

STATE OF NEW YORK

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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Matter of the Alleged Violation of Article 9 of the

Environmental Conservation Law and Part 196 of Title 6

of the Official Compilation of Codes, Rules and Regulations

of New York State

DEC Case No.: R-5-  
20050613-505

by

James W. McCulley,

Respondent

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**REPLY BRIEF OF THE ADIRONDACK COUNCIL**

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## **Statement of the Case**

The Adirondack Council (“Council”) seeks clarification of the Decision and Order of the Commissioner dated May 19, 2009 (“Decision”). The issues to be clarified surround the status of Old Mountain Road (also known as Old Military Road), between the Towns of Keene and North Elba. The Department of Environmental Conservation (“Department”) commenced enforcement proceedings against the respondent, James W. McCulley for operating a motor vehicle on Old Mountain Road within the Forest Preserve. Old Mountain Road lies within the Sentinel Range area of the Forest Preserve within the Adirondack Park. Operation of a motor vehicle within the Forest Preserve and on Old Mountain Road is only permissible (1) on a road under the jurisdiction of a town highway department or the New York State Department of Transportation or (2) where a legal right of way exists for public or private use. 6 NYCRR §§196.1(b)(1) and (b)(5). The Hearing Report of the Administrative Law Judge (“ALJ”) dated March 27, 2009, establishes that the State acquired fee simple title to the lands of the Forest Preserve through which Old Mountain Road traverses. (HR<sup>1</sup>, pp 23-26). Abandonment of Old Mountain Road extinguishes any right to operate a motor vehicle within that section of the Forest Preserve. Highway Law §212.

The Decision determined that in the course of the administrative proceedings, the Department failed to establish the abandonment of Old Mountain Road, and as a consequence assigned to the Towns of North Elba and Keene certain obligations for repair and maintenance along with the associated potential liabilities for such road. Based upon these findings, the Commissioner dismissed the complaint. It is respectfully submitted that in making this determination, the Commissioner issued legal conclusions outside the scope of his authority and

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<sup>1</sup> References to the Hearing Report of the Administrative Law Judge dated March 27, 2009, will be referred to as “HR”.

failed to properly interpret N.Y. Highway Law and the facts and circumstances surrounding the history of Old Mountain Road, thus requiring clarification of the May 19, 2009 decision.

### **The May 19, 2009 decision**

By Decision of the Commissioner dated May 19, 2009, it was determined that the Department failed to demonstrate that Old Mountain Road had been abandoned as a town road under N.Y. Highway Law § 205(1) (abandonment after six years) or § 205(2) (qualified abandonment) or that the road is not a public right of way, and granted respondent James W. McCulley's ("respondent" or "McCulley") Motion to Dismiss the complaint. The Council respectfully submits that, for the reasons set forth below, this Decision is in conflict with the facts and circumstances in the administrative record regarding the nature of the historic use of Old Mountain Road, established law, the Adirondack Park State Land Master Plan ("SLMP") and the forever wild provisions of the NY Constitution, Article XIV, Sec. 1. The Council supports re-examination of this determination and clarification of the Decision to correctly interpret N.Y. Highway Law §205 regarding the abandonment of Old Mountain Road.

The Decision requires further clarification as to the status and obligations of the Towns of Keene and North Elba in maintaining this road, in light of the strictures and requirements of the provisions of the SLMP and the forever wild provisions of Article XIV of the NYS Constitution. In determining that Old Mountain Road is a legal right of way for public use, the Decision concluded that abandonment for motor vehicle use, does not mean abandonment for all uses. The Decision reasons that because there is no authority under New York law for partial abandonment, Old Mountain Road remains viable for motor vehicle use, and the Towns still have the potential liability for activities on the road. (Decision of May 19, 2009, p.4) . This

conclusion is at odds with existing precedent and fails to distinguish between the recreational and motor vehicle usage of Old Mountain Road.

In making these determinations, the Commissioner relied upon and incorporated the March 27, 2009 Hearing Report of the ALJ, based upon the evidence produced at the administrative hearing. In his report, the ALJ noted the status of Old Mountain Road, as posted by the Department, and that it was not passable to motor vehicle traffic. The determination also noted the road was clearly “passable” in winter when the beaver pond that blocked a portion of the road was frozen as skiers had been known to use that portion of the trail otherwise impassable as a consequence of flooding. HR, p.7 The hearing report makes numerous findings concerning the status of public use of Old Mountain Road, including:

- It is clearly used by cross country skiers, and ice climbers, and the parking turnaround frequently full. HR, p.9
- There is non-winter use by hiker, bikers, hunters and horseback riders. HR, p.9
- There was significant snowmobile use prior to the mid 1980’s, and it appears there is still occasional use. HR, p.9
- There has been some ATV’s and 4WD use since the 1980’s, and virtually no personal automobile use in at least 50 years. HR, p.10
- Old Mountain Road has not been reported as part of the Town of Elba inventory of roads since 1981 (but it is not considered to be heavily maintained, i.e. snow removal).HR, p.16-17
- The Adirondack Ski Touring Council (“ASTC”) began maintenance Old Mountain Road for skiing purposes in 1986 with the help of the Towns in 1987, and a TRP was obtained to improve the road for skiing and horseback riding in 1988 through 1990. HR, p.17
- Inmates and ASTC were maintaining Old Mountain Road through 1998. HR, pp.18-19
- ASTC continued to maintain Old Mountain Road through 2002. HR, p.19

The Decision requires clarification that these recreational uses do not support a finding that Old Mountain Road was not abandoned as a public highway.

Finally, the ALJ recommended to the Commissioner that the portion of the road that runs through the Forest Preserve should be discontinued as a town road and public right of way pursuant to Highway Law §212, and reopened as a trail fully subject to DEC jurisdiction.HR, p.

37 This determination also requires clarification as it mischaracterizes the role of the Commissioner in the current proceedings.

### **Role of the Adirondack Council**

By Ruling of the Acting Commissioner dated December 30, 2010 the Council was granted permission to intervene in this administrative proceeding. In making this determination, the Acting Commissioner determined:

[T]he Adirondack Council has demonstrated that it has private rights that support its petition for intervention... It has determined that there is a reasonable likelihood that those rights would be substantially adversely affected by the Order. Finally the rights of the Adirondack Council are separate from, and not necessarily congruent with, the interests of the two governmental entities, the DEC and the APA.

*In the Matter of McCulley*, Ruling of the Acting Commissioner, December 30, 2010.

The Commissioner set forth the following items for clarification:

1. Town obligations to improve and maintain Road ;
2. ATV and snowmobile use of OMR to eliminate any implication that ATV or snowmobile use of highways is lawful where a town has not opened a highway;
3. Criteria for statutory abandonment as to “the road is deemed abandoned when the town superintendent, based on written consent of the town board majority, files a description of the highway abandoned with the town clerk.”;
4. Hiking, snowshoeing, and skiing. As uses promoted by the ADSLMP and/or UMP’s are indications of travel or use as a highway under Highway Law §205(1);
5. Dismissal as a matter of law and failure to meet burden of proof.

The Department’s brief in support of clarification adjusted the order of the issues to be addressed. For purposes of consistency and clarity, the Council will address the issues in a similar order to that presented in the Department’s brief.

## **Statement of Facts**

Except as set forth below, the Council is in accord and accepts and adopts the Statement of Facts as set forth in the Department's Brief Supporting Motion For Clarification at pp. 4 through 7.

The evolution and history of the use of Old Mountain Road demonstrates it has been abandoned as a Town highway. The Decision found that the Department had not met its burden of showing that Old Mountain Road had been abandoned within the meaning of N.Y. Highway Law §205(1); that no certificate of abandonment had been filed; and, that maintenance and repair of Old Mountain Road remained the responsibilities of the Towns of North Elba and the Town of Keene. In 2002, DEC gave notice that due to lack of maintenance and lack of use, Old Mountain Road was abandoned and as such, no ATV's, snowmobiles or other motor vehicle use would be permitted. In 2005, the Town of Keene approved qualified abandonment of the road. There was no formal order by the Town of North Elba.

## **ARGUMENT**

### **Abandonment of Old Mountain Road under N.Y. Highway Law §205**

While the Department has jurisdiction to determine the abandonment of a town road for purposes of determining the propriety of motor vehicle use in the Forest Preserve, for purposes of determining the Towns' respective responsibilities and liabilities, the venue for a declaration as to the abandonment of a town road does not lie with the Department. It is within the province of the town board of a municipality to make this determination and for a court of competent jurisdiction to determine whether abandonment has occurred in accordance with N.Y. Highway Law §205(1) or (2).

N.Y. Highway Law § 205(1) provides in pertinent part:

... every highway that shall not have been traveled or used as a highway for six years, shall cease to be a highway, and every public right of way that shall not have been used for said period shall be deemed abandoned as a right-of-way. The town superintendent with the written consent of a majority of the town board shall file, and cause to be recorded in the town clerk's office of the town a written description, signed by him, and by said town board of each highway and public right-of-way so abandoned, and the same shall thereupon be discontinued.

In the Decision, the Commissioner relied upon the failure of the Town of North Elba to file a Certificate of Abandonment for Old Mountain Road as a basis for determining that the road was not abandoned by the Town. Failure to file a Certificate of Abandonment by the Town Highway Superintendant of the Town of North Elba neither precludes nor establishes the facts of abandonment necessary to sustain a finding of abandonment pursuant to Highway Law § 205 (1). As noted by the Appellate Division, Fourth Department, “[a]ny defects in the certificate of abandonment are of no consequence in this action. The certification of abandonment is a ministerial act. *If the facts constituting an abandonment are present, the road is deemed abandoned by operation of law, not by the filing of the certificate.*” Matter of Pless v. Town of Royalton, 185 AD 2d 659 (4<sup>th</sup> Dept. 1992) *aff’d* 81 N.Y. 2d 1047 (1993) (citations omitted) (emphasis added).

Based upon a showing of the severely constrained physical limitations of Old Mountain Road for motor vehicle use, its non-use by motor vehicles and the actions of the Town of North Elba, the facts presented in the administrative hearing demonstrate that DEC Staff sustained its burden of proof that the road had been abandoned by the Town. In addition, as early as 1987 in the SLMP, the Adirondack Park Agency in consultation with the Department determined that Old Mountain Road had been abandoned. Section 196.1 prohibits motor vehicle use on Forest Preserve lands except if the use occurs on a road under the jurisdiction of a town highway department in accordance with state and local laws. 6 NYCRR 196.1 (b) (1).

In accordance with N.Y. Highway Law §205, Old Mountain Road would remain a highway until it is abandoned by the Town of North Elba, Flacke v. Strack, 98 A.D. 2d 881 (3d Dept. 1983). Abandonment, for purposes of the Highway Law, can be accomplished through consent of the majority of the Town Board and/or a declaratory judgment action. Highway Law § 205 prescribes the exclusive process and standard for declaring a town road to be abandoned. See, Holland v Superintendent of Highways of the Town of Smithtown, 73 Misc. 2d 851, 854 (Sup. Ct. Nassau Co. 1973) (“There are not procedures set forth in the statute indicating who may obtain, and how, the ‘consent’ to abandonment by the Town Board. No reason is suggested why a court, with the Town and Highway Department fully and fairly before it, may not declare the respective rights of the parties so to resolve the controversy.”)

The Environmental Conservation Law does not provide the authority to the Department of Environmental Conservation to determine the legal status of a town road pursuant to Highway Law § 205 (1). See ECL, Articles 3 and 9. However, the Commissioner does have authority in an enforcement proceeding alleging violation of 6 NYCRR 196.1 (b) (1) to determine whether DEC Staff sustained its burden of proof that the facts and circumstances surrounding the use of Old Mountain Road demonstrate that it had been abandoned.

If the Commissioner were to find that Department Staff failed to sustain its burden of proof demonstrating that Old Mountain Road was no longer under the jurisdiction of the Town of North Elba Highway Department, the operation of a motor vehicle on the Town road would be permissible within the meaning of section 196.1, and the Complaint should simply have been dismissed. There was no basis, and indeed no authority, for the Commissioner to make any further determination in the context of the current proceeding as to the status of Old Mountain Road, vis a vis the Towns’ legal responsibilities. Authority to declare a town road abandoned

vests in the Town Board, which must declare a highway to be abandoned if has failed to be used as a highway for six years. Highway Law § 205(1). However, jurisdiction remains with the Commissioner to determine whether the facts and circumstances in the administrative record demonstrate that Old Mountain Road had in fact been abandoned for purposes of determining permissible motor vehicle use in the Forest Preserve. Whether the Town Board formally declared Old Mountain Road abandoned, and consideration of the underlying facts regarding the historic use of Old Mountain Road, should form the basis of such a determination.

The Department Staff presented substantial evidence in the record to support a factual determination that Old Mountain Road had been abandoned long ago, except for limited recreational uses. The evidence established that Old Mountain Road and segments thereof were no longer under the jurisdiction of the Town of North Elba Highway Department on the following grounds:

1. The cul de sac installed at the end of the paved portion of Old Mountain Road. HR, pp.3, 4;
2. Old Mountain Road is an unpaved trail through heavily wooded areas, which measures in areas 7 – 8 feet in width. HR, p.6;
3. Old Mountain Road is inaccessible to motor vehicles except snow mobiles and ATVs which are not legally authorized to use Old Mountain Road (Highway Law 2405 and PRHPL § 25.05 and 25.09) HR, p.8-10;
4. The beaver ponds regularly overflow onto Old Mountain Road rendering it impassable for portions of the year. HR, p.6, 7;
5. The use of foot bridges is necessary to traverse Old Mountain Road, HR, p.10;
6. Trees on either side of Old Mountain Road are often 7 to 8 feet apart. HR, p. 8;
7. The Town of North Elba reported to the Department of Transportation that the length of Old Mountain Road is one mile and stopped including it on its inventory of roads. HR, p.16,17.

Even the limited recreational activities that have been occurring on the road have been forced to detour off the established road bed, and the path itself has become encumbered by trees and other obstacles.

In the event that the need arises, N.Y. Highway Law §212 dictates the Commissioner's authority regarding the status of town roads within the Forest Preserve, such as Old Mountain Road, providing:

If a highway passes over or through lands wholly owned and occupied by the state, the location of such portion of such highway as passes through such lands may be altered and changed, or the same may be abandoned or the use thereof as a highway discontinued with the consent and approval of the state authority having jurisdiction or control over such lands by an order directing such change in location, abandonment or discontinuance. Such order shall contain a description of that portion of the highway the location of which has been changed, abandoned or discontinued, and a description of the new location thereof, if any, and shall be filed in the office of the state authority having control of such lands.

N.Y. Highway Law §212.

This provision of the law is intended to give DEC authority over roads on state lands that endanger a state purpose. *See, Matter of Altona Citizens Comm. v. Hennessy*, 77 A.D. 2d 956, 957 (3rd Dept. 1980) lv. Denied, 52 N.Y.2d 705 (1981) (State purpose of preserving Native American culture and promoting racial and cultural harmony served in abandoning state road through Genienkeh territory.) There has not been a proceeding commenced in accordance with N.Y. Highway Law §212 to seek an order abandoning Old Mountain Road. This separate authority for determining the status of Old Mountain Road is not a part of the current proceeding.

### **Recreational Use**

Contrary to the finding of the ALJ, use of Old Mountain Road for the recreational purposes of snowshoeing, skiing and hiking also supports a determination that the Old Mountain Road is abandoned for purposes of determining whether the respondent impermissibly operated a

motor vehicle on the Forest Preserve. Although the Commissioner and the ALJ relied upon these uses as demonstrating continued public usage of Old Mountain Road and a lack of abandonment, there is an inherent danger in utilizing limited recreational uses for this purpose. The historic recreational uses of Old Mountain Road do not form a legal basis to determine that it has not been abandoned for the operation of motor vehicles. Such recreational uses are directly inconsistent with motor vehicle use on the Old Mountain Road and do not lend any basis for a finding that Old Mountain Road was not abandoned. It would cause those individuals who do utilize the trails for these recreational purposes to suffer a diminution in the use and enjoyment of the trails and face the potential danger of physical harm to allow inconsistent motor vehicle use on this recognized recreational trail.

The limited recreational use of a seeming abandoned road through lands classified as wilderness and wild forest in the Forest Preserve, where the uses are consistent with those prescribed in DEC regulations and the SLMP, does not preclude a finding of abandonment pursuant to Highway Law § 205 (1). The occasional limited use by four-wheel drive trucks, recreational vehicles, farmers and hunters, does not amount to “use 'as a highway', which presupposes '[t]ravel ... in forms reasonably normal.’” Matter of Pless v. Town of Royalton, supra, 185 A.D. 2d at 559-560 (citations omitted).

The majority of courts that have had the opportunity to review the issue of continuing recreational usage in the context of abandonment of a public road have separated usage for recreational purposes as distinct from or supporting abandonment for motor vehicle usage. As early as 1919, the Court of Appeals in Town of Leray v New York Central Railroad Company, 226 N.Y. 109, 113 noted, “Use ‘as a highway’ involves something more. Travel must proceed in forms reasonably normal, along the lines of an existing street.” Similarly, “[w]hile use as a

highway upon appropriate circumstances may encompass less than contemporary expressway traffic of tractor trailers and high speed automobiles, even the most active use posited by the Town, that of pedestrian and bicycle passage falls far short of being highway use.” Holland v Superintendent of Highways of the Town of Smithtown, 73 Misc 2d 851, 853 (Sup Ct. Nassau Co. 1973). Limited public activity and impassable conditions on the subject road will support a finding of abandonment. Matter of Faigle v Macumber, 169 AD 2d 914, 916 (3d Dept. 1991). At least one court has determined that obstructions such as the ones on Old Mountain Road of a beaver dam, trees and bridge obstruction will be considered to abate use as a public highway, particularly where “obstructions leave no portion of the road surface available for use as a sidewalk or path for pedestrians”. Leary Town of Trenton, 172 Misc. 2d 447, 451 (Sup Ct. Oneida Co. 1997). But see, Smigel v Town of Rensselaerville, 283 A.D. 2d 863 (3d Dept. 2001) (Continued public access for limited recreational purposes along right of way on an ancient road may be sufficient to preclude finding of abandonment, dependent upon conditions of road and ability to travel along lines of the existing street. Motion for Summary Judgment denied).

### **Role of Adirondack Park State Land Master Plan and classifications therein**

The SLMP governs state agency actions within the Forest Preserve. Executive Law § 816. The SLMP has the force and effect of law. Helms v Reid, 90 Misc. 2d 583, 604 (Sup Ct. Ham. Co. 1977); Adirondack Plan/FGEIS p. 263. The SLMP must be construed in accordance with the protections afforded Forest Preserve lands by the New York State Constitution, Article XIV. Id. The Commissioner’s determination that Old Mountain Road is an existing Town Road is contrary to the finding and classification of that road as abandoned within the Forest Preserve as reflected in the 1987 SLMP.

As noted in the Petition and Motion to Intervene by the Adirondack Park Agency, the classification of Old Mountain Road within the revised versions of the SLMP, reflects the legal status of that road to the public and the state, which the Department is bound to follow. The 1979 version of the SLMP references Old Military Road (Old Mountain Road) describing it as a “former town road 3.5 miles in length, which is *not generally passable by motorized vehicles* but has not yet been appropriately barricaded as required by wilderness guidelines.” 1979 SLMP, p. 46 (emphasis added). The 1987 revisions to the SLMP, specifically note “[t]he Old Military Road [a/k/a Old Mountain Road], a former town road 3.5 miles in length, has been closed and the area now fully conforms to wilderness standards.” At the very least, absent a substantial change in circumstances, this finding should be left intact. The lapse of more than 20 years from the SLMP to the Decision without evidence of changed circumstances strongly suggests that Old Mountain Road must continue to be considered abandoned.

The Decision has the potential for far reaching implications for other roads within the Forest Preserve. The Constitutional purpose, in part, underlying establishment of the Forest Preserve lands is maintenance of the wild forest lands of the Adirondacks with their large, core wilderness area as essential to the region’s evolutionary processes. The Forest Preserve serves as a genetic bank of native flora and fauna; helps maintain vital ecological functions important to clean air and abundant pure water; and provides critical habitat for viable populations of wide-ranging migratory, threatened and endangered species. Consistent with the goals of the Council for the future of the Park is the limitation on the use of motorized vehicles in the Forest Preserve. Strict adherence to the regulations that designate appropriate locations for the use of motorized vehicles in the Forest Preserve provides protection for the use and enjoyment of wilderness and

wild forest areas within the Park and for preservation of habitat for native flora and fauna that must remain free from, or be subject to only limited human interference.

Based on the criteria for designation of wilderness and wild forest lands in the SLMP, the potential for motorized uses of abandoned roads on or through these Forest Preserve lands will likely undermine classification of wilderness and wild forest lands in addition to the substantial deleterious effect on the trails, the surrounding flora and fauna and with uses more compatible with a wilderness designation. Motorized uses will erode the area's fragile soils, increase stream sedimentation, destabilize the beaver dams adjacent to the trail, disrupt peregrine falcon habitat on the cliff faces, and potentially destroy the habitat of sensitive herptofauna. Furthermore, the potential for motorized vehicle and pedestrian accidents will increase greatly, especially in the narrow passes along rock faces where there is virtually no room to pass.

The APA prepared the first SLMP and subsequent amendments in consultation with the Department. Executive Law § 816 (formerly § 807, added L.1971, c. 706, § 1; renumbered 816 and amended L.1973, c. 348, § 1). Upon approval by the Governor, the Department, as the steward of state lands within the Adirondack Park, must adhere to the SLMP in determining the range and scope of activities that are permitted on such Forest Preserve lands. Executive Law § 816 (1); ECL § 3-0301 (1) (d); ECL § 9- 0105 (1). The Department must prepare individual or unit management plans ("UMPs") to govern the management of Forest Preserve lands in accordance and conformity with the classification established in the SLMP and the guidelines and criteria set forth therein. Executive Law § 816 (1).

The SLMP established the land classifications for the management of state lands based on "their characteristics and capacity to withstand use." SLMP p. 6. Classification of the Forest Preserve land surrounding Old Mountain Road as wilderness to the Decision is nine land

classifications listed in the SLMP include: Wilderness, Primitive, Canoe, Wild Forest, Intensive Use, Historic, Administrative, Wild Scenic and Recreational Rivers and Travel Corridors.

SLMP p. 15. The SLMP defines Wilderness as follows:

A wilderness area, in contrast with those areas where man and his own works dominate the landscape, is an area where the earth and its community of life are untrammelled by man--where man himself is a visitor who does not remain. A wilderness area is further defined to mean an area of state land or water having a primeval character, without significant improvement or permanent human habitation, which is protected and managed so as to preserve, enhance and restore, where necessary, its natural conditions, and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least ten thousand acres of contiguous land and water or is of sufficient size and character as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological or other features of scientific, educational, scenic or historical value.

SLMP, p. 20.

Public use of motorized vehicles on Forest Preserve lands is permitted in limited circumstances such as on existing roads and on those rivers, lakes and ponds where such use has been designated. *SLMP, Classification System and Guidelines, Canoe, GUIDELINES FOR MANAGEMENT AND USE, Motor vehicles, motorized equipment and aircraft, ¶¶1,2.* If Old Mountain Road is not an existing Town Road, and has been considered abandoned by the state and the public, re-opening Old Mountain Road to motor vehicle traffic would violate the terms and provisions of the SLMP and negatively impact the Forest Preserve.

## **NYS Constitution, Article XI**

The Council's mission is to ensure the ecological integrity and wild character of the Adirondack Park for current and future generations. In meeting this goal, the Council scrutinizes policies to ensure the Park's protection and appropriate uses of the Park, and takes a stand on all actions that could compromise the integrity of the "Forever Wild Clause". The Council's goals include upholding the constitutional protections and agency regulations and policies established to protect the Adirondack Park. The SLMP must be read in harmony with the Constitutional protection afforded wild forest lands in the Forest Preserve restricting unreasonable intrusions into the interior of lands classified as Wild Forest. Statutes § 95. The New York State Constitution, Article XIV, establishes the New York State Forest Preserve:

The lands of the state, now owned or hereafter acquired, constituting the Forest Preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.

NYS Constitution, Article XIV, Section 1.

The authority to make use of Forest Preserve lands must be construed in light of the overall objective of New York State Constitution to secure and protect the Forest Preserve from activities that impair the wild forest character and habitat of Forest Preserve lands while allowing their reasonable use and enjoyment. Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 238 (1930). "The Forest Preserve and the Adirondack Park within it are for the reasonable use and benefit of the public, as heretofore stated. A very considerable use may be made by campers and others without in any way interfering with the purpose of preserving them as wild forest lands." *Id.*, at 240, 241. In Association for the Protection of the Adirondacks, the seminal case on the use and protection of Forest Preserve lands, the Court concluded that the Constitution must be construed to preserve the wild forest character of Forest

Preserve lands, but, also allow for the reasonable use and enjoyment of such lands. See, Helms v Reid, 90 Misc 2d 583, 595 (Sup Ct. Ham Co. 1977) citing, Association for the Protection of the Adirondacks, Id. The Department bears responsibility for ensuring compliance with the Constitutional limitations and preservation of the wild forest character of Forest Preserve lands as the agency responsible for the care and custody of the Forest Preserve. ECL § 9-0105 (1); Helms v Reid, supra at 598, 600.

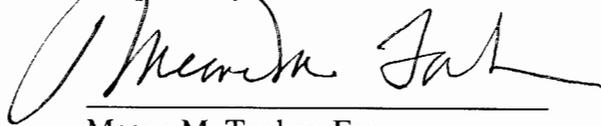
The Court of Appeals has long recognized the necessity of access within the forest preserve for the maintenance of existing roads within the Forest Preserve. Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234 (1933). The long standing abandonment of Old Mountain Road however, has resulted in the characterization and recognition of that road as a part of the Forest Preserve. Thus, even if the Old Mountain Road had not been abandoned by the Town, the road has substantially deteriorated and would require substantial construction to allow motor vehicle access and enable the road to function safely as a public highway. However, towns cannot widen roads located within the New York State Forest Preserve beyond their surfaces without first getting the DEC's permission. See, Flacke v. Town of Fine, 113 Misc.2d 56, 57 (N.Y. Sup. 1982) (maintenance of a town road by prescription or use running through the New York State Forest Preserve requires a permit before cutting any trees beyond the surface of the road.) The SLMP, however, considers Old Mountain Road closed and returned to wilderness status. "The New York State Constitution prohibits the destruction of timber and the construction of roads not authorized by constitutional amendment in the State Forest Preserve." Id., at 62. Because the road has deteriorated to the extent that it has, the level of work required to restore Old Mountain Road would run afoul of the Constitutional limitations that exist upon the lands of the Forest Preserve.

## Conclusion

For the foregoing reasons, the Adirondack Council respectfully requests that the Commissioner clarify the Decision dated May 19, 2009 to find that the historic recreational uses of Old Mountain Road did not preclude a finding of abandonment; that this determination is not determinative of the Towns of North Elba and Keene responsibility to repair and maintain Old Mountain Road as a thoroughfare for motor vehicle use; that absent a change in circumstances, the Commissioner must defer to the finding in the Adirondack Park State Land Master Plan that Old Mountain Road had been closed and conformed to the wilderness classification; that filing a Certificate of Abandonment is a ministerial act under Highway Law § 205; and that the failure to file such document has no legal effect on the question whether a road has been abandoned.

Dated: March 18, 2011

Respectfully submitted,



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