STATE OF NEW YORK
SUPREME COURT CHAMBERS
FULTON COUNTY COURTHOUSE

FACSIMILE TRANSMITTAL SHEET

TO:	FROM:
John W. Caffry, Esq.	Hon. Richard T. Aulisi
COMPANY:	DATE:
Caffry & Flower	December 20, 2018
FAX NUMBER:	TOTAL NO. OF PAGES, INCLUDING COVER:
(518) 793-0541	27
RE:	
Friends of Thayer Lake	

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

STATE OF NEW YORK
SUPREME COURT CHAMBERS
FULTON COUNTY COURTHOUSE
223 WEST MAIN STREET
JOHNSTOWN, NY 12095

RICHARD T. AULISI
JUSTICE

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December 20, 2018

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Re: Friends of Thayer Lake LLC, vs. Phil Brown and The State of New York and the New York State Department of Environmental Conservation
Hamilton County Supreme Court
Index #6803-10, RJI #17-1-11-0078

Dear Counselors:

Enclosed herewith please find a copy of the Court's Decision with regard to the matter above referenced. I am, by a copy of this letter, forwarding the original Decision to the office of the Hamilton County Clerk for filing. The plaintiffs are to submit a judgment consistent with the Court's decision, on notice to the defendants.

The plaintiffs are to make arrangements to secure and file the trial exhibits currently in the possession of the Court.

Thank you.

Very truly yours,

RICHARD T. AULISI
Justice

RTA/tb
enc.
cc: Jane S. Zarecki, Hamilton County Clerk

STATE OF NEW YORK
SUPREME COURT COUNTY OF HAMILTON

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

Plaintiffs,

-vs-

PHIL BROWN AND JANE DOE, AND ANY OTHER PERSON KNOWN OR UNKNOWN,

Defendants,

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

Interveners-Defendants.

DECISION

Index # 6803-2010
RJI # 17-1-11-0078

Findings of Fact:

Plaintiffs are the collective owners of real property in a remote area of the Adirondack Mountains in the Town of Long Lake, Hamilton County. The land was conveyed by defendant, State of New York, to Benjamin Brandreth in 1851 and has remained in the private ownership and control of descendants of the Brandreth family. The property is bounded on the north by the William C. Whitney Wilderness Area (hereinafter "Wilderness Area"), which, according to the Adirondack Park State Land Master Plan, consists of approximately 19,500 acres of state forest preserve land.

The Wilderness Area was privately owned, at least during the twentieth century, until fully acquired by the State in 1998. The Wilderness Area comprises of a network of lakes, ponds, streams and canoe carry trails. Of particular importance to the instant action, is a canoeing waterway known as the Lila Traverse Section of the Whitney Loop. The Lila Traverse permits canoeists to travel across a network of lakes, ponds, streams and canoe carry trails maintained by defendant, New York State Department of Environmental Conservation

(hereinafter "DEC"), between Little Tupper Lake on the Wilderness Area's eastern side and Lake Lila on the western side.

Here, the parties are in dispute over a 1.89 mile-long system of ponds and streams within the Lila Traverse that crosses plaintiffs' property. The disputed area includes the western portion of Lilypad Pond (including "the Narrows")[1], Mud Pond, the outlet of Mud Pond (a/k/a Mud Pond Outlet Brook), and a portion of Shingle Shanty Brook from its confluence with the Mud Pond Outlet to the disputed waterway's northwestern boundary with the Wilderness Area. During the trial the parties primarily referred to the disputed area as "the disputed waterway"; however, the same area has previously been referred to as "the Mud Pond Waterway" by this Court, the Appellate Division, Third Department and the Court of Appeals. In an effort to be consistent with the trial record, this Court will hereinafter refer to the disputed area as the disputed waterway.

The disputed waterway crosses the northernmost corner of plaintiffs' property between two water bodies in the Wilderness Area: Lilypad Pond on the northeast and Shingle Shanty Brook on the northwest. As mentioned above, both bodies of water are part of the Lila Traverse; therefore, the DEC constructed a 0.8-mile State carry trail in order to permit canoe travelers to avoid the disputed waterway and complete the Lila Traverse without entering the plaintiffs' property.

In May 2009, defendant, Phil Brown (hereinafter "defendant Brown"), canoed through the disputed waterway in exploration of its navigability. Defendant Brown, editor of Adirondack Explorer, published an article in said magazine about his May 2009 trip called "Testing the Legal Waters." Plaintiffs subsequently commenced the subject action for trespass, among other things, against defendant Brown on November 15, 2010. Thereafter, the defendant State of New York and the DEC (hereinafter collectively "defendant State") intervened, arguing that even though the disputed waterway is located on privately owned property, it is navigable-in-fact and therefore open to public use.

The instant action has proceeded through a well-litigated course. The ultimate issue is whether the disputed waterway is navigable-in-fact under the common law of the State of New York. Notably, the recent trial took place upon the directive of the Court of Appeals, which determined that summary judgment was inappropriate - especially, given that more than one conclusion could be drawn from the extensive record (see Friends of Thayer Lake LLC v Brown, 27 NY3d 1039 [2016]). To that end, the Court of Appeals tasked this Court to hear and determine the parties competing evidence concerning five factual allegations it deemed to be "not conclusive" (Id. at 1044). Specifically, the [disputed w]aterway's historical and prospective commercial utility, the [disputed w]aterway's historical accessibility to the public, the relative ease of passage by canoe, the volume of historical travel, and the volume of prospective

[1] The Narrows is a portion of Lilypad Pond, that can be as narrow as one-hundred feet wide (see Trial Transcript 925:22-24; State Exhibit P:1).

commercial and recreational use" (Id.).

The 14-day bench trial commenced on August 20, 2018 and concluded on September 26, 2018. After hearing the parties proof and reviewing their post-trial submissions, this Court hereby finds the following facts:

1. On May 20 and 21, 2009, defendant Brown went on a two-day canoe trip in the western Adirondacks (see Trial Transcript 535:3-11; 1607:13-17). He started his excursion at the Whitney Headquarters (see Trial Transcript 537:11-15, 1608:13-18), where he first traveled across Little Tupper Lake and finished on Lake Lila (see Trial Transcript 561:6-13; 1608:19-25).[2]

2. During the course of his trip, defendant Brown entered the plaintiffs' property, where he knowingly opted against using the above-referenced DEC constructed 0.8-mile State carry trail. Instead, he crossed Lilypad Pond[3] and Mud Pond by canoe, traveled by foot across the a carry trail constructed by the plaintiffs on the plaintiffs' property to avoid a 500 foot stretch of rapids of the Mud Pond Outlet Brook, and re-entered the water, where he paddled down the Mud Pond Outlet Brook and Shingle Shanty Brook until he reached the State property line (see Trial Transcript 553:16-18; 554:22-555: 1; 556:6-557:6; 559:13-560:2; 1618:17-1679:3; 1619:22-25; 1622:2-1323:6; 1626:11-1629:3).

3. There is a rock ledge at the western end of Mud Pond (see Trial Transcript 1326:2-11, 1623:3-6; Plaintiffs' Exhibit 36, pages 41, 99; State Exhibit N:10, O:9, X:1). The outlet of the Mud Pond flows over the ledge and enters approximately 500 feet of rapids (see Trial Transcript 103:6-10; 121:14-122:25; 636:16-17; Plaintiffs' Exhibits 36, pages 41-42 and KK:2-6; State Exhibits K and L). Since the rapids are not navigable, the plaintiffs constructed a carry trail around the rapids (see Trial Transcript 103:11-15; 297:13-14; 556:23-25; 617:13-19; 902:25-903:6; 926:15-22). At the foot of the rapids, the Mud Pond Outlet Brook becomes flat water and continues to its confluence with Shingle Shanty Brook (see Trial Transcript 1627:5-1628:14; 2106:16-22; 2111:18-2112:13; 1627:5-1628:10; Plaintiffs' Exhibit 36, pages 94-97; State Exhibits O:11, N:14, T, Z:1-2). Some distance downstream from the confluence, Shingle Shanty Brook crosses the property line from the plaintiffs' private property to State owned land (see Trial Transcript 1628:23-1629:3; 1750:4-21; Plaintiffs' Exhibit 8; State Exhibits K and L).

Issue: Whether the Disputed Waterway is Navigable-In-Fact Under the Common Law of the State of New York

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[2] This route is commonly referred to as the Lila Traverse (see Trial Transcript 564:13-17; Defendant Brown Exhibit 42).

[3] Lilypad Pond falls on public land; however, a channel (or the Narrows) connects Lilypad Pond to Mud Pond (see Trial Transcript 554:22-555:1; 556:6-556:10). The boundary between the plaintiffs' property and the State's property crosses this channel. The western end of the channel and Mud Pond are located on the plaintiffs' property (see Trial Transcript 1619:22-1622:8; State Exhibits K and L).

4. "As a general principle, if a waterway is not navigable-in-fact, 'it is the private property of the adjacent landowner' (Friends of Thayer Lake LLC v Brown, 27 NY3d 1039, 1042 [2016] quoting Adirondack League Club v Sierra Club, 92 NY2d 591, 601 [1998]). Conversely, if a waterway is navigable-in-fact, "it is considered a public highway, notwithstanding the fact that its banks and bed are in private hands" (Adirondack League Club v Sierra Club, 92 NY2d 591, 601 [1998] citing Morgan v King, 35 NY 454 [1866]).

5. "To be subject to this public easement, a waterway must provide practical utility to the public as a means for transportation, whether for trade or travel" (Friends of Thayer Lake LLC v Brown, 27 NY3d 1039, 1042 [2016] quoting Adirondack League Club v Sierra Club, 92 NY2d 591, 603 [1998]).

6. Of pertinent importance, and a strong issue of contention among the parties, is the extent recreational use can be considered in determining whether the disputed waterway is navigable-in-fact. The Court of Appeals has held that "recreational use should be part of the navigability analysis" (Adirondack League Club v Sierra Club, 92 NY2d 591, 604 [1998]; see Friends of Thayer Lake LLC v Brown, 27 NY3d 1039, 1042 [2016]). However, Adirondack League Club, *supra*, did "not broaden the standard for navigability-in-fact" (Id.), stating that "the central premise of the common-law rule remains the same - in order to be navigable-in-fact, a river must provide practical utility to the public as a means for transportation" (Id.), where "recreational use fits within it" (Id.).

Factor One: The Disputed Waterway's Historical and Prospective Commercial Utility

A. Historical Commercial Utility

7. The plaintiffs' property, including the disputed waterway, was open to the public until 1878 (see Trial Transcript 1169:10-12, 1171:6-16, 1179:20-1180:2).

8. In 1851, there is a published record that Jervis McEntee traveled on the Shingle Shanty Brook section of the disputed waterway, with a guide, Asa Puffer, and other individuals (see Trial Transcript 1172:6-1173:16, 1341:5-17, 2172:7-16; Brown Exhibits B pages 1-6 and P pages 3-4; State Exhibit M1).

9. In 1872, H. Perry Smith, with unnamed companions, including a guide, published about his travels from Lake Lila to Salmon Lake (see Trial Transcript 1208:11-1209:21; Plaintiffs' Exhibit 18:a-I; State Exhibit M1). There is no conclusive evidence that H. Perry Smith traveled on the disputed waterway during the aforesaid trip. Rather, Dr. Philip Terrie, historian, testified that the most direct route from Lake Lila to Salmon Lake is through the disputed waterway (see Trial Transcript 1210:13-15).

10. In 1877, Stevenson Constable, with his guide, Rubin Cary, traveled by boat on the disputed waterway (see Trial Transcript 1214:13-17, 1216:9-1217:3; Brown Exhibit C; State

Exhibit M5).

11. Pursuant to Dr. Terrie, apart from log driving, during the nineteenth century, recreational travel, involving a sportsman and a guide, was the most common type of commercial use of the Adirondack waterways (see Trial Transcript 1135:11-19).

12. Dr. Terrie defined recreational travel as "a sportsman would contract with a guide either previously by mail or upon showing up in the Adirondacks at a hotel and he would hire a guide who would furnish his boat and camping gear and often a deer hound or two to take him out into the woods, and if there were two sportsmen they would hire two guides, if there were three sportsmen, they would hire three guides and so on, and paid them by the day to take them camping and fishing and hunting" (Trial Transcript 1135:22-1136:7).

13. Dr. Terrie indicated that the guides were "expected to make sure [the sportsmen] got a deer, keep them alive, tell them stories and get them home again" (Trial Transcript 1137:21-23).

14. In 1888, Verplanck Colvin, Superintendent of the State Land Survey for New York State, performed a land survey, including work near the disputed waterway (see Trial Transcript 1153:6-23). Mr. Colvin had paid guides who worked as part of his crew (see Trial Transcript 1342:6-8). Mr. Colvin was paid by the State. The guides were paid by his allotment (see Trial Transcript 1342:10-13).

15. Mr. Colvin, along with his surveying crew and guides, began at Brandreth Lake, went to Salmon Lake, to Little Salmon and Lilypad Pond (see Trial Transcript 1153:6-9, 1225:1227:18). Mr. Colvin made a campsite between Little Salmon Lake and Lilypad Pond (see Trial Transcript 1231:9-10; Brown Exhibits D, E, F and G). Part of his crew went up to Lake Lila, by boat, to secure supplies and bring them back to the campsite (see Trial Transcript 1153:9-11). Dr. Terrie testified the crew used the disputed waterway to retrieve, transport and deliver said supplies (see Trial Transcript 1153:9-12, 1231:10-1233:17).

16. Dr. Terrie testified that, the need for part of Mr. Colvin's crew to secure supplies and bring them back to the work site, using the disputed waterway, was considered official duty as being part of the survey (see Trial Transcript 1153:6-18).

B. Perspective Commercial Utility

17. Peter Burns, owner of an outfitters business in Warren County, New York, testified that he would recommend the Lila Traverse route to his customers if the disputed waterway was accessible to the public (see Trial Transcript 1721:18-1722:4, 1758:-18). He further testified that, if the disputed waterway were open to the public, he would offer guided trips on the Lila Traverse (see Trial Transcript 1823:2-12).

18. Tyler Merriam is a licensed guide, who has guided canoe trips in the Wilderness Area

(see Trial Transcript 834:17:21). During the summer, Mr. Merriam works for Adirondack Lakes and Trails Outfitters (see Trial Transcript 832:22-23). Adirondack Lakes and Trails Outfitters is located in Saranack Lake, New York, and provides canoe and kayak rentals; instruction; guiding; and sells outdoor equipment, including canoes and kayaks (see Trial Transcript 833:22-834:3). Mr. Merriam testified that he would be interested in guiding a trip through the disputed waterway in the future (see Trial Transcript 928: 5-8).

19. Mr. Merriam testified that a private guide typically charges between $175 to $250 per day (see Trial Transcript 928:3-4).

20. Defendant DEC allows commercial guides in its wilderness areas (see Trial Transcript 1955:22-24), provided it is in compliance with the licensing guidelines established by the DEC (see Trial Transcript 1956:1-13, 2005:13-16). The licensing of guides is managed by the DEC's forest ranger program (see Trial Transcript 2006:21-24).

Factor Two: The Disputed Waterway's Historical Accessibility to the Public

21. Plaintiffs' ancestor Benjamin Brandreth acquired the 24,000+ acres of Township 39 of the Totten and Crossfield Purchase in the Adirondacks from the State of New York in 1851 (see Plaintiffs' Exhibits 30, 31). The property is known as Brandreth Park.

22. Until the 1870's and 1880's much of the land in the Adirondacks was considered to be a "commons" and was open to the public regardless of who owned it (see Trial Transcript 1125:23-1126:21).

23. Edward Comstock, Jr., historian, testified that Private Parks Law of 1871 "delineates that an entity, an individual or otherwise, who owns, in fee, a property in the Adirondacks had the right to post it and have it be his or her exclusive use and prohibit others from that use" (Trial Transcript 340:19-24). Around the time of the aforesaid law, large landowners began to close their lands and the waters on them from public use (see Trial Transcript 376:9-377:22, 1133:19-1134:15; Brown Exhibit Y, pages 149-151; Plaintiffs' Exhibit 38, pages 12-13 and 39).

24. Brandreth Park was open to the public between 1851 and 1878 (see Trial Transcript 1171:2-3). Brandreth Park was closed to the public in 1878 (see Plaintiffs' Exhibit 14 and 15; Brown Exhibits I, J and K).

25. Dr. Philip Terrie testified from the 1878 edition of Edwin R. (E.R.) Wallace's Descriptive Guide to the Adirondacks, stating that "Brandreth's shooting box and grounds no longer open to the public as the privilege was abused" (Trial Transcript 1250:4-6). Dr. Terrie further testified from the 1881 edition of E.R. Wallace's guide book and said "Brandreth's shooting box and grounds no longer open to the public as privilege was abused. Sportsmen will not trespass upon this preserve which embraces all of Township 39, some twenty-four thousand acres" (Trial Transcript 1251:3-7).

26. Like Brandreth Park, the Whitney Tract and the Lake Lila Tract were closed off to the public around 1878. The Whitney Tract is located in Whitney Park and is comprised of Little Tupper Lake and a majority of the Lila Traverse. The Lake Lila Tract is located in Nehasane Park and is comprised of the lower reaches of Shingle Shanty Brook, Lake Lila, the Beaver River and Nehasane Lake (formerly known as Albany Lake) (see Trial Transcript 376:5-377:22; Plaintiffs' Exhibit 38, pages 12-13; Brown Exhibit 4, pages 151, 153-154).

27. In 1978, the State of New York acquired the Lake Lila Tract, adjoining Brandreth Park. It became part of the forest preserve, thereby reopening it to the public (see Plaintiffs' Exhibits 20, 32, 33 and 38).

28. In 1998, the State of New York acquired the Whitney Tract, adjoining Brandreth Park. It became part of the forest preserve, thereby reopening it to the public (see Plaintiffs' Exhibits 20, 33 and 39).

29. The Lake Lila Tract and the Whitney Tract adjoin each other, and were consolidated as the William C. Whitney Wilderness Area (i.e., "Wilderness Area", *supra*) for management purposes (see Id.).

30. The Wilderness Area is situated north of the disputed waterway (see Id.).

31. Before the creation of the Wilderness Area, there were no public roads that would access Mud Pond (see Trial Transcript 169:10-14).

Factor Three: The Relative Ease of Passage by Canoe

A. Maintenance of the Disputed Waterway

32. In 1995, a derecho blew down multiple trees blocking navigation in various areas throughout approximately 600 feet of the disputed waterway (see Trial Transcript 109:16-17; 111:19-23, 115:10-25, 121:14-20; Plaintiffs' Exhibit 19).[4] [5]

33. In 1999, the plaintiffs did a major clean-up with chainsaws to clear the passageway (see Trial Transcript 112:1-3). During said clean-up, the plaintiffs cut more than twenty good-sized trees (see Trial Transcript 112:7-10).

34. On other occasions, the plaintiffs cut fallen trees and impediments on the disputed

[4] The 600 foot section of the disputed waterway is commonly referred to, in this litigation, as the Mud Pond Outlet Brook connecting to the Shingle Shanty Brook via a confluence.

[5] Fallen trees also cluttered the 500 foot carry trail on plaintiffs' property (see Trial Transcript 122:1-15).

waterway (see Trial Transcript 113:17-114:8, 115:25-116:18, 218:19-219:9, 299:1-4).

35. Plaintiffs practice is to remove obstacles, to the extent they can, on the disputed waterway (see Trial Transcript 225:12-17).

B. Mud Pond

36. Bernard Carr, an environmental scientist employed by Terrestrial Environmental Specialists, inspected Mud Pond on August 4, 2017. His inspection included observing wetland vegetation, hydric soils and wetland hydrology (see Trial Transcript 451:22-24, 453:10-16, 477:9-12).

37. Mr. Carr testified that, in its ordinary state, Mud Pond is a shallow pond covered with vegetation from shore to shore (see generally Trial Transcript 487:22-23). Mr. Carr further testified that Mud Pond contains a lot of "muck" or organic material (see Trial Transcript 462:22-463:1), and due to its depth, it is prone to plant communities that are shallow water aquatic and shallow emergent marshes (see Trial Transcript 482:1-15).[6] [7]

38. Donald B. Potter, Jr., a member of the plaintiffs, who was referred to as "Bran" during the trial, has paddled on Mud Pond approximately twenty-five to thirty times during the spring, summer and fall seasons (see Trial Transcript 95:17-23). Bran testified that Mud Pond is "the shallowest pond in my experience and that experience would involve more than a dozen bodies of water on the Brandreth Park" (Trial Transcript 96:23-97:1). Bran further testified that "Mud Pond is variable in the going. Sometimes it's easy to paddle, sometimes it's not . . ." (Trial Transcript 97:6-8).

39. On August 5, 2016, Bran paddled on Mud Pond, and indicated that the pond was shallow on that day (see Trial Transcript 93:20). When asked about his method of moving the canoe through Mud Pond on that day, Bran testified "[p]addling with a shallow depth and pushing as with a paddle as a pole and propelling the boat forward by pushing backwards on the bottom of the pond" (Trial Transcript 95:2-5; see Trial Transcript 94:24-25). Bran utilized this method of paddling in most of the pond that day (see Trial Transcript 95:8-10).

40. Christopher Potter, a member of the plaintiffs, has paddled on Mud Pond. He described Mud Pond as ". . . shallow with a muddy bottom and commonly when one is paddling on Mud Pond one is poling the mud on the bottom of the pond as the boat plows through the

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[6] Mr. Carr defined emergent marsh as "a marsh with shallow depths and plants that emerge above the surface" (Trial Testimony 483:8-9).

[7] Plaintiffs' Exhibit 23 is a photograph that corroborates Mr. Carr's observations of a real dense matter of aquatic vegetation covering Mud Pond and the Narrows section of the disputed waterway (see Trial Transcript 517:1-6). Plaintiffs' Exhibit 23 was received in evidence over the defendants' collective objection with the understanding that it is just a picture of what State Exhibit B is.

muddy bottom" (Trial Transcript 293:16-20). He further testified that "[i]n high water there may be one area of the pond where, you know, the keel of the boat would be free of the bottom and it would be more like normal canoeing and paddling. In what I would call average to low conditions, you're always plowing through mud and aquatic vegetation, vegetation mats that float on the water . . ." (Trial Transcript 293:22-294:1-4).

41. Judson Potter, a member of the plaintiffs, has paddled on Mud Pond. With regard to a canoe trip he took in 2010, he testified Mud Pond is ". . . a very shallow pond so that involved a lot of poling and pushing paddles into the mud . . ." (Trial Transcript 399:4-6).

C. Mud Pond Outlet Brook and Shingle Shanty Brook

42. After exiting Mud Pond at the above-described rock ledge, the plaintiffs constructed a carry trail to avoid the 500 feet of rapids. Near the west end of the carry trail, there is a long, straight stretch of the Mud Pond Outlet Brook that contains many rocks, boulders and granite boulders (see Trial Transcript 123:5-8, 926:24-927:1).

43. The long, straight stretch, below the 500 feet of rapids, flowing downstream of the Mud Pond Outlet Brook is between 200 and 300 feet (see Trial Transcript 107:5-12, 298:17-19).

44. Christopher Potter testified "below the rapids that next three hundred feet is a stretch of the stream characterized by many boulders in the stream commonly protruding up out of the water as well as there being logs that have been clearly cut almost certainly by a chainsaw that are partially obstructing passage in the stream" (Trial Transcript 298:17-24).

45. Depending on the water level, some rocks are above or near the surface of the water (see Trial Transcript 123:5-8, 927:3-4, 2111:22-23).

46. Bran testified that "if we go through the long, straight stretch . . . , the going can be in low water pretty impossible for someone that wants to stay in their boat. You can drag your boat over that section" (Trial Testimony 123:15-18; Plaintiffs' Exhibit 6C).

47. Judson Potter considers the aforesaid rocks to be obstructions when canoeing (see Trial Transcript 441:2-9).

48. Tyler Merriam observed some rocks below the surface of the water. He did not hit any of the rocks, but indicated that the rocks made the water somewhat shallow - where he had to navigate around them in order to continue paddling downstream towards Shingle Shanty Brook (see Trial Transcript 926:24-927:8).

49. Michael Milgroom, paddled on the disputed waterway five times. Mr. Milgroom testified that, "[t]he area at the end of the portage is relatively narrow and there are rocks. There are rocks in the edges of the creek at that point" (Trial Testimony 1681:11-14). He testified that he had to go a bit slower than normal to pick his way through the rocks (see Trial Testimony

1682:5-9).

50. At times, there are beaver dams across the disputed waterway (see Trial Transcript 125:16-24, 626:22-627:3, 923:18-24[8]). Pursuant to the trial testimony, canoeists either got out of their canoe and pulled it over the dam or paddled over or through the dam (see Trial Transcript 409:17-410:14, 2112:1-4).

51. E.R. Wallace's guide book, first edition, published in 1872, described sections of the disputed waterway as "a desperately crooked stream, with its navigation considerably obstructed by flood jams" (i.e., Shingle Shanty Brook), and "[f]rom thence boats are generally towed or pulled one-half or three-fourths mile to the portage" (i.e., confluence with the Mud Pond Outlet Brook) (see Trial Transcript 1241:17-1242:22; Brown Exhibit X, page 5).

52. Dr. Philip Terrie testified that all subsequent editions of E.R. Wallace's guide books contained the same description with slight variations of punctuation and other trivia (see Trial Transcript 1243:1-4).

53. Donald Sipher, paddled on the disputed waterway. Mr. Sipher described Shingle Shanty Brook as "very twisty" (Trial Transcript 1389:21).

54. Tyler Merriam testified that Shingle Shanty Brook, on the plaintiffs' land, is "similar to the Shingle Shanty Brook on the State land except more narrow, a little bit more twisting and turning . . . [i]t was a little bit more enclosed than the open nature of the lower Shingle Shanty Brook as far as vegetation is concerned" (Trial Transcript 858:7-9,13-16).

55. Bran testified that "[m]ost of the Shingle Shanty Stream from the confluence with Mud Pond Stream to Lake Lila is tortuously curved" (Trial Transcript 126:24-127:1-2).

E. Estimated Water Flow

56. Christopher Gazoorian is a hydrologic modeler with the United States Geological Survey (USGS). Mr. Gazoorian presented hydrological modeling results showing water conditions on the dates that both plaintiffs' and defendants' witnesses paddled the disputed waterway. Specifically, he evaluated the relative water flow of the Shingle Shanty Brook and Mud Pond Outlet Brook section of the disputed waterway (see Trial Transcript 1838:13-1839:3, 1851:16-23).

57. Mr. Gazoorian used the New York Stream Estimation Tool (NYSET) software, which applies modeling methods to estimate relative stream flow of ungaged streams, i.e.,

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[8] Unlike the other cited references which are situated on Mud Pond Outlet Brook and Shingle Shanty Brook, this particular cited-reference speaks of a beaver dam situated at the Narrows entering Mud Pond section of the disputed waterway.

streams without gages to monitor their flow (see Trial Transcript 1852:14-1853:4). The USGS places streamgages in certain waterways to monitor its conditions where natural flow of the water can be described (see Trial Transcript 1847:3-5). The USGS has not placed streamgages in any of the water bodies of the disputed waterway (see Trial Transcript 1848:19-22, 1850:18-23).

58. NYSET employs the map correlation method, which estimates the correlation of flows between an ungaged location (here the disputed waterway) and a reference stream that has a gage (see Trial Transcript 1853:2-13). Mr. Gazoorian chose the Independence River at Donnattsburg, New York (see Trial Transcript 1870:15-20).

59. Mr. Gazoorian determined the results for nineteen separate boat trips on the disputed waterway, that were taken on eighteen different days - ranging from May 21, 2009 through October 27, 2017 (see State Exhibit W). In forming his estimates, Mr. Gazoorian used relative flows from the Independence River gage based on the historical records as a representative of the relative flows at the disputed waterway on the particular dates (see Trial Testimony 1876:11-21).

60. Mr. Gazoorian estimated that out of the eighteen days he tested, eleven days fell within the normal to moderate range (i.e., between the 39th and 62nd percentiles for estimated flows) (see Trial Transcript 1885:9-1888:1, 1889:11-1894:14; State Exhibit W).[9]

61. Mr. Gazoorian estimated that four of the eighteen days can be classified as high or very high flows (see Trial Transcript 1894-15:1896:19, 1897:14-1898:4).[10]

62. No evidence was proffered comparing the estimated relative water flow of the disputed waterway with the relative water volume (or depth) of the disputed waterway on the aforesaid eighteen dates.

Factor Four: The Volume of Historical Travel

63. During the 1800's and early 1900's, the disputed waterway route appeared in Seneca Ray Stoddard's Map of the Adirondack Wilderness and E.R. Wallace's guide books (see Trial Transcript 1095:3-1097:3; Plaintiffs' Exhibits 13-16; Brown Exhibits H-K, Q-X).

64. E.R. Wallace wrote a series of guide books of the Adirondacks (see Trial Transcript

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[9] Those dates include: June 22, 2010 (Chris Amato/Judson Potter); July 25, 2014 (Michael Milgroom); August 18, 2015 (Tyler Merriam); October 26, 2017 (Peter Burns); October 27, 2017 (Peter Burns); July 16, 2013 (Donald Sipher; Tyler Merriam); August 4, 2013 (Brian Wolfe); August 19, 2014 (Michael Milgroom); July 15, 2013 (Richard Hart); August 14, 2015 (Michael Milgroom) and May 12, 2016 (Michael Milgroom) (see Trial Transcript 1885:9-1888:1; 1889:11-1894:14; State Exhibit W).

[10] Those dates include: September 11, 2017 (Peter Burns); May 21, 2009 (Phil Brown); May 15, 2017 (Tyler Merriam; Chad Dawson), and June 19, 2015 (Brian Wolfe) (see Trial Transcript 1894:15-1896:19; 1897:14-1898:4).

1234:9-13). The first was published in 1872, and thereafter, not every year, but for many years, he published guide books between 1875 and 1900 (see Trial Transcript 1234:16-23). He published approximately thirteen editions (see Trial Transcript 1234:24-1235:5). Sportsmen, defined *supra*, routinely used the E.R. Wallace's guide books (see Trial Transcript 1236:25-1237:1).

65. Historical records indicate five documented trips by boat on the disputed waterway: a 1851 trip by Jervis McEntee; a 1872 trip by H. Perry Smith[11]; a 1877 trip by Stevenson Constable; a 1888 trip by Verplanck Colvin; and a 1941 trip by Donald Dunton and Maurice Blake (see Trial Transcript 1150:5-15, 1152:4-7, 1152:19-24, 1209:17-21, 1210:13-15, 1153:6-12, 1338:15-1339:22).

66. Jervis McEntee, H. Perry Smith and Stevenson Constable were sportsmen, as discussed *supra*.

67. Verplanck Colvin was near the disputed waterway for official State business. Part of his crew used the disputed waterway to retrieve supplies, as discussed *supra*.

68. On September 9-10, 1941, Maurice Blake and Donald Dunton traveled from Lake Lila to the Mud Pond Camp, and then onto Brandreth Lake (see Trial Transcript 1338:15-1339:22; Brown Exhibit Z, 124-125; State Exhibit M:15). Plaintiffs' predecessor, Frederick Potter, fed and housed Mr. Blake and Mr. Dunton, who visited the Mud Pond Camp, before sending them on their way (see Trial Transcript 1337:14-1340:9; Brown Exhibit AA).

69. In the late 1970's, a lone canoeist, unknown to the plaintiffs, passed Mud Pond going downstream (see Trial Transcript 1305:18-20; Plaintiffs' Exhibit 36, page 191).

Factor Five: The Volume of Prospective Commercial and Recreational Use

70. Due to defendant Brown's publication in the Adirondack Explorer, plaintiffs installed two trail cameras on their property overlooking the disputed waterway (see Trial Transcript 578:1-10).

71. The trail cameras were installed in 2009 and monitored the Mud Pond Outlet Brook section of the disputed waterway (see Trial Transcript 578:12-16). In 2009, one camera was positioned on the Mud Pond Outlet Brook across from the bottom of the trail around the rapids, and the other was downstream of the confluence facing upstream (see Trial Transcript 580:24-581:6). The location of the cameras was later changed in 2010, where one was moved to

[11] There is no dispositive proof that H. Perry Smith traveled through the disputed waterway during his 1872 trip (see Trial Transcript 1209:17-21; 1210:13-15).

overlook the rock ledge between Mud Pond and Mud Pond Outlet Brook (see Trial Transcript 581:20-582:4).

72. The trail cameras were generally in operation from early spring until November from 2009 through 2012 (see Trial Transcript 578:22-579:2). For a brief period there was one trail camera on the Mud Pond Outlet Brook during early spring of 2013 (see Trial Transcript 579:3-4). The camera was removed after this Court's 2013 decision (see Trial Transcript 579:6-9).

73. In 2009 there were four groups of strangers that were captured in photos from the trail camera (see Trial Transcript 580:2-4).

74. In 2010, there were photographs of four groups of strangers using the disputed waterway from the camera overlooking the aforesaid rock ledge (see Trial Transcript 582:23-25), meaning on four different occasions the trail cameras captured two or more persons using the disputed waterway (see Trial Transcript 583:9-13). The total amount of people during said trips was thirteen people (see Trial Transcript 584:1-18).

75. In 2011, the photographs generated from the trail cameras indicated approximately twenty-four strangers used the disputed waterway (see Trial Transcript 680:10-11).

76. In 2012, the photos generated up until September 2, 2012, revealed one group of four individuals that used the disputed waterway (see Trial Transcript 681:4-7).

77. In 2013, the trail camera did not generate any photos demonstrating that the disputed waterway was used by strangers (see Trial Transcript 681:10-17).

78. Justin Potter, a member of plaintiffs, took over the maintenance and placement of the trail cameras in 2010 (see Trial Transcript 578:14-16). He has reviewed the photos generated from the trail cameras from 2009 through 2013. To that end, he testified that from 2013 to date, the disputed waterway has been infrequently used by non family members or non owner members (see Trial Transcript 587:19-25).

A. Recreational Use

79. From April 2, 2013, through May 10, 2016, the disputed waterway was open to public. This equates to approximately three years, one month and eight days.[12]

80. Defendant Brown and Defendant State proffered six accounts of paddlers, from the

[12] In particular, on April 2, 2013, this Court granted defendant Brown's and defendant State's motion for summary judgment, declaring the waterway as navigable-in-fact. This Court's decision was affirmed by the Appellate Division, Third Department on January 15, 2015. However, the Court of Appeals modified the decision on May 10, 2016 closing the disputed waterway from public use.

general public, who paddled the disputed waterway during the above-referenced time period.

81. The six individuals include: Tyler Merriam; Donald Sipher; Richard Hart, III; Dr. Michael Milgroom; and Brian Wolfe. None of the six individuals used a guide during their canoe trip(s)[13] (see Trial Transcript 837:13-840:10, 1362:23-1363:5, 1575:1-2, 1575:19, 1667:10-17, 2040:11-16).

(i) 2016 Study Gauging Recreational Paddler Interest

82. Dr. Chad Dawson, a professor emeritus at the State University of New York, College of Environmental Science and Forestry conducted a study in 2016 that was designed to gauge paddler interest in using the disputed waterway (see Trial Transcript 1424:10-1425:5, 1433:18-1434:4).

83. It was a consumer survey of the Wilderness Area and the water bodies at issue. The study was limited to people who already recreated at Lake Lila or Little Tupper Lake (see Trial Transcript 1437:3-12), which are the termini of the Lila Traverse (see Trial Transcript 214:12-25; 1657:17-21).

84. The study sought information only from prior users of the Wilderness Area concerning their experience, preference and interest in paddling the disputed waterway (see Trial Transcript 1424:10-1425:5), 1433:18-1434:4). Dr. Dawson collected six hundred and forty-eight names from the trailhead registers from 2016 where a mailing label could be created, and mailed those individuals a survey (see Trial Transcript 1437:3-18). Forty-two of the mailings were returned as nondeliverable (see Trial Transcript 1437:18-20).

85. Dr. Dawson received 447 survey responses in return (see Trial Transcript 1438:11-12).

86. Dr. Dawson was aware of the instant litigation and the defendant State's arguments when creating the survey (see Trial Transcript 1423:20-1424:11, 1485:1-11). Dr. Dawson did not eliminate responses from individuals aware of the subject litigation (see Trial Transcript 1485:12-24).

87. Four hundred and thirty-seven survey participants answered the question concerning their interest in traveling between Lake Lila and Lilypad Pond. The results found that 61% would be interested in traveling between Lake Lila and Lilypad Pond, and 25.25% may be interested in traveling between Lake Lila and Lilypad Pond (see Trial Transcript 1460:5-8, 1471:4-17; State Exhibit S). Dr. Dawson did not ask the level of interest of paddling the disputed waterway, such as very interested, somewhat interested - known as Likert scales (see

[13] Mr. Milgroom, Mr. Merriam and Mr. Wolfe used the disputed waterway on more than one occasion.

Trial Transcript 1519:14-1520:3).

88. With regard to the immediately above percentages, noting that Dr. Dawson included the aforesaid 25.25% of "maybes" as "yeses" (see Trial Transcript 1520:4-19), the survey results found that 72% would prefer to use the disputed waterway if it were available for public use; 22.6% would use either the disputed waterway or the DEC 0.8-mile State carry trail; and 5.3% prefer to use the DEC 0.8-mile State carry trail (see Trial Transcript 1463:2-4, 1467:2-4).[14]

89. Four hundred and thirty-nine survey participants answered the question concerning their interest in traveling the entire Lila Traverse between Lake Lila and Little Tupper Lake. The results indicated that 46.9% would be interested in paddling the entire Lila Traverse, and 28.5% may be interested in paddling the entire Lila Traverse (see Trial Transcript 1463:8-23, 1471L23-1472:13; State Exhibit S). Again, the level of interest was not asked.

90. With regard to the immediately above percentages, again noting that Dr. Dawson included the aforesaid 28.5% of "maybes" as "yeses", the survey results found that 71.3% would prefer to take the disputed waterway if it were available for public use; 24.9 would use either the disputed waterway or the DEC 0.8-mile State carry trail; and 3.8% prefer to use the DEC 0.8-mile State carry trail (see Trial Transcript 1463:25-1464:16; State Exhibit S).[15]

91. The survey did not inform respondents of the distance to the water bodies at issue, including the number of carries or paddling distance before reaching them (see Trial Transcript 1516:1-21). Additionally, the survey did not fully describe the attributes of each of the two potential routes it identified in its questions (see Trial Transcript 1547:7-10). To that end, the survey questions discussed above (i.e., ¶¶ 87-90, *supra*) asked survey respondents to determine their preference without knowing the attributes of each route (see Trial Transcript 1547:11-15). Furthermore, the survey failed to inquire if survey respondents would not complete the Lila Traverse if they had to use the DEC 0.8-mile State carry trail only (see Trial Transcript 1520:25-1521:21).

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[14] To put the above-referenced percentages into perspective of the volume of perspective recreational use, approximately 377 people said "yes" or "maybe" to being interested in traveling between Lake Lila and Lilypad Pond. Of the 377 people, approximately 271 prefer to use the disputed waterway if it was open to the public; approximately 85 would use either the disputed waterway or the DEC 0.8-mile State carry trail; and approximately 20 would prefer to use the DEC 0.8-mile State carry trail.

[15] To put the above-referenced percentages into perspective of the volume of perspective recreational use, keeping in mind that "interested" responses to this question likely overlap with "interested" responses with the prior question discussed in Footnote 11, approximately 331 people said "yes" or "maybe" to being interested in traveling the entire Lila Traverse. Of the 331 people, approximately 236 would prefer to take the disputed waterway; approximately 82 would use either the disputed waterway or the DEC 0.8-mile State carry trail; and approximately 13 would prefer to use the DEC 0.8-mile State carry trail.

92. Four hundred and forty-two survey participants answered the question concerning whether their 2016 trip in the Wilderness Area was arranged by or supported by an outfitter (i.e., through rentals or other equipment they may have borrowed, leased, rented). The results showed that 8.6% used an outfitter (see Trial Transcript 1456:4-12; State Exhibit S at 3).[16]

93. Dr. Dawson testified, based on his experience in analyzing similar surveys, "that those who say yes, they use an outfitter tend not to be the ones who have been there before. They're new visitors to the area who are unfamiliar with it and are looking for support to have that experience" (Trial Transcript 1459:4-9).

94. Dr. Dawson further testified that the role of an outfitter, or guide, is to "introduce the person to the activity and make sure they're safe and also provide possibly services and equipment that the person does not otherwise own" (Trial Transcript 1459:13-16).

(ii) Members of the Public Recreational Interest

95. Thomas Martin, who is employed by the DEC as the Natural Resources Supervisor, testified, that the DEC "gets calls all the time from folks wondering about access to different places in the park and [the disputed waterway] is one of the places where the public has called [the DEC] over the years and asked whether or not it was okay for them to paddle through there" (Trial Transcript 1964:1-6).[17]

96. Christopher Amato, former employee of the DEC, has paddled through the disputed waterway. Mr. Amato avers that if the disputed waterway was open to the public, he would be interested in paddling it again (see Trial Transcript 2128:2-9). Mr. Amato described the disputed waterway as "absolutely beautiful" and "a very enjoyable paddling experience" (see Trial Transcript 2128:12,23-24).

97. Defendant Brown would be interested in paddling on the disputed waterway in the future because it was enjoyable the first time; therefore, he opines that he would enjoy it a second time (see Trial Transcript 1635:1-5).

B. Commercial Use

98. As stated herein, (i.e., ¶¶ 17-20, *supra*), if the disputed waterway was open to the public, an owner of an Adirondack outfitters company and a licensed guide - proclaimed that they would recommend canoe routes, including the disputed waterway, that they would not

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[16] To put the above-referenced percentage into perspective of the volume of perspective recreators using an outfitter, of 442 people, approximately 38 used an outfitter.

[17] The record fails to provide additional information concerning the aforesaid calls. For instance, no proof was offered regarding the quantity and frequency of calls received by the DEC concerning the disputed waterway.

recommend if the disputed waterway was closed to the public.

Conclusions of Law:

Based on the aforementioned, this Court makes the following conclusions of law:

1. "A waterway's navigability is a highly fact-specific determination" (Friends of Thayer Lake LLC v Brown, 27 NY3d 1039, 1043 [2016]).

2. "As a general principle, if a waterway is not navigable-in-fact, 'it is the private property of the adjacent landowner'" (Friends of Thayer Lake LLC v Brown, 27 NY3d 1039, 1042 [2016] quoting Adirondack League Club v Sierra Club, 92 NY2d 591, 601 [1998]). A waterway that is navigable-in-fact; however, "is considered a public highway, notwithstanding the fact that its banks and bed are in private hands" (Adirondack League Club v Sierra Club, 92 NY2d 591, 601 citing Morgan v King, 35 NY 454 [1866]).

3. "New York's navigable-in-fact doctrine is rooted in the public's use of waterways as a common public highway for transporting people or goods" (Friends of Thayer Lake LLC v Brown, 126 AD3d 22, 33 [3d Dept 2015]; see Van Cortlandt v New York Cent. R.R. Co., 265 NY 249, 254-255 [1934], Morgan v King, 35 NY 454, 458 [1866]), "and it 'recognizes that some waterways are of such practical utility that private ownership from the time of the original grant from the State or sovereign is subject to an easement for public travel'" (Id. quoting Adirondack League Club v Sierra Club, 92 NY2d 591, 601 [1998]).

4. "To be subject to this public easement, a waterway must provide practical utility to the public as a means for transportation, whether for trade or travel" (Friends of Thayer Lake LLC v Brown, 27 NY3d 1039, 1042 [2016]; see Adirondack League Club v Sierra Club, 92 NY2d 591, 603 [1998]).

5. "Traditionally, 'a waterway is navigable[-]in[-]fact only when it is used, or susceptible of being used, in its natural and ordinary condition, as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water'" (Friends of Thayer Lake LLC v Brown, 126 AD3d 22, 33 [3d Dept 2015] quoting Fairchild v Kraemer, 11 AD2d 232, 235 [2d 1960]). The Court of Appeals, in Adirondack League Club v Sierra Club (92 NY2d 591, 600 [1998]), determined that evidence of a waterway's capacity for recreational use is a factor within the traditional test of navigability. "The Court of Appeals in Adirondack League Club explicitly held that the recognition that recreational uses may be considered in determining navigability did 'not broaden the standard for navigability-in-fact,' and the standard remains '[p]ractical utility for travel or transport' (Friends of Thayer Lake LLC v Brown, 126 AD3d 22, 33 [3d Dept 2016] quoting Adirondack League Club v Sierra Club, 92 NY2d 591, 603 [1998]).

6. "[R]ecreational use alone is insufficient to establish that a body of water is navigable in fact, as there must be some evidence that it has the capacity for transport, whether for trade or

travel" (Dale v Chisholm, 67 AD3d 626, 627 [2d Dept 2009]).

Factor One: The Disputed Waterway's Historical and Prospective Commercial Utility

A. Historical Commercial Utility

7. Initially, this Court notes that it heard testimony and received exhibits supporting defendant Brown and defendant State's arguments alleging that the plaintiffs' predecessors used the disputed waterway for "commercial" activities in the early and mid twentieth century.

8. With regard to materials brought to Mud Pond Camp, the defendants collectively proffered the following, non-complete, list of evidence: in 1918, plaintiffs' predecessor, Fred Potter, built the first Mud Pond Camp next to the disputed waterway - to which, he used the disputed waterway during the construction of the camp (see Trial Transcript 1325:21-1327:3); in 1927, Fred Potter shipped building materials to the east shore of Lilypad Pond that were loaded onto an Adirondack guide boat and rowed over the disputed waterway (i.e., The Narrows and Mud Pond) to Mud Pond Camp (see Plaintiffs' Exhibit 36); and, in October of 1949, fifteen hundred and forty pounds of roof shingles were brought, by boat, to Mud Pond Camp using the disputed waterway (see Trial Transcript 2278:6-17; Brown Exhibit AA).

9. With regard to materials being brought from plaintiffs' property "to market", the defendants collectively point to plaintiffs' predecessor, Fred Potter, who trapped beaver, mink, otter and other furs on the plaintiffs' property (see Trial Transcript 437:6-22, 2233:12-2236:9). A majority of the trappings were beavers (see Trial Transcript 2262:16). Once trapped, the animals were often processed at the Mud Pond Camp (see Plaintiffs' Exhibit 36, pages 138-140, 145-149, 194-196, 219-221). After the skins were prepared, if feasible, Fred Potter would take the furs (i.e., pelts) upstream from Mud Pond Camp to St. Agnes landing by boat (see Trial Transcript 225-:19-2260:1-11; Plaintiffs' Exhibit 36, page 146).[18] Fred Potter would then sell the pelts to fur dealers in either Tupper Lake, Utica or somewhere in the Mohawk Valley, Watertown area (see Trial Transcript 2261:11-14; Plaintiffs' Exhibit 36, page 147). This encompassed traveling on sections of the disputed waterway. This practice (i.e., trapping and selling pelts) basically ended when Fred Potter passed away in 1953.

10. Upon review of the record, this Court does not assign much weight to the above-referenced arguments (i.e., CoL, *supra*, ¶¶ 2-3). After hearing the competing proof before it, this Court is in agreement with the dissent of Friends of Thayer Lake LLC v Brown (126 AD3d 22 [3d Dept 2015]). Specifically:

> "to suggest that the private owners' personal use of the [disputed

[18] In the winter, Fred Potter would take the pelts, to be sold, by snowshoe. Once the stream (i.e., the section of the disputed waterway) melted, he would take them by boat upstream to St. Agnes (see Trial Transcript 2261:6-9; Plaintiffs' Exhibit 36, page 146).

> w]aterway reflects a capacity for commercial use also ignores its remote, isolated nature. Notably, based on the [disputed w]aterway's narrow, meandering path and impassable rapids, it is incapable of transporting any timber, a traditional test for navigability. Based on the lack of any nearby roads or population centers, and the portages required to reach the [disputed w]aterway, the only goods that would be transported through it would be for personal use . . . . [P]roof that plaintiffs' predecessors . . . [and] individual members of the plaintiffs used the [disputed w]aterway for hunting, trapping and carrying supplies to their isolated hunting camp, merely reflects their private property rights in the [disputed w]aterway and does not establish any practical utility to the general public for travel or transport" (Id. at 37-38).

11. Likewise, after hearing the proof, at length, this Court does not agree that "[t]he landowners' longstanding use of the [disputed w]aterway to transport goods and materials for private use reveals that it has the capacity to transport similar goods for commercial purposes" (Id. at 29). First, with regard to "practical utility", the arguments proffered concerning the disputed waterway's capacity for commercial use, go "far beyond the term's ordinary meaning of something that actually provides or is readily susceptible of providing the general public with meaningful or useful commerce" (Matthew Ingber, Paddling in Mr. Potter's Backyard: Navigating New York's Navigable-in-Fact Doctrine, 32 Touro L Rev 453, 483 [2016]). Second, this Court understands that "a waterway's capacity for commercial use does not depend exclusively on its utility for moving commodities . . . [,] 'but instead [is] valued in [its] own right as a means of travel'" (Friends of Thayer Lake LLC v Brown (126 AD3d 22, 29 [3d Dept 2015]) quoting Adirondack League Club v Sierra Club, 92 NY2d 591, 603 [1998]). However, the evidence demonstrates that the disputed waterway "is still impracticable for such use because of its isolated nature and the lengthy trek required to reach it" (Matthew Ingber, Paddling in Mr. Potter's Backyard: Navigating New York's Navigable-in-Fact Doctrine, 32 Touro L Rev 453, 488 [2016]).

12. When viewing the historic accounts of paid guides as evidence of historical commercial utility of the disputed waterway, this Court is not satisfied that said accounts meet the standard of practical utility to the public as a means for transportation, whether trade or travel. The primary purpose behind the sportsmen use of guides was for recreational travel. But for recreational travel, there would be no need for a guide - and recreational use yields no common law necessity (see Morgan v King, 35 NY 454, 459 [1866]).

B. Perspective Commercial Utility

13. Again, initially, this Court notes that it heard testimony and received exhibits supporting defendant Brown and defendant State's arguments alleging that the disputed waterway yields itself to perspective "commercial" activity based on paddlers commercial activities related to their canoeing trip, and that it will bring new business to the area.

14. With regard to commercial related activities, defendants collectively proffered the following, non-complete list, of evidence: Donald Sipher, who paddled on the disputed waterway, purchased gas and food for his canoe trip (see Trial Transcript 1368:20); Michael Milgroom, who paddled on the disputed waterway a few times, bought gas in the Village of Tupper Lake almost every trip (see Trial Transcript 1690:205), and on one occasion, Mr. Milgroom purchased a canoe from Raquette River Outfitters in Tupper Lake for $2,250 pre-tax (see Trial Transcript 1690:11-20); and Brian Wolfe, who paddled on the disputed waterway on two occasions, hired a shuttle service who moved his car from Little Tupper Lake to Lake Lila for approximately $130 each time (see Trial Transcript 2051:11-17).

15. With regard to generating new business, if the disputed waterway is open, defendant Brown maintains that it will generate interest from first time visitors (or, recreators) who tend to hire outfitters. Defendant Brown, references Dr. Chad Dawson's 2016 study, discussed *infra*, where 8.6% of the survey responses used an outfitter for their Wilderness Area trip in 2016 (see Trial Transcript 1456:4-12; State Exhibit S).[19]

16. Upon review of the record, this Court does not assign much weight to the above-referenced arguments (i.e., CoL, *supra*, ¶¶ 14-15). After hearing the competing proof before it, this Court is in agreement with the dissent of Friends of Thayer Lake LLC v Brown (126 AD3d 22 [3d Dept 2015]). "Nor does the fact that a back country guide may propose to take canoeists through the [disputed w]aterway if it were to be adjudicated as navigable prove the [disputed w]aterway's capacity for common use by the general public" (Friends of Thayer Lake LLC v Brown, 126 AD3d 22, 38 [3d Dept 2015]).

Factor Two: The Disputed Waterway's Historical Accessibility to the Public

17. It is undisputed that the land encompassing the disputed waterway has been within the private ownership of the plaintiffs' since 1851 (see Friends of Thayer Lake LLC v Brown, 126 AD3d 22, 32). Additionally, there is no dispute that the plaintiffs closed their land from public use on or about 1878. Also, there is no dispute that the adjoining land, now known as the Wilderness Area, was privately owned until the State's acquisition of the Lake Lila Tract in 1979 and the Whitney Tract in 1998. (The aforesaid parcels of adjoining land were also closed off to the public on or about 1878). To that end, prior to these two acquisitions, members of the public "previously had no way of accessing" the disputed waterway located on the private land of the plaintiffs (Id.), especially because "there were no nearby roads or other means of public access" (Id. at 29). Nevertheless, when the State acquired said land parcels, the deeds did not contain language affirmatively granting the State or the general public any ownership interest in or any recreational right to the disputed waterway (see Plaintiffs' Exhibit 34, items 22 and 23).

[19] The above-referenced percentage was generated from a question yielding 442 survey responses, which is only an estimated 38 people.

18. Post-acquisitions, the record reveals that the disputed waterway adjoins public property at both of its termini (i.e., Lilypad Pond on the east and Shingle Shanty Brook on the west) providing the public with two access points. "Given the [disputed w]aterway's remote nature and the number and length of the carries required to reach it, only a strained reading of the navigability standard would suggest that these two access points are enough to give it any practical utility for common usage as a public highway for travel or transport" (Friends of Thayer Lake LLC v Brown, 126 AD3d 22, 35 [3d Dept 2015]). Thus, this Court is in agreement with the dissent of Friends of Thayer Lake, *supra*, that "[w]hile the lack of any public access is determinative, the mere existence of access is not" (Id.). Here, the two access points are unpopulated and significant distance and effort is required to reach the disputed waterway (see Id.).

Factor Three: The Relative Ease of Passage by Canoe

19. Initially, this Court notes that the defendants collectively proffered testimony arguing in favor of the ease of passage. However, the evidence indicated that part of the appeal of paddling in the Wilderness Area includes the element of adventure.

20. Defendant Brown paddled from Little Tupper Lake to Lake Lila (see Trial Transcript 1634:4-6). He enjoyed the adventure element of the trip, testifying ". . . part of the difficulty, talking about the difficulty of the trip, well, that really adds to the remoteness of it, I think. You know, when it's hard to get to a place you appreciate it more" (Trial Transcript 1634:10-14).

21. Likewise, Richard Hart, III, paddled the Lila Traverse and enjoyed the adventure aspect of the trip (see Trial Transcript 1584:15-19). Mr. Hart testified "I like doing things that are a little challenging and this was" (Trial Transcript 1584:21-22).

22. "The Lila Traverse over publicly-owned lands covers a total of 16.58 miles, including both the water travel and portages. The distance traveling the Lila Traverse via the [disputed w]aterway is 17.86 miles" (Friends of Thayer Lake LLC v Brown, 126 AD3d 22, 35 [3d Dept 2015]). To that end, this Court is in agreement with the dissenting judge's characterization of members of the public who paddle the Lila Traverse, including the disputed waterway. In particular, "[t]hose members of the public who do so must necessarily be canoers who are physically fit and equipped with the necessary gear to paddle and portage through the remote back country over the course of multiple days" (Id.).

23. Here, both defendant Brown and Mr. Hart are experienced canoeists with proper equipment (see Trial Transcript 533:19-22, 535:22-25, 1605:8). Defendant Brown has canoed many, many canoe routes across the Adirondacks (see Trial Transcript 533:23-25), were he has even written a recent book about canoeing in the Adirondacks titled "Adirondack Paddling" that was published in 2012 (see Trial Transcript 534:1-7). Mr. Hart loves canoeing and has been canoeing for about eight years (see Trial Transcript 1572:7-8, 1572:17-18). Mr. Hart testified that he goes on several dozen canoe day trips per year and two-to-four overnight trips per year (see Trial Transcript 1572:23-1573:3).

Factor Four: The Volume of Historical Travel

24. "Inasmuch as the adjoining [Wilderness Area] did not become open to the public until after the State's multimillion dollar purchase in 1998, there is limited history of the public making the Lila Traverse by using the [disputed w]aterway" (Friends of Thayer Lake LLC v Brown (126 AD3d 22, 35 [3d Dept 2015]).

25. Nevertheless, the proof adduced at trial reveals less than staggering numbers, discussed *supra*.

Factor Five: The Volume of Prospective Commercial and Recreational Use

A. Recreation

26. Initially, this Court notes that it heard testimony collectively proffered by defendant Brown and the defendant State regarding the paddlers' enjoyable experience on the disputed waterway.

27. Tyler Merriam enjoyed his trips on the disputed waterway (see Trial Transcript 855:6-9). He testified that he "love[d] the solitude of the area . . . , the quietness of it and being able to spend the whole day without time restrictions exploring an area I like" (Trial Transcript 855:15-20). He further testified that he enjoys "[t]he feeling of remoteness, the quiet water nature of it. Motor boats aren't allowed on any of these waterways. I appreciate that very much. I appreciate not seeing a lot of other people and I believe there was some wildlife out there as well" (Trial Transcript 855:25-856:5).

28. Donald Sipher enjoyed paddling on the disputed waterway (see Trial Transcript 1396:1-3).

29. Dr. Chad Dawson enjoyed his paddling experience through the disputed waterway (see Trial Transcript 1430:14-15).

30. Richard Hart, III, described paddling on Mud Pond as "[i]t was okay. It was nice" (Trial Transcript 1578:18-19). He described the plaintiffs carry trail around the rapids as "[i]t was good. It was short and very clear" (Trial Transcript 1579:8-9). He described paddling on Mud Pond Outlet as "[i]t was nice. It was better than I thought it would be" (Trial Transcript 1579:19-21).

31. Peter Burns found his trip on the disputed waterway to be enjoyable (see Trial Transcript 1750:1-3).

32. Brian Wolfe most enjoyed the Mud Pond Outlet Brook and Shingle Shanty Brook section of the disputed waterway (see Trial Transcript 2049:5-10). He testified that "[t]he terrain

was different compared to, you know, the big bodies of water. There was a lot of kind of grassy area around. One of the big differences too is that you had current at your back which was kind of pushing you through, you know, through the waterway which was a nice change of pace, you know, considering you were pretty tired when you get to this kind of portion of the traverse" (Trial Transcript 2049:12-21).

33. However, when determining whether a waterway is navigable-in-fact, the common law standard and case precedents do not incorporate a paddler's recreational enjoyment as part of the analysis. This Court is not persuaded that defendant Brown's arguments: i.e., (1) carrying a canoe and gear is more difficult and less enjoyable for people than paddling the canoe with gear in it and (2) most paddlers would prefer to paddle more rather than carry more, are justification for declaring a waterway navigable-in-fact.[20]

34. "While the [disputed waterway] is capable of being used for recreational activity of wilderness canoeing . . . , it has no practical utility to be commonly used by the general public for travel or transport" (Friends of Thayer Lake LLC v Brown, 126 AD3d 22, 36 [3d Dept 2016]). For instance, "in determining navigability, the recreational use of a body of water 'should be considered as relevant evidence of the stream's suitability and capacity for commercial use'" (Hanigan v State of New York, 213 AD2d 80, 84 [3d Dept 1995], quoting Adirondack League Club v Sierra Club, 201 AD2d 225, 230 [3d Dept 1994]). This concept harmonizes with the facts of Adirondack League Club, *supra*, more so than the facts specific to the instant case. In particular, "in Adirondack League Club v Sierra Club, 201 AD2d 225 [3d Dept 1994]), . . . the fact that canoes successfully traveled the South Branch of the Moose River for substantial distances was a relevant consideration in determining the stream's suitability and capacity for commercial transportation which, when coupled with evidence of historical use of the stream for logging, established the stream's navigability" (Hanigan v State of New York, 213 AD2d 80, 84 [3d Dept 1995]). Conversely, there is no history of log driving on the disputed waterway and no capacity for log driving on the disputed waterway. Unlike the South Branch of the Moose River, i.e., a 12-mile continuous and uninterrupted river, the disputed waterway is not a river. Instead, the disputed waterway is a combination of two small and remote Adirondack ponds and two

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[20] Moreover, this Court is not persuaded by defendant Brown's argument that the existence of the DEC 0.8-mile State carry trail does not make the disputed waterway non-navigable. First, this Court disagrees with defendant Brown's characterization of the State carry trail as an "alternate detour route"; rather, the State carry trail is the sole, primary route available to the members of the public. Apart from the period, during this litigation, where the disputed waterway was open for public use, the disputed waterway is not considered a public route available to the members of the public at large.

Furthermore, Donald Sipher took two different trips on the Lila Traverse, one using the State carry trail, and the other using the disputed waterway. Mr. Sipher testified that traveling on the disputed waterway took about one hour, and estimated that using the State carry trail took a little more time - but, was pretty close to the same time as travel on the disputed waterway (Trial Transcript 1415:10-1416:10). This indicates that use of the disputed waterway does not significantly reduce recreational travel time - rather, it provides recreators with a more enjoyable experience because they are traveling by water instead of portaging their canoe.

small and remote Adirondack brooks, one a tributary to the other, only "defined by the parties" as a waterway for purposes of this litigation (see Friends of Thayer Lake LLC v Brown, 126 AD3d, 22, 31 [3d Dept 2015]). Any individual traversing the disputed waterway would have to engage in 'pond hopping' which may prove impractical.

35. After hearing all the proof and reviewing the record before it, this Court opines that the evidence establishes that the actual and potential use of the pond is limited to recreation (see Hanigan v State of New York, 213 AD2d 80, 84 [3d Dept 1995]). Recreational use alone is insufficient to deem a waterway navigable-in-fact (see Dale v Chisholm, 67 AD3d 626, 627 [2d Dept 2009]), and the record reveals that only a marginal segment of the general population would benefit from using the disputed waterway for recreational travel.

36. "The Court of Appeals in Adirondack League Club explicitly held that the recognition that recreational use may be considered in determining navigability did 'not broaden the standard for navigability-in-fact,' and the standard remains '[p]ractical utility for travel or transport'" (Friends of Thayer Lake LLC v Brown, 126 AD3d 22, 33 [3d Dept 2015], quoting Adirondack League Club v Sierra Club, 92 NY2d 591, 603 [1998]). Based on the aforesaid, commercial use has not been replaced by recreational use. Therefore, this Court fears that if it were to declare the disputed waterway as navigable-in-fact, it would be expanding the concept of "practical utility" and gravitating towards a pure recreational use standard.[21]

B. Commercial

37. Initially, this Court notes that it heard testimony from economist Shanna Ratner. Ms. Ratner evaluated the total spending by New York residents who paddle in New York (see Trial Transcript 981:21-23). Ms. Ratner estimated that the annual spending, in 2007 dollars, is $1.9 billion (see Trial Transcript 983:8-14). To reach that amount, Ms. Ratner looked at direct, indirect and induced spending (see Trial Transcript 983:15-19).

38. Ms. Ratner defined direct spending as "spending that paddlers make themselves. So, when a paddler buys something in a restaurant or buys groceries or buys gas they are directly spending. When they spend money on guides they are directly spending" (Trial Transcript 983:21-984:1).

39. Ms. Ratner defined indirect spending as "spending that businesses do in order to provide the goods and services that people spend directly on" (Trial Transcript 984:3-5).

40. Ms. Ratner defined induced spending as "spending by employees or people who make a salary in relation - - from the direct spending. It's the portion of that salary that they re-

[21] This Court opines that while canoe guided trips may be a commercial activity, said activity is only a product of recreational travel. This Court further opines, based on its interpretation of case precedent, that there must first be proof of practical utility of the disputed waterway, whether it be by trade or travel - in order to open it up to the derivative benefit of recreational travel.

spend locally" (Trial Transcript 984:7-10).

41. Ms. Ratner estimated that almost $900 million of the annual spending per year by New York residents on paddling is in direct spending (see Trial Transcript 985:11-14).

42. Of pertinent importance here, is how the above-referenced dollar amounts relate to the disputed waterway. Upon review of the record, this Court does not assign much weight to the relevance of Ms. Ratner's testimony in demonstrating perspective commercial activity generated from the disputed waterway. While Ms. Ratner testified that paddling is part of Hamilton County tourism (see Trial Transcript 1007:22-24), her testimony demonstrated that in 2017, only an estimated $680,000, in 2007 dollars, was generated in expenditures from spending by paddlers who used Lake Lila and Little Tupper Lake (see Trial Transcript 1008:7-18, 1009:24-1010:3). That is roughly 0.04% of the overall annual spending generated from New York State residents paddling within the State. Overall, this Court is not satisfied that the evidence indicates that just because the disputed waterway is accessible to the public, it will generate additional paddler spending - as, it appears that said spending, if at all, would likely occur regardless. Moreover, this Court does not find that paddler expenditures (i.e., gas, food, etc.), are evidence of the practical utility of the disputed waterway for trade or travel.

43. Upon the findings of fact and conclusions of law set forth above, this Court finds that the disputed waterway is not navigable-in-fact, therefore, it is not open for public use and the public is thereby enjoined from recreational use, or other, of the disputed waterway.

44. Based on the testimony and exhibits, the Court will deny plaintiffs' request for compensatory and/or punitive damages, however, awards plaintiffs statutory costs and disbursements as provided in the CPLR.

45. Plaintiffs are to submit a proposed judgment consistent with this Court's determination, on notice to the defendants.

Signed this 20th day of December, 2018, at Johnstown, New York.

HON. RICHARD T. AULISI
Justice of the Supreme Court

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