

*State of New York  
Supreme Court, Appellate Division  
Third Judicial Department*

Decided and Entered: January 15, 2015

518309

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FRIENDS OF THAYER LAKE LLC  
et al.,

Appellants,

v

OPINION AND ORDER

PHIL BROWN et al.,

Respondents,  
et al.,  
Defendant.

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Calendar Date: October 8, 2014

Before: Peters, P.J., Lahtinen, Garry, Rose and Lynch, JJ.

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McPhillips, Fitzgerald & Cullum, LLP, Glens Falls (Dennis J. Phillips of counsel), for appellants.

Caffry & Flower, Glens Falls (John W. Caffry of counsel), for Phil Brown, respondent.

Eric T. Schneiderman, Attorney General, Albany (Philip Bein of counsel), for State of New York and another, respondents.

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Garry, J.

Appeal from an order and judgment of the Supreme Court (Aulisi, J.), entered April 2, 2013 in Hamilton County, which, among other things, denied plaintiffs' cross motion for summary judgment.

Plaintiffs are the collective owners of thousands of acres 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, as pertinent here, has remained since then in the private ownership and control of descendants of the Brandreth family. Plaintiffs' property is bounded on the north by the William C. Whitney Wilderness Area, which was formerly privately owned, but had been fully acquired by the State by 1998, and now consists of over 20,000 acres of State Forest Preserve land. Within the Wilderness Area, a canoeing waterway known as the Lila Traverse Section of the Whitney Loop permits canoeists to travel across a network of lakes, ponds, streams and canoe carry trails maintained by defendant Department of Environmental Conservation (hereinafter DEC) between Little Tupper Lake on the Wilderness Area's eastern side and Lake Lila on the western side.

The subject of this litigation is a two-mile-long system of ponds and streams known as the Mud Pond Waterway (hereinafter the Waterway) that 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. Both of these bodies of water are part of the Lila Traverse, and shortly after this part of the Wilderness Area entered public ownership, DEC constructed an .8-mile carry trail between them in order to permit canoe travelers to use the Lila Traverse without entering plaintiffs' property or using the Waterway. Defendants now assert that canoeists are not obliged to use the carry trail, arguing that even though the Waterway is located on privately owned property, it is navigable-in-fact and therefore open to public use. Plaintiffs disagree, contending that the Waterway is their private property and that they are entitled to exclude members of the public from using it.

In May 2009, defendant Phil Brown, the editor of a publication called Adirondack Explorer, explored the question of the Waterway's navigability-in-fact by canoeing through it. In a subsequent article entitled "Testing the Legal Waters," Brown reported that he began his trip at a DEC access point on Little Tupper Lake and then traveled westward across the various lakes, ponds, streams and portages that make up the Lila Traverse until he reached Lilypad Pond. At that point, instead of exiting the pond and using the DEC carry trail, by which he could have

reached Shingle Shanty Brook without leaving State-owned land, Brown canoed across Lilypad Pond into a narrow neck or outlet that crosses plaintiffs' property line. Brown saw and photographed plaintiffs' no trespassing signs at the boundary, but continued past them into Mud Pond – a shallow body of water comprising about 40 acres – and then to the pond's western edge, where the Mud Pond Outlet Brook begins. The first 500 feet of the Outlet Brook consist of rapids, which Brown avoided by removing his canoe from the water and portaging for approximately .1 miles on a nearby carry trail that plaintiffs had constructed and maintained for their own use. He reentered the Outlet Brook below the rapids, canoed westward to this stream's confluence with Shingle Shanty Brook on plaintiffs' property, and then continued northward on this brook for about a mile to the point where it crosses plaintiffs' property line and reenters the Wilderness Area. Thereafter, Brown completed the Lila Traverse by continuing on Shingle Shanty Brook to Lake Lila, where he exited at a DEC public access point.

Plaintiffs commenced this action after they learned about Brown's trip, seeking compensatory damages for trespass and a judgment declaring that the Waterway is not navigable-in-fact, and barring the public from using the Waterway and entering plaintiffs' property. Brown answered and asserted, among other things, that the State was a necessary party. The State and DEC (hereinafter collectively referred to as the State defendants) thereafter moved to intervene as defendants, and Supreme Court granted the motion. The State defendants then answered and asserted counterclaims, including a demand for a declaratory judgment that the Waterway is navigable-in-fact, and that plaintiffs created a public nuisance by interfering with the public's right to use it. The State defendants further sought an injunction prohibiting plaintiffs from posting the Waterway against trespass. Following discovery, Brown and the State defendants moved and plaintiffs cross-moved for summary judgment. Supreme Court declared that the Waterway is navigable-in-fact, granted the motions for summary judgment by Brown and the State defendants, denied plaintiffs' cross motion and enjoined plaintiffs from interfering with the right of the public to navigate the Waterway. Plaintiffs appeal.

As a preliminary matter, we note that in rendering its summary judgment determination, Supreme Court stated that it would have been inclined to find triable issues of fact as to the navigable character of the Waterway, but did not do so because the parties had asked the court to render a determination as a matter of law. On appeal, the parties renew that request, jointly advising this Court that the material facts are fully and accurately presented in the record and are not in significant dispute. The determination whether a waterway is navigable-in-fact is heavily dependent on factual evidence and assessments and thus cannot always be resolved as a matter of law (see e.g. Adirondack League Club v Sierra Club, 92 NY2d 591, 605 [1998]; Fairchild v Kraemer, 11 AD2d 232, 236 [1960]; compare Morgan v King, 35 NY 454, 460 [1866]; People ex rel. Erie R.R. Co. v State Tax Commn., 266 App Div 452, 454-455 [1943]). Nevertheless, the parties in a civil dispute may chart their own course in litigation and may agree upon the factual basis for the resolution of a legal controversy (see Matter of Kaczor v Kaczor, 101 AD3d 1403, 1404-1405 [2012]). In view of the comprehensive character of the record and the lack of any major factual disagreements in the parties' arguments, we grant their mutual request to resolve this matter as a question of law.

Pursuant to the common law, a waterway on private property that is not navigable-in-fact is owned by the adjacent landowners, but a waterway that is navigable-in-fact "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 at 601; see Morgan v King, 35 NY at 455). The State cannot alienate the right of the public to travel on a navigable-in-fact waterway by transferring title in its bed and banks to a private owner (see Smith v City of Rochester, 92 NY 463, 479 [1883]). As riparian owners never obtain ownership interests in the waters of navigable-in-fact waterways, a judicial determination that the public has the right of navigation does not result in a taking for public use without compensation (see Adirondack League Club v Sierra Club, 92 NY2d

at 604).<sup>1</sup> Accordingly, the import of a judicial determination that a waterway is navigable-in-fact is that it has always been open to the public in that character, even though the riparian owners may not have believed it to be, and no trespass was committed by a traveler who navigated upon it before a court ruled upon its navigability.

Where, as here, a waterway passes through privately-owned property, a common-law standard is applicable in determining its navigability. While the Navigation Law contains a definition of navigability-in-fact, that legislation applies to the "navigable waters of the state," a term that is statutorily defined to exclude privately-owned bodies of water (Navigation Law § 1; see Navigation Law §§ 2 [4]; [5]; People v System Props., Inc., 281 App Div 433, 443-444 [1953]). In addition to this statutory distinction, the common law differentiates between the navigability of waterways on private property and those passing over land owned by the State in its sovereign capacity, such as tidal waters, the Great Lakes, boundary rivers and certain other rivers and lakes (see Douglaston Manor v Bahrakis, 89 NY2d 472, 481-482 [1997]; Town of N. Elba v Grimdtich, 98 AD3d 183, 189-190 [2012]). Accordingly, where, as here, the State has no sovereign or proprietary ownership interest in the land and the waterway in question passes through private property, its navigability-in-fact is determined by a common law examination of "evidence of [the waterway's] actual practical use or evidence of capacity for practical use" (Adirondack League Club v Sierra Club, 92 NY2d at 605). Historically, this analysis turned on whether the waterway had the capacity to be used for commercial transportation; the public was deemed to have the right to travel on "every stream which is capable, in its natural state and its ordinary volume of water, of transporting, in a condition fit for market, the products of the forests or mines, or of the tillage of the soil

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<sup>1</sup> For this reason, and contrary to Brown's contention, a 2007 deed that purported to transfer some of the affected property "subject [to the] right of the public to navigate" on the Waterway does not affect our analysis, as no private ownership interests affecting such rights had been acquired or could be conveyed.

upon its banks" (Morgan v King, 35 NY at 459). More recently, the Court of Appeals clarified that commercial use is not the only relevant factor, and that a waterway's capacity for recreational use is also significant in determining its navigability. "[W]hile the purpose or type of use remains important, of paramount concern is the capacity of the river for transport, whether for trade or travel" (Adirondack League Club v Sierra Club, 92 NY2d at 603). The Court of Appeals stated that this holding neither altered nor enlarged the applicable common-law analysis and was "in line with the traditional test of navigability, that is, whether a river has a practical utility for trade or travel" (id. at 600).

Accordingly, the Waterway's navigability-in-fact must be determined based upon its utility for travel or trade as revealed by the testimony, affidavits, maps, photographs, historical records and other evidence in the voluminous record. Of particular significance is the extensive testimony of Donald Brandreth Potter, a member of plaintiff Friends of Thayer Lake LLC, who has lifelong familiarity with the Waterway and its history. Potter – who was 88 years old when he testified – has been the owner for 55 years of Mud Pond Camp, a hunting cabin near the Waterway that was constructed by his family in 1918. Potter testified that although the Waterway is shallow in some areas and narrow, tortuous and crowded with plant growth in others, it is "generally floatable by canoe" during periods of ordinary water. The rapids below Mud Pond are an exception; Potter testified that this part of the Waterway is never canoeable and must be avoided by use of a 500-foot carry trail that his family constructed and maintains. In addition to maintaining this trail, Potter stated that he and his family routinely maintain the Waterway by removing fallen trees, vegetation and other obstacles that would otherwise block or narrow the channel. Even with such attention, the Waterway below Mud Pond is so narrow and winding that there is no room for large craft or boats with oars; canoes are the only type of vessel that can pass. Nevertheless, Potter's testimony fully established that, throughout most of its length, the Waterway is capable of being used for canoe travel and has in fact been used for this

purpose for many years.<sup>2</sup> This evidence established that the Waterway has "sufficient natural volume for a sufficient portion of the year to make it useful as a means for transportation," a required element of navigability-in-fact (Adirondack League Club v Sierra Club, 92 NY2d at 607).

The Waterway's narrow, shallow character does not preclude such a finding, as a stream that can carry only small boats may nevertheless be navigable-in-fact (see People ex rel. Lehigh Val. Ry Co. v State Tax Commn., 247 NY 9, 11-12 [1928]; People ex rel. New York Cent. R.R. Co. v State Tax Commn., 238 App Div 267, 268 [1933], affd 268 NY 519 [1935]). Likewise, neither the portage around the relatively short Mud Pond rapids nor the presence in the Waterway of other incidental obstacles such as beaver dams and fallen trees renders the Waterway nonnavigable, as "occasional natural obstructions do not destroy the navigability of a [waterway]" (Adirondack League Club v Sierra Club, 92 NY2d at 607; see People ex rel. Erie R.R. Co. v State Tax Commn., 266 App Div at 454; see also Matter of City of Niagara Falls v Water Power & Control Comm., 267 NY 265, 270 [1935], cert denied 296 US 609 [1935]). On the contrary, the presence of such occasional obstructions in a navigable-in-fact waterway gives rise to a public right to circumvent them by "mak[ing] use, when absolutely necessary, of the bed and banks, including the right to portage on riparian lands" (Adirondack League Club v Sierra Club, 92 NY2d at 607).<sup>3</sup>

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<sup>2</sup> Before this litigation was commenced, Potter and a relative escorted two DEC officials on a canoe tour through the Waterway; at the conclusion of the trip, the officials opined that the Waterway is navigable-in-fact.

<sup>3</sup> The public right to travel through private property on a navigable-in-fact waterway "does not sweep away or displace other rights accompanying . . . private ownership," such as exclusive fishery rights (Douglaston Manor v Bahrakis, 89 NY2d 472, 481 [1997]). Public use "that is not strictly incidental to the right to navigate gives rise to [a cause of] action for trespass" (Adirondack League Club v Sierra Club, 92 NY2d at 607).

As for evidence of actual use, Potter's testimony and family records reveal that – as there are no roads anywhere nearby – his family has always relied on the Waterway as a primary means of traveling to Mud Pond Camp from other parts of their property. Additionally, the family has frequently used it as a route for travel to other bodies of water, including those that now make up the Lila Traverse. Although much of this travel has been undertaken for recreational reasons such as hunting and fishing, the family has also regularly used the Waterway for such utilitarian purposes as transporting goods and supplies to Mud Pond Camp. Potter described the water transportation of food, baggage, equipment, beds, a stove and building materials, such as lumber, doors, windows and shingles. Such items were either brought overland from the north through the area now comprising the Wilderness Area to Lilypad Pond, and then by canoe or guideboat to Mud Pond, or from the south by canoe on Shingle Shanty Brook, Mud Pond Outlet Brook and Mud Pond. The Waterway has also been used to transport deer and other game shot by Potter and his family for their own use, and it saw some limited commercial use in the 1920s and 1930s, when Potter's father operated a trapping business and sometimes used the Waterway to transport furs to market.

Contrary to plaintiffs' argument, the fact that the Waterway's use has been almost exclusively private and recreational rather than commercial does not preclude a determination that it is navigable-in-fact. The standard is phrased in the disjunctive, looking to the stream's practical utility for "trade or travel" (*id.* at 603 [emphasis added]). Moreover, the test examines a waterway's capacity for use and not merely its actual use (see Adirondack League Club v Sierra Club, 92 NY2d at 605; Fairchild v Kraemer, 11 AD2d at 235). The landowners' longstanding use of the Waterway to transport goods and materials for private use reveals that it has the capacity to transport similar goods for commercial purposes. Further, a waterway's capacity for commercial use does not depend exclusively on its utility for moving commodities; as the Court of Appeals noted, logs are now moved by truck, and rivers "are no longer primarily subjects of commercial exploitation and gain but instead are valued in their own right as a means of travel" (Adirondack League Club v Sierra Club, 92 NY2d at 603). In this

modern view of a waterway's utility, recreational and commercial uses are often intertwined, as illustrated by the affidavit testimony of the owner of an Adirondack outfitting and guide service, who stated that his business now includes canoe tours in the Wilderness Area, and that he will include the Waterway in this commercial activity if it is judicially declared to be navigable-in-fact.

Plaintiffs' arguments pertaining to the Waterway's remote nature are unavailing. The Wilderness Area was privately owned before the late 20th century, and there were no nearby roads or other means of public access; thus, before Brown's 2009 trip, use of the Waterway was limited almost exclusively to the landowners and their guests.<sup>4</sup> There is some record evidence that the Waterway was briefly used for public recreational canoe travel during the late 1800s, when a popular Adirondack guide book described a canoe route between Lake Lila and Little Tupper Lake that included the streams and ponds that make up the Waterway, specifically mentioning Shingle Shanty Brook, the portage around the Mud Pond rapids and the ponds now known as Mud Pond and Lilypad Pond. However, a note in the guidebook indicates that the owners eventually withdrew permission for entry "as the privilege was abused." Other than this guidebook, there is no indication of public use or attempts to gain public access to the Waterway until after the State acquired the Wilderness Area and canoeists began using the Lila Traverse.

Even now, access to the Waterway remains difficult, requiring lengthy canoe travel across the Wilderness Area on the various component lakes and streams of the Lila Traverse and several portages, the longest of which covers 1.75 miles.

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<sup>4</sup> Following the publication of Brown's article describing his 2009 trip on the Waterway, other members of the public followed his lead; plaintiffs' motion-sensitive cameras have documented the presence of dozens of canoe travelers on the Waterway. While this travel offers additional evidence of the Waterway's navigable character, we do not rely on it, finding adequate proof in the evidence of the Waterway's physical characteristics and historical use.

However, the standard for navigability-in-fact is more concerned with a waterway's capacity and characteristics than its location. A significant element in determining whether a waterway on private property is navigable-in-fact is whether there are multiple "termini" by which the public can gain access and which provide means by which the waterway can be used for travel to and from other destinations. A body of water on private land that has no inlet, outlet or public access – such that it cannot be reached without crossing private land or cannot be used as a travel route to other destinations – is not navigable-in-fact (see Dale v Chisholm, 67 AD3d 626, 627 [2009]; Mohawk Val. Ski Club v Town of Duaneburg, 304 AD2d 881, 883-884 [2003], abrogated on other grounds 98 AD3d 183 [2012]; Hanigan v State of New York, 213 AD2d 80, 84 [1995]). The Waterway meets this test, as it adjoins public property at both of its termini. Lilypad Pond on the east and Shingle Shanty Brook on the west provide public access to and from the Waterway for travelers from the DEC access points at Lake Lila and Little Tupper Lake, as well as other bodies of water, campsites and hiking trails throughout the Wilderness Area.

Contrary to plaintiffs' contention, no showing of necessity for public use of the Waterway is required. The references to commercial necessity in the early cases did not result in a requirement for a showing of public need to use a waterway as an element of navigability-in-fact, but instead reflected judicial efforts to adapt English common-law standards of navigability to the needs and characteristics of a new country (see Adirondack League Club v Sierra Club, 92 NY2d at 601-602; Morgan v King, 35 NY at 458-459). The standard is practical utility, not necessity, and when that standard reveals that a waterway is navigable-in-fact, "the public claim to such use ought to be liberally supported" (Morgan v King, 35 NY at 459). The evidence establishes that the Waterway has the capacity to provide practical utility to the public for both trade and travel. Accordingly, we agree with Supreme Court that it is navigable-in-fact and subject to a public right of navigation, including the right to portage on plaintiffs' land where absolutely necessary for the limited purpose of avoiding obstacles to navigation such

as the Mud Pond rapids.<sup>5</sup>

Based on this determination, Supreme Court also properly declared that plaintiffs created a public nuisance by placing cables and no trespassing signs across the Waterway that interfered with the public right of navigation, and enjoined them from continuing to do so (see Blanchard v Western Union Tel. Co., 60 NY 510, 513-516 [1875]; see also Khoury v County of Saratoga, 243 App Div 195, 198 [1935], affd 267 NY 384 [1935]).

Peters, P.J., and Lynch, J., concur.

Rose, J. (dissenting).

In our view, the Mud Pond Waterway (hereinafter the Waterway) does not meet the navigable-in-fact test under common law and, therefore, we respectfully dissent. The Waterway is defined by the parties to include the Narrows of Lilypad Pond, Mud Pond, the Mud Pond Outlet Rapids, the Mud Pond Outlet Brook and the Shingle Shanty Brook from the junction of the Mud Pond Outlet Brook until it reaches publicly-owned land. Mud Pond

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<sup>5</sup> Our legal analysis applies established precedent, but it bears noting that, in this circumstance, there are some troubling results left unaddressed. Prior to the State's acquisition of the adjoining lands, there was no question that the Waterway was understood to be private property, not subject to public use. The law is clear that no taking without just compensation results from a determination of navigability-in-fact; however, it appears most unlikely that anyone contemplated that this remote property was burdened by a public easement of any nature when the property was conveyed into private hands in 1851, or indeed, at any time prior to the State's purchase of the adjoining lands. While it is well established that property ownership rights are not altered by adjudications of navigability-in-fact, we share the dissent's concern that the application of the rule in cases such as this may destabilize long-established expectations as to the nature of private ownership (compare Douglaston Manor v Baharakis, 89 NY2d at 481).

itself is shallow and narrow, and the rapids at the outlet are approximately 500 feet in length. Given the rocky terrain and shallowness of the water, the rapids are impassable, even by canoe. The Mud Pond Outlet Brook and Shingle Shanty Brook are so narrow in spots that a rowboat cannot navigate them because its oars will hit the banks, and the water course meanders, twists and turns back upon itself, with beaver dams, downed trees and dense vegetation growing out from the banks and up from the bed. It is only through plaintiffs' efforts that the Waterway is cleared of natural debris that would otherwise render it impassable.

There is no dispute that the land encompassing the Waterway, referred to by the parties as the Mud Pond parcel, is privately owned, with plaintiffs' ownership and right to use the Waterway dating to 1851. Historically, the land bordering the Mud Pond parcel to the north was also privately owned, but defendant State of New York acquired neighboring Lake Lila in 1979 and the Whitney Wilderness Area, including Little Tupper Lake, in 1998. The State then opened these areas to the public and, as a result, the public may now canoe on what is known as the Lila Traverse, a series of lakes, ponds, streams and portages by which one can travel from Little Tupper Lake to Lake Lila. Defendants do not dispute that it is only as a result of the State's recent acquisitions that the Waterway may be accessed from publicly-owned land and that, but for the short portage around the rapids, those members of the public engaged in the sport of wilderness canoeing are now able to reach the Waterway and navigate its meandering path, whereas they previously had no way of accessing it. The majority relies on this public access and ability to travel by canoe through the Waterway, as well as plaintiffs' own use of the Waterway to hunt, trap and bring supplies to construct and maintain their hunting camp located on the Mud Pond parcel, as proof of the Waterway's capacity for travel or transport and, thus, its navigability. In our view, however, the evidence regarding the location of the Waterway and its history of use establishes that it is not of such practical usefulness to the general public as a means of travel or transport that it can be said to meet the navigable-in-fact standard.

The common law of New York provides that bodies of water may be privately owned by the riparian owners (see Smith v City of Rochester, 92 NY 463, 473-474 [1883]). A public easement over privately-owned lakes and streams will be recognized only if the body of water satisfies the navigable-in-fact standard (see Douglaston Manor v Bahrakis, 89 NY2d 472, 479 [1997]). 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 (see Van Cortlandt v New York Cent. R.R. Co., 265 NY 249, 254-255 [1934]; Morgan v King, 35 NY 454, 458 [1866]; Waterford Elec. Light, Heat & Power Co. v State of New York, 208 App Div 273, 277 [1924], affd 239 NY 629 [1925]; see also People v Platt, 17 Johns 195, 209-211 [1819]), 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" (Adirondack League Club v Sierra Club, 92 NY2d 591, 601 [1998]; see also Navigation Law § 2 [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" (Fairchild v Kraemer, 11 AD2d 232, 235 [1960], citing The Daniel Ball, 77 US 557, 563 [1870]). While the Court of Appeals has made clear that the ability to support recreation is a factor for consideration in determining navigability (see Adirondack League Club v Sierra Club, 92 NY2d at 603), "recreational use alone is insufficient to establish that a body of water is navigable[-]in[-]fact" (Dale v Chisholm, 67 AD3d 626, 627 [2009]; compare Arkansas River Rights Committee v Echubby Lake Hunting Club, 83 Ark App 276, 286, 126 SW3d 738, 744 [2003]; In re Adjudication of the Existing Rights to the Use of All the Water, 311 Mont 327, 340, 55 P3d 396, 404 [2002] [examples of jurisdictions where the law has developed differently than it has in New York, and navigability may be established by recreational use alone]). 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" (Adirondack League Club v Sierra Club, 92 NY2d at 603).

Defendants argue that the Waterway is now part of the Lila Traverse, although the Traverse was originally laid out by defendant Department of Environmental Conservation (hereinafter DEC) to avoid any encroachment on private property. As defendants now depict it, the Lila Traverse begins at the public access point on Little Tupper Lake with a 4.19-mile paddle across the lake, followed by an additional 1.3 miles by water to the first portage of .1 miles. From there, travel by water for another 1.18 miles on Rock Pond is possible until the next portage, which is 1.75 miles to Hardigan Pond. This portage has been described as difficult, with the path oftentimes submerged or muddy. The water travel on Hardigan Pond is .61 miles, followed by another portage of .4 miles to the Salmon Lake Outlet. From there, water travel of .92 miles on the Salmon Lake Outlet followed by .36 miles on the Little Salmon Lake leads to another portage of .4 miles to Lilypad Pond, which then feeds into the Narrows where the water crosses the property line and leads to the privately owned Mud Pond, allowing for one mile of water travel over plaintiffs' private property before reaching the Mud Pond Outlet Rapids. A short portage around the Mud Pond Rapids is required before following the Mud Pond Outlet to the Shingle Shanty Brook for 1.28 miles until it exits plaintiffs' property and reenters the publicly-owned Whitney Wilderness Area. From there, the public-owned portion of Shingle Shanty Brook leads for 2.14 miles to publicly-owned Lake Lila, which requires another 2.14 miles of water travel to the public beach. Yet another .3-mile portage is required to the nearest publicly accessible road, which is only open seasonally. This trip may be done in reverse, which of course would be required in the absence of having a mode of transportation at both access points. The Lila Traverse as described covers two watersheds and, although the Waterway flows downstream from Salmon Lake via the Salmon Lake Outlet, that lake is still privately owned and thus does not serve as a public access point to the Waterway.

As described, defendant Phil Brown took the route from Little Tupper Lake to Lake Lila over the course of two days in May 2009, with another individual meeting him with a vehicle

parked near Lake Lila.<sup>1</sup> There is no dispute that Brown could have remained on State land during his trip by taking the publicly-owned and DEC-maintained portage trail of .77 miles from Lilypad Pond to the Shingle Shanty Brook.<sup>2</sup> 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 privately-owned Waterway is 17.86 miles. Inasmuch as the adjoining Whitney 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 Waterway.<sup>3</sup> Those members of the public who do so must necessarily be canoeists 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.

While the majority correctly states that a body of water with no inlet, outlet or public access is not navigable-in-fact (see e.g. Dale v Chisholm, 67 AD3d at 627; Mohawk Val. Ski Club v Town of Duaneburg, 304 AD2d 881, 883-884 [2003], abrogated on other grounds 98 AD3d 183 [2012]; Hanigan v State of New York, 213 AD2d 80, 84 [1995]), it seems clear enough to us that the converse of this statement is not true (see e.g. Morgan v King, 35 NY at 460 [portion of Raquette River in question not navigable despite the ability of the public to access it from either end]). While the lack of any public access is determinative, the mere existence of access is not. The majority's reliance on the

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<sup>1</sup> At the time of Brown's trip, the seasonal road had not been opened, requiring him to leave his gear on the shore of the lake and hike 4½ miles to the nearest County road. A helpful road crew then assisted him in retrieving his gear.

<sup>2</sup> DEC built this trail in apparent recognition of plaintiffs' private property rights.

<sup>3</sup> Prior to Brown's publicized trip, any wilderness canoeists wishing to make the Lake Lila Traverse who referred to the DEC's trail guide were directed to take the route that remained on publicly-owned land.

existence of two public access points from Lake Lila and Little Tupper Lake, both of which are unpopulated, as proof sustaining navigability, overlooks the distance from these access points to the Waterway and the effort required to reach it. Given the Waterway'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.

In addition to limited access, the record makes clear that the capacity of the Waterway is limited to canoes. However, to conclude that the ability to canoe it is evidence of its capacity for travel or transport ignores the practical utility aspect of the standard required to find a public easement. While the ability of back country paddlers to canoe the Waterway is certainly a factor to be considered, it cannot be viewed in isolation or accorded undue weight in determining navigability. Indeed, the evidence in Morgan established that logs were capable of being floated through the privately owned portion of the Raquette River in question. Nevertheless, the available season only lasted two months, workers were required to aid the passage of the logs and the resulting damage to the logs caused by the rapids and rocks led to the conclusion that "[i]t would be going beyond the warrant of either principle or precedent to hold that a floatable capacity, so temporary, precarious and unprofitable, constituted the stream a public highway" (Morgan v King, 35 NY at 460). In Adirondack League Club, factual issues were found regarding navigability despite the fact that commercial activity had indisputably occurred on the South Branch of the Moose River (Adirondack League Club v Sierra Club, 92 NY2d at 602).<sup>4</sup> Although a waterway may be capable of supporting limited activity, it may nevertheless be considered nonnavigable (see Morgan v King, 35 NY at 460; see also Meyer v Phillips, 97 NY

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<sup>4</sup> The settlement ultimately reached by the parties in Adirondack League Club provides less access for the public than will be available under the majority's holding in this case (see South Branch Moose River Settlement, [www.dec.ny.gov/docs/lands\\_forests\\_pdf/mrpwfump019.pdf](http://www.dec.ny.gov/docs/lands_forests_pdf/mrpwfump019.pdf)).

485, 490 [1884] [five-mile stream, of which two miles were privately owned, deemed nonnavigable given the infrequency of use by a "limited number of persons"]; Munson v Hungerford, 6 Barb 265, 270 [1849] [in order to be navigable, stream "must be of common or public use for carriage of boats and lighters<sup>5</sup>"]; People v Platt, 17 Johns at 212-213 [Saranac River nonnavigable despite fact that rafts "have occasionally been brought down"]). The Waterway likewise does not meet the navigability standard in that, while it is capable of being used for the recreational activity of wilderness canoeing, and such canoers have in fact begun to use it, it has no practical utility to be commonly used by the general public for travel or transport.

Nor are we persuaded by the majority's reliance on People ex rel. Lehigh Val. Ry. Co. v State Tax Commn. (247 NY 9, 11-12 [1928]) and People ex rel. New York Cent. R.R. Co. v State Tax Commn. (238 App Div 267, 268 [1933], affd 268 NY 519 [1935]) for the proposition that narrow, shallow streams may be considered navigable. Those cases differ materially from this one. At issue in Lehigh Val. Ry. Co. were the Cascadilla and Six Mile Creeks, both of which, as reflected by the decisions and the materials in the record, are located in the populated City of Ithaca, Tompkins County, where they lead directly into Cayuga Lake. At issue in New York Cent R.R. Co. was Roeliff Jansen's Kill located in the Town of Livingston, Columbia County, where the tide ebbed and flowed and there was a history of "considerable commercial transportation and navigation" (People ex rel. New York Cent. R.R. Co. v State Tax Commn., 238 App Div at 268). Thus, although Cascadilla Creek, Six Mile Creek and the relevant portion of Roeliff Jansen's Kill may all be shallow and narrow streams accommodating only small-size craft, there is a distinct and telling difference between them and the Waterway. Given the latter's limited use and remote location far from any population centers or arteries of commerce, it has no practical utility to the general public. To conclude that such a remote

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<sup>5</sup> A lighter is "a large, open, flat-bottomed barge, used in unloading and loading ships offshore or in transporting goods for short distances in shallow waters" (Random House Webster's Unabridged Dictionary [2d ed 2001]).

and narrow stream may be navigable-in-fact without consideration of this broader context reduces the navigability test to an improper one of mere access and floatability – i.e., as long as any member of the public can successfully travel by canoe on the stream in question, the stream has capacity and is navigable.<sup>6</sup> Such a result does not adhere to the common-law standard.

Finally, to suggest that the private owners' personal use of the Waterway reflects a capacity for commercial use also ignores its remote, isolated nature. Notably, based on the Waterway'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 Waterway, the only goods that would be transported through it would be for personal use. The proof that plaintiffs' predecessors allowed individuals to travel through the Waterway for a period of time in the 1800s before closing access to it, and that individual members of plaintiffs used the Waterway for hunting, trapping and carrying supplies to their isolated hunting camp, merely reflects their private property rights in the Waterway and does not establish any practical utility to the general public for travel or transport. Nor does the fact that a back country guide may propose to take canoeists through the Waterway if it were to be adjudicated as navigable prove the Waterway's capacity for common use by the general public.

In summary, we cannot agree that the feasibility of using the Waterway for recreation and the fact that the public is capable of reaching it through a series of lakes, ponds, streams and portages render it a practical means of transportation so as to be navigable-in-fact. To conclude that they do would, in our view, unnecessarily expand our navigability-in-fact doctrine and destabilize settled expectations of private property ownership by

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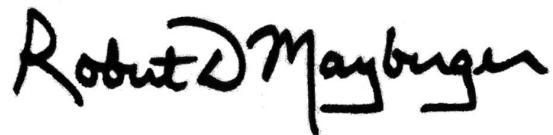
<sup>6</sup> This improper standard for navigability is reflected in the majority's reference to the DEC officials' opinion that the Waterway is navigable-in-fact based on their ability to travel through it. DEC took a similarly incorrect position in Hanigan v State of New York (213 AD2d at 82).

opening up remote, unpopulated, privately owned bodies of water as long as the public has some way, however arduous and recently acquired, of gaining access to them.

Lahtinen, J., concurs.

ORDERED that the order and judgment are affirmed, without costs.

ENTER:

A handwritten signature in black ink, appearing to read "Robert D. Mayberger". The signature is fluid and cursive, with "Robert D." on top and "Mayberger" on the bottom, separated by a small gap.

Robert D. Mayberger  
Clerk of the Court