

19
BRANDRETH PARK ASSOCIATION
P.O. Box 4386
Queensbury, NY 12804

October 9, 2009

Alexander B. "Pete" Grann's
Commissioner, NYSDEC
625 Broadway
Albany, NY 12233-1017

Re: August 27, 2009 Sierra Club Letter
Brandreth Private Property Rights
Mud Pond Outlet Brook / Shingle Shanty Stream.
Township 39, Totten and Crossfield's Purchase
Town of Long Lake, New York

Dear Commissioner Grann's:

My name is Judson S. Potter and I am the President of the Brandreth Park Association (the "Association" or "Brandreth"). It has come to our attention that the Sierra Club wrote a letter to you dated August 27, 2009 regarding the portion of Township 39, Totten and Crossfield's Purchase, Town of Long Lake, New York, that includes Mud Pond, the Mud Pond Outlet Brook and a segment of the Shingle Shanty Stream (the "Sierra Letter"). We have not seen the sketch map provided to you by the Sierra Club, but for your reference we are attaching to this letter a satellite image that shows the following:

1. The approximate boundary line of the Friends of Thayer Lake property as it crosses the area between Lilypad Pond (forest preserve) and Mud Pond (private);
2. A line that represents the New York State-constructed portage trail on forest preserve land that runs from Lilypad Pond to the Shingle Shanty Stream.

By way of historical background, the People of the State of New York conveyed all of Township 39 (containing roughly 24,038 acres), Totten and Crossfield's Purchase, Long Lake, New York, to Benjamin Brandreth by Letters Patent dated March 21, 1851, reserving to the State only the gold and silver on the property (hereinafter the "1851 Deed"). This 1851 Deed transferred to Benjamin Brandreth the lake bed and shoreline of Mud Pond, the stream bed and banks of the Mud Pond Outlet Brook, and the stream bed and banks of the Shingle Shanty Stream within the boundaries of the Township 39. Although the fee title to this land has changed ownership, and is now owned by the Friends of Thayer Lake, the Brandreth family has owned the recreational rights associated with these waters as of the issuance of the 1851 Deed.

For 158 years, the recreational rights inside of the boundaries of the 1851 Dee have been recognized as private property rights exclusively owned, possessed and/or occupied by the members of the Brandreth family. In 1918 a member of the Brandreth family constructed a camp near Mud Pond and its outlet brook (the "Mud Pond Camp"). This camp was remodeled in 1927 just before the Great Depression and rehabilitated after the Microburst of 1995. The Brandreth family uses the Mud Pond Camp in a few seasons of the year, and it is the hub of five trails that have been cleared, maintained and used throughout the history of the camp, including a footbridge crossing the Mud Pond Outlet and a private carry from Mud Pond around the outlet rapids. During the bulk of this same 158-year period, the neighboring and contiguous Nehasane and Whitney Parks enjoyed the same private property recognition as Brandreth, and there was no claim by the State or the public that there was any public interest in the privately-owned lakes, ponds, streams and brooks of these ownerships. When the State of New York purchased Nehasane Park in 1976, there was no argument to the effect that the public had a right to cross onto private property on the surface of the Shingle Shanty Stream, for the headwaters of the stream were located on private property.

After the purchase by the State of New York of the Whitney property in 1998, in order to create a new canoe route, the State constructed a portage across its newly acquired forest preserve land that linked Lily Pad Pond with the Shingle Shanty Stream on the former Nehasane Park property. This portage is a beautiful, upland trail which took me all of 25 minutes to walk last summer. Even with a lightweight canoe on my shoulders, it probably would have taken at most an additional 10-15 minutes to make the portage. As a new landowner, it was reasonable for the State to connect the water resources on its two newly-acquired tracts of forest preserve by a portage that would be a benefit to the public, while respecting private property.

A recent article in the Adirondack Explorer by Phil Brown, its editor, described a canoe trip across the private Mud Pond Outlet Brook, thereby admitting to a trespass and invasion of the Brandreth recreational rights. The Association is now on notice that Mr. Brown has chosen to attempt to redefine navigability and landowners' rights outside the historical constraints of existing common law. I, too, recently completed the portage around the Mud Pond Outlet Brook. Following part of Mr. Brown's documented route, I paddled across Lily Pad and Mud Ponds, portaged around the Mud Pond Rapids by traveling on the trail created and maintained by the Brandreth family, and then paddled down the Mud Pond Outlet Brook to the Shingle Shanty Stream, and finally continued on to the Township 39 boundary line. It took me one hour to portage and paddle as opposed to the 25 minutes that it took me to walk the State-constructed portage on Forest Preserve lands. To argue that the public has a right to cross private land when it has a good and far shorter route across the Forest Preserve is to overlook the historical and present use of the area, as well as to ignore common law and our Constitutionally-protected rights.

There is no historical precedent for the DEC having legal authority to declare that Mud Pond, the Mud Pond Outlet Brook or the Shingle Shanty Stream inside of Township 39 is navigable-in-fact. Indeed, common law, which is judge-made law, is the standard for adjudicating these matters. Until a court as a matter of fact and law

determines that the exclusive Brandreth recreational rights are to be taken, the Mud Pond Outlet Brook and the Shingle Shanty Stream inside of Township 39 will remain closed to the public and posted as private.

New York has always recognized navigability-in-fact as defined by a commercial use standard, and I am informed that the courts of the State of New York have not yet abandoned this standard. Brandreth has been advised that the case involving the south branch of the Moose River is not precedent for the Mud Pond and Mud Pond Outlet Brook, since the Moose River case involved a river with a history of commercial use. In that case, the highest court in the State denied summary judgment and decided that a trial on the facts and law was necessary before the case could be legally resolved. This in fact never happened because the case was settled out of court.

On a related issue, mention has been made of draft legislation that is attempting to codify the common law relative to the issue of navigability-in-fact. In the event any such legislation attempts to exceed the common law and authorize a physical invasion of the Brandreth recreational rights, whether directly by the Legislature or by delegation to any administrative body, it would be the position of Brandreth that any such legislation could be viewed as a disguised act of eminent domain and a compensable taking of property under the Fifth and Fourteenth Amendments of the U.S. Constitution. We would request that any proposed legislation be carefully vetted as part of the legislative process.

As the protector of the State's natural resources, and in light of the extensive lands that are currently owned by the State, we would not expect the DEC to take action on the requests made by the Sierra Club or any of its surrogates given current law in the State of New York. Contrary to the assertions of the Sierra Club letter, it cannot be objectively stated or reasonably believed that "this is a clear-cut case" where any laws have been violated. A diligent inquiry into the facts reveals the following:

1. Township 39 has a long history of private ownership and has never been open to the public;
2. Nehasane Park, containing lands contiguous to Township 39 and including Lake Lila and a stretch of the Shingle Shanty Stream, did not have a public boating route until it was purchased by the State in 1978.
3. After the purchase of Nehasane Park by the State in 1978, there was no attempt for boaters to trespass on the Brandreth recreational rights, for the Shingle Shanty Stream was a "stream to nowhere" in that its headwaters were totally located on private property.
4. Whitney Park, also containing lands contiguous to Township 39 and including Little Tupper Lake, Rock Pond, Salmon Lake and Lillypad Pond did not have a public boating and portage route over the trails and lakes from Little Tupper Lake to Lillypad Pond until it was purchased by the State in 1998.

5. After the purchase of Whitney Park by the State in 1988, the State constructed new portage trail linking Lilypad Pond with the Shingle Shanty Stream on its own lands, since it could achieve its goal of a new canoe route without purchasing a easement over or condemning private property.
6. Lilypad Pond, Mud Pond, Mud Pond Outlet and the Shingle Shanty Stream have never been used for any commercial purposes whatsoever. Both the Whitney and Lake Lila Wilderness Areas- the only public lands to access this area - are Forest Preserve. By DEC regulation, the use of the Forest Preserve for private revenue or commercial purposes is prohibited. Therefore there is no commercial use to support a public right of way on Mud Pond, Mud Pond Outlet, or the privately owned sections of Shingle Shanty Stream.
7. Mud Pond is aptly named, for it is a muddy body of water that dramatically recedes in the summer and in low water seasons it can be hazardous to traverse
8. Mud Pond Outlet Brook is a very small and remote brook with a limited seasonal flow of water;
9. Mud Pond Outlet Brook is impeded by shallow water, trees, beaver dams, rock and rapids;
10. There is no dam at the end of Mud Pond, but rather a natural rock shelf which, by definition forces a paddler to get out and portage around the extensive outlet rapids.
11. Superimposed upon Mud Pond, Mud Pond Outlet and the Shingle Shanty Stream is a very protective conservation easement that aims to preserve the fragile ecosystem of the area. The owners of this property are bound by the easement to protect this area, are required to submit a management plan that demonstrates a highly protective approach to ensuring the goals of the easement. Access to this area is limited to Brandreth family members and researchers. Public access leads to uncontrolled human impact, leading to the potential introduction of invasive species as well as litter in this remote area, possibly threatening this fragile ecosystem.

Considering that there is an excellent portage already constructed on State land to by-pass private property, and in the context of the above site-specific and historical facts, the DEC, as a State agency, should not assist in the taking of legally recognized private recreation rights owned by the Adirondack's oldest private (family) landowner with a reputation of environmental and community stewardship.

The Sierra Letter makes reference to an attachment alleging an illegal blockage. Curiously, Brandreth was not provided with a copy of the Sierra Letter or the attachment, so at this time we request a copy of the Sierra Letter and all attachments pursuant to New York's Freedom of Information Law. Upon receipt, Brandreth will refer any legal assertions contained therein to its lawyers for review. In the meantime, as mentioned above, Brandreth has been advised by its lawyers that the common law is

judge-made law, law that evolves on a case by case basis depending on the facts and circumstances in the Court record, and law that is solely within the jurisdiction of the judicial branch of government, not State agencies.

Aside from the assertions made in the Sierra Letter, it appears to Brandreth that the Sierra Letter makes no mention of the aforementioned fragile ecosystem of this corner of Township 39. The Shingle Shanty Stream is unique, shallow, slow moving and fragile. It would be a shame to see such an area degraded by substantial public traffic which, in turn, raises the risk of contaminated vessels carrying imported invasives such as Eurasian Milfoil (new to Lake Placid just this August) as well as the risk of litter (which we found and removed this summer after others chose to follow the route Mr. Brown highlighted in his article) In terms of protecting its resources, the private stewardship of this and by the Brandreth family is longstanding and continues to this day.

Further, this area has been made available to the Shingle Shanty Preserve and Research Station (SSPRS), a newly created non-profit research organization dedicated to long term environmental studies. 2009 marks the first year of academic research being directed by SSPRS. The entire paddling route in question that Mr. Brown describes in the Adirondack Explorer article is within the study area of the SSPRS. The idea of setting up an area for research where there is little human usage benefits all of us who treasure the Adirondacks, whether it is to help establish baseline data regarding the northern boreal forest or glean clues as to the effects of global warming in the North Country. Is it necessary to compromise the integrity of this unique, scientific research area when recreational paddlers have a much shorter route over State land that completes a passage in a fraction of the time?

Mr. Grannis, after 158 years of private stewardship, the Brandreth family has been very quiet in regards to its recreational rights in Township 39. But after hearing about the Sierra Letter, the family decided that the time had come to present a different point of view to those who are attacking the legally recognized recreational rights of the Brandreth family. We are sure, as DEC commissioner, you will not take unreasonable action, as requested by the Sierra Club, and instead carefully and fully review the facts and the pertinent history of the area, and as a representative of a State department, treat all parties with the equal respect and fairness.

Thank you for the courtesy of your attention to these important matters, and if you have any questions about recreational rights owned by the Brandreth family, please do not hesitate to get in contact with me. In addition we would be happy to discuss this matter in person with you, as well as meet with whatever groups have an interest in this issue to talk and listen.

Sincerely,

BRANDRETH PARK ASSOCIATION

Judson S. Potter, President
978-375-0188

cc: The Hon. David A. Paterson
Governor, State of New York
State Capitol
Albany, NY 12224

The Hon. Elizabeth O'C. Little
5 Warren Street
Glens Falls, NY 12801

The Hon. Theresa Seyward
140 Glen Street
Glens Falls, NY 12801

Sierra Club Atlantic Chapter
353 Hamilton Street
Albany, NY 12210