, on which boats, lighters[4] or rafts may be floated to market." Morgan v. King, 35 NY 454, 458 (1866) (citing Hale, De Jure Maris; Ex parte Jennings, 6 Cow., 518). Lord Hale had gone on, however, to provide the following as examples of navigable rivers in England: the rivers of Wey, Severn

[4] "Lighter" is defined as "a large usually flat-bottomed barge used especially in unloading or loading ships". Merriam-Webster online dictionary. http://www.merriam-webster.com

and Thames. See Ex parte Jennings, 6 Cow., 518. Notably absent was any mention of narrow, shallow brooks.

The Court in Morgan recognized that our State had certain rivers that were navigable-in-fact under the English standard–capable of floating "small boat, raft or skiff" to market–but that it also had other, smaller rivers that, though not navigable-in-fact under the English standard, were necessary for public use because they had capacity for transporting massive quantities of raw materials such as timber. Therefore, while the Court discussed the English rule, it specifically acknowledged that the rule in New York was more expansive because it also included rivers, which in their natural state had capacity to float to market large quantities of timber without human aid. Morgan v. King, 35 NY 454 (1866). "Necessity of use by the public was essential to the Morgan Court when it crafted this definition from its English ancestor." Adirondack League Club, Inc. v. Sierra Club, 92 NY2d 591, 602 (1998).

Though the common law standard has been stated in other words by other courts since it was first affirmatively pronounced in Morgan v. King, it has not been changed or expanded. See e.g., Adirondack League Club, Inc., 92 NY2d 591, 603 (1998) ("we do not broaden the standard for navigability-in-fact"). Thus, rivers, brooks and streams which were not navigable-in-fact prior to ALC, for example, did not become so subsequent to ALC. Had a court done otherwise, it would have undermined the very premise of the historic navigability standard.

3. Practical Utility Requires More Than *de Minimis* Capacity

Contrary to Defendants' assertions, the Court in Morgan did not adopt a standard under which a river with *de minimus* capacity had practical utility for transport. For a river to be considered a public highway because its use by the public was considered necessary, it has to be

capable of transporting significant quantities of timber or other materials. The ability to float small quantities of logs did not suffice. It turns out that the **Raquette River between Colton and Raymondsville**, the section at issue in Morgan v. King, "was not in its natural state, a public highway, even within the liberal rules above laid down" because the few logs that could be floated unaided were so destroyed by the rocks and rapids as to be unmarketable. Morgan at 456. The Court held that "[i]t would be going beyond the warrant of either principle or precedent to hold that a floatable capacity, so temporary, precarious and unprofitable, constituted the stream a public highway." Id. at 460 (emphasis added). Even the New York Legislature's statutory definition of navigability-in-fact (which governs State regulation of publicly owned water bodies) requires a waterway to have practical usefulness for measurable and profitable commercial use before it is deemed navigable-in-fact.[5]

That the rule required more than *de minimis* capacity was further evidenced by the holding in De Camp v. Thomson, 16 AD 528 (4th Dep't 1897), affd, De Camp v. Dix, 159 NY 436 (1899) concerning the **North Branch of the Moose River**. The North Branch's upper reaches averaged thirty-feet wide and two-feet deep, and, after its junction with the Middle Branch, its volume increased one-third. Id. at 532-33. Nevertheless, it lacked sufficient capacity for transport because, even though it floated 16,000 logs, about 3,000 of those jammed. Id.

[5] "Navigable in fact" shall mean navigable in its natural or unimproved condition, affording a channel for useful commerce of a substantial and permanent character conducted in the customary mode of trade and travel on water. A theoretical or potential navigability, or one that is temporary, precarious and unprofitable is not sufficient, but to be navigable in fact a lake or stream must have practical usefulness to the public as a highway for transportation." Navigation Law §2(5).

> "[I]t is a tortuous stream, with many bends and turns, and with a current of but two miles an hour, except in places where there are rapids;...in other places the flow of water is obstructed by rocks and rapids, which form an obstacle to the floating of logs in either high or low water." Id. at 533.

Examples of other rivers or parts of rivers held to be non-navigable include: the **Black River** *from Carthage to Dexter* (Munson v. Hungerford, 6 Barb. 265); **Callicoon Creek** (Curtis v. Keesler, 14 Barb. 511, 518); **Honeoye Creek** (Smith v. Rochester, 92 NY 463, 475 [1883]); the **Oswego River** *at Fulton* (Fulton Light, Heat & Power Co. v. New York, 200 NY 400, 412 [1911]); **Peekskill Creek** (People ex rel. New York Cent. R.R. v. State Tax Comm'n, 239 NY 183, 186 [1924]); the **Saranac River** (People v. Platt, 17 Johns. 195); and the **Genessee River** *near Leicester, Mt. Morris, Genessee Falls and Portage* (State of New York ex rel. Western New York and Pennsylvania Railway Co. v. State Tax Commission, 244 NY 596).

4. The Mud Pond Waterway Fails the Historic Log Driving Test.

Unquestionably, neither Mud Pond, Mud Pond Outlet nor Shingle Shanty Brook have the capacity for transport sufficient to make them navigable-in-fact under the common law standard as espoused in the cases discussed so far. The Mud Pond Outlet measures an average of sixteen feet wide and seventeen inches deep, with a minimum width of twelve feet and depth of four inches. Donald B. Potter Aff. ¶ 48. This hardly describes a river capable of floating timber any distance, let alone a profitable amount of timber. Donald B. Potter Aff. ¶ 70. The historical record and the recent video of the brook bear this out. (See Video: Ex. A to Justin B. Potter Aff.) Neither Mud Pond, Mud Pond Outlet nor Shingle Shanty Brook have ever been used to float pulp or timber logs to mill or market. In fact, even though major logging operations were conducted in their immediate vicinity, the logging companies went to the expense of building railroads far into

the woods to haul out the timber. The companies also bridged the Shingle Shanty Brook and Mud Pond Outlet with haul roads. Donald B. Potter Aff. ¶¶ 71-76. Further, the testimony and evidence produced fails to show that the narrow brook beds could have been made susceptible to log driving even with artificial augmentation.

5. The Commercially Rooted Standard Survived *ALC*.

In Adirondack League Club, Inc. v. Sierra Club, 92 NY2d 591 (1998), the Court of Appeals was afforded the opportunity to again re-examine the common law standard. The waterway at issue was a twelve-mile long section of the South Branch of the Moose River. Id. at 600. This section of river varies in width from 100 to 200 feet and there was testimony to the fact that a floatplane had landed on the river.[6] The river has also been used for massive log drives. Id. at 606. By all accounts, the South Branch has greater capacity than the North Branch which had previously been found non-navigable-in-fact (see De Camp v. Thomson, 16 AD 528). Even in modern times the river has high importance to the State and has been designated under the Wild, Scenic and Recreational Rivers Act, but notably this designation under the rivers act has no legal bearing on its navigability status. See generally DEC Regulations Part 666.

Plaintiffs in ALC argued that evidence of recreational use should not even be considered, while Defendants contended that the commercial use test should be abandoned and replaced by a recreational use test. Adirondack League Club, Inc., 92 NY2d at 603 (discussing Plaintiff ALC's contentions). The Supreme Court, Hamilton County, concluded "that the test of navigability should be reformulated from a strictly commercial use test to a test that included recreational use.

---

[6] From brief of Adirondack Mountain Club, Inc. (co-authored by John Caffry, Esq.) to the Court of Appeals: "The [South Branch of the Moose River] varies from 100 to 200 feet wide as it passes through the lands of the ALC."

[It] held that under the reformulated test there was an issue of fact as to the navigability of the [river] which precluded summary judgment." Adirondack League Club v. Sierra Club, 201 AD2d 225, 228 (3d Dep't 1995). The Appellate Division agreed that "legislative findings and declarations of policy support Supreme Court's conclusion that the common-law standard for navigability based exclusively on commercial uses is an anachronism." Id. at 229.

Yet the Appellate Division overturned Judge White's decision to abandon the commercial standard and held that the commercial use test was not superseded, rather "the recreational uses of a stream [were] considered as relevant evidence of the stream's suitability and capacity for commercial use." Id. Later that year, in Hanigan v. State, 213 AD2d 80, the Third Department clarified once and for all its decision in ALC:

> "The decision in [ALC] did not alter the established standard for determining navigability so as to permit a determination of navigability based solely upon a waterway's suitability and capacity for recreational use. Rather, we expressly adhered to the traditional commercial use standard and held only that a waterway's use for recreational purposes can, in an appropriate case, be relevant evidence on the issue of the waterway's suitability and capacity for trade, travel and commerce." Id. at 84 (fn).

The Court of Appeals accepted the ALC case and its decision emphasized that "in order to be navigable-in-fact, a river must provide practical utility to the public as a means for transportation" Adirondack League Club, Inc., 92 NY2d 591, 603 (1998). It agreed with the Appellate Division that evidence of recreational usage could be considered in addition to evidence of commercial usage. Id. at 603 ("evidence of a river's practical utility for transport need not be limited to evidence of its capacity for movement of commercial goods) (emphasis added). The Court responded to "Appellant's fear that consideration of recreational use unduly broadens the common-law standard and threatens private property rights" but stating clearly that

it was "not broaden[ing] the standard for navigability-in-fact, but merely recogniz[ing] that recreational use fits within it." Id. at 603 (emphasis added). Thus, even though the Court of Appeals confirmed the Appellate Division's decision to allow evidence of recreational usage into the analysis, it did not expand the common law standard which had always been rooted in commercial viability. See Smith v. Rochester, 92 NY 463, 483 (1883).

Though Judge Bellacosa agreed with the majority's statement of the law, he dissented on the issue of summary judgment and would have upheld the decision of the Appellate Division to grant summary judgment because he credited "the Appellate Division majority's double-barreled justification that "[b]ased upon the undisputed evidence of the river's historic use as a major log-driving stream for some 50 years and its recent use by recreational canoeists, the South Branch of the Moose River is navigable in fact." Adirondack League Club, Inc., 92 NY2d at 610 (emphasis added). The majority, though, felt less confident in the conclusions to be drawn from the evidence adduced and sent the case back for trial for further proof about the recreational uses of the river and whether commercial log driving had been accomplished only through artificial augmentation. 92 NY2d at 607. The case was eventually settled without a trial in Supreme Court.

6. Defendants' Claims That Evidence of Any Recreational Use Satisfies the Common Law Standard Must Fail.

Defendants contend that the small Mud Pond outlet brook and Shingle Shanty Brook are open to public usage because, as they assert, under ALC and numerous other cases (see infra Subsection 10 of this Point I.c.) the question is merely whether a canoe or kayak can float down the waterway in question. According to Defendants, the well-established common law standard

can now be satisfied merely by showing any evidence of recreational usage.[7] If Defendants are correct, it would hardly seem necessary for the Court of Appeals to have sent the question of log driving back to the trial court, if answering the easier question about its ability to float canoes would have sufficed. See ALC, 92 NY2d at 605-07.

Moreover, under Defendants' theory, many of the waterways that had previously been held to be non-navigable (see supra, this Point I.c.) but which were clearly capable of floating canoes and kayaks would be navigable-in-fact under the ALC decision. In fact, waterways that a person could practically jump over would be navigable-in-fact so long as a canoe could slip by. Under Defendants' theory, nearly every creek, brook or stream in New York State has been subject to a public easement from the time of the sovereign. Having no waterways in exclusive private ownership was clearly not the situation envisioned by the Courts in ALC and Smith v. Rochester, 92 NY 463, 483 (1883) (holding that privately owned rivers could be used exclusively by their owners unless they were navigable-in-fact). However, it is the situation that Defendants have been long seeking. (See infra, Point II.)

Unfortunately for Defendants, the Court in ALC clearly stated that it was not expanding the common law. Adirondack League Club, Inc., 92 NY2d at 603 ("We do not broaden the standard for navigability-in-fact..."). In making this statement, the Court was merely following its prior holding in Douglaston Manor, Inc. v. Bahrakis, 89 NY2d 472 (1997), in which it refused to abandon certain long held common law principles because changing the common law of property

---

[7] Defendant State cites to Sawczyk v. United States Coast Guard, 499 F.Supp. 1034, 1039 (W.D.N.Y. 1980) in support of its claim that any evidence of recreational use satisfies the well-established common law standard. (See Brief of State, fn. 2 on page 15.) Sawczyk contained proof of major commercial operations that just happened to contain recreational elements. The Court discussed the Niagara River's use by a rafting company and by the famous Maid-of-the-Mist tour boats. There, the Court clearly stated that it was applying a federal commercial-based standard to determine federal admiralty jurisdiction regarding the river.

"would precipitate serious destabilizing effects on property ownership principles and precedents." Id. at 482. Thus, rivers not previously having sufficient capacity for transport under the common law standard were not made navigable-in-fact by the holding in ALC. Perhaps this is why Judge Bellacosa warned in his dissent "that neither [his] dissenting view nor the majority's prevailing direction for a trial, should be interpreted as a precedential Waterloo for either environmental camp in [the ALC] dispute." Adirondack League Club, Inc., 92 NY2d at 612.

7. The Evidence Shows Only That Parts of the Brooks Can be Floated in Canoes.

To support their 'floatability equals navigability-in-fact' theory, Defendants did not have to search far for examples of canoeing in the Mud Pond Outlet brook and Shingle Shanty Brook. Plaintiffs have naturally used the brooks and ponds more than a few times for canoeing in 150 years of ownership. Caffry Aff. ¶ 87. To show that the brooks have long been able to float canoes, Defendant State produced an ancient guidebook for recreational visitors to the Adirondacks that was written by E.R. Wallace and first published in 1875.[8] Ex. C to Donovan Aff. Defendants submit the Affidavit of Philip G. Terrie to show the reliability and accuracy of the waterway descriptions contained in the book.

For readers who had completed the arduous journey up the Beaver River to Lake Lila

---

[8] The guidebook by E.R. Wallace is not authoritative of the legal status of the waters he described. For example, the book notes that readers can reach excellent trout fishing by heading up the North Branch of the Moose River, a river we know now is not navigable-in-fact (see supra De Camp v. Thomson, 16 AD 528 (4th Dep't 1897), affd, De Camp v. Dix, 159 NY 436 [1899]). Ex. I to Phillips Aff. The book also continued to included sections about the Shingle Shanty Brook, Mud Pond Outlet, Shingle Shanty Pond, and Brandreth Lake long after the author had inserted a footnote stating that public access to Township 39, where all these waters are located, had been revoked by its owner, Brandreth. The author acknowledged that access had been by permission and stated: "We wish to tender our thanks for the right royal hospitality once received here from the courteous proprietors." Ex. B to Donovan Aff.

(f/k/a Smith's Lake), E.R. Wallace describes how they could continue their exploration by continuing one of three ways to reach Little Tupper Lake. Those looking for the most ordinary and direct route could go via Charley Pond. However, those looking for better fishing opportunities might consider the more "indirect and difficult" route up the Shingle Shanty Brook, "a desperately crooked stream, with its navigation considerably obstructed by 'flood-jams.'" Readers were instructed to then turn up the Mud Pond Outlet Brook, in which "boats are generally towed or poled" to the bottom of the rapids. See Ex. C to Donovan Aff., p.p. 41-44.

In modern times, to keep the brooks canoeable, Donald B. Potter and his family have spent time over the years keeping the Mud Pond Outlet clear. Donald B. Potter Aff. ¶ 49. Evidence of these debris and Mr. Potter's efforts is evident from the video taken recently by Justin B. Potter. Ex. A to Justin B. Potter Aff. Additionally, Donald B. Potter constructed a portage trail around the non-floatable Mud Pond Outlet Rapids to aid his family's recreational use of the brooks. Donald B. Potter Aff. ¶ ¶ 58-60. Thus, the historic and modern evidence shows nothing more than the fact that canoes can be floated (historically, with some difficulty) up the Shingle Shanty Brook and Mud Pond Outlet to the bottom of the rapids.

8. Defendants' Efforts to Show That the Mud Pond Waterway Has Commercial Viability Must Fail.

Because they know this Court–like others before it–may not expand the common law by adopting their expansive 'canoeability' legal theory, Defendants also attempt to satisfy the common law standard by concocting a history of commercial use of the Mud Pond Waterway. According to Defendants, Plaintiffs were engaged in commercial exploitation of the two small brooks because they put supplies and animal skins in the canoes they paddled across their

property to and from the Mud Pond Camp. In reality, if Donald B. Potter and his immediate family members were lucky enough to shoot a deer during hunting season, they put the deer in a canoe and paddled to another point on their Mud Pond Parcel, and from there they took it home either by road or railroad. Donald B. Potter Aff. ¶ 54. On rare occasions, Plaintiffs also trapped beavers. Deposition Transcript of Donald B. Potter pp 139-40. ("Potter Tr.") ("That was a very rare event.") Instead of leaving the animal skins and pelts to rot, Plaintiffs sometimes sold them once they had brought the deer or beaver home. Potter Tr. pp 140. Also, Plaintiffs–like most landowners–bought items elsewhere and brought them to their camp. Plaintiffs were not using the brooks to facilitate any business or commercial interests. Donald B. Potter Aff. ¶ 54. Defendants' proof, therefore, really does nothing more than buttress their claim that the brooks can be used for canoeing.

Defendants second salvo at meeting the commercial standard is their claim that the brooks support and make possible commercial guiding businesses. In support, Defendants cite to an old magazine article describing one sporting trip during which Frederick A. Potter, an owner of the parcel, hired a guide to assist him and his guests while fishing the Mud Pond Parcel. Donovan Aff. ¶ 46. Guides were not taking the public on fishing trips to Plaintiffs' property.

Defendant State then presents the Affidavit of David E. Cilley, the owner of a guide service, who states that he has been on the Lila-Traverse eight times and has guided clients during some of those trips even though the New York State Constitution, DEC Regulations and Whitney Management Plan expressly forbid the Whitney Park lands from being "used for commercial purposes or private profit." Cilley Aff. ¶ ¶ 30 and 36; NYS DEC Regulations §§190.8 and 190.33. Thus, if Defendant State allows Mr. Cilley's so called commercial

exploitation of the Forest Preserve, it must consider his uses recreational, not commercial.

Mr. Cilley claims to support his business based on the many recreational opportunities (including canoeing "trails") available on publicly owned lands throughout the Adirondacks. Cilley Aff. ¶ 7. He does not assert that making Plaintiffs' property a public highway is necessary to his business or that it would increase his business. As should be evident by now, Plaintiffs do not propose to reduce or eliminate the numerous recreational opportunities available to the public throughout the Adirondacks on which Mr. Cilley relies and which have so far been sufficient to support his well-established business. Furthermore, the Lila-Traverse alone cannot be critical to Mr. Cilley's business because the intensity of public use of Whitney Park is carefully managed by restrictions that limit the size of overnight groups (which by his own admission are required to complete the Lila-Traverse) and that restrict camping to the limited, designated camping areas which are limited. Cilley Aff. ¶ 28. See restrictions listed on Ex. A to MacDonald Aff.

9. Defendants' Efforts to Mischaracterize the Nature of the Waterways Must Also Fail.

Like the Court of Appeals in ALC, this Court is only being asked to determine the navigability of a particular section of waterway, not the entire watershed. Nevertheless, Defendant Brown attempts to divert the Court's attention away from the segment at issue by insinuating that the question is really about the navigability of his hypothetical 'Salmon River.' However, this Court needs to determine only whether the Mud Pond Waterway is navigable-in-fact under the common law standard to decide Plaintiffs' trespass claim. Plaintiffs do not seek to bar the public from utilizing the Shingle Shanty Brook, Lilypad Pond, or its tributaries on the State-owned Whitney Wilderness. Moreover, the navigability status of those waters is irrelevant

because the public has the right to paddle those waters by virtue of State ownership.

However, even if these waters were at issue, they, like the Mud Pond Waterway, would not satisfy the well-established common law navigability standard because, at most, they are suitable, in part, for recreational canoeing. Author E.R. Wallace described the lower Shingle Shanty Brook as "a desperately crooked stream, with its navigation considerably obstructed by 'flood-jams.'" Ex. C to Donovan Aff. ¶ 43. In describing the waters above Lilypad Pond, he states that over 4,500 feet of portaging was necessary to reach the headwaters at Salmon Lake and that some 'floatable' parts still required considerable towing and dragging of boats. Ex. C to Donovan Aff. ¶ 44. The modern evidence continues to show that portages remain necessary and that the brooks support only recreational canoeing and kayaking. Caffry Aff. ¶ ¶ 36-45; Donald B. Potter Aff. ¶ ¶ 25-29. At one point, Defendants' so called 'river' flows through a 5-foot wide culvert. MacDonald Aff. ¶ ¶ 7-9.

Defendants' so called 'river' would also fail the test of navigability because of the sheer number and length of portages involved. The fact that obstructions can be of sufficient magnitude to prevent a waterway or water bodies' classification as navigable-in-fact is well proven. see e.g., Morgan v. King, 35 NY 454 (1866) and De Camp v. Thomson, 16 AD 528 (4th Dep't 1897), affd, De Camp v. Dix, 159 NY 436 (1899); and see Hanigan v State of New York, 213 A.D.2d 80 (3d Dept' 1995) and Mohawk Valley Ski Club, Inc. v. Town of Duanesburg, 304 AD2d 881 (3d Dep't 2003). The so called 'right of portaging' is not a crutch by which Defendants can string together miscellaneous stream segments into a navigable–in–fact river; otherwise, with a little creativity, any combination of a land and water route could be deemed navigable-in-fact and opened as a public highway.

The State's own actions fail to support Defendant Brown's theory. It made no claim that the waters upstream of Lake Lila were navigable-in-fact even after it purchased the lake in 1978. In fact, for the first 10 years after it purchased the Whitney Park lands, it showed no concern with the fact that the public could not go onto Plaintiffs' adjacent private land. Perhaps this is because the evidence fails to support Defendants' theory that their so called 'river' has been extensively used as a public highway for decades. Neither the guidebook nor the Affidavit of Philip Terrie contains any proof tending to show that the public ever used the route described by E.R. Wallace from Lake Lila to Salmon Lake to any material extent. In fact, the testimony of Donald B. Potter, who used the parcel extensively since the early 1950s, shows quite the opposite: He testified that he knew of only one person trespassing on the Mud Pond Waterway prior to the creation of the Whitney Wilderness in 1998. Potter Tr. pp 190-91.

10. No Cases Support Defendants' Theory of Navigability.

Clearly, under the common law standard, the term 'practical utility' means more than *de minimis* capacity for transport; otherwise, nearly every swamp, creek or brook would be navigable-in-fact and subject to a public right of passage (see supra, subsection 6 of this Point I.c.). Yet Defendants continue to insist that many prior New York cases support their theory that any brook capable of floating a canoe is navigable-in-fact and has been subject to a public right of passage since the underlying lands were first sold by the State. In support, Defendants cite to numerous cases. An analysis of the waterways involved in these cases will show that in none of these cases did a court find that a waterway capable of floating only recreational canoes was navigable-in-fact. Because of the sheer number of cases, they are set off separately in this section. They are arranged in order of their precedential value.

i. People v. System Properties, Inc., 2 NY2d 330 (1957)

Defendants and Prof. Humbach all state that the Ticonderoga River is navigable-in-fact and cite this case in support. In fact, the Court of Appeals concluded that the Trial Court and Appellate Division's ruminations on the river's navigable status were unnecessary, so it did not address the issue. The Court, therefore, modified the judgment of the Appellate Division by striking out the finding of fact and conclusion of law pertaining to the finding of navigability. Id. There is no legal precedent to the effect that the river is navigable-in-fact.

ii. People ex rel. Erie R.R. Co. v. State Tax Commn., 266 AD 452, 454, (3d Dep't 1943) affd 293 NY 900.

This was a railroad franchise tax case involving the railroad's bridge crossing the Chemung River. Though the reported decision was devoid of specific river measurements, the Court noted that the 40-mile long river was formed by the confluence of the Tioga and Cohochton Rivers and had previously been navigated by three steam boats in about 1826.

iii. People ex rel. New York Cent. R.R. Co. v. State Tax Commn., 258 AD 356, 360 (3d Dep't 1940), affd 284 NY 616.

This was another railroad franchise tax case involving three railroad crossings of the New York Central Railroad along the west shore of the Hudson River–a major commercial artery–near Bear Mountain: Iona bay, Doodletown Bight (a bay) and Popolopen Creek. All three were located immediately adjacent to the Hudson River, and so close in fact that the tide ebbed and flowed for at least three-quarters of a mile upstream of the crossings. The bridge across Iona bay was 1,692 feet long with 663 feet of that length across open water, and previously there had been

a dock located further upstream on Iona creek, and "salt hay, hoop poles and hundreds of cords of wood were carried out of the creek by means of boats and rafts..." The bridge across Doodletown Bight (a bay) was 1,053 feet long, and the shortest bridge, that across Popolepen creek, still measured 279 feet in length.

iv. Van Cortlandt v. The N.Y. Cent. Ry. Co., 265 NY 249 (1934)

In this case the trial court determined that the Croton river was non-navigable and the Appellate Division, while modifying parts of the trial court's decision, affirmed the finding. The Court of Appeals affirmed the trial court's finding of non-navigability. The point where the railroad's bridge crossed the river was located just upstream of where the Croton flows into the Hudson River. The crossing at the Croton River was not insignificant: It required two bridges and a section of fill 730 feet in length. The relevant portion of the channel upstream of the bridge reached 80 in width. Factories had also once been located on the river banks. Id. at 257-59.

v. People ex rel. Lehigh Val. Ry. Co. v State Tax Commn., 247 NY 9 (1928).

This was a railroad franchise tax case involving the railroad's crossings of Cascadilla Creek and Six Mile Creek in downtown Ithaca. From the respective railroad bridges, each creek flowed a short distance to Cayuga Inlet, which was part of the Barge Canal System that emptied into Cayuga Lake. Cascadilla Creek flowed 1,500' from the railroad bridge to Cayuga Inlet, and Six Mile Creek flowed only 600' to the same point. As explained by the Supreme Court, these creeks provided practical utility for commerce in the heart of Ithaca and were navigated by boats larger than canoes and kayaks:

"Fair sized row boats, motor boats, skiffs, and small rafts run from the Inlet under the bridge on Six Mile Creek, and about four hundred or five hundred feet above the bridge. There are two places above the Six Mile Creek bridge for the sale of gasoline and motor boat supplies....Boats are operated on Cascadilla Creek for about seven hundred or eight hundred feet above the bridge. There are places for the sale of gasoline and motor boat supplies, and also for groceries above the bridge." People ex rel. Lehigh Val. Ry. Co. v State Tax Commn. (Supreme Court, Albany County [a copy of this Decision is Ex. J to the Phillips Aff.]).

vi. People ex rel. N.Y. Central Railroad Co. v. State Tax Commn., 238 AD 267 (3d Dep't 1933)

This was a railroad franchise tax case involving a railroad crossing of Roeliff Jansen's Kill in the Columbia County. The waterway was described as follows:

"The tide ebbs and flows up stream for more than half a mile above the bridge. Formerly, there was considerable commercial transportation and navigation on the kill. It continued to some extent until 1915. Fishermen still continue to navigate the stream in small boats." Id. at 268.

The Court held that the stream was navigable, though it would appear that its decision may have relied on the fact that the tide effected the stream. "The rise and fall of the tide was determinative of navigability under the English common law." Id.

vii. Fairchild v. Kraemer, 11 AD2d 232 (2d Dep't 1960)

This case involved an artificially created boat basin seven-tenths of a nautical mile long and about three-tenths of a mile at its greatest width. Its depth ranged from 9 to 18 feet deep at low water. The basin was separated from Long Island Sound by a jetty and a breakwater, though there was a gap of 500 feet of water in which boats could pass in and out of the sound. Three or four creeks flowed in to fill the artificially created basin. The Court stated that if the creeks were navigable-in-fact prior to the dredging, the artificial basin would be considered an expansion of the navigable creeks, and thus subject to use by the public. The Court found, however, that the

proof before it failed to establish that the creek had been used for any boating prior to the dredging. It remanded the case for a new trial to see if any evidence of boat use could be found.

viii. St. Lawrence Shores, Inc. v. State, 60 Misc2d 74 (Ct. Claims 1969)

This case involved a bridge built by the State across Crooked Creek in St. Lawrence County. The adjacent landowner claimed the bridge devalued his property because it blocked access to a navigable-in-fact stream. The creek begins in Jefferson County and flows two to three miles into St. Lawrence County where it continues for another 8,500 feet. It varies in width from 75 feet near the county border to about 175 feet at its mouth near Chippewa Bay. "During the ice-free seasons, it was traveled by pleasure boats and sport fishing boats..." Id. at 78. It appears the Judges visited the bridge twice, in winter and summer. In summer, they "proceeded in a 16-foot Boston Whaler, with an 80 to 85 horsepower motor..." Id. at 80. They determined the bridge did not alter the general navigable character of the stream, and denied damages.

ix. Trustees of the Freeholders and Commonalty of the Town of Southampton v. Heilner, 84 Misc.2d 318 (Sup. Ct. Suffolk Co. 1975)

This case involved a determination of whether Shinnecock Bay on Long Island was navigable in law, in order to determine whether ownership of the upland ran to the highwater or low water mark. It found that in 1898 a determination had been made that the bay was nontidal, and navigable-in-fact. The Court noted that the waters were suitable for use by pleasure craft such as outboard motor boats, "fairly large inboard cruising boats with planing type hull," and center board sail boats or keel sail boats. Id. at 328.

d. Summary and Conclusion to Point I.

The New York Courts have very clearly demonstrated that private lands underlying a river are not made subject to a public highway unless the river has practical utility for transport and, secondly, that a river's practical utility is not proven by evidence of *de minimis* recreational transport such as use by canoes or kayaks. Mud Pond, with its sole point of potential public access, clearly fails the test under this doctrine. Therefore, no public right of passage exists across Mud Pond, unless a right of passage exists across the entire Mud Pond Waterway. Defendants claim that linking Mud Pond to two small brooks via a 500-foot long non-floatable outlet creates a navigable-in-fact waterway. According to Defendants, the well-established common law standard (rooted in a waterway's commercial viability and necessity of use) is satisfied merely by presenting any evidence of recreational usage. As shown, accepting Defendants' theory would result in a substantial expansion of the navigable-in-fact standard, and, in practice, render practically every waterway a public highway. None of Defendants' cases support their expansive theory and the evidence shows the brooks fail to meet the well-established common law standard which requires evidence of more than *de minimis* capacity for transport. Next, Plaintiffs will show how Defendants' developed their theory and why this Court would be well advised to heed the Court of Appeals' conservative attitude towards altering fundamental property laws because of the serious and destabilizing consequences involved.

II. DEFENDANTS' PUT FORTH AN EXPANDED THEORY OF THE NAVIGABILITY WHICH THIS COURT MUST REJECT.

Here, Defendants both put forth an expansive interpretation of the common law standard. Under their interpretation all private lands across the State with canoeable streams would be opened to public usage. This interpretation has been repeatedly and unsuccessfully advanced by Defendant DEC, the Sierra Club, and others for nearly three decades. During this time, both the Legislature and the Court of Appeals have rejected Defendants' theory.

a. Some at Defendant DEC Have Long Sought To Expand the Areas Where Canoeists Can Paddle on Private Land.

1. Introduction to the "Cause"

Through the instrumentality of this case, Defendant DEC continues its advocacy for an expanded common law standard. The full history is set forth in the Affidavit of Judson S. Potter, submitted herewith. In sum though, since the 1980s when Charles Morrison was at Defendant DEC, the agency has been agitating for a broad recreationally-based standard as a way to expand areas where canoeists could recreate. Judson Potter Aff. ¶¶ 45-61. (Charles Morrison is now affiliated with the Sierra Club. Judson Potter Aff. ¶ 29.) Though Mr. Morrison has termed his advocacy as a fight for "paddler's rights", the only rights at issue here are the landowners' right to exclusivity and the public's right to paddle rivers that are navigable-in-fact public highways. Judson Potter Aff. ¶ 46.

2. DEC's Commissioning of a Self-Serving Law Review Article

Defendant DEC's prior advocacy has included the commissioning of a law review article by Professor Humbach to support its expansive navigability theory. Defendant DEC worked with

Prof. Humbach to create the article, entitled "Public Rights in the Navigable Streams of New York," as evidenced by the fact that he submitted multiple drafts to the DEC for review. Judson Potter Aff. ¶ 50. Defendant DEC continues to rely on this self-serving article to the point of submitting it with its motion papers here. A close analysis of the article though shows that it simply makes generalized pronouncements on the law without providing any useful or qualitative analysis of the rivers involved in the navigability cases. Moreover, it incorrectly cites to People ex rel. New York Centr. R.R. v. State Tax Comm'n., 244 NY 596, 597 (1927) as holding that the Genessee River is navigable-in-fact. In reality, the Supreme Court adopted the report of the referee which found that the portions of the river in question were not navigable-in-fact, the Appellate Division Affirmed and the Court of Appeals affirmed again: "The evidence sustains the findings that the Genessee river is not and, in its natural state, never has been navigable for any purpose at the places where bridges have been erected and in the stretch of twenty-two miles between such bridges." Id. at 597.

3. Failed Attempts to Expand the Standard by Legislative Action

Defendant DEC and various environmental organizations have also lobbied unsuccessfully for the adoption of self-drafted legislation governing navigation rights. Though those supporting the bill claimed it merely codified the existing common law, the controversial bill eventually met with such strong resistence it was never enacted. Judson Potter Aff. ¶¶ 49-61. If the bill would have simply codified existing law, it would have been redundant and should have met with little resistance. Perhaps then it asked for more than its supporters admit. Further efforts to push the legistation were dropped in 1991 when the ALC lawsuit was commenced. Judson Potter Aff. ¶ 60.

4. The "Cause" Resurfaces at the Mud Pond Waterway

Because the eventual decision by the Court of Appeals did not expand the public's common law navigation rights to every brook capable of floating a canoe, Charles Morrison and the Sierra Club have teamed up again to force their agenda forward, this time utilizing Plaintiff's private Mud Pond Waterway as the catalyst. Judson Potter Aff. ¶¶ 29, 36, and 67-70. Charles Morrison and his group hope to open up many miles of streams across the State of New York. Ex. "C" to Brown Aff. Mr. Morrison has pressed Defendant DEC into supporting this revitalized crusade even though it had been content to make no effort to lay claim to Plaintiffs' Mud Pond Parcel for the first decade the Lila-Traverse was in existence. Judson Potter Aff. ¶¶ 29; Phillips Aff. ¶¶ 57-58. Defendant DEC certainly has taken a contradictory position with its claims herein that lack of public access to Plaintiffs' Mud Pond Property is a serious and pressing issue.

5. The Paddler's "Wish List" Fails to Justify Defendant Brown's Decision to Trespass on the Mud Pond Parcel.

Prior to his trespass across Plaintiffs' Mud Pond Parcel, Defendant Brown consulted a list of supposed navigable-in-fact waterways that had been created by Defendant DEC (with the help of others) in the early 1990s as part of its failed attempt to "codify" the common law standard. Brown Aff. ¶ 14; Judson Potter Aff. ¶¶ 38-40 and 43-44 and Ex. "M" thereto. Defendant DEC at one point blatantly denied the existence of this list to Plaintiffs, though it was later published in Defendant Brown's newspaper. Judson Potter Aff. ¶ 34; Brown Aff. 14. The authors of "The List" claimed that Shingle Shanty Brook was navigable-in-fact. Notably absent is the Mud Pond

outlet brook.[9] Ex. "M" to Judson Potter Aff. Perhaps Defendant Brown should have taken note of the fact that even the expansively drafted list failed to include both of the brooks he was about to paddle across Plaintiffs' Mud Pond Parcel.

6. Summary

Here, Defendants continue nearly thirty years worth of unsuccessful advocacy to expand the areas where recreational canoeists can paddle in New York State. The Sierra Club and Defendant DEC are nothing if not persistent. Nonetheless, well-settled notions of private property rights must not be lightly swept aside.

b. Defendants' Sought After Changes to the Common Law Would Precipitate Serious Destabilizing Effects on Property Ownership.

The Court of Appeals has twice in recent memory refused to expand the common law doctrines of navigability. In reversing an Appellate Division that had expanded the public's rights in navigable-in-fact rivers, the Court of Appeals, in Douglaston Manor, Inc. v. Bahrakis, 89 NY2d 472 (1997), refused to abandon long held common law principles. It reasoned that changing the common law of property "would precipitate serious destabilizing effects on property ownership principles and precedents." Id. at 482. Therefore, "the desirable definiteness attendant upon discrete property rights and principles, along with reliable, predictable expectations build upon centuries of precedent, ought not be sacrificed to the vicissitudes of unsupportable legal theories." Id. at 483. Only one year later, the Court of Appeals, in

---

[9] Because the public has only one potential point of access to the Shingle Shanty Brook, the Brook by itself, independent of the Mud Pond Outlet, cannot be a navigable-in-fact public highway in light of the holding in Hanigan v. State, 213 AD2d 80 (3d Dep't 1995), rendered after the "List" was developed.

Adirondack League Club, Inc. v. Sierra Club, 92 NY2d 591 (1998), again refused to expand the common law doctrine of navigability-in-fact.

Should this Court accept Defendants' theory that the mere ability to float a canoe makes a waterway a public highway, it would effect an expansion of public rights in private property all across New York State, not simply in wilderness areas. This expansion could not occur without also simultaneously stripping away one of the fundamental property rights held by Plaintiffs and all other private property owners–the right of exclusivity. Moreover, this expansion would have collateral consequences in other legal doctrines.[10]

c. Upholding the Well-Established Common Law Will Not Block Access to State Wilderness Land or Eliminate Any Public Rights.

A decision to uphold Plaintiffs' well-established private property will not block a canoe and hiking route or prevent access to the State-owned parcel where the trail is located. All parts of the State parcel are already readily accessible to the public. Canoeists would simply be prevented from extending their wilderness recreational experience onto private property only to re-enter the same State parcel. Arguably, the point of the canoe 'route' is the remote wilderness hiking and canoeing experience in itself, as evidenced by Defendants' assertions that frequent and long portages are common to these types of wilderness trips and do not deter the public from utilizing State-owned canoe routes. See e.g. Terrie Aff. ¶¶ 20-23; Cilley Aff. ¶ 16.

---

[10] For example, if the owner of a parcel of land has no legal overland access rights to the parcel, but does have access via a navigable river, he or she is precluded from utilizing the doctrine of 'easement by necessity' to obtain overland access. McQuinn v. Tantalo, 41 AD2d 575 (3d Dep't 1973). Therefore, the 'floatable by canoe' standard advanced by Defendants could have dramatic collateral consequences if some landowners are limited to accessing their property via canoes.

Here, taking a route through Plaintiffs property would substitute one portage for another, reduce approximately 3.5 miles of walking to 2.75 miles, but increase the total distance of the route. Special Agent McSalis, David E. Cilley, and Josh Houghton were not deterred from taking the route as posted and marked by Defendant DEC, and, in the case of Mr. Cilley, from leading a few clients across the route. (See their respective Affidavits submitted by Defendant DEC.) For some reason, Special Agent McSalis saw fit to complain about the last portage he and his Boy Scout Troop encountered, despite knowing that he was undertaking a recreational route with numerous portages, including one twice as long as the one he complained about. McSalis Aff. ¶¶ 9-30, If Defendant Brown and Special Agent McSalis were interested in getting from Little Tupper Lake to Lake Lila in the most direct and ordinary fashion, they could have simply taken the State-maintained dirt road linking the two water bodies.

The State has shown great dedication to creating recreational rights beyond those afforded under the common law. The Whitney Wilderness alone is a conglomeration of two large parcels totaling more than 30,000 acres that were purchased in 1979 and 1998 at the combined expense of $15.6 Million, specifically to provide wilderness recreational opportunities. Phillips Aff. ¶ ¶ 4-13. Both are part of a total of 2.7 Million acres of land the State owns within the Adirondacks alone to preserve and provide recreational opportunities for the public. An example of particular relevance here is the State's purchase of the Bartlett Canoe Carry over private land in 2001 for approximately $2.4 Million Dollars. Bradford Aff. ¶ 9. In creating such opportunities, the State and DEC respected private property rights by paying landowners for fee title to or easements across their lands. Additionally, Defendant DEC approved the creation of the Lila-Traverse on Whitney Park in part because its design respected adjoining private ownerships. Phillips Aff. ¶ ¶

51-53. Yet Defendant Brown and the Sierra Club do not see what has been generously purchased for them by their fellow State-citizens; instead, they see only what they do not have, only where they cannot go.

By finding for Plaintiffs, this Court does not diminish existing recreational opportunities, it merely avoids expanding public recreational rights to the detriment of private landowners. It will be rightly upholding well-settled notions of private property law and predictable expectations built upon centuries of precedent. To do otherwise "would precipitate serious destabilizing effects on property ownership principles and precedents." Douglaston Manor, Inc. v. Bahrakis, 89 NY2d 472, 482 (1997).

III. PLAINTIFFS HAVE SUFFICIENT PROPERTY RIGHTS TO MAINTAIN AN ACTION FOR TRESPASS AGAINST DEFENDANT PHIL BROWN.

a. Introduction

The named Plaintiffs have the right to maintain an action for trespass against Defendant Phil Brown, who ignored posted-signs at the Mud Pond Parcel boundary line and intentionally entered upon the parcel. A detailed history of Plaintiffs' title is set forth in the Affidavit of Marcus J. Magee submitted herewith. The following is a brief synopsis.

Plaintiff Friends of Thayer Lake LLC own the fee title to the Mud Pond Parcel. Magee Aff. ¶¶ 6-7. All recreational rights associated with the parcel–including rights with respect to boating–were long ago separated from the fee ownership. The ownership will be described in more detail below, but, to summarize, some of these rights are now owned by the tenant-in-common owners of Lot 84 of Township 39, Totten and Crossfield's Purchase. The remainder of

the recreational rights are now owned by the trustees of the Brandreth Park Recreational Trust. Since all recreational rights are accounted for, the public has no right to use the Mud Pond Waterway for the recreational activities of canoeing or kayaking unless the pond and small brooks comprising the waterway are a navigable-in-fact public highway.

b. 1911 Exclusive Rights - Hunting & Fishing

To understand how the recreational rights came into their current ownership, one must begin in 1911 when the entirety of Township 39 was owned in fee by four individuals. Magee Aff. ¶¶ 6-7. These four individuals traced their ownership rights–which included all private rights associated with the township–back to 1851 when their ancestor Benjamin Brandreth purchased the entire Township 39 from the State of New York. Magee Aff. ¶¶ 5-6.

In 1911, these four owners conveyed all of Township 39 except Lot 84 to Brandreth Lake Lumber and Improvement Company. Not only did they keep Lot 84 for themselves, but they also wanted to retain the rights to hunt and fish over not just Lot 84 but the entire Township 39. Therefore, the conveyance specifically excepted and reserved "the right of shooting and fishing over all the property hereby conveyed..." (the "1911 Exclusive Rights"). Consequently, the four owners of Lot 84 became the owners of the 1911 Exclusive Rights. Magee Aff. ¶ 7. The ownership of Lot 84 has devolved over the years to the current tenant-in-common owners who make up the Brandreth Park Association, and the 1911 Exclusive Rights have likewise passed down to these 104 tenant-in-common owners. Magee Aff. ¶¶ 17 and 9 et seq.; Bradford Aff. ¶ 4.

These 104 owners comprise the unincorporated association known as the "Brandreth Park Association." Bradford Aff. ¶ 3. Therefore, enforcement of the 1911 Exclusive Rights is a right unique to association members. To avoid the onerous burden of naming all 104 association

members as parties to this action, the association utilized section 1025 of the C.P.L.R. and named its Treasurer, Cathryn Potter, in the pleadings.

c. 1974 Retained Recreational Rights - All Other Recreational Rights

The recreational rights not reserved by the owners of Lot 84 (see sub-point B, above) were conveyed to Brandreth Lake Lumber and Improvement Company (the "Lumber Company") in 1911. The Lumber Company's tract–comprising Township 39 excepting Lot 84–was conveyed between various corporations. Magee Aff. ¶ 8.

The Lots which make up the Mud Pond Parcel were first subdivided out of the Lumber Company's tract in 1954. They were conveyed in two deeds from Brandreth Lake Corporation to Potter Properties, Incorporated. Magee Aff. ¶¶ 9-10. Twenty years later, this corporation later conveyed the Mud Pond Parcel to International Paper Company ("I.P.") in 1974 (the "Potter Deed"). So that I.P. would not obtain any of the remaining recreational rights, the Potter Deed specifically excepted and reserved to Potter Properties, Incorporated "the exclusive right of hunting and fishing and all recreational rights and privileges (to be exercised non-commercially) over and upon the aforesaid premises." (emphasis added) (the "1974 Retained Recreational Rights") Magee Aff. ¶ 11. While the shooting and fishing rights had previously been retained by the owners of Lot 84, the 1974 reservation and exception effectively swept up all remaining recreational rights. As stated in the Affidavit of Marcus J. Magee, the President of Hamilton Abstract Company, "it is clear from the Potter Deed that International Paper Company did not acquire any hunting, fishing or recreational rights in the Mud Pond Parcel..." Magee Aff. ¶ 12.

In 2007, the 1974 Retained Recreational Rights were conveyed by Potter Properties, Incorporated to Potter Properties L.L.C. Magee Aff. ¶ 14. The limited liability company

subsequently amended its name to "Bottle Trail Preserve, LLC" in 2008, and thereafter conveyed the 1974 Retained Recreational Rights to the Brandreth Park Association Recreational Trust on November 12, 2010. Magee Aff. ¶ 15. The beneficiaries of the rights under the trust are the tenant-in-common owners of Lot 84 of Township 39, Totten and Crossfield's Purchase, who, as mentioned above, are the members of the Brandreth Park Association. Magee Aff. ¶¶ 16-17. The circle was thus closed and the owners of Lot 84 are now the exclusive owners–outright and/or beneficially–of all recreational rights associated with the Mud Pond Parcel.

d. <u>The Nature Conservancy Created No Public Rights</u>

Plaintiffs Friends of Thayer Lake, LLC purchased the fee title to the Mud Pond Parcel from The Nature Conservancy ("TNC"), which had obtained it from an I.P. holding company. Magee Aff. ¶ 20. Defendants contend that TNC created a public right of passage across the Mud Pond Waterway as part of the conveyance to Plaintiff. In support of this assertion, Defendant Brown seizes upon language contained in the deed from TNC to Plaintiff Friends of Thayer Lake LLC which says that the conveyance is:

> "SUBJECT also to the right of the public to navigate the surface waters of Lilypad Pond, Mud Pond, the outlet leading from Mud Pond to its confluence with Shingle Shanty Stream, and Shingle Shanty Stream northeasterly" towards Lake Lila. Brown Aff. ¶ 13; Ex. G to Steven Potter Aff.

This "subject to" language merely acted as a standard 'subject to' deed disclaimer by acknowledging the obvious: If the subject pond and brooks are navigable-in-fact, they are subject to a public highway and Plaintiff Friends of Thayer Lake LLC was taking the property subject to those public rights. Steven Potter Aff ¶¶ 26-32. TNC could not have conveyed recreational rights to anyone because the exclusive recreational rights had long ago been separated from fee

ownership. Magee Aff. ¶ 18; Steven Potter Aff ¶¶ 26-32. Moreover, even an attempt to reserve an easement in the public, who were third-party strangers to the deed, would have been ineffective and would have conveyed no interest whatsoever to the public. Thomson v. Wade, 69 NY2d 570 (1987).

e. All Necessary Parties Have Joined as Plaintiffs

Defendant Brown also claims that none of the Plaintiffs have sufficient property rights to maintain an action for trespass, but this assertion simply does not stick. All necessary parties have joined as Plaintiffs in this action. The owner of the fee title, Friends of Thayer Lake LLC, has joined. The owners of the recreational rights have joined: First, the individual tenant-in-common owners of Lot 84 have joined via the Brandreth Park Association. Second, the Brandreth Park Association Recreational Trust–owner of the remaining recreational rights–has also joined. Additionally, William L. Bingham, Jr. has joined as a Plaintiff. He is a tenant-in-common owner of Lot 84. Thus, he is an owner of the 1911 Exclusive Rights and a beneficiary of the 1974 Retained Recreational Rights under the trust. Magee Aff. ¶¶ 16-17 and Item "13" attached thereto. Since none of the Plaintiffs gave Defendant Brown permission to cross the Mud Pond Parcel for commercial or recreational purposes, the instant action is lawful and justified.

CONCLUSION

For the reasons set forth above, this Court should deny Defendant State and Defendant Brown's motions for summary judgment and grant the Plaintiffs' motion for summary judgment. Accordingly, this Court should

(1) Grant Plaintiffs' First cause of action by finding that Defendant Brown trespassed on Plaintiffs' Mud Pond Parcel, and schedule a trial on the issue of damages;

(2) Grant Plaintiffs' Second cause of action by finding that Plaintiffs', their members and beneficiaries, as the case may be, own all recreational rights associated with the Mud Pond Parcel and that Defendant Brown, as a member of the public, does not own or benefit from any right to enter upon or cross the Mud Pond Parcel;

(3) Grant Plaintiffs' Third cause of action by declaring that the Mud Pond Waterway is not navigable-in-fact under the common law of the State of New York;

(4) Deny Defendant Brown's request for a declaration that the Mud Pond Waterway is navigable-in-fact under the common law of the State of New York;

(5) Deny Defendant State's First counterclaim by declaring that the Mud Pond Waterway is not navigable-in-fact under the common law of New York;

(6) Deny Defendant State's Second counterclaim and its requests for an injunction by finding that Plaintiffs' posting and fencing of their property boundary lines and prosecuting of trespassers does not constitute a public nuisance; and

(7) Deny Defendant State's request for a declaration that the Bargain and Sale deed dated December 21, 2007, and recorded in the Hamilton County Clerk's Office on page 549 of book 243 is void and of no legal effect.

Dated: Glens Falls, New York
September 28, 2012

Respectfully submitted,

McPHILLIPS, FITZGERALD & CULLUM LLP
Attorneys for Plaintiffs
288 Glen Street, PO Box 299
Glens Falls, New York 12801
(518) 792-1174

By: Dennis J. Phillips
Dennis J. Phillips, of Counsel

TO:
John W. Caffry, Esq.
CAFFRY & FLOWER
Attorneys for Defendant Phil Brown
100 Bay Street
Glens Falls, New York 12801
(518) 792-1582

Kevin P. Donovan, Esq.
Assistant Attorney General
ATTORNEY GENERAL'S OFFICE
OF THE STATE OF NEW YORK
Attorneys for Intervenors-Defendants
The Capitol
Albany, New York 12224
(518) 474-4843