

Index No.

Year 2010

STATE OF NEW YORK

SUPREME COURT

COUNTY OF HAMILTON

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FRIENDS OF THAYER LAKE LLC; BRANDRETH PARK ASSOCIATION, CATHRYN POTTER AS TREASURER; AND WILLIAM L. BINGHAM, JR., INDIVIDUALLY AND AS A REPRESENTATIVE MEMBER OF THE BRANDRETH PARK ASSOCIATION,

Plaintiffs,

-against-

PHIL BROWN AND JANE DOE (THE "LADY IN RED") AND ANY OTHER PERSON, KNOWN OR UNKNOWN,

Defendants.

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**SUMMONS AND COMPLAINT**

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**McPHILLIPS, FITZGERALD & CULLUM L.L.P.**

Attorneys for Plaintiffs

Office and Post Office Address

288 Glen Street

P.O. Box 299

GLENS FALLS, NEW YORK 12801-0299

PHONE (518) 792-1174

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SUPREME COURT COUNTY OF HAMILTON

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PARK ASSOCIATION, CATHRYN POTTER, AS  
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ASSOCIATION,

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Defendants.

**SUMMONS**

Index No.: 6803-10

RJI No.: \_\_\_\_\_

Assigned Judge:  
Hon. \_\_\_\_\_

FILED

NOV 15 2010

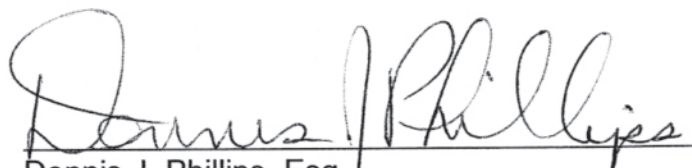
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HAMILTON COUNTY CLERK

TO THE ABOVE NAMED DEFENDANTS:

**YOU ARE HEREBY SUMMONED** to answer the Complaint of the Plaintiffs in this action and to serve a copy of your Answer, or, if the Complaint is not served with this Summons, to serve a Notice of Appearance, on the Plaintiffs' attorney within twenty (20) days after service of this Summons exclusive of the day of service, where service is made by delivery upon you personally within the state, or within thirty (30) days after completion of service where service is made in any other manner. In case of your failure to appear or answer, Judgment will be taken against you by default for the relief demanded in the Complaint.

Trial to be held in the County of Hamilton/Fulton.

The basis of the venue is the subject real property is in Hamilton County.



Dennis J. Phillips, Esq.  
McPHILLIPS, FITZGERALD & CULLUM L.L.P.  
Attorneys for Plaintiffs  
288 Glen Street, P.O. Box 299  
Glens Falls, NY 12801  
Tel. (518) 792-1174

STATE OF NEW YORK  
SUPREME COURT COUNTY OF HAMILTON

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9:20  
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HAMILTON COUNTY CLERK  
By *[Signature]*

Plaintiffs, by and through their attorneys, McPhillips, Fitzgerald & Cullum L.L.P., allege

the following for a complaint:

**I. NATURE OF ACTIONS**

1. The Plaintiffs herein are the private owners of the fee and the recreational rights of the "Mud Pond Parcel" hereinafter described in accordance with their respective interests, including the lands underneath, on, and above the surface waters of the narrows portion of Lilypad Pond, all of Mud Pond, all of the Mud Pond Outlet, and all of the Shingle Shanty Brook located within the boundaries of the Mud Pond Parcel. The general location of the Mud Pond Parcel in relationship to the "Lake Lila Tract" and the "Whitney Tract," two parcels of recently acquired land by the State of New York hereinafter described, is shown on the sketch attached hereto and marked **EXHIBIT "A."** which



sketch is a portion of a publication of the New York State Department of Environmental Conservation relating to the William C. Whitney Wilderness (hereinafter referred to as the "DEC Map").

2. The causes of action contained in this Complaint are for trespass, for a determination of claims to real property, and for a declaratory judgment.

## II. PARTIES

### PLAINTIFFS

3. Plaintiff Friends of Thayer Lake LLC (hereinafter referred to as "FOTL") is a limited liability company organized under the laws of the State of New York, with a place of business at Brandreth Lake, Town of Long Lake, Hamilton County, New York. FOTL is the fee owner of real property located in Township 39, Totten and Crossfield's Purchase, Town of Long Lake, Hamilton County, New York included in which is the "Mud Pond Parcel" hereinafter described in this Complaint.
4. Plaintiff Brandreth Park Association, Cathryn Potter as Treasurer, is an unincorporated association consisting of approximately ninety (90) individual owners or ownerships, with a principal place of business in the Town of Long Lake, County of Hamilton and State of New York (hereinafter referred to as the "Association"). The individual members of the Association jointly own the legal and beneficial interests in the "1911 Exclusive Rights" and the "1974 Retained Recreational Rights" in the Mud Pond Parcel, all as hereinafter described.
5. Plaintiff Brandreth Park Association Recreational Trust, Cathryn Potter as Trustee, is the holder of the 1974 Retained Recreational Rights hereinafter described for the benefit of



the tenancy in common owners of Lot 84, Township 39, Totten and Crossfield's Purchase, with a principal place of business in the Town of Long Lake, County of Hamilton and State of New York. The individual members of the Association jointly own the legal and beneficial interests in the "1911 Exclusive Rights" and the "1974 Retained Recreational Rights" in the Mud Pond Parcel, all as hereinafter described.

6. William L. Bingham, Jr. is a member of the Brandreth Park Association and is an individual owner of Lot 84, Township 39, Totten and Crossfield's Purchase, and therefore a member of the Brandreth Park Association and a holder of a beneficial interest in the Brandreth Park Association Recreational Trust, and one of the owners of the 1911 Exclusive Rights and the 1974 Retained Recreational Rights in the Mud Pond Parcel. He resides at 476 Skiff Mountain Road, Kent, Connecticut 06757-3001.

#### **DEFENDANTS**

7. Upon information and belief, Defendant, Phil Brown, is a resident of the County of Franklin and State of New York, with a place of employment at 36 Church Street in Saranac Lake, New York 12983.
8. Upon information and belief, Jane Doe (the lady in red) and any other person, known or unknown, resides in the State of New York or the United States.
9. Upon information and belief, the above named defendants, known and unknown, are not infants, mentally retarded, mentally ill, or alcohol or drug abusers.

### III. LAND TITLES

#### VESTING DEED: TOWNSHIP 39, TOTTEN AND CROSSFIELD'S PURCHASE HAMILTON COUNTY, NEW YORK: "MUD POND PARCEL"

10. In the year 1851, the State of New York conveyed to Benjamin Brandreth premises located in the Town of Long Lake, Hamilton County and State of New York known and distinguished as Township No. 39, Totten & Crossfield's Purchase, divided into Lots 1 to 154 inclusive and containing 24,038 acres of land, by Letters Patent dated March 21, 1851 and recorded in the Hamilton County Clerk's Office on November 17, 1880 in Book 14 of Deeds at page 31 (hereinafter these lands are referred to as "Township 39").
11. In the year 1911, Edwin A. McAlpin et al., the successors in interest to Benjamin Brandreth, conveyed Township 39 to the Brandreth Lake Lumber and Improvement Company, by deed dated May 4, 1911, and recorded in the Hamilton County Clerk's Office on May 15, 1911 in Book 47 of Deeds at page 544, and the Herkimer County Clerk's Office on May 23, 1911 in Book 207 of Deeds at page 543, excepting and reserving therefrom the following:
  - a. Lot No. 84 of Township 39 and
  - b. the transferrable and assignable exclusive right of shooting and fishing over all the Township 39 property conveyed for the benefit of the owners of Lot No. 84 of Township 39

[The shooting and fishing rights above excepted are hereinafter referred to as the "1911 Exclusive Rights."]
12. In the year 1929, Brandreth Lake Lumber and Improvement Company conveyed Township 39 (except Lot No. 84) to Brandreth Lake Corporation by deed dated October

17, 1929 and recorded November 7, 1929 in the Hamilton County Clerk's Office in Book 65 of Deeds at page 325, and the Herkimer County Clerk's Office on October 24, 1929 in Book 293 of Deeds at page 100, excepting therefrom the 1911 Exclusive Rights.

**CREATION AND CURRENT FEE OWNERSHIP OF MUD POND PARCEL**

13. In the year 1954, by two separate deeds, Brandreth Lake Corporation conveyed to Potter Properties Incorporated certain lots in Township 39; specifically Lots 7-11, Lot 18-22 and Lots 29-33, which deeds were as follows:

- a. Deed dated September 28, 1954 and recorded in the Hamilton County Clerk's Office on October 7, 1954 in Book 98 of Deeds at page 81, and recorded in the Herkimer County Clerk's Office on October 21, 1954 in Book 484 of Deeds at page 215, subject to the 1911 Exclusive Rights;
- b. Deed dated December 16, 1954 and recorded in the Hamilton County Clerk's Office on December 27, 1954 in Book 99 of Deeds at page 19, and recorded in the Herkimer County Clerk's Office on January 13, 1955 in Book 486 of Deeds at page 344, subject to the 1911 Exclusive Rights.

[The lands conveyed to Potter Properties Incorporated in the two deeds recited above are hereinafter specifically referred to as the "Mud Pond Parcel" and are shown on the portion of the 1821 Richards Survey of Township 39 attached hereto and marked **EXHIBIT "B"** (currently Town of Long Lake Tax Map Parcel Nos. 22-1-5, 22-1-6 and 22-1-7.)]

14. In the year 1974, Potter Properties Incorporated conveyed the Mud Pond Parcel to International Paper Company by deed dated November 13, 1974 and recorded in the



Hamilton County Clerk's Office on November 18, 1974 in Book 164 of Deeds at page 400 with two specific exceptions as hereinafter set forth:

- a. Excepting and reserving to Potter Properties, Incorporated, its successors and assigns the exclusive right of hunting and fishing and all recreational rights and privileges (to be exercised non-commercially) over and upon the aforesaid premises; and

[The exception and reservation recited above is hereinafter referred to as the "1974 Retained Recreational Rights."]

- b. Subject to the exceptions and reservation contained in Deed dated May 4, 1911, recorded in the Clerk's Office, Hamilton County on May 15, 1911 in Book 47 of Deeds at page 544 and recorded in the Clerk's Office, Herkimer County on May 23, 1911 in Liber 207 of Deeds at page 543 [i.e. the 1911 Exclusive Rights].

International Paper Company never bought and never owned any recreational rights in the Mud Pond Parcel.

15. In the year 2000, SP Forests L.L.C., the successor in interest to International Paper Company, conveyed the Mud Pond Parcel, together with other lands, to The Nature Conservancy, Inc. ("TNC") by deed dated December 27, 2000, and recorded in the Hamilton County Clerk's Office on January 4, 2001 in Book 223 of Deeds at page 321 and the Herkimer County Clerk's Office on December 26, 2003 in Book 932 of Deeds at page 644 [Parcel II contained in the deed], but "subject to all valid and outstanding easements, servitudes, rights-of-way, flowage rights, restrictions, leases, licenses, reservations, covenants, cutting contracts and all other rights in third parties." Since SP Forests L.L.C.

never owned the 1911 Exclusive Rights and the 1974 Retained Recreational Rights, TNC never bought and never owned any recreational rights in the Mud Pond Parcel.

### **TNC GRANTS CONSERVATION EASEMENT**

16. In the year 2003, The Nature Conservancy, Inc., granted a conservation easement over the Mud Pond Parcel and other lands to Walter G. Buckner, sole trustee of the Sweet Water Trust by deed of Conservation Easement dated December 3, 2003 and recorded in the Hamilton County Clerk's Office in Book 230 of Deeds at page 447 (hereinafter referred to as the "CE"), prohibiting the following activities on the Mud Pond Parcel:

"6...Dumping on or applying to the Property trash,...junk, waste, other debris or any other unsightly or offensive material;"

"7. Polluting, altering,...diverting, channelizing,...or manipulating the hydraulic regime of any surface and/or ground water;"

"10. Purposely introducing non-native species of plants or animal as defined by currently published floras and faunas applicable to Hamilton and Herkimer Counties, New York;"

"11. Purposely planting or broadcasting any genetically modified organisms, transgenic organisms, or organisms replicated through genetic manipulations such as cloning;"

"14. Managing the Property for other than ecological restoration, rare species, exemplary natural communities...."

"15. Conducting or authorizing any recreational activity that would cause harm or disruption to plants, animals or other organisms, especially during nesting season or other sensitive times in the life cycles of wild species, including but not limited to noise or light disturbance, use of machines...access by domesticated animals or pets, or open fires;"

"16. Any other use of or activity on, above, through or below the Property, not otherwise permitted herein, that would materially impair its ecological integrity."

17. Notwithstanding the foregoing prohibitions, TNC recognized and admitted that the CE was subject to the 1911 Exclusive Rights and the 1974 Retained Recreational Rights hereinafter described in the Mud Pond Parcel as expressly set forth as follows:
- a. "WHEREAS, prior to Grantor coming into fee title ownership of the Property, fee title conveyances or long term leases (collectively the "Conveyances") of the Property or portions thereof occurred between various third parties, and these Conveyances established encumbrances over and reserved rights in the Property or portions thereof that cannot be affected or diminished by this Conservation Easement" [CE-page 1].
  - b. "Reference is made to the fact that, prior to the Grantor's acquisition of the Property...access and exclusive hunting, fishing, and recreational rights were reserved in and now encumber both the Brandreth and Potter parcels." [CE-page 5] [NOTE: The "Potter Parcel" referred to in the CE is the same as the "Mud Pond Parcel" referred to in this complaint.]
  - c. "The Potter Parcel (Exhibit B-3) is encumbered by reserved hunting, fishing, and recreational rights established and/or clarified by a deed...." [CE-page 6].
  - d. "Grantor and Grantee hereto accept and acknowledge that all acts and uses of the Property associated with the exercising of the reserved hunting, fishing, recreational, and access rights encumbering the Property or portions thereof are permitted, and that the terms, conditions, and restrictions of this Conservation Easement do not apply to or affect the se hunting, fishing, recreational and access rights." [CE-page 7]



- e. "Notwithstanding the foregoing and anything set forth to the contrary elsewhere in this Easement, the rights and obligations of Grantor and Grantee hereunder are subject to and cannot affect or diminish the prior and pre-existing reserved rights held by Potter, Brandreth and the Brandreth Park Association." [CE-page 13]
18. In the year 2007, The Nature Conservancy, Inc. conveyed its fee interest in the Mud Pond Parcel to Friends of Thayer Lake LLC, a New York limited liability company, by deed dated December 27, 2007, recorded in the Hamilton County Clerk's Office on January 4, 2008 in Book 243 of Deeds at page 632, and also recorded in the Herkimer County Clerk's Office on January 4, 2008 in Book 1257 of Deeds at page 266, subject to any and all encumbrances, easements, reserved and retained rights, and leases, whether of record or not.

#### **IV. OWNERSHIP OF RECREATIONAL RIGHTS**

##### **BRANDRETH PARK ASSOCIATION MEMBERS' OWNERSHIP OF 1974 RETAINED RECREATIONAL RIGHTS**

19. In the year 2007, the 1974 Retained Recreational Rights of Potter Properties Incorporated were duly transferred to Potter Properties L.L.C., a New York limited liability company, by deed dated December 21, 2007 and recorded in the Hamilton County Clerk's Office on December 31, 2007 in Book 243 of Deeds at page 549.
20. Potter Properties L.L.C. changed its name to Bottle Trail Preserve, LLC by certificate of amendment filed March 14, 2008 with the New York State Secretary of State's Office, and thereafter conveyed the 1974 Retained Recreational Rights in the Mud Pond Parcel to the Brandreth Park Association Recreational Trust for the benefit of the tenancy in common

owners of Lot 84 of Township 39, the same owners who are members of the Plaintiff Brandreth Park Association.

**V. LOCATION AND PHYSICAL FEATURES  
OF THE MUD POND PARCEL**

21. The Mud Pond Parcel is located in the northeastern corner of Township 39 in the middle of a wilderness area with no public road access and no connection to the public utility grid system.
22. The Mud Pond Parcel contains the following water resources:
  - a. **LILYPAD POND (NARROWS)**. The narrow and westerly portion of Lilypad Pond, a remote Adirondack pond with no navigable inlet, straddles the northeastern boundary of the Mud Pond Parcel. Lilypad Pond flows into Mud Pond at a narrows and an area of flow over an old beaver dam. A photograph of this outlet area, which also shows "No Trespassing" signs, is attached hereto and marked **EXHIBIT "C."**
  - b. **MUD POND**. Mud Pond is a narrow, shallow body of water containing and surrounded by wetland-type vegetation. It lies to the west of Lilypad Pond, another remote Adirondack pond that is located on adjoining New York State land, and it is connected to the surface waters of Lilypad Pond by a narrows and an area of flow over an old beaver dam as shown in Exhibit "C" above. Mud Pond is a remote headwater of Shingle Shanty Brook, which is a remote tributary of Lake Lila. Mud Pond has no navigable outlet. From the Mud Pond Parcel eastern boundary to the Mud Pond Outlet Brook Rapids hereinafter described, along the surface waters of Lilypad Pond and Mud Pond, the distance is approximately six-tenths of a mile.

- c. **MUD POND OUTLET BROOK RAPIDS.** The Mud Pond Outlet Brook is on the westernmost shore of Mud Pond and begins with shallow water flowing over bedrock, followed by a rocky fall for a distance of approximately 500 feet with a brook bed ranging in width between 11 feet and 50 feet. The Mud Pond Outlet Brook Rapids are not navigable (i.e. floatable) by canoe or kayak. A photograph of the Mud Pond Outlet Brook Rapids is attached hereto and marked **EXHIBIT "D."**
- d. **MUD POND OUTLET BROOK RAPIDS TO CONFLUENCE OF SHINGLE SHANTY BROOK.** The distance of the Mud Pond Outlet Brook from the bottom of the rapids to the confluence with Shingle Shanty Brook is approximately 3/4 of a mile, with the upstream portion of the brook being shallow, rocky, winding, and obstructed with at least one beaver dam. The normal width of this portion of the brook ranges between 12 feet and 28 feet. A photograph of the beaver dam on this stretch of the brook is attached hereto and marked **EXHIBIT "E."**
- e. **SHINGLE SHANTY BROOK.** Shingle Shanty Brook runs from west to east across the Mud Pond Parcel, and from the confluence with the Mud Pond Outlet Brook, it runs a distance of approximately one mile to the boundary between the Mud Pond Parcel and lands owned by the State of New York (the 1979 Lake Lila Tract acquisition by the State of New York hereinafter described). This stretch of Shingle Shanty Brook is obstructed by one beaver dam and has six sharp bends and turns between the confluence with the Mud Pond Outlet Brook and the State boundary line. A photograph of the beaver dam is attached hereto and marked **EXHIBIT "F."**



- f. **WETLANDS.** The Mud Pond Parcel is characterized by extensive wetlands with typical wetland vegetation, including dense alders along the shore of the Shingle Shanty Brook and the Mud Pond Outlet Brook. A representative photo of these wetland areas is attached hereto and marked **EXHIBIT "G."**

[The water resources on the Mud Pond Parcel above described shall be hereinafter referred to as the "Mud Pond Waterway."]

23. The Mud Pond Waterway is legally posted with "No Trespassing" signs strung across the waterway as the Mud Pond Parcel boundary lines cross Shingle Shanty Brook and the Narrows of Lilypad Pond. Additionally, the Mud Pond Waterway is posted inside of the Mud Pond Parcel boundary at the outlet of Lilypad Pond as it flows into Mud Pond, as shown in Exhibit "C" above. The signs clearly state that the Mud Pond Waterway is private property and that violators will be prosecuted.

**MUD POND WATERWAY NEVER USED FOR  
LOGGING OR OTHER COMMERCIAL PURPOSES**

24. The Mud Pond Waterway was never used to float logs to market or for any other commercial use, and is not susceptible to any commercial use.
25. In order to commercially extract the timber resource from Township 39, including the Mud Pond Parcel, between 1912 and 1920 a railroad known as the "Mac-A-Mac Railroad" (the "Railroad") was constructed to log the immense area. The Railroad connected with the New York Central Railroad at the Brandreth station and about 12 miles of rails were laid into the interior of Township 39. During the cutting season, log cars were brought to Brandreth station where the cars were picked up by the New York Central Railroad for

movement to the mills. A sketch of the Railroad system is attached hereto and marked **EXHIBIT "H."**

#### **IMPROVEMENTS TO MUD POND PARCEL**

26. The Mud Pond Parcel contains the following improvements:
- a. **MUD POND OUTLET CAMP.** The Mud Pond Parcel is improved by a hunting camp constructed in 1918 near the Mud Pond Outlet Brook Rapids. The camp is regularly used by the recreational owners of the property. A photo of the Mud Pond Outlet camp is attached hereto and marked **EXHIBIT "I."**
  - b. **FOOTBRIDGE.** The Mud Pond Parcel is also improved by a footbridge constructed across the head of the Mud Pond Outlet Brook Rapids by the owners of the 1974 Recreational Rights, as shown on the photo attached hereto and marked **EXHIBIT "J."**
  - c. **UPLAND PORTAGE AROUND MUD POND BROOK RAPIDS.** An upland portage trail outside of the mean high water mark of the Mud Pond Outlet Brook Rapids has been cleared and constructed by the recreational owners of the property.

#### **VI. RECENTLY ACQUIRED FOREST PRESERVE CONTIGUOUS TO MUD POND PARCEL**

##### **LAKE LILA TRACT: 1979 ACQUISITION BY THE STATE OF NEW YORK**

27. Upon information and belief, William Seward Webb became the owner of land adjoining the Mud Pond Parcel in the years 1891-1895, and thereafter, his successors and assigns conveyed such land to The Nature Conservancy ("TNC") by deed dated October 9, 1978 and recorded in the Hamilton County Clerk's Office on November 2, 1978 in Book 174 of

Deeds at page 294. William Seward Webb and his successors and assigns, including TNC, possessed no rights in the Mud Pond Parcel.

28. In the year 1979, TNC conveyed to The People of the State of New York (the "State") a large tract of land adjoining the Mud Pond Parcel by deed dated June 6, 1979 and recorded in the Hamilton County Clerk's Office in Book 175 of Deeds at page 692 (hereinafter the "Lake Lila Tract"). The deed from TNC to the State did not convey any rights in the Mud Pond Parcel.

**LOCATION AND PHYSICAL FEATURES OF  
SHINGLE SHANTY BROOK ON LAKE LILA TRACT**

29. The Lake Lila Tract adjoins the Mud Pond Parcel and is located on the northwesterly and northeasterly boundaries of the Mud Pond Parcel, as shown the DEC map attached as Exhibit "A" referred to above.
30. As shown on the DEC Map, a stretch of the Shingle Shanty Brook runs from the northerly boundary of the Mud Pond Parcel in a northwesterly direction to Lake Lila. Shingle Shanty Brook has many winds and turns in this stretch and is obstructed by at least ten beaver dams between the Mud Pond Parcel boundary and Lake Lila.
31. The stretch of the Shingle Shanty Brook between the Mud Pond Parcel boundary and Lake Lila has never been used for commercial purposes and is not susceptible to commercial use.

**SHINGLE SHANTY BROOK ON THE LAKE LILA TRACT WAS  
NEVER USED FOR LOGGING OR OTHER COMMERCIAL PURPOSES**

32. The portion of the Shingle Shanty Brook located on the Lake Lila Tract was never used to float logs to market and is not susceptible to such use or any other commercial use.



33. In order to commercially extract the timber resource from the Lake Lila Tract north of Township 39, between 1904 and 1910, the lumberman Patrick C. Moynehan harvested pine in the Shingle Shanty Brook lowlands and constructed two bridges to get the wood out. One bridge crossed the Shingle Shanty Brook near an improvement known as "Hunter's Lodge," and the other bridge crossed the Mud Pond Outlet Rapids above described. The harvested pine was hauled to Nehasane Lake, boomed to the southern end of the lake, and then shipped on the New York Central Railroad to market. No log floating was conducted on either the Shingle Shanty Brook or on the Mud Pond Outlet Brook.

**WHITNEY TRACT: 1998 ACQUISITION BY THE STATE OF NEW YORK**

34. Upon information and belief, William C. Whitney became the owner of land adjoining the Mud Pond Parcel in the year 1897, and thereafter his executors transferred the land into a company known as Whitney Realty Company, which subsequently changed its name to Whitney Industries, Inc. and, later on, to Whitney Industries, LLC. Whitney Industries, LLC possessed no rights in the Mud Pond Parcel.
35. In the year 1998, Whitney Industries, LLC conveyed to The People of the State of New York (the "State") approximately 14,750 acres of land adjoining the Mud Pond Parcel, by deed dated May 29, 1998 and recorded in the Hamilton County Clerk's Office on June 1, 1998 in Book 217 of Deeds at page 101 (hereinafter referred to as the "Whitney Tract"). The deed from Whitney Industries, LLC to the State did not convey any rights in the Mud Pond Parcel.

**LOCATION AND PHYSICAL FEATURES OF LILYPAD POND  
ON THE WHITNEY TRACT**

36. The main body of Lilypad Pond is located on the Whitney Tract, but the Narrows portion of the pond is located on the Mud Pond Parcel.
37. Lilypad Pond outlets and flows into the privately-owned Mud Pond at a location approximately 45 feet wide over an old beaver dam, as shown in the photo set forth as Exhibit "C."
38. Lilypad Pond has no navigable inlet and Mud Pond has no navigable outlet, so access to the Lilypad Pond/Mud Pond Water complex is isolated and not navigable-in-fact.
39. The general public has no right to travel on the surface waters of Lilypad Pond inside of the boundary line of the Mud Pond Parcel.
40. Lilypad Pond has no history of commercial use and is not susceptible to commercial use, for it is a remote Adirondack pond in the middle of the wilderness with no navigable inlet and no navigable outlet on public lands.
41. Lilypad Pond is not designated as a wild, scenic or recreational river pursuant to authority contained in the Environmental Conservation law.
42. The general public has no need to use the surface waters of Lilypad Pond for commercial use or for a route for trade and travel.

**LILYPAD POND ON THE WHITNEY TRACT NEVER USED  
FOR LOGGING OR OTHER COMMERCIAL PURPOSES**

43. Lilypad Pond and the Mud Pond Waterway have never been used to float logs to market and are not susceptible to such use or any other commercial use.

44. In order to commercially extract the timber resource from the Lilypad Pond vicinity of the Whitney Tract, in the years 1934 - 1939 an agreement was in effect between the Whitney Tract owners and the predecessors in interest of the Plaintiffs herein to construct a railroad across Township 39 on the old Mac-A-Mac Railroad bed and for the new construction of a rail bed on Township 39 easterly to the Whitney Tract boundary, where the railroad was then extended to the eastern side of Rock Pond on the Whitney Tract, all as shown on Exhibit "H" above.

**LILYPAD POND / SHINGLE SHANTY BROOK PUBLIC PORTAGE  
ON WHITNEY TRACT**

45. In the year 1998, Department of Environmental Conservation (the "DEC") published a report entitled "William C. Whitney Area Stewardship Management Plan" (the "Plan") dated June 1, 1998, in which it was stated under the heading of "Detailed Management Proposals" at page 24 the following: "(3) Mark carry trail to Shingle Shanty Brook. Canoe Carry Trail (yellow markers) - .7 miles from the northern shoreline of Lilypad Pond to Shingle Shanty Brook. This short carry on an existing trail will provide the public an opportunity to access Lake Lila while avoiding problems and navigation rights issues over the Brandreth lease on IP lands in the vicinity of Mud Pond." A copy of page 24 of the Plan is attached hereto and marked **EXHIBIT "K."**

46. In the year 2008, after the acquisition by the State of the Lake Lila and Whitney Tracts, the State officially stated on the DEC website that "a canoe trail will be marked from the northern shoreline of Lilypad Pond to Shingle Shanty Brook for the more adventurous who may want to paddle to Lake Lila," all as set forth in a printout of the DEC website on August 8, 2008, a copy of which is attached hereto and marked **EXHIBIT "L."**



47. The Lake Lila and Whitney Tracts are contiguous properties, so after the 1998 acquisition of the Whitney Tract, the two tracts were joined together and became part of the forest preserve. Both the Lake Lila tract and the Whitney Tract are depicted on the DEC Map referred to above as Exhibit A.
48. The DEC constructed an approximate 3/4 mile long canoe carry trail that connected the State-owned portion of Shingle Shanty Brook with the State-owned portion of Lilypad Pond (hereinafter referred to as the "Public Portage").
49. The Lilypad Pond end of the Public Portage is clearly marked with a large white sign, as evidenced by the photo attached hereto and marked **EXHIBIT "M."**
50. The Shingle Shanty Brook end of the Public Portage is clearly marked with a large white sign and yellow State trail markers, as evidenced by the photo attached hereto and marked **EXHIBIT "N"**
51. There is a well-worn and marked path marking the trail of the Public Portage between Lilypad Pond and Shingle Shanty Brook, as evidenced by the photo attached hereto and marked **EXHIBIT "O."**
52. The Public Portage is depicted on the DEC Map at Exhibit A above and also on page 156 of the "Adirondack Paddler's Guide," Second Edition (2008) (hereinafter the "Paddler's Guide" or "PG"), where it is designated as P #5. Copies of pages 150-159 of the Paddler's Guide are attached hereto and marked **EXHIBIT "P."**
53. The State constructed the Public Portage for the benefit of the Defendant Phil Brown and the other Defendants, as well as for other members of the general public, so they could paddle from Little Tupper Lake to Lake Lila, and vice versa.

54. By traveling across the Public Portage, a hiker/paddler can lawfully remain on the newly acquired State land (1998) and enjoy the waters of Shingle Shanty Brook and Lilypad Pond. A photo of a Vermont Boy Scout troop lawfully utilizing the Public Portage on June 22, 2010 is attached hereto and marked **EXHIBIT "Q."**

**"WHITNEY LOOP"**

55. The Paddler's Guide provides information about a multitude of paddling opportunities on lands open to the general public in the Adirondack Park, one of which opportunities is referred to as the "Whitney Loop." See pages 150-159 of the Paddler's Guide contained in Exhibit "P" above.
56. The water bodies of the Whitney Loop relevant to this action are Little Tupper Lake, Rock Pond Outlet, Rock Pond, Hardigan Pond, Salmon Lake Outlet, Little Salmon Lake, Lilypad Pond, Shingle Shanty Brook, and Lake Lila.
57. The Narrows of Lilypad Pond, Mud Pond, Mud Pond Outlet and the portion of Shingle Shanty Brook on the Mud Pond Parcel referenced above are not shown in the Paddler's Guide as being part of the Whitney Loop.
58. As described in the Paddler's Guide, the Whitney Loop has a "wildness rating" of 10 (PG - 150), the highest degree of wilderness, with access points at Little Tupper Lake and Lake Lila, and with the "Lila Traverse" requiring "one or two nights" (PG - 151).
59. The "put-in and take-out" options for the Whitney Loop are at DEC Whitney area headquarters on Little Tupper Lake or on Lake Lila, both of which require extensive driving trips in the first instance before arriving at any water.

60. After the put-in on either Little Tupper Lake or Lake Lila, there are five separate portages on the Whitney Loop over a watershed divide between the Black River watershed and the Raquette River watershed as follows (PG - 153, 156-157):

<u>PORTAGE NO.</u>	<u>TO / FROM</u>	<u>DISTANCE</u>
1	Rock Pond Outlet Rapids	0.1 miles
2	Rock Pond / Hardigan Pond	1.75 miles
3	Hardigan Pond Outlet / Salmon Lake Outlet	0.4 miles
4	Little Salmon Lake Outlet / Lilypad Pond	0.4 miles
5	Lilypad Pond / Shingle Shanty Brook	0.77 miles

61. Upon information and belief, the walking distance for Portage # 2, Rock Pond to Hardigan Pond (1.75 miles), is greater than the straight line paddling distance on Rock Pond and greater than the straight line paddling distance on Hardigan Pond.
62. Upon information and belief, the walking distance of Portage #5, Lilypad Pond to Shingle Shanty Brook, is greater than the straight line paddling distance on Lilypad Pond and Little Salmon Lake.
63. The Whitney Loop is a newly developed trip and trail route created in modern times as a result of the 1998 acquisition by the State of the Whitney Tract. The Whitney Loop requires walking and hiking over a watershed divide where the flow of water is in two different directions and in two different watersheds, the Black and the Raquette. As such, the Whitney Loop is not a free flowing and continuous waterbody.
64. As part of the forest preserve, the use of the Whitney Loop for private revenue or commercial purposes is prohibited [9 NYCRR §190.8(a)].



65. As part of the forest preserve, the "put-in" and "take-out" at Little Tupper Lake and Lake Lila cannot be used in trade, for no person shall conduct any business at a boat launching site [9 NYCRR §190.24].
66. As part of the forest preserve, within the Whitney Loop it is unlawful for any person to camp anywhere except at an officially designated campsite marked by an official sign, and it is unlawful to camp in a group larger than eight people [9 NYCRR §190.3(b)(5)(6)], thereby making travel very restrictive.
67. By virtue of its physical, environmental, and legal limitations, the Whitney Loop is not a necessary or natural route for trade or travel over a continuous flowing waterway and cannot be used for travel without extensive hiking over long overland distances and severe limitations and legal restrictions. Trade is prohibited on the Whitney Loop.

**NO COMMERCIAL USE OF SHINGLE SHANTY BROOK  
OR MUD POND WATERWAY**

68. Neither the Shingle Shanty Brook, as it flows over the Lake Lila Tract, nor the Mud Pond Waterway, nor any of the tributaries or headwaters thereof, has any history of commercial use or use for trade and/or travel and neither is susceptible to commercial use or trade and/or travel.
69. Because of the inability of the Shingle Shanty Brook and The Mud Pond Waterway to be used in commerce, railroads were necessary to be constructed and utilized to facilitate the extraction of the timber resource from the Whitney Tract and the Mud Pond Parcel.

**FIRST CAUSE OF ACTION:  
TRESPASS**

70. The Plaintiffs repeat and reallege each and every allegation above stated.

71. Upon information and belief, the Defendant Phil Brown is the Editor of a bi-monthly newspaper known as the "Adirondack Explorer" that is in the business of advocacy and getting the word out.
72. Upon information and belief, during the month of May in the year 2009, the Defendant Phil Brown paddled his canoe or kayak in the vicinity of the Whitney Loop above described.
73. Upon information and belief, during the month of May in the year 2009, the Defendant Phil Brown had the opportunity to lawfully traverse the Whitney Loop by utilizing the Public Portage between Lilypad Pond and Shingle Shanty Brook constructed for his benefit by the State.
74. Upon information and belief, during the month of May in the year 2009, unlike the law-abiding Vermont Boy Scout Troop shown on Exhibit Q above, the Defendant Phil Brown chose not to use the Public Portage constructed for his benefit by the State.
75. Upon information and belief, during the month of May in the year 2009, the Defendant Phil Brown paddled to the boundary line of the Mud Pond Parcel and saw the "No Trespassing" signs that marked the boundaries of the Mud Pond Parcel.
76. Upon information and belief, the Defendant Phil Brown chose to ignore the "No Trespassing" signs that marked the boundary lines of the Mud Pond Parcel.
77. Upon information and belief, the Defendant Phil Brown paddled past the "No Trespassing" signs and knowingly and unlawfully entered upon the privately-owned Mud Pond Parcel with the intention of deriving personal satisfaction and commercial gain from his trespass. More particularly, during the month of May in the year 2009, the Defendant Phil Brown:

- a. Trespassed on the Mud Pond Parcel by penetrating the boundary line of the Mud Pond Parcel inside of the Lilypad Pond/Shingle Shanty Brook boundary lines;
  - b. Trespassed and used and enjoyed the portion of the surface waters of Lilypad Pond located on the Mud Pond Parcel;
  - c. Trespassed and used and enjoyed the privately-owned surface waters of Mud Pond;
  - d. Trespassed by getting out of his floating vessel and stepping foot on the privately-owned Mud Pond Parcel;
  - e. Trespassed by walking on and using and enjoying the privately-owned Mud Pond Parcel for his personal joy and satisfaction;
  - f. Trespassed and used and enjoyed the privately-owned Mud Pond Outlet Waterway, including boating through a beaver dam;
  - g. Trespassed and used and enjoyed the privately-owned Shingle Shanty Brook including boating through another beaver dam.
78. On or about July/August 2009, after the multiple trespasses alleged above, and for commercial gain, the Defendant Phil Brown caused to be published in the July/August 2009 issue of the "Adirondack Explorer" a narrative and pictorial account boasting of his illegal and unlawful trespasses and flaunting his use and enjoyment of the privately-owned Mud Pond Parcel.
79. On November 18, 2009, the Defendant Phil Brown posted an article or editorial on the "Adirondack Explorer" website, without seeking a ruling from a court of law, wherein he advocated to the public at large that the privately-owned Mud Pond Parcel and the Mud



Pond Waterway located thereon were navigable-in-fact under New York law. The Defendant Phil Brown has continued to advocate the position that his trespasses were lawful and that he and other members of the general public have the right to travel over the privately-owned Mud Pond Parcel.

80. Following the trespasses of the Defendant Phil Brown and his public advocacy in the "Adirondack Explorer," at least ten (10) additional trespassers have entered upon the Mud Pond Parcel and used and enjoyed the Mud Pond waterway including the Jane Doe (lady in red) referred to in the caption who lounged on the rocky shore of Mud Pond for an extended period of time.
81. Phil Brown continues to commercially exploit his trespasses on the Mud Pond Parcel by virtue of the recent article in the November/December 2010 "Adirondack Explorer" entitled "DEC sides with paddlers," (page 5), wherein he specifically identifies the "Lila Traverse" of the Whitney Loop above identified and labels the Public Portage constructed for his benefit as a "Portage Avoided" (page 49). Encouraging others to avoid the lawfully constructed Public Portage is an exacerbation of his trespasses and the commercial exploitation thereof. See "Lila Traverse" attached hereto and marked "EXHIBIT "R."
82. Upon information and belief, Phil Brown has commercially benefitted by his trespass and advocacy through sales of the "Adirondack Explorer" and, in addition, has incited and induced members of the general public to act unlawfully by trespassing on the Mud Pond Parcel.

83. Upon information and belief, the Defendants and their like-minded followers intend to continue their trespasses on the Mud Pond Parcel to the detriment of their Plaintiffs and their historical and legal private property rights.

84. By reason of the foregoing, the Plaintiffs have or will sustain damages.

**SECOND CAUSE OF ACTION:**  
**DETERMINATION OF CLAIMS TO REAL PROPERTY**

85. The Plaintiffs repeat and reallege each and every allegation above stated.

86. Upon information and belief, in order to absolve their trespasses, the Defendants claim that the Mud Pond Waterway is navigable-in-fact, according to their extreme and incorrect interpretation of the common law of the State of New York.

87. The Mud Pond Waterway is not navigable-in-fact but is the exclusive private property of the Plaintiffs and is not open to the public or trespassers like the Defendants.

88. The claim by the Defendants that the Mud Pond Waterway is navigable-in-fact is invalid and of no force and effect.

**THIRD CAUSE OF ACTION:**  
**DECLARATORY JUDGMENT**

89. The Plaintiffs repeat and reallege each and every allegation above stated.

90. The Plaintiffs seek a declaratory judgment from the court to the effect that the Mud Pond Waterway is not navigable-in-fact and that the Defendants and the general public be forever barred from the use of the Mud Pond Waterway and entry upon the Mud Pond Parcel.

WHEREFORE, the Plaintiffs demand judgment as follows:

- A. On the first cause of action, that the Defendants be awarded compensatory and/or punitive damages in an amount equal to the costs, expenses and reasonable attorneys' fees incurred by the Plaintiffs to protect their legal and historical property rights and to prevent the Defendants and others from unlawfully trespassing on and using the Mud Pond Parcel.
- B. On the second cause of action, that the Defendants and all persons claiming under them be forever barred from all claims to an estate or interest in the Mud Pond Parcel and/or the Mud Pond Waterway, and that it be adjudged and finally determined that the Plaintiffs, other than FOTL, are the lawful owners and are vested with the exclusive recreational rights to the Mud Pond Parcel free of any claim by the Defendants.
- C. On the third cause of action, a declaratory judgment be entered herein that:
- (1) the portion of Lilypad Pond on the Mud Pond Parcel, Mud Pond, Mud Pond Outlet Rapids, Mud Pond Brook and Shingle Shanty Brook, as within the boundary lines of the Mud Pond Parcel, are not navigable-in-fact under New York Law and that, therefore, a common law easement in favor of the public does not exist on or over the Mud Pond Waterway, and, alternatively,
  - (2) that the start of the Mud Pond Outlet Rapids at the outlet of Mud Pond is not navigable-in-fact under New York Law and, therefore, a common law easement in favor of the public does not exist on or over the aforesaid stretch of the stream, and, alternatively,
  - (3) that if said streams or stream sections are declared navigable in fact, that the public does not have the right to travel above the mean high water mark except as

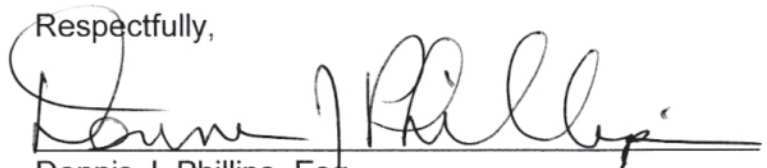


is necessary to travel around the footbridge that presently exists across the Mud Pond Outlet.

- D. On all causes of action, that the Plaintiffs recover their costs, disbursements, and allowances against any and all defendants answering or intervening in this action.
- E. On all causes of action, that the Plaintiffs have such other and further relief as to the court may be just, equitable and proper.

Dated: November 15, 2010

Respectfully,

A handwritten signature in black ink, appearing to read "Dennis J. Phillips", written over a horizontal line.

Dennis J. Phillips, Esq.  
McPHILLIPS, FITZGERALD & CULLUM L.L.P.  
Attorneys for Plaintiffs  
288 Glen Street, P.O. Box 299  
Glens Falls, New York 12801  
Tel. (518) 792-1174