

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.

Index No. 6803-10

RJI No. 17-1-11-0078

HON. RICHARD T. AULISI

Memorandum of Law In Support of the Motion for Summary Judgment
of the State of New York and the
New York State Department of Environmental Conservation

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Dated: August 8, 2012

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PRELIMINARY STATEMENT

The Defendants-Intervenors State of New York and the New York State Department of Environmental Conservation (“DEC” or jointly “State”), are entitled to summary judgment in their favor against Plaintiffs Friends of Thayer Lake, et al. (collectively “Plaintiffs”), declaring that the Mud Pond Waterway (“Waterway”) is navigable-in-fact and subject to an easement for public navigation, and that Plaintiffs’ interference with travel on the Waterway constitutes a public nuisance. The Waterway meets the legal standard of navigability because it has “practical utility for trade or travel,” as it is floatable in its natural state and of use in transportation in its ordinary capacity. *Adirondack League Club v. Sierra Club*, 92 N.Y.2d 591, 600 (1998); *Morgan v. King*, 35 N.Y. 454, 459 (1866).

There are no material issues of fact, particularly no issues concerning the capacity of the Waterway for travel. Plaintiffs’ pleadings, documents produced during discovery and deposition testimony show that the Waterway is “navigable-in-fact,” as evidenced by Plaintiffs’ and their predecessors’ use of the Waterway as a major highway for travel since 1918, and that it is navigable in normal water levels.

Accordingly, the State is entitled to summary judgment on its First Cause of Action and a declaration that the Waterway is navigable. Because the Waterway is navigable, the State is entitled to summary judgment on its Second Cause of Action seeking a declaration that Plaintiffs’ obstructions of the Waterway and threats of prosecution for trespass constitute a public nuisance, and an order enjoining plaintiffs from further obstruction of Waterway travel. Additionally, the State is

entitled to summary judgment dismissing Plaintiffs' Second and Third Causes of Action which seek a declaration that the waterway is not navigable-in-fact and therefore not open for travel by the public.

STATEMENT OF FACTS

The facts supporting this motion are contained in the Statement of Material Facts set forth in the Affirmation of Assistant Attorney General Kevin P. Donovan, and are supported by the Amended Complaint, the Verified Counterclaim, the affidavits of Dr. Phil Terrie, William McSalis, Alan Belenzs, David Cilley, Kenneth R. Hamm, and Josh Houghton, as well as the affidavit and sworn deposition testimony of Donald Potter, Ph.D, a member of plaintiffs, and the deposition testimony of Defendant Phil Brown. Key facts are summarized here for the Court's convenience.

A. Procedural Background

Plaintiffs brought this action for trespass against Defendant Phil Brown after he traveled over the Mud Pond Waterway ("Waterway") and wrote a true and accurate description of that trip in an article published in the *Adirondack Explorer* entitled *Testing the Legal Waters* in which he stated that the Waterway was navigable and that public travel over it should be allowed. August 8, 2012 Affirmation of Assistant Attorney General Kevin P. Donovan ("Donovan Aff."), ¶¶ 63-64; February 15, 2011 Verified Counterclaim, ¶¶ 56-58, Exhibit 5 at 49; February 8, 2012 Examination Before Trial of Philip H. Brown ("Brown Dep.") at

30-31. Because the Plaintiffs seek a declaration that the Waterway was not navigable, contrary to the right of the public to navigate waters that are navigable-in-fact, the State moved to intervene. This Court granted intervention by Order dated August 12, 2011.

B. The Navigable Waterway and Plaintiffs' Interference with Travel.

The Waterway is navigable-in-fact, and has utility for trade or travel, as demonstrated by the facts, including Plaintiffs' own records and admissions. Plaintiffs and their predecessors have made continuous use of the Waterway as a highway for travel since 1918 - nearly a century. Donovan Aff., ¶¶ 37-51; February 16, 2012 Examination Before Trial of Donald B. Potter ("Potter Dep.") at 101-102, 132, 134-35, 137-39, 172-73, 216-17, 221-22; February 4, 2011 Amended Complaint ("Amended Complaint"), ¶ 26.a.

Donald Potter, a member of Plaintiffs who has regularly been in the area of the Mud Pond Parcel since 1936, describes the Waterway as navigable. April 29, 2011 Affidavit of Donald Potter Relative to Intervention, ("Potter Aff.") (filed with May 4, 2011 Plaintiffs' Opposition to State's Motion to Intervene), ¶¶ 14-16. Mr. Potter states: "The Waterway is generally floatable by canoe;" that "Mud Pond is canoeable even in periods of low water . . . ;" that "Below the Mud Pond Outlet Brook Rapids, the Mud Pond Outlet Brook is navigable by canoe . . . ;" and that Shingle Shanty Brook is navigable from upstream of Mud Pond outlet to the boundary of the Plaintiffs' property with State lands. Donovan Aff., ¶¶ 26-32; Potter Aff., ¶¶ 7, 18, 24, 31-32, 34. His deposition testimony established that the

Waterway is canoeable the entire route from the foot of the Mud Pond Outlet Rapids, down Mud Pond Outlet to the confluence with Shingle Shanty Brook and continuing on Shingle Shanty Brook to the property boundary with State lands. Potter Dep. at 101.

Donald Potter's testimony confirms the history of consistent use of the Waterway by Plaintiffs and their predecessors as the "major route of access" and "primary means of access" to and from the Mud Pond Camp ("Camp"). Donovan Aff., ¶ 37-39; Potter Aff., ¶ 9; Potter Dep. at 102, 134-35, 137, 221-22. Mr. Potter's father built the Camp near the Waterway in 1918. Donovan Aff., ¶¶ 36, 38; Potter Dep. at 90-91; Potter Aff., ¶ 11. Because there are no roads to the Camp, Plaintiffs and their predecessors regularly traveled on the Waterway and it was in "continuous use since the Mud Pond Camp was built" to transport themselves and their supplies to and from Camp. Donovan Aff., ¶¶ 37; Amended Complaint, ¶¶ 21; Potter Aff., ¶ 9; Potter Dep. at 102, 134-35, 137, 221-22.

Plaintiffs travel from what they refer to as the St. Agnes boathouse on Shingle Shanty Brook to the Camp via the Waterway, about one and one-half to two hours of travel by canoe each way. Donovan Aff., ¶¶ 41-42; Potter Dep. at 102, 133, 136-138. Plaintiffs and their predecessors traveled on the Waterway below the Camp for personal transport to and from Camp, to transport supplies, building materials and furnishings from market to the Camp such as lumber, windows and doors, telephone wire, roofing materials, tar paper, metal sheeting, stoves and beds. Donovan Aff., ¶¶ 39-45; Potter Dep. at 101, 102, 132-35, 136-38, 169-71, 221-22,

253. They used the Waterway to hunt and fish and to transport to the Camp the fish they caught as well as deer, beaver, and mink they harvested by hunting or trapping, and to transport to market the pelts of animals they obtained. Donovan Aff., ¶ 45; Potter Dep. at 138-39, 140, 145-147. They used the Waterway above the Camp to regularly travel to the private property of their neighbors the Whitneys [now part of the Whitney Wilderness Area] to trap, hunt and fish and as a route to other Brandreth lands. Donovan Aff., ¶ 47-48; Potter Dep. at 141, 144-45, 153-55, 157, 167-68, 244-47. They also used that portion of the Waterway to transport to market the pelts of trapped animals and to transport in from market various supplies including the materials to rebuild the Camp. Donovan Aff., ¶¶ 47-49; Potter Dep. at 91-92, 151-52, 221-22. Plaintiffs continued using the Waterway above the Camp to cross the Whitneys' posted property boundary to access the Whitneys' private property to hunt there - even after they had been twice told not to do so and there was no misunderstanding that they were not to be on Whitney property. Donovan Aff., ¶ 51; Potter Dep. 172-73, 177, 216-17.

In addition to Plaintiffs' own use establishing the Waterway's navigability, others have travelled its route. Plaintiffs acknowledge that "Following the trespasses of the Defendant Phil Brown and his public advocacy in the *Adirondack Explorer*, at least ten (10) additional trespassers have entered up the Mud Pond Parcel and used and enjoyed the Mud Pond Waterway" Amended Complaint, ¶ 80. And Plaintiffs' cameras recorded many groups passing over the Waterway and using the short carry around the Mud Pond Outlet rapids from 2008 to 2011.

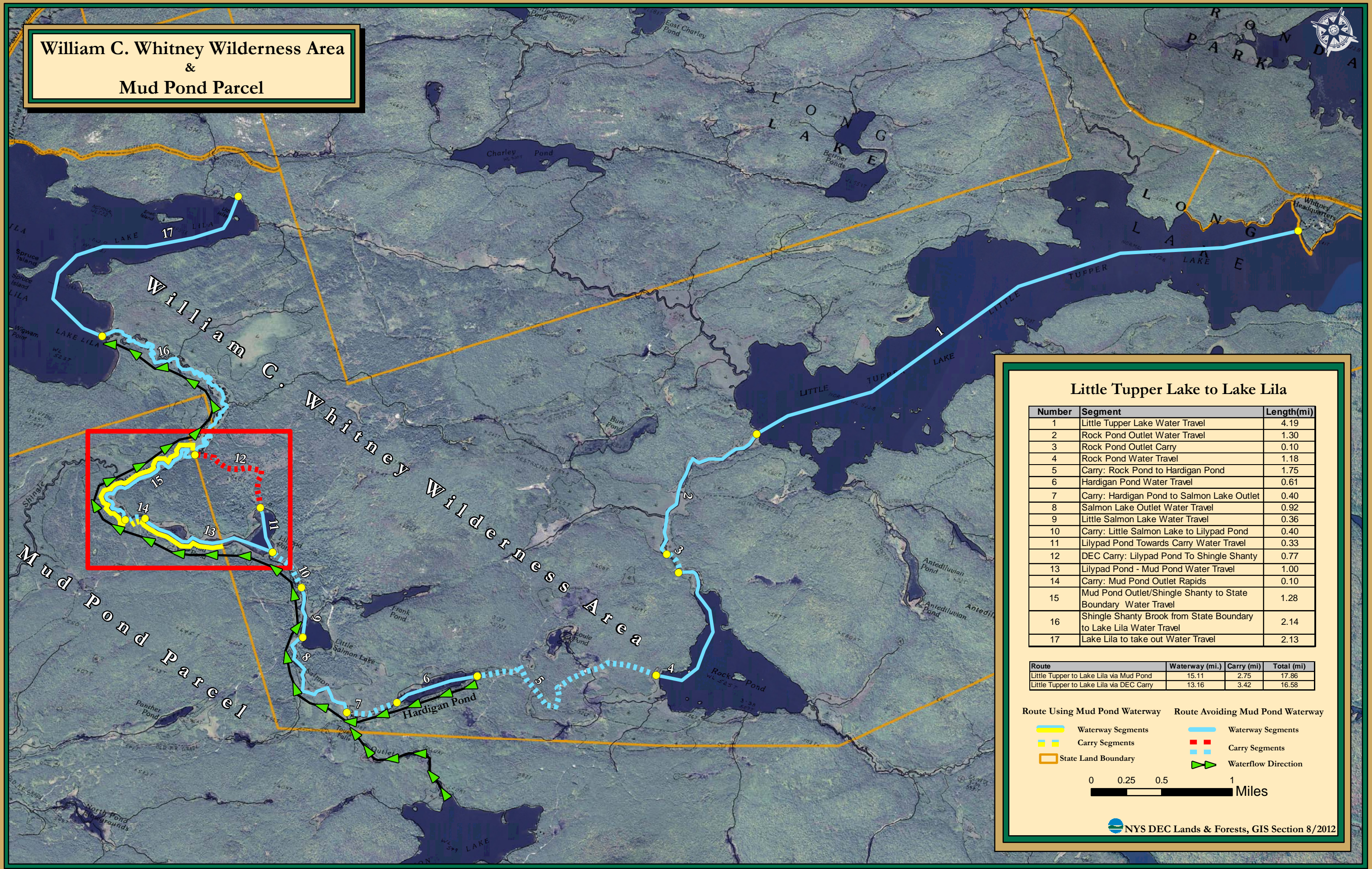
Donovan Aff., ¶ 60, Donovan Aff., Exhibit D (Potter Dep. State's Exhibits 2-12-photos); Potter Dep. at 229-241. Donald Potter testified that members of the public now use the route "in droves," and that at least a dozen groups paddled through in the last few years. Donovan Aff., ¶ 59; Potter Dep. at 229, 252.

And DEC officials found, during a site visit at the request of Plaintiffs when water levels were normal, that the Waterway was easily navigable both upstream and downstream and met the standard for navigability. Donovan Aff., ¶¶ 52-55; Potter Aff., ¶¶ 7, 34; February 15, 2011 Affidavit of Christopher Amato ("Amato Aff.") (affidavit filed with February 23, 2011 State's Motion to Intervene), ¶ 20. Defendant Phil Brown testified that his travel over the Waterway showed that it was easily navigable, and that the carry around the rapids was one of the shortest he had encountered while paddling in the Adirondacks. Donovan Aff., ¶¶ 63-64; Brown Dep. at 30-31, 123; Verified Counterclaim, ¶¶ 57-58, Exhibit 5, *Testing the Legal Waters*, at 49. Finally, the author of a 19th century guidebook to the Adirondacks described travel over the Waterway as part of a water route between Lake Lila and Little Tupper Lake. Donovan Aff., ¶¶ 56-58 and Exhibits B and C (excerpts from 1899 and 1875 editions of E.R. Wallace's *A Descriptive Guide to the Adirondacks*).

The Waterway consists of waters that flow out of State lands classified as the William C. Whitney Wilderness Area ("Whitney Wilderness Area"), over a corner of private property the Plaintiffs refer to as the Mud Pond Parcel, and then back into the Whitney Wilderness Area. See August 1, 2012 Affidavit of Josh Houghton

("Houghton Aff."), ¶¶ 8, 9, 16, Exhibit A (Map of William C. Whitney Wilderness Area and Mud Pond Parcel, depicting the Whitney Wilderness Area, the abutting private property, and the flow of waters). A copy of the Map of the William C. Whitney Wilderness Area and Mud Pond Parcel follows on the next page.

**William C. Whitney Wilderness Area
&
Mud Pond Parcel**



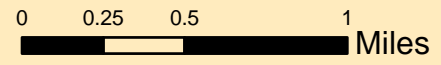
Little Tupper Lake to Lake Lila

Number	Segment	Length(mi)
1	Little Tupper Lake Water Travel	4.19
2	Rock Pond Outlet Water Travel	1.30
3	Rock Pond Outlet Carry	0.10
4	Rock Pond Water Travel	1.18
5	Carry: Rock Pond to Hardigan Pond	1.75
6	Hardigan Pond Water Travel	0.61
7	Carry: Hardigan Pond to Salmon Lake Outlet	0.40
8	Salmon Lake Outlet Water Travel	0.92
9	Little Salmon Lake Water Travel	0.36
10	Carry: Little Salmon Lake to Lilypad Pond	0.40
11	Lilypad Pond Towards Carry Water Travel	0.33
12	DEC Carry: Lilypad Pond To Shingle Shanty	0.77
13	Lilypad Pond - Mud Pond Water Travel	1.00
14	Carry: Mud Pond Outlet Rapids	0.10
15	Mud Pond Outlet/Shingle Shanty to State Boundary Water Travel	1.28
16	Shingle Shanty Brook from State Boundary to Lake Lila Water Travel	2.14
17	Lake Lila to take out Water Travel	2.13

Route	Waterway (mi.)	Carry (mi)	Total (mi)
Little Tupper to Lake Lila via Mud Pond	15.11	2.75	17.86
Little Tupper to Lake Lila via DEC Carry	13.16	3.42	16.58

Route Using Mud Pond Waterway Route Avoiding Mud Pond Waterway

- Waterway Segments
- - - Carry Segments
- State Land Boundary
- Waterway Segments
- - - Carry Segments
- ▶▶ Waterflow Direction



The Whitney Wilderness Area consists of more than 20,000 acres of State Forest Preserve lands, and includes waters used for travel and other recreational purposes such as swimming, camping, fishing, hunting and trapping. Donovan Aff., ¶ 11; Verified Counterclaim, ¶ 28, Exhibit 2 (Whitney Wilderness Area brochure) at 1-3. The Mud Pond Parcel was a portion of lands purchased from the State by Benjamin Brandreth in 1851. Donovan Aff., ¶ 14; Amended Complaint, ¶¶ 10, 21-22. Plaintiffs do not allege that the State conveyed to Brandreth the public right of navigability. Donovan Aff., ¶ 17.

As depicted on the map, the Whitney Wilderness Area bounds the Mud Pond Parcel on the west, north, and east. Donovan Aff., ¶ 15; Amended Complaint, ¶¶ 1, 22; Exhibit A (DEC map on which Plaintiffs' have marked an area as "Mud Pond Parcel."); Houghton Aff., ¶¶ 8-10, Exhibit A (map also depicted on preceding page). The Plaintiffs have adopted the name "Mud Pond Waterway" ("Waterway") for the waters as they flow over the Mud Pond Parcel. Donovan Aff., ¶ 16; Amended Complaint, ¶¶ 22, 23; Potter Dep. at 221. They define the Waterway as including, in the direction the waters flow out of Lilypad Pond, the western portion of the Narrows of Lilypad Pond, Mud Pond, Mud Pond Outlet, and the portion of Shingle Shanty Brook until it reaches a boundary of State lands for the Whitney Wilderness Area. Donovan Aff., ¶ 16; Amended Complaint, ¶¶ 22, 23; Potter Aff., ¶ 9; Potter Dep. at 221; Houghton Aff., Exhibits A, B. The Waterway is part of a single integrated stream system consisting of connected streams and ponds that flow

uninterrupted from one to the other. Donovan Aff., ¶ 20; Potter Dep. at 209-10, 274; Verified Counterclaim, ¶¶ 37-41; Houghton Aff., ¶ 16, Exhibits A and B.

The Plaintiffs claim the exclusive right to travel on the Waterway, and assert that members of the public who do so are guilty of trespass. Donovan Aff., ¶ 21; Amended Complaint, ¶¶ 87, 90; Potter Dep. at 226-228; Potter Aff., ¶¶ 3, 17, 39. To deter the public from traveling on the Waterway, Plaintiffs have posted the Waterway with “no trespassing” signs threatening civil and criminal prosecutions, have asked the State to bring criminal trespass charges against water travelers, have placed obstructive cables across the Waterway, and have brought this action for trespass, seeking punitive damages. Donovan Aff., ¶ 22 and State’s Potter Dep. Exhibit 1 (Donovan Aff., Exhibit A (photos of signs)); Potter Dep. at 226-228, 266; Amended Complaint, ¶ 23 and Prayer for Relief; Verified Counterclaim, ¶¶ 67, 68, 69, 71, 73, Exhibit 5; Brown Dep. at 64, 73, 96, 97. Barring the public from the Waterway either discourages the traveler from continuing water travel to other portions of the Whitney Wilderness Area (July 26, 2012 Affidavit of David Cilley (“Cilley Aff.”), ¶ 38), or requires them to bypass that section of the Waterway by disembarking and carrying boats and equipment over the 0.8 mile long overland carry (Donovan Aff., ¶¶ 71-81; Cilley Aff., ¶¶ 35-39; August 22, 2011 Affidavit of William G. McSalis (“McSalis Aff.”), ¶¶ 16-27).

ARGUMENT

Legal Standard for Summary Judgment

A summary judgment motion “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” CPLR 3212(b). Summary judgment is appropriate when no genuine issue of material fact exists between the parties and the moving party is entitled to judgment as a matter of law. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 N.Y.2d 1065, 1067 (1979). The moving party 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). A verified pleading serves as an affidavit. CPLR 105(u); *Pollnow v. Poughkeepsie Newspapers, Inc.*, 67 N.Y.2d 778, 780 (1986).

Once a *prima facie* showing is made, the nonmoving party must produce proof in admissible form to demonstrate triable issues - general averments do not suffice. *Gonzalez v. 98 Mag Leasing Corp.*, 95 N.Y.2d 124, 129 (2000); *see Alvarez*, 68 N.Y.2d at 324-326; *Zuckerman*, 49 N.Y.2d at 561, 562-63; *Micco v. Skidmore Coll.*, 180 A.D.2d 983, 984 (3d Dep’t 1992); *Bytner v. Capital Newspaper*, 112 A.D.2d 666, 668 (3d Dep’t 1985). Conclusory assertions, mere expressions of hope, unsubstantiated allegations, or statements by persons without personal knowledge such as counsel for a party, are insufficient to defeat a motion for summary

judgment. *Gonzalez*, 95 N.Y.2d at 129; *Alvarez*, 68 N.Y.2d at 324-326; *Zuckerman*, 49 N.Y.2d at 562-63; *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967 (1988). Similarly, a claim that discovery may bring some evidence to light is not a basis for denial. *Grimm Bldg. Material Co., Inc. v. Freeman Excavating*, 194 A.D.2d 857, 858 (3d Dep't 1993).

Nor may a motion for summary judgment be defeated by claims with no basis in the law. *Citibank (S.D.) v. Coughlin*, 274 A.D.2d 658, 659-60 (3d Dep't 2000); *Butler v. Catinella*, 58 A.D.3d 145, 151 (2d Dep't 2008) (same); *Justus Recycling Corp. v. AFC Enters.*, 290 A.D. 2d 279, 280 (1st Dep't 2002); *Leumi Fin. Corp. v. Richter*, 24 A.D. 2d 855, 855 (1st Dep't 1965), *citing Richard v. Credit Suisse*, 242 N.Y. 346, 350 (N.Y. 1926) ("The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial").

POINT I

THE STATE IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE WATERWAY IS NAVIGABLE

The record in this case – including Plaintiffs’ documents, records and testimony – clearly establishes that the Waterway is navigable-in-fact. Accordingly, the State is entitled to summary judgment and a declaration that the Waterway is subject to the public easement for navigability.

A. The Law of Public Navigability

1. A Navigable Waterway Is a Public Highway.

A navigable-in-fact waterway is a public highway subject to an easement for public travel, notwithstanding the fact that its banks and bed may be in private hands.¹ *Adirondack League Club*, 92 N.Y.2d at 601, citing *Morgan v. King*, 35 N.Y. 454, 458 (1866); and see *People ex Rel. New York Central RR v. State Tax Comm’n*, 258 A.D. 356, 359 (3d Dep’t 1940) (there exists an easement or right in the public to use navigable waters as a highway). This public easement is held by the State in trust for the public. *People v. System Props.*, 2 N.Y. 2d 330, 344-45 (1957); *Long Sault Dev. Co. v. Kennedy*, 212 N.Y. 1, 10 (1914); *Fulton Light, Heat & Power Co. v. New York*, 200 N.Y. 400, 418 (1911). As highways for public use, navigable streams

¹ For a comprehensive treatise on the law of navigability in New York, see Humbach, JA, *Public Rights in the Navigable Streams of New York*, 6 Pace Env’tl L. Rev. 461 (1989), copy filed herewith, cited in *Mohawk Val. Ski Club, Inc. v. Town of Duanesburg*, 304 A.D. 2d 881, 883 (3d Dep’t 2003), The article may be found at: <http://digitalcommons.pace.edu/lawfaculty/94> The treatise was published before the Court of Appeals explication of the law of navigability in *Adirondack League Club v. Sierra Club*, 92 N.Y.2d 591 (1998).

are indistinguishable from public highways on dry land save for the means of transport. *See City of Albany v. State*, 71 Misc. 2d 294, 298 (N.Y. Ct. Cl. 1972).

The public easement for navigation extends to the right to navigate a waterway over private property. *Morgan*, 35 N.Y. at 459 (1866) (public navigability should be “liberally supported”). Land ownership is subject to the easement of navigability from the time of the grant from the State, *Adirondack League Club*, 92 N.Y.2d at 601, 604. Because the State cannot convey the right of public navigation, the easement for public navigability does not diminish private property rights. *See Long Sault Dev. Co.*, 212 N.Y. 1, 10 (1914); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 198 N.Y. 287, 292 (1910) *aff’d*, 229 U.S. 82 (1913); *People v. New York and Ontario Power Co.*, 219 A.D. 114, 116 (3d Dep’t 1927). “Having never owned the easement, riparian owners cannot complain that this rule works a taking for public use without compensation.” *Adirondack League Club*, 92 N.Y.2d at 601, 604.

2. Navigability Means a Stream Has Capacity for Practical Utility for Trade or Travel.

The standard for determining whether a waterway is navigable-in-fact is whether it has “practical utility for trade or travel” as shown by “evidence of actual practical use or evidence of capacity for practical use,” including recreational use. *See Adirondack League Club v. Sierra Club*, 92 N.Y.2d at 601, 605. In *Adirondack League Club*, a private club sued canoeists and a kayaker for trespass after they traveled on a portion of a river that flowed through the club’s lands. The Court of Appeals ruled that recreational use of a waterway can provide proof of its navigability. “[E]vidence of the river’s capacity for recreational use is in line with

the traditional test of navigability, that is, whether a river has a practical utility for trade *or* travel.” *Adirondack League Club*, 92 N.Y.2d at 600 (emphasis added).

Rejecting the landowner’s argument that navigability could be based only on commercial utility of the waterway, the Court explained, “We do not broaden the standard for navigability-in-fact but merely recognize that recreational use fits within it.” *Adirondack League Club*, 92 N.Y.2d at 601, 603. After undertaking an exhaustive review of navigation law, the Court explained that commercial uses were not the sole criteria for navigability, and focused instead on the practical utility for travel or transport. *Adirondack League Club* 92 N.Y. 2d at 603-604.² Noting that rivers were no longer being used to transport logs but were “instead valued in their own right as a means of travel,” the Court directed that recreational use be part of the navigability analysis. *Adirondack League Club*, 92 N.Y.2d at 603; *accord*,

² New York’s courts have long recognized non-commercial, or recreational use, as providing proof of navigability. See *People v. System Props., Inc.*, 2 N.Y.2d 330, 344-45 (1957) (uses not excluding recreation); *Smith v. City of Rochester*, 92 N.Y. 463, 480 (1883); (fishing, ferrying and transportation); *Morgan*, 35 N.Y. at 458 (1866) (for passage or transportation); *Fairchild v. Kraemer*, 11 A.D. 2d 232, 235 (2d Dep’t 1960)) (pleasure boating); *St. Lawrence Shores, Inc. v. State*, 60 Misc. 2d 74, 78 (N.Y. Ct. Cl. 1969) (same); *Trustees of Freeholders & Commonalty of Town of Southampton v. Heilner*, 84 Misc. 2d 318, 328 (Sup. Ct. Suffolk Co. 1975) (“[I]n today’s life it cannot be said that this use [recreational] is less important to society than commercial uses such as logging or transporting produce across the water.”) See also Humbach, JA, *Public Rights in the Navigable Streams of New York*, 6 Pace Env’tl L. Rev. 462, 521, § 4.4 (1989) (“Although commercial usefulness is frequently given as both a rationale and a criterion for the public right of passage, no case found has ever held that the public’s common-law right of use is limited to commercial passage.”) Further, evidence of capacity for recreational use supports a conclusion of usefulness for commerce, and recreational boating has commercial aspects. *Adirondack League Club*, 92 N.Y. 2d at 603; *Sawczyk v. U. S. Coast Guard*, 499 F. Supp. 1034, 1039 (W.D.N.Y. 1980).

Mohawk Val. Ski Club, Inc. v. Town of Duanesburg, 304 A.D. 2d 881, 883 (3d Dep't 2003), quoting *Adirondack League Club*, 92 N.Y.2d at 603.

A stream's "practical utility for trade or travel" can be shown by evidence of actual practical use or by evidence of capacity for practical use. *Adirondack League Club*, 92 N.Y.2d at 605. This includes evidence that the waterway: 1) is navigable or floatable³ in its natural state;⁴ 2) is navigable in its ordinary capacity for a sufficient length of time, either periodically or seasonally, to make it useful as a highway;⁵ and 3) is of public use in transportation. *Adirondack League Club*, 92 N.Y.2d at 601 (quoting *Morgan*, 35 N.Y. at 458-59). It is the capacity of a waterway for travel, not simply its actual use, that is pertinent. *Adirondack League Club*, 92 N.Y.2d at 600; *People ex rel. New York Central R. Co. v. State Tax Comm'n*, 258 A.D. 356, 360 (3d Dep't 1940); *Fairchild v. Kraemer*, 11 A.D.2d 232, 235 (2d Dep't 1960).

B. The Waterway Has Practical Utility for Travel

There are no material facts in dispute regarding the Waterway's navigability-in-fact. Plaintiffs' continuous use of the Waterway for transportation and travel

³ Navigability is equated with floatability, including small boats, canoes, and, even single logs when a waterway will not allow passage by any boat. *Adirondack League Club*, 92 N.Y.2d at 603-604 ("*Morgan* did not limit the common-law rule, but expanded it to include mill-logs."); *Morgan v. King*, 35 N.Y. at 458-459.

⁴ Artificially enhanced streams made navigable only by artificial improvements would not qualify as "navigable." *Adirondack League Club*, 92 N.Y.2d at 605.

⁵ *Adirondack League Club*, 92 N.Y.2d at 605, 607.

since 1918 is evidence of its actual practical use as well as evidence of its capacity for practical use. *See Adirondack League Club*, 92 N.Y.2d at 605.

1. The Waterway Is Navigable In Its Natural State.

Proof provided by Plaintiffs is dispositive of the issue of the Waterway's navigability-in-fact in its natural state. They proved that the Waterway has been in continuous use as a route of travel in transporting persons and goods to and from the Camp since 1918. Donovan Aff., ¶¶ 37-51; Potter Dep. at 100-102, 132-35, 137-39, 172-73, 216-17, 221-22; Amended Complaint ¶ 26.a. And Plaintiffs acknowledge the navigability of the Waterway, averring that "the Waterway is generally floatable by canoe" except for the 500-foot long Mud Pond Outlet Brook Rapids, which are easily circumvented by a carry, that the portion of it known as Mud Pond is canoeable even in periods of low water, and that the portion known as Mud Pond Outlet Brook is navigable as is Shingle Shanty Brook to the property boundary with State lands. Donovan Aff., ¶¶ 26-32; Potter Dep. 101; Potter Aff., ¶¶ 7, 18, 24, 31-32, 34. Mr. Potter's testimony concerning Plaintiffs' use of the Waterway proves the Waterway's navigability. *Adirondack League Club*, 92 N.Y.2d at 611 (citing proof of use for navigation by member of plaintiffs in that action).

Moreover, with the exception of the 500 foot long rapids, the Amended Complaint does not plead, nor do Mr. Potter's Affidavit or testimony in the Examination Before Trial offer proof that any portion of the Waterway is not navigable by watercraft during normal, or ordinary, water levels. And the site visit of the DEC officials during normal water levels, the trip across the Waterway by the

Defendant Brown, travel by members of the public over the Waterway as proved by Plaintiffs' cameras and testimony, and the inclusion of the Waterway as a route for water travel by a 19th century guidebook all require a conclusion that the Waterway is useful for travel.

Because navigability equates to floatability, passage by canoes is sufficient to demonstrate utility for travel. *See Adirondack League Club*, 92 N.Y.2d at 600, 607 (“trip down the South Branch [in two canoes and a kayak] is evidence of navigability”). *See also Morgan v. King*, 35 N.Y. at 459 (even a waterway that will not allow passage by *any* boats is navigable if it will allow single logs to float); *People ex rel. New York Cent. R.R. Co. v. State Tax Comm'n*, 238 A.D. 267, 268 (3d Dep't 1933) (“Streams so shallow as to accommodate small size craft only are now determined to be navigable in fact.”); *People ex rel. New York Cent. R.R. Co. v. State Tax Comm'n*, 258 A.D. 356, 360, 361 (3d Dep't 1940) (small craft useable in marsh and swamp lands covered with water at high tide when there is a two foot rise of water) *aff'd* 284 N.Y. 616 (1940); *People ex rel. Erie R.R. Co. v. State Tax Comm'n*, 266 A.D. 452, 454 (3d Dep't 1943), *aff'd*, 293 N.Y. 900 (1944) (“used by row boats, and canoes . . . for traffic, fishing and trapping”); *People ex rel. New York, Ontario & W. Ry. Co. v. State Tax Comm'n*, 116 Misc. 774, 777, (Albany Co. Sup. Ct. 1921) (Fleets of boats and canoes would come down).

Moreover, the Waterway is navigable in its natural state, as there is no evidence of artificial improvements related to water levels, *see Adirondack League Club*, 92 N.Y.2d at 605, as the only human improvements on the Mud Pond Parcel

are a camp, shed and a footbridge. Donovan Aff., ¶ 19; Potter Dep. at 218; Potter Aff., ¶ 10. Thus, this Waterway is in its natural state.

Nor does the short 500 foot carry around the Mud Pond Outlet rapids constitute an obstruction that negates navigability. As the Court of Appeals ruled, the right of the public to navigate includes the right to portage over private property, to walk on the bed of the waterway, and to otherwise touch the streambed to bypass obstructions incident to navigation. *Adirondack League Club*, 92 N.Y.2d at 600, 607; *see also People ex rel. Erie R. Co.*, 266 A.D. at 454 (“Navigability is not destroyed because of occasional natural obstructions or portages”).⁶

There has been a long history of travel by water in the Adirondacks, which contain water routes that require carries, or portages, to circumvent obstructions and continue water travel. Donovan Aff., ¶¶ 7-8; September 20, 2011 Affidavit of Philip Terrie, Ph.D. (“Terrie Aff.”), ¶¶ 21-22; Cilley Aff., ¶¶ 16, 21, 23, 26; August 1, 2012 Affidavit of Kenneth R. Hamm (“Hamm Aff.”), ¶¶ 7-11. Carries are common in the Adirondacks to circumvent obstructions and to continue water travel. Donovan Aff., ¶¶ 7-8; Terrie Aff., ¶¶ 21-22; Cilley Aff., ¶ 16, 21, 23, 26. Carries are necessary to continue travel on the same body of water to avoid rapids, shallows, or waterfalls,

⁶ Other examples of obstructions deemed not to interfere with navigability include Niagara Falls (*Matter of Niagara Falls Power Co. v. Water Power & Control Comm.*, 267 N.Y. 265, 270 (1935)), shallows (*Danes v. New York*, 219 N.Y. 67, 71 (1916)), water so shallow as usable only when high tide raises water two feet to cover marsh and swamp land (*People ex rel. New York Cent. R.R. Co. v. State Tax Comm’n*, 258 A.D. at 360, 361), lack of continuous flow of water at various times (*Bacorn v. State*, 20 Misc. 2d 369, 373 (N.Y. Ct. Cl. 1959)), a 35 foot waterfall (*Finch, Pruyn & Co. v. State*, 122 Misc. 404, 405, (N.Y. Ct. Cl. 1924)), and rapids, obstructions and water too shallow for travel in all its parts (*Frazer Milling Co. v. State*, 122 Misc. 545, 547 (Ct. Cl. 1924)).

or to move from one water body to another, even in different watersheds. Donovan Aff., ¶¶ 7-8; Cilley Aff., ¶¶ 16, 21-26, 31, Exhibits A - C (descriptions of travel routes requiring carries); McSalis Aff., ¶ 16; Hamm Aff., ¶¶ 7-11, Exhibit A. And the 500 foot long carry around the rapids here is one of the shortest carries in the Adirondacks, as testified to by David Cilley, a guide with decades of experience, and by the Defendant Brown and the DEC officials. Cilley Aff., ¶ 24; Brown Dep. at 83-84, 123; Amato Aff., ¶ 20 (“an easy carry”). Similarly, Mr. Potter agreed that the 0.8 mile carry on State land - 8 times the length of the 0.1 mile carry around Mud Pond Rapids - was short. Potter Dep. at 66-67.

2. The Waterway Is Navigable or Floatable In Its Ordinary Capacity.

A waterway is navigable if it has sufficient ordinary capacity for a length of time, either periodically or seasonally, to make it useful as a highway. *Adirondack League Club*, 92 N.Y.2d at 605, 607. Plaintiffs acknowledge that the Mud Pond Waterway is generally floatable by canoe, even in periods of low water. Donovan Aff., ¶¶ 26-32; Potter Aff., ¶¶ 7, 18, 24, 31-32, 34. The DEC officials who canoed the Waterway found it to be easily navigable in what Plaintiffs acknowledges to be normal water levels. Amato Aff., ¶¶ 18-20; Potter Aff., ¶ 18.

3. The Waterway Has Capacity for Public Transport.

The ability of a waterway to support travel from point to point may be considered in determining whether a waterway has utility for travel. *Hanigan v. State*, 213 A.D.2d 80, 84 (3d Dep't 1995); see also *Mohawk Val. Ski Club*, 304 A.D.2d 881, 883-84 (3d Dep't 2003).⁷

Here, the Mud Pond Waterway connects to State lands and waters of the Whitney Wilderness Area both upstream and downstream from the Mud Pond Parcel. Donovan Aff., ¶¶ 13-16, 20; Houghton Aff., ¶¶ 8-10, 16, Exhibits A and B (maps); Verified Counterclaim, ¶¶ 37-41 and exhibit 2 (map); Potter Dep. at 209-210; Amended Complaint, ¶¶ 29-30, and exhibit A (map). Plaintiffs and their predecessors have used the Waterway to travel from one point to another, either downstream toward Shingle Shanty Brook and Lake Lila, or upstream across Mud Pond onto the State lands of Lilypad Pond and the waters and lands beyond. See Donovan Aff., ¶¶ 36-51 (and voluminous citations therein to evidence provided by Plaintiffs' witness, Mr. Potter).

A person passing upstream from State lands on Lake Lila and Shingle Shanty Brook may continue on the Waterway to State land on Lilypad Pond. Donovan Aff., ¶ 67; Verified Counterclaim, ¶¶ 33-37; Houghton Aff., Exhibits A and B (maps); Potter Dep. at 184. At Lilypad Pond, the traveler can fish, paddle, hike,

⁷ *Hanigan* and *Mohawk Valley Ski Club* decided that ponds with only one access point were not navigable-in-fact as the lack of more than one public access point meant they did not have practical utility to the public as a means of transportation. *Mohawk Val. Ski Club*, 304 A.D.2d at 884; *Hanigan v. State*, 213 A.D.2d at 84-85.

or hunt, or continue on State land to a short carry (0.4 miles) to Little Salmon Lake to either engage in those activities or to camp at DEC-designated campsites (Verified Counterclaim, ¶ 35; Potter Dep. at 55, 240-42, 253), or continue on to DEC campsites on Hardigan Pond, Rock Pond, and Little Tupper Lake (Potter Dep. at 241-42), where there is public road access. Verified Counterclaim, ¶¶ 30, 42, Exhibit 3 (map). Using these waters for hunting, fishing, camping, and trapping are the very activities in which Plaintiffs have engaged for close to a century. Donovan Aff., ¶ 48; Potter Dep. at 153-55, 157, 241-242. A person traveling from the State land of Lilypad Pond can travel down the Waterway to reach State land on Shingle Shanty Brook and Lake Lila. Donovan Aff., ¶ 45; Potter Dep. at 254, 255. Lake Lila has designated DEC campsites, is a popular camping destination, and has a canoe take out and a public parking lot with road access. Verified Counterclaim, ¶¶ 29, 30, 33-34, Exhibit 3 (map).

This practical ability to use the Waterway to travel to multiple points was demonstrated in the June 2010 site visit of the DEC officials, when they traveled the entire length of the Waterway in both directions with no difficulty. Amato Aff., ¶¶ 19, 20. Specifically, they proceeded upstream on the Waterway from Mud Pond onto State land at Lilypad Pond, and to the marked carry from Lilypad pond to Shingle Shanty. Potter Aff., ¶ 7. They then canoed downstream on the Waterway from State land on Lilypad Pond through Mud Pond, the Mud Pond Outlet portage, Mud Pond Outlet and Shingle Shanty Stream until they reached the State land boundary. Potter Aff., ¶ 7. And Plaintiffs' trail cameras for the years 2009-2011

demonstrate that many canoeists and kayakers have traveled the Waterway in the same fashion and that the public use the Waterway “in droves.” Donovan Aff., ¶ 59, 60, Exhibit D (Potter Dep., State’s Exhibits 2-12); Potter Dep. at 229; 229-241 (describing Potter Dep., State’s Exhibits 2-12).

Finally, although proof of recreational travel alone suffices to satisfy the standard for navigability, recreational use will also support a finding that a river is susceptible to commercial use. *Adirondack League Club*, 92 N.Y.2d at 603. And the Waterway has practical utility for trade and commercial use. Plaintiffs’ historical use of the Waterway included the transport of commercial goods from market to Camp, including heavy loads of lumber, shingles, tar paper, stoves, beds, doors, windows, and other building and Camp supplies, and for transport from Camp to market for sale of the pelts of beaver and other animals. Donovan Aff., ¶¶ 43-44; Potter Dep. at 91-92, 102, 132, 137, 138, 152, 169-71, 219, 221-22, 253. Use of a waterway for trapping was a fact noted in a determination of navigability of a waterway. *People ex rel. Erie R.R.*, 266 A.D. at 454. Hunters were guided on its waters, as shown by the article reporting the guided hunting expedition of Frederick Potter. Donovan Aff., ¶ 46; Potter Dep. at 194-95, 222-23, 243. These activities all show either actual use for, or utility for, commercial travel. Moreover, Adirondack guides and commercial outfitters continue to lead clients through the Whitney Wilderness Area and provide boats and gear for clients who wish to explore without a guide. Cilley Aff., ¶¶ 5-11, 39.

POINT II

PLAINTIFFS' INTERFERENCE WITH TRAVEL ON THE WATERWAY CONSTITUTES A PUBLIC NUISANCE

Interference with the public right of passage on a navigable waterway constitutes a public nuisance which may be abated through an action brought by the Attorney General. *People v. Vanderbilt*, 1 Tiffany 396, 399 (1863); *see also* *People v. Vanderbilt*, 26 N.Y. 287, 293 (1863), *see also* *Knickerbocker Ice Co. v. Schultz*, 116 N.Y. 382, 387 (1889). Courts have the authority to grant an injunction for an actual, threatened, or attempted obstruction. *People v. Vanderbilt*, 24 How. Pr. 301 (1862). “A common nuisance is an unlawful act or omission . . . by which the public are obstructed in the exercise or enjoyment of any right common to all . . . the placing of obstructions in a highway or public navigable river, is a familiar example.” *Khoury v. Saratoga County*, 243 A.D. 195, 198 (3d Dep’t 1935) (*citing* Pollock’s *The Law of Torts* [13th Ed.], p. 418). *See also* *Chenango Bridge Co. v. Paige*, 83 N.Y. 178, 185 (1880) (one who makes an “erection rendering the passage of boats, etc., inconvenient or unsafe, he is guilty of a nuisance.”).

Plaintiffs have interfered with and placed obstructions to travel on the Waterway, including placing cables across the stream to impede passage by boat and posting signs threatening criminal and civil prosecution for trespass of those who cross the property line. Donovan Aff., ¶¶ 21-24; Exhibit A (Potter Dep. State’s Exhibit 1 (photos of signage)); Potter Aff., ¶¶ 3, 17, 39; Potter Dep. at 179-186, 226-28, 266; August 1, 2012 Affidavit of Alan Belenz (“Belenz Aff.”), ¶¶ 8, 15; Brown Dep. at 64, 73, 96-97. Plaintiffs also have repeatedly requested that DEC criminally

prosecute members of the public who travel on the Mud Pond Waterway. Donovan Aff., ¶ 23; Amato Aff. ¶¶ 22, 24, Exhibits 5, 7 (July 23, 2010 and September 3, 2010 letters from Plaintiffs' counsel to DEC). These threats -- carried out by Plaintiffs in the instant legal action against Defendant Brown and others -- are not merely theoretical but constitute an interference with the public right of navigation as substantial as a solid barrier: An Adirondack guide, a Scoutmaster with young scouts and other adult leaders, and a scientist of the Attorney General's office all have chosen not to paddle the Waterway because of the Plaintiffs' threats. Donovan Aff., ¶ 25; McSalis Aff., ¶¶ 15-17, 21-27; Cilley Aff., ¶¶ 1, 33-35, 39; Belenz Aff., ¶¶ 8, 16. Plaintiffs' course of action improperly chills the public right to travel on the Waterway.

Plaintiffs' threats of prosecution cause members of the public to not travel the Waterway, either discontinuing travel to other State lands or unloading their boats and moving boats and gear over a difficult and hilly 0.8 mile carry before resuming their travels, often after repeated trips to ferry belongings. Each trip to retrieve more gear adds an additional 1.6 miles round trip. The practical implications are plain: one trip over this carry is 0.8 miles, but two trips totals 2.4 miles, and three trips totals 4.0 miles. Cilley Aff., ¶ 36; McSalis Aff., ¶¶ 17-21, 23-27. Donald Potter confirmed in his deposition, and testimony of others also establish, the obvious fact that traveling by water is much easier than performing a carry. Donovan Aff., ¶ 73; Potter Dep. at 184; Cilley Aff., ¶¶ 20, 38, 39; McSalis Aff., ¶¶ 17-20; Belenz Aff., ¶ 12.

Thus, Plaintiffs should be prohibited from any interference with the right to exercise the easement of public navigability on the entirety of the Mud Pond Waterway, whether by the placement of physical obstructions, intimidation through written or spoken statement, or by implication.

CONCLUSION


Wherefore, for the reasons stated above and for any others that the Court deems appropriate, the State requests summary judgment in its favor and against Plaintiffs, dismissing Plaintiffs' Amended Complaint in its entirety and granting the State's Counterclaims in their entirety.

Respectfully submitted,

Dated: Albany, New York
August 8, 2012

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