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COURT OF APPEALS

STATE OF NEW YORK

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FRIENDS OF THAYER LAKE, ET AL.,

Appellant,

-against-

No. 55

BROWN, ET AL.,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
March 24, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

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Appearances :

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1 CHIEF JUDGE DIFIORE: Good afternoon,  
2 everyone. First matter on today's calendar is number  
3 55, Friends of Thayer Lake v. Brown.

4 Counsel.

5 MR. PHILLIPS: Good afternoon, Your Honors.

6 My name is Dennis Phillips, I'm representing the  
7 appellants in this case. I would ask for two minutes of  
8 rebuttal at the conclusion of my time.

9 CHIEF JUDGE DIFIORE: You have two minutes,  
10 sir.

11 MR. PHILLIPS: Thank you.

12 And seated next to me today are Diane Finnegan  
13 (ph.), on behalf of the Adirondack Landowners Association,  
14 and Alan Pierce, on behalf of the Empire State Forest  
15 Products Association.

16 So as Your Honors know, this is a case involving  
17 New York's navigably - - - navigability-in-fact doctrine,  
18 which is a common-law commercial doctrine, as we have  
19 discussed in our papers. It is not a case about ordinary  
20 navigability, not a case about ordinary floatability, not  
21 a case about travel; it's a very, very technical provision  
22 of the common law that has been extant in York State - - -

23 JUDGE RIVERA: Well, it's about - - -

24 MR. PHILLIPS: - - - as early as 1826.

25 JUDGE RIVERA: - - - it's about

1 recreational use. And didn't the court recognize  
2 that as fitting within the navigability-in-fact  
3 doctrine in Adirondack League?

4 MR. PHILLIPS: Yes, Your Honor. The court  
5 in Adirondack League Club agreed that recreational  
6 use was part of the analysis. And - - - but contrary  
7 to what our - - - the respondents are saying, our  
8 position is that it is not all of the analysis; it's  
9 part of the analysis. And - - -

10 JUDGE RIVERA: So are you suggesting then  
11 that although it may be navigable for some  
12 recreational use, it also has to be navigable for a  
13 commercial - - - a different type of commercial  
14 purpose?

15 MR. PHILLIPS: Yes, that is our - - - our  
16 position, and that would be - - -

17 JUDGE RIVERA: How does that stand up  
18 though against Adirondack League? Wasn't the use  
19 there these canoes and kayaks?

20 MR. PHILLIPS: Well, in Adirondack League  
21 Club, that was primarily a log-driving case - - -

22 JUDGE RIVERA: Uh-huh.

23 MR. PHILLIPS: - - - a historical log-  
24 driving case which was - - - which really was the  
25 rule of Morgan v. King, the 1866 case.

1           So this Court, in that case, spent a lot of  
2 time analyzing whether logs could be floated on the  
3 waterway in its natural condition. So that was a  
4 natural-condition case. The way I read the case is  
5 that because we don't do log driving anymore, it  
6 would be difficult to prove a log-driving case unless  
7 you had some external floatability evidence.

8           I think that the court in that case went to  
9 the recreational use of canoeing because - - - I  
10 think the principle was that canoes float and logs  
11 float. I actually thought the Appellate Division did  
12 a good job on that, because they were direct in  
13 saying that there was a combination test of  
14 commercial use and recreational use - - -

15           JUDGE FAHEY: So - - - so do you agree that  
16 the standard is practical utility for travel or  
17 transport?

18           MR. PHILLIPS: That's an interesting  
19 question. I agree that the standard is practical  
20 utility to the public as a means for transportation.  
21 In Adirondack League Club, this Court, I thought, as  
22 it evolved the common-law standard - - - which was  
23 the touchstone of Morgan and the navigation law - - -  
24 it talked about the touchstone being practical  
25 usefulness for - - - to the public as a highway for

1 transportation.

2 That evolved in Adirondack League Club as  
3 practical utility to the public as a means for  
4 transportation. I think that's the same thing; I  
5 think that the travel or trade language of Adirondack  
6 League Club, or the travel and transport language of  
7 Adirondack League Club, was a little bit loose, if  
8 you will.

9 JUDGE STEIN: Is it - - - isn't there  
10 evidence in this record going beyond a mere  
11 recreation, though - - - historically, at least.  
12 Doesn't the record show some evidence of trappers for  
13 hire, maybe even the Native Americans, going back  
14 even further, using this waterway for - - - for  
15 commercial - - - what we'll call commercial purposes.  
16 So are we limited in this record to simply  
17 recreational use; is that your position?

18 MR. PHILLIPS: Our position is that the  
19 Appellate Division effectively changed the common law  
20 of New York by holding that recreational use, by  
21 itself, could change the common law.

22 JUDGE STEIN: We - - - if we were,  
23 theoretically, to agree with you and say recreational  
24 use by itself is not enough, would there be enough in  
25 this record to support the result that the Appellate

1 Division reached here?

2 MR. PHILLIPS: I do not there - - - I do  
3 not think there is any commercial use in this record.  
4 On the trapping, for example, trapping is defined  
5 under the General Obligations Law as a recreation.

6 JUDGE STEIN: Well, as I understand it, the  
7 record has trapping by the family, by the private own  
8 - - - landowners. But also, hiring people from - - -  
9 professional trappers, if you will, to come in and  
10 trap and sell it. So aren't those two different  
11 things?

12 MR. PHILLIPS: Well, that - - - that's in  
13 the record when Mr. Potter was the superintendent of  
14 Whitney Park, and in that capacity, he hired trappers  
15 to come in and trap - - - or trap beavers and other  
16 furbearing animals at Whitney Park. But that would  
17 still be a private use of land. And trapping by  
18 itself, if you match that up against the common-law  
19 standard - - - and I have called the common-law  
20 standard a three-prong test in - - - in one of my  
21 responsive briefs - - -

22 JUDGE STEIN: Yeah. But we're talking  
23 about practical utility, right? So doesn't that tend  
24 to show some practical utility for a commercial  
25 purpose?

1                   MR. PHILLIPS: Well, the standard is  
2 practical utility to the public, not practical  
3 utility to the private. The standard is not self-  
4 aclas - - - self-actualization to the individual;  
5 it's practical utility to the public.

6                   If Mr. Potter brought trappers in to - - - to  
7 assist him, back in the day, relative to private property,  
8 there would be no public utility to that. That would not  
9 match up to the common-law test which I call the three-  
10 prong test. So I do not look at trapping as being - - -

11                  JUDGE STEIN: But that's the way it was  
12 used. So maybe it wasn't used for the public, but  
13 the question is, is it - - - could it practically be  
14 used for the public, and doesn't that provide some  
15 evidence of its practical utility.

16                  JUDGE RIVERA: If I may add, is - - - isn't  
17 that what the case law says; it's the capacity,  
18 right?

19                  MR. PHILLIPS: Well, as we look at  
20 trapping, we know that trapping is a winter activity.  
21 And from this record, we know that trapping begins in  
22 the winter on the ice, and in the spring - - - if  
23 there is a spring breakup, sometimes the canoes were  
24 used to check out the trap lines in the spring and to  
25 carry some pelts.

1                   But whether they were on the Whitney Park  
2                   or the Brandreth Park, the pelts never went to market  
3                   by canoe; they just went from point A to point B  
4                   inside the private land, never went to market by  
5                   canoe, because there were intervening long hauls - -  
6                   - six miles in one case, at least five miles in  
7                   another case - - - where the chain of any kind of  
8                   waterway is broking - - - broken. So under the  
9                   common law, if you look at the commercial use,  
10                  "getting the goods to market", it would not apply in  
11                  a case like this, in my opinion.

12                  JUDGE FAHEY: Well, you know, before - - -

13                  CHIEF JUDGE DIFIORE: Counsel, are we bound  
14                  by the party's desire to have this matter decided on  
15                  summary judgment?

16                  MR. PHILLIPS: As far as the facts were  
17                  concerned, relative to the character of this  
18                  waterway, the facts were not in dispute in terms of  
19                  what this waterway look like. And I think that as  
20                  far as the natural condition of this waterway is  
21                  concerned, which is a necessary finding of the court,  
22                  I think that, effectively, both the majority and the  
23                  dissent found that but for the maintenance of this  
24                  waterway over a period of at least sixty years by the  
25                  Potter family - - - including chain-sawing trees from

1 a canoe, which is a dangerous activity - - - but for  
2 that, the waterway would not have been passable, and  
3 even then, as admitted by both the majority and the  
4 ~~descent~~dissent, only passable by canoes.

5 So in terms of the nature of this waterway,  
6 there was no dispute relative to the factual aspect  
7 of what the waterway was all about.

8 JUDGE FAHEY: Well, to take it - - - to  
9 take it a step further, I guess what screams out at  
10 me is that if the standard is practical utility, why  
11 would you agree that there are no issues of fact?  
12 While there may be facts that are agreed upon, the  
13 practicality of those facts in terms of usefulness  
14 seems to me would be a question of fact, as it was in  
15 Adirondack's League.

16 Why would you not pursue the factual  
17 determination on the practical utility of the  
18 application of the usefulness?

19 MR. PHILLIPS: Your Honor, I think that in  
20 my responsive brief to the Adirondack Mountain Club -  
21 - -

22 JUDGE FAHEY: Uh-huh.

23 MR. PHILLIPS: - - - I set forth a three-  
24 prong test, which I think is the common-law test.  
25 The last part of it was practical utility.

1 JUDGE FAHEY: Uh-huh.

2 MR. PHILLIPS: And practical utility,  
3 according to our papers, and as we believe, is the  
4 modern rendition of necessity, which is the  
5 foundation - - -

6 JUDGE FAHEY: Right.

7 MR. PHILLIPS: - - - for the navigability-  
8 in-fact doctrine. So - - -

9 JUDGE FAHEY: I don't want to - - - I don't  
10 want you to get too far down on the fact. I  
11 understand the connection that you made there, I  
12 looked at your briefs, all 192 pages; we read them,  
13 all of us - - - you know, but - - -

14 MR. PHILLIPS: Thank you, and I apologize  
15 for that.

16 JUDGE FAHEY: - - - but leaving that  
17 aside, what I want to - - - what I wanted to get to  
18 is that it seems to me that this could - - - this  
19 case could lead to a test - - - it says, "ability to  
20 access is equivalent with a practical utility for a  
21 usefulness." And that's why I'm asking the question.  
22 And that's the thought that I want you to address.

23 Does the - - - now that the State has bought  
24 land adjacent to private land, and so, in theory, there is  
25 an ability to access this land, and - - - does that

1           essentially equate to practical usefulness and therefore  
2           meet the standard?

3                       MR. PHILLIPS: I believe that the pract - -  
4           - the practical utility to the public is the ultimate  
5           legal conclusion arrived at by this court or any  
6           court. And that is - - - as I've said in my papers,  
7           it's a conclusion based on an evidentiary foundation.  
8           It can't just be an arbitrary and complete - - - and  
9           capricious conclusion.

10                      So I think that practical utility is the  
11           functional equivalent of necessity. So as you've  
12           looked at all of the other evidence, you ultimately  
13           say, okay, we've looked at everything, now is there  
14           any necessity to the public to use this waterway.

15                      JUDGE RIVERA: Well, that - - -

16                      JUDGE FAHEY: What - - -

17                      JUDGE RIVERA: - - - that doesn't seem to  
18           me to align with Adirondack, because recreational use  
19           by its definition is not necessary in the way you're  
20           describing it.

21                      MR. PHILLIPS: Well, and recreational use -  
22           - -

23                      JUDGE RIVERA: Some - - - some people might  
24           think, yes, you need to indeed do some form of  
25           exercise to live, but that's - - - that's not really

1 what we're referring to.

2 MR. PHILLIPS: Well, Adirondack League Club  
3 is a - - - is a difficult case to read the first time  
4 and the one hundredth time, but I think that in  
5 Adirondack League Club - - -

6 JUDGE RIVERA: For some of us it's the  
7 200th time.

8 MR. PHILLIPS: I think that - - - I think  
9 that the canoe - - - the canoe - - - the recreational  
10 use in that case was like a supporting actor. They  
11 needed something to support the idea of logging in  
12 the natural condition. And - - - and again, I  
13 thought that the Appellate Division described that  
14 very well, particularly in the footnote to Hanigan,  
15 where it said, in the appropriate circumstances,  
16 recreational use could be used to establish a  
17 commercial utility of the waterway.

18 JUDGE RIVERA: Thank you.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.

20 MR. PHILLIPS: Thank you.

21 CHIEF JUDGE DIFIORE: Counsel.

22 MR. CAFFRY: Good afternoon, Your Honors.

23 I'm John Caffry with my co-counsel, Claudia Braymer,  
24 representing the respondent Phil Brown.

25 And I think the most important question

1           that the court's faced with here is, what did the  
2           court hold when it decided the Adirondack League Club  
3           case?

4                    JUDGE GARCIA:  Counsel - - - counsel,  
5           before you get to the Adirondack again, maybe you  
6           could help me a little with the facts here.  This  
7           Lila Traverse, this is the waterway, right?

8                    MR. CAFFRY:  It's - - - it's one part of  
9           it, really.  I look at it - - - that's the route Mr.  
10          Brown took - - -

11                   JUDGE GARCIA:  Right.

12                   MR. CAFFRY:  - - - to reach the waterway  
13          that passes through the plaintiff's property.  
14          There's multiple ways to access this waterway which  
15          really starts south of the plaintiff's property, goes  
16          north through their property briefly, and then goes  
17          back onto state land again - - -

18                   JUDGE GARCIA:  Right.

19                   MR. CAFFRY:  - - - out to Lake Lila.  The  
20          Lila Traverse is just one means to access it.

21                   JUDGE GARCIA:  And it's that water - - -  
22          series of waterways and links that is the passage,  
23          right?  That's the waterway we're talking about here?

24                   MR. CAFFRY:  Again, that's part of it, yes.

25                   JUDGE GARCIA:  Okay.  And it seems to me,

1 in looking at the many maps that we have in the  
2 record, that part of that trail is overland.

3 MR. CAFFRY: If you come in from that  
4 direction.

5 JUDGE GARCIA: No, even in between the  
6 bodies of water.

7 MR. CAFFRY: Only in a f - - - only in a  
8 few locations. If you look at this where it starts  
9 at the Salmon Lake, in the south, on the Whitney  
10 property, and then flows northwards, you - - - that's  
11 a continuous waterway. If - - - one way to access it  
12 is to come in on what's called the Lila Traverse,  
13 from the east, from Little Tupper Lake. There are  
14 other places to access this waterway from.

15 JUDGE GARCIA: But forgetting access, once  
16 you're in this waterway - - -

17 MR. CAFFRY: Once you're in it.

18 JUDGE GARCIA: - - - there are these - - -  
19 "portages" they're called in the record, right?

20 MR. CAFFRY: There - - - there are - - -  
21 within the plaintiff's property, there is one short  
22 portage.

23 JUDGE GARCIA: One, but outside the  
24 plaintiff's property.

25 MR. CAFFRY: Outside the plaintiff's

1 property, once you're on this waterway or this river,  
2 there is one at Little Salmon Lake, there is one on  
3 the plaintiff's property.

4 JUDGE GARCIA: And one of them is 1.6 miles  
5 or so?

6 MR. CAFFRY: Well, that, again, is on the  
7 Lila Traverse - - -

8 JUDGE GARCIA: Right.

9 MR. CAFFRY: - - - which is connecting two  
10 different waterways, really.

11 JUDGE GARCIA: But that part - - - so let's  
12 say this 1.6-mile part, right?

13 MR. CAFFRY: Uh-huh.

14 JUDGE GARCIA: That's a portage; is that a  
15 portage because there is water there that you can't  
16 pass because of an obstruction, or is that just an  
17 overland trail to correct - - - collect - - - connect  
18 two bodies of water?

19 MR. CAFFRY: That part is an overland trail  
20 connecting two bodies of water. But that's not the  
21 part we are looking at the navigability of.

22 JUDGE GARCIA: We're not.

23 MR. CAFFRY: No.

24 JUDGE GARCIA: We are only looking at the  
25 navigability over the part of the plaintiff's land.

1                   MR. CAFFRY: Right. Which is, again, part  
2 of a longer waterway - - -

3                   JUDGE GARCIA: Right. But if we were only  
4 looking at that - - - so if you had a navigable  
5 waterway that, for some reason, ended, and the two  
6 lakes ended within your property, the people could  
7 come on and do that?

8                   MR. CAFFRY: You wouldn't have - - - if - -  
9 - you wouldn't have - - - the public wouldn't have  
10 access to it, because you can't cross private land to  
11 gain access to the navigable waterway; you have to  
12 access it from public land - - - unless you're the  
13 upstream landowner. If you're the upstream private  
14 landowner, you can access it from your own land too.

15                  JUDGE GARCIA: But it seems to me, if you  
16 look at our cases - - - and I understand Adirondack  
17 put the recreational component into it, in one way or  
18 another, but it is a public highway. This is a  
19 series of bodies of water that, in some place, you've  
20 connected with overland trails. And then you get to  
21 the plaintiff's property and you say, well, now we  
22 can get through here because that's a waterway, and  
23 then we can get onto the other side and connect that  
24 through a couple more overland trails, and you've got  
25 this nice - - - from this lake to this lake.

1 MR. CAFFRY: But again - - -

2 JUDGE GARCIA: And that seems not to fit at  
3 all within the doctrine of navigable waterway.

4 MR. CAFFRY: Well, I'm sorry to disagree or  
5 be argumentative, but that's just - - - we're not  
6 talking about the navigability of that connector out  
7 to Little Tupper Lake; that's the way Mr. Brown  
8 happened to go. You can also go - - - on the same  
9 waterway, you could put in at Lake Lila, travel south  
10 through the plaintiff's land, and then go - - - on -  
11 - - all on one waterway, with portages right next to  
12 the water, to the Lily Pad Pond, to Little Salmon  
13 Pond, and various camp sites, as the lower court - -  
14 - as the Appellate Division found, all on state land.

15 That is the - - - to me, that's the more  
16 relevant waterway to examine - - -

17 JUDGE FAHEY: Though - - -

18 MR. CAFFRY: - - - then the fact that Mr.  
19 Brown went - - -

20 JUDGE FAHEY: In the - - -

21 MR. CAFFRY: - - - a different way.

22 JUDGE FAHEY: In the dissent - - - in the  
23 dissent, he outlined - - - he out - - - it's hard  
24 for me to judge, but he outlined six different  
25 portages, that I counted, that he specifically

1 outlined - - -

2 MR. CAFFRY: Uh-huh.

3 JUDGE FAHEY: - - - that cover the path.

4 Are you saying that that's not what we should be

5 looking at in evaluating the facts, as Judge Garcia

6 outlined them?

7 MR. CAFFRY: Yes, I think the - - - again,

8 there's multiple - - -

9 JUDGE FAHEY: Just so I'm clear, there are  
10 not six portages?

11 MR. CAFFRY: If you go the way Mr. - - -

12 JUDGE FAHEY: Wait.

13 MR. CAFFRY: If you - - -

14 JUDGE FAHEY: Let me finish - - - let me  
15 finish - - -

16 MR. CAFFRY: Yes.

17 JUDGE FAHEY: - - - just to get the point

18 out. I think it amounted to about 2.5 miles in

19 portages, if that's correct. Some of my math may be

20 off but - - - that's my only point; we should - - -

21 should we count that or not?

22 MR. CAFFRY: I don't think you count all of  
23 them.

24 JUDGE FAHEY: Uh-huh.

25 MR. CAFFRY: Because Mr. Brown took a

1 particular route that happened to include this  
2 waterway that flows through the plaintiff's property.  
3 There are other trips that you can take on this  
4 waterway through the plaintiff's property that don't  
5 involve all those portages.

6 It would be kind of like if you started out  
7 on Eagle Street here, and you wanted to go on Pearl  
8 Street, you would connect it by going down, I think,  
9 Steuben or something. But you don't have to go that  
10 way; you could go all the way up Pearl street as far  
11 as it goes, and that's another trip.

12 What I am saying is, we want to look at this  
13 waterway for all its connections for its whole length.

14 JUDGE FAHEY: For our - - - for our review  
15 of the record purposes, can we say there are six  
16 portages in the waterway that we're looking at here,  
17 in terms of navigability?

18 MR. CAFFRY: I don't think you should; I  
19 think you should look at the ones - - -

20 JUDGE FAHEY: But that is the record that  
21 Mr. Brown developed in his article.

22 MR. CAFFRY: Right, but there's many, many,  
23 other users of this - - - of this waterway - - -

24 JUDGE FAHEY: I understand that.

25 MR. CAFFRY: - - - that did not take that

1 same trip - - -

2 JUDGE FAHEY: Okay.

3 JUDGE PIGOTT: Are you - - - are you - - -

4 MR. CAFFRY: - - - that started and went  
5 other places.

6 JUDGE PIGOTT: Are you saying then that it is  
7 conceivable that you can go - - - you could stay on the  
8 water all the way in some fashion?

9 MR. CAFFRY: Correct.

10 JUDGE PIGOTT: You could float a log.

11 MR. CAFFRY: You could start at Lake Lila -  
12 - -

13 JUDGE PIGOTT: You could float a log.

14 MR. CAFFRY: I've done it. You could start  
15 at Lake Lila, you can go upstream to what's called  
16 Touey Falls, which is at the property line with the  
17 Whitney Estate - - -

18 JUDGE PIGOTT: Well, so, you don't need any  
19 of the portages, is your point.

20 MR. CAFFRY: There, you have two short  
21 portages.

22 JUDGE PIGOTT: So you can't float a log.

23 MR. CAFFRY: You can't float a log, but you  
24 can canoe it and you can have two short portages - -  
25 -

1 JUDGE PIGOTT: I think your light is on.

2 MR. CAFFRY: - - - and have a very nice  
3 travel on this waterway.

4 JUDGE PIGOTT: When you're talking about  
5 canoes, I got - - - I was thinking, it seems that in  
6 Adirondack, we elided into recreational, you know - -  
7 - because up until then, it's serious business. It's  
8 people that, you know, need it for commerce, you  
9 know, we talked all about this frontier stuff,  
10 trapping, and logging, and everything else.

11 Is it possible that if this is found to be  
12 navigable, and we say that because of recreational -  
13 - - and someone talked about they can get people  
14 together to, you know, go up in some group, you know,  
15 and I suppose charge them for doing that? Is it  
16 possible that in the winter, when someone was  
17 alluding to the fact that's when you do the trapping,  
18 that you can run your snowmobiles there?

19 MR. CAFFRY: No.

20 JUDGE PIGOTT: Why not?

21 MR. CAFFRY: The right of navigation is a  
22 right of navigation - - -

23 JUDGE PIGOTT: You're saying it's a public  
24 - - -

25 MR. CAFFRY: - - - and does not include

1 other forms of travel.

2 JUDGE PIGOTT: You're saying it's a public  
3 highway - - -

4 MR. CAFFRY: Correct.

5 JUDGE PIGOTT: - - - and you're saying that  
6 it could be used in that fashion, and it was used, as  
7 your opponent argued, you know, in the winter for  
8 trapping and things - - - I don't - - - I don't see  
9 where that would not be the next extension. And I  
10 don't see where it would not then be, you know, well,  
11 we can camp over here even in the summer. You know,  
12 we're - - - we just finished one portage, and now  
13 we're about to do this, I think we've got to set up  
14 camp here, on the riparian rights that we have, and  
15 build a fire.

16 MR. CAFFRY: There is no foundation for  
17 that in all of the hundreds of years of adjudication  
18 - - -

19 JUDGE PIGOTT: There's no foundation - - -  
20 there's no foundation - - -

21 MR. CAFFRY: - - - under the right of  
22 navigation.

23 JUDGE PIGOTT: All right.

24 MR. CAFFRY: This is an easement of  
25 navigation, and I don't think it extends to those

1 other uses. I think this court made it clear in  
2 Douglaston Manor, it doesn't even extend to fishing  
3 even if you don't leave your boat.

4 So I can't see it as opening the door to  
5 these other things that you have mentioned, Your  
6 Honor.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 MR. CAFFRY: Thank you.

9 CHIEF JUDGE DIFIORE: Counsel.

10 MR. GINSBERG: Brian Ginsberg for the  
11 State, Your Honor.

12 Judge Pigott, there is nothing to worry about in  
13 terms of extending the navigation easement into areas that  
14 don't concern navigation. The easement is a very limited  
15 right, only the right to navigate the surface waterways.  
16 The public does not have a right to swim, to fish, to camp  
17 on private land, or to hike on private land. And not only  
18 that, even while they are exercising their very limited  
19 navigational right, there is no sense of navigation  
20 immunity or anything of the like; they still have to obey  
21 all generally applicable laws. They can't disturb the  
22 peace, they can't litter, they can't invade privacy.

23 JUDGE PIGOTT: Well - - -

24 JUDGE ABDUS-SALAAM: So would you - - -

25 JUDGE PIGOTT: I'm sorry, go ahead, please.

1                   JUDGE ABDUS-SALAAM: Counsel, would you  
2 agree that the focus here is primarily recreation?  
3 Is there any real commercial use to this property,  
4 this - - - or these rivers or waterways at this  
5 point?

6                   MR. GINSBERG: There is, Your Honor. And  
7 one of the crucial commercial uses that persist to  
8 this day is tourism. As my opponent said during the  
9 summary judgment hearing, of course tourism is  
10 commerce. And especially in the context here, where  
11 we're talking about the economy of the Adirondacks -  
12 - -

13                  JUDGE PIGOTT: So you're saying, you know,  
14 if somebody wants to go up and down in their canoe  
15 for recreational purposes, that probably shouldn't be  
16 within the definition, except because of Adirondack.  
17 But if you put fifty canoes together and you charge  
18 them, now we've got commercial and we have a right to  
19 do it.

20                  I'm missing that; it's recreation, it only  
21 - - - only you're making it commercial recre - - -  
22 somebody has got to make money at it, as opposed to  
23 people just going up and down.

24                  MR. GINSBERG: Your Honor, that's exactly  
25 the evidence that this court thought significant in

1 Adirondack League. The court there denies it - - -  
2 denied summary judgment, but did so because there was  
3 a dispute about the "ability", or the river's  
4 capacity - - -

5 JUDGE PIGOTT: But wasn't it always both?  
6 I thought it was - - - part of the appellant's  
7 argument is that it - - - there's always been the  
8 commercial part, and then tagged onto it came the  
9 recreational part. But you had to float the log, so  
10 to speak, in order to show that it was navigable - -  
11 - and so we can do recreational too.

12 MR. GINSBERG: That's not how we read  
13 Adirondack League, Your Honor. Log floating and  
14 movement of commodities were use that people often  
15 thought of when they wanted to make use of rivers  
16 centuries ago.

17 JUDGE PIGOTT: No, in Adirondack, wasn't  
18 that one of the issues?

19 MR. GINSBERG: Well, that was one of the  
20 issues, but the way the court resolved that issue is  
21 to say that, no, we don't look only at the uses - - -  
22 the commercial uses people used centuries ago, we  
23 look at commercial use - - -

24 JUDGE PIGOTT: No, maybe I'm being unclear.  
25 What I'm - - - what I'm saying is that there was - -

1           - there was commercial use that was in issue in  
2           Adirondack, right? And then added onto it was the  
3           recreational - - - it wasn't just recreational. It's  
4           almost like it was a - - - it was a precept before  
5           you get into the other that it had to be some  
6           commercial use, floating logs.

7                       MR. GINSBERG: Well, even if that's the  
8           case, Your Honor, there is a history of commercial  
9           use on this waterway. As some of Your Honors were  
10          discussing with my friends on the other side, there  
11          was use for fur trapping, which was one of the  
12          primary industries in the Adirondacks.

13                      JUDGE PIGOTT: Yeah, but what - - - at what  
14          point do we stop that? At what point do we - - - do  
15          we say, there hasn't been a commercial trapper around  
16          here in however many years, and there hasn't been,  
17          you know, whatever we keep going back to and saying  
18          well, back, you know, pre-civil war, this is the way  
19          it was, therefore it applies now.

20                      MR. GINSBERG: Well, Your Honor, let me  
21          give you three evidentiary guideposts that this  
22          court's cases reveal about assessing practical  
23          utility for travel and transport in a commercial  
24          context and otherwise.

25                      First, evidence of the physical properties of

1 the waterway to support travel or transport. Mud Pond  
2 Waterway, the stretch of waterway that we are dealing with  
3 here, is not a storm drain. It's a two-and-a-half-mile  
4 stretch of waterway that, at its narrowest, is fourteen  
5 feet deep. That's not an insubstantial distance.

6 JUDGE PIGOTT: No, no, we know that; I  
7 don't mean to cut you off, but I want you to save  
8 your time for your point.

9 JUDGE FAHEY: You know, can I just step it  
10 aside to a different area a little bit? Let's say  
11 that we said that this waterway is navigable. The  
12 owners of the property along the navigable waterway  
13 then don't do anything to maintain it at all. Can  
14 the waterway, which we declare to be navigable, lose  
15 its navigability through neglect by the private  
16 owner?

17 MR. GINSBERG: No, Your Honor, and here is  
18 why. This court's case - - -

19 JUDGE FAHEY: So they are obliged to  
20 continue to maintain passing water - - - the public  
21 land then has to be portaged over, or the private  
22 land then has to be portaged over?

23 MR. GINSBERG: No, they're not obligated to  
24 do that. As my colleague on the other side said,  
25 navigability is a technical term.

1                   JUDGE FAHEY: I am concerned not just about  
2                   the portage areas, but also the waterway itself; the  
3                   way I understand the waterway is, it's the kind of  
4                   place where you could have a tree growing in the  
5                   middle of the water, and things like that. Over  
6                   time, if you don't maintain it, it would seem to  
7                   affect its navigability.

8                   MR. GINSBERG: As a legal matter, the  
9                   answer to that is no.

10                  JUDGE FAHEY: Uh-huh.

11                  MR. GINSBERG: As a - - - once the waterway  
12                  is navigable in fact, it remains so even if routine  
13                  maintenance is not performed. The question is  
14                  whether the waterway supports practical utility for  
15                  travel or transport if maintained. Maintenance is  
16                  bound up with the right of navigation.

17                  JUDGE FAHEY: Is that in the standard? It  
18                  says - - - I didn't read that, if maintained.

19                  MR. GINSBERG: This court's cases, and we  
20                  cite many of them in our briefs, suggest that  
21                  "routine maintenance", short of artificial  
22                  improvements, but clearing of debris, beaver dams,  
23                  fallen trees, and the like.

24                  JUDGE RIVERA: So if they don't do it, who  
25                  - - - who would do that maintenance?

1 MR. GINSBERG: The State has the right to  
2 do that maintenance.

3 What about the company that wants to have the  
4 rowboats or the canoes go up, can they do it, do - - -  
5 could they get a permit to do that?

6 MR. GINSBERG: I suppose that could be  
7 something to be worked out with DEC, but the point is  
8 it does not - - - but in any event, it does not put  
9 any affirmative obligation on the - - -

10 JUDGE RIVERA: And they couldn't stop them  
11 from maintaining it, correct? The riparian owners  
12 could not prevent the maintenance, so long as it's  
13 not on their own property - - -

14 MR. GINSBERG: Exactl - - -

15 JUDGE RIVERA: - - - or could they stop  
16 you from trying to maintain it if you're standing on  
17 their own property?

18 MR. GINSBERG: The riparian owners could  
19 not stand in the way of maintenance, so long as that  
20 maintenance, as all the rights that are bound up in  
21 the navigation easement - - -

22 JUDGE RIVERA: Because it's attached to the  
23 easement.

24 MR. GINSBERG: - - - are incidental to  
25 facilitating that navigation.

1                   JUDGE RIVERA: Even though they do not - -  
2                   - although some people who, of course, allow an  
3                   easement, are required to maintain. But you are  
4                   arguing, in this particular public easement, they are  
5                   not required to maintain. But they cannot prohibit  
6                   the State from trying to maintain.

7                   MR. GINSBERG: Well, the owners don't have  
8                   to maintain it as a regular matter; they certainly  
9                   are not permitted to interfere - - -

10                  JUDGE RIVERA: That's right.

11                  MR. GINSBERG: - - - with the public  
12                  navigation easement.

13                  CHIEF JUDGE DIFIORE: Counsel, what was the  
14                  State's motivation in attempting to broker that  
15                  compromise between the owners, the State, and the  
16                  Sierra Club?

17                  MR. GINSBERG: The State's motivation, Your  
18                  Honor, was the motivation of any prudent litigant, is  
19                  to try to achieve compromise; to try to resolve this  
20                  matter without putting the matter before the courts,  
21                  without putting the matter before you today. And I  
22                  think due regard should be given that do - - - DEC  
23                  was called into this case to mediate this dispute.

24                  DEC made an independent judgment when it  
25                  was literally called into - - - on the ground in this

1 case, to navigate the waterway, found the waterway is  
2 navigable in fact. Both courts below recognized  
3 that, this court should honor that judgment, the  
4 judgment below should be affirmed.

5 CHIEF JUDGE DIFIORE: Thank you, sir.  
6 Counsel.

7 MR. PHILLIPS: Your Honor, a couple of  
8 things.

9 I think that I'd like to comment on the deed  
10 itself in this case, which is no ordinary deed; it's a  
11 deed from the sovereign State of New York. As you know  
12 from the briefs, it's a deed that has been executed by the  
13 Governor of the State in 1851.

14 And as you look at the face of the deed itself,  
15 the language of the deed, which is in the record at 1796,  
16 is an all-in kind of deed, because it conveys to the - - -  
17 the ancestors of the appellants, "All and singular the  
18 rights, hereditaments, and appurtenances to the same  
19 belonging", and then it goes on to say, "As a good and  
20 indefeasible estate of inheritance forever".

21 So that raises the question of whether the State  
22 retained anything when it conveyed this property to  
23 Benjamin Brandreth - - -

24 JUDGE STEIN: Isn't the question whether  
25 the State would be required to specifically exclude

1 the public easement in - - - in a deed such as that?  
2 Isn't that really the question?

3 MR. PHILLIPS: Your Honor, the - - -

4 JUDGE STEIN: Obviously it's not there.

5 MR. PHILLIPS: Honor - - - Your Honor,  
6 there is actually a case for which I'd like you to  
7 take judicial notice, if you could. It's called  
8 People of the State of New York v. Steeplechase Park  
9 Company, 218 N.Y. 459.

10 And in that case, it talks about that very  
11 issue. It talks about looking at the plain language  
12 of the deed. It talks about the authority of the  
13 State to relinquish its sovereignty relative to a  
14 waterway, sets up a procedure for it. And that  
15 actually is discussed in terms of the authority, it's  
16 discussed in a case cited by the State, Loomis v.  
17 Canal Appraisers, 33 N.Y. 461.

18 It's also discussed on the other side, in  
19 terms of the authority of the legislature to release  
20 and apply an easement in the case of Waterford  
21 Electric v. State, 208 A.D. 273.

22 So, I just wanted to bring that to your  
23 attention because on the plain language of this deed,  
24 the State has relinquished its implied easement in  
25 very, very plain terms. I think that case will

1 support that position.

2 One other thing that I would like to say  
3 relative to the Adirondack Guide, who has an  
4 affidavit in this case, who has been pitched as being  
5 the State's expert. I think he was an expert on pond  
6 hopping. I don't think he was an expert on this  
7 particular waterway, because he said he never saw it,  
8 he said he never paddled it, and he never said he  
9 needed it.

10 He said that he and his clients were happy  
11 with the Lila Traverse the way it had been laid out  
12 by the State. He never said that there was any  
13 economic benefit to him; he said, I'll use it if I  
14 can, the public will use it if I can, just like he's  
15 using the Lila Traverse because the State bought it  
16 for him.

17 But I do not think that anything he said in  
18 the record satisfies the common-law standard where  
19 you would have to have some kind of permanent and  
20 substantial economic commerce in order to - - - to  
21 satisfy that prong - - - that commercial prong that I  
22 think you need in order to arrive at a conclusion  
23 that there is practical utility to the public as a  
24 means for transportation on this waterway.

25 JUDGE PIGOTT: I looked at that as, do you

1 need it or do you want it? If you need it, you know,  
2 and you make the argument, you know, that it's  
3 navigable, we need it for commerce or we need it for  
4 something, therefore we are entitled to it.

5 If we want it - - - I mean, we can't use it  
6 now, we can - - - we can live without it, but we want  
7 it. And therefore, you know, I'm not sure that makes  
8 it - - - I don't think the State could come in and  
9 say, we want your land because we want to do  
10 something else. It's a need thing, it seems to me.

11 MR. PHILLIPS: And Your Honor, I think  
12 that's the morality issue in this case, which is not  
13 in the briefs. But to use an extreme example, I  
14 think that Hitler wanted Poland when he marched into  
15 Poland in 1939.

16 When Phil Brown came across the line, and  
17 he said that, boy, this Lila Traverse is great. But,  
18 if I could use the private land, it would be even  
19 better. But he had no economic purpose for needing  
20 the private land. He didn't have any common-law  
21 commercial purpose for needing the private land; he  
22 just wanted it.

23 And so that was a wish that he had, and I  
24 don't think that the wishful thinking of the paddlers  
25 is enough to change the common law of the State of

1 New York. I don't think that their wishful thinking  
2 is more important than historical property rights in  
3 the State.

4 CHIEF JUDGE DIFIORE: Thank you, sir.

5 MR. PHILLIPS: Thank you.

6 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Friends of Thayer Lake v. Brown, No. 55 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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