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Joe Martens
Commissioner

April 29, 2011

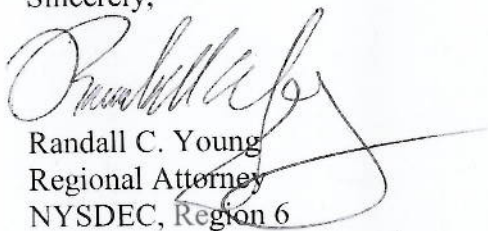
Office of the Commissioner
Attn. Louis A. Alexander
Assistant Commissioner
Office of Hearings and Mediation Services
625 Broadway
Albany, NY 12233-1010

RE: Matter of James W. McCulley
R5-20050613-505

Dear Assistant Commissioner Alexander:

An original and two copies of Staff's sur-reply to the briefs submitted by the other parties in this matter are enclosed. Thank you for your consideration.

Sincerely,



Randall C. Young
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NYSDEC, Region 6

RCY:als

Enclosure

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Hon. James McClymonds
Chief Administrative Law Judge
Office of Hearings & Mediation Services
NYSDEC

(Via E-mail)

STATE OF NEW YORK

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 9 of the
Environmental Conservation Law and Title 6 Part 196.1 of
the Official Compilation of Codes Rules and Regulations of the
State of New York by:

SUR REPLY BRIEF

VISTA Number:
R520050613-505

JAMES W. McCULLEY

Respondent.

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I. CONCISE STATEMENT OF THE CASE

Department Staff brought an administrative enforcement action against Respondent for allegedly violating 6 NYCRR Part 196.1 by driving his truck in the Sentinel Range Wilderness. On May 19, 2009, the Commissioner issued a Decision, inter alia, dismissing Staff's case. Staff filed a motion for clarification of five points in the Commissioner's Decision. On December 30, 2010, Acting Commissioner Peter Iwanowicz granted Staff's motion and set a schedule for submission of briefs. On February 4, 2011, Staff submitted its brief supporting clarification. On March 1, 2011, the law firm representing The Adirondack Council requested an extension of the deadline for filing its brief to March 18, 2011, due to a serious family illness. All parties consented, and the deadlines for all reply briefs were extended to March 18, 2011.

On the afternoon of March 17, 2011, Staff received an e-mail with a scanned letter attached, dated March 16, 2011, from Respondent's attorney to Assistant Commissioner Louis A. Alexander. The letter objected to the briefing schedule set in the Acting Commissioner's December 30, 2010, ruling and requested an additional three weeks for submission of his brief. That same afternoon, Staff objected in writing to this request as untimely and unnecessary.

Respondent's request for additional time was denied, and on March 18, 2011, Respondent submitted a reply brief stating a general objection to Staff's request for clarification as unnecessary and baseless.

Adirondack Park Agency and The Adirondack Council also submitted reply briefs on March 18, 2011. Respondent objected to acceptance of these briefs on technical and procedural grounds. On April 5, 2011, Assistant Commissioner Louis A. Alexander accepted the reply briefs submitted by the Adirondack Park Agency and The Adirondack Council and authorized submission of sur-replies to be postmarked by April 29, 2011.

II. ARGUMENT

A. COMPARISON OF THE HEARING REPORT TO THE COMMISSIONER'S MAY 19, 2009, DECISION ILLUSTRATES THE NEED FOR CLARIFICATION OF THE DECISION

Respondent's brief adopts the Chief ALJ's Hearing Report by reference and states that no further discussion is necessary because the Decision is wholly correct. However, the Hearing Report does not address the issues of law or ambiguities in the Commissioner's Decision for which Staff seeks clarification. Indeed, comparing the Hearing Report to the Commissioner's Decision illustrates the need for clarification of the Commissioner's Decision.

The Chief ALJ confined the Hearing Report to review and analysis of the alleged violation of 6 NYCRR Part 196. Nothing in the Hearing Report's findings or its recommendations addresses the towns' obligations vis-à-vis improving the route for motor vehicle traffic. In fact, it suggests the opposite would be appropriate. [HR at 37] Therefore, the Hearing Report did not discuss the potential legal issues that would be raised by improvement of the route for motor vehicle use as suggested by the Commissioner's Decision. Nor does the Hearing Report offer any grounds for the Decision's statement that the towns must make the route suitable for ATVs or snowmobiles. Those matters appear only in the Commissioner's Decision. [Decision at 5]

The Chief ALJ's Hearing Report offered two options for resolution of the matter: dismissal of Staff's case as a matter of law [HR at 33] or a conclusion that Staff failed to meet its burden of proof. [HR at 34] The Commissioner's Decision is ambiguous as to which basis for dismissal of Staff's case was ultimately adopted. The Decision states that Staff failed to meet its burden. [Decision at 1] The Decision later states that Staff failed to prove that where Mr. McCulley drove his truck was not a public right of way "... as a matter of law. . ." [Decision at 6] Simply referring to the Hearing Report as a whole does not address the ambiguity of the Decision as to which basis for dismissing Staff's case the Commissioner adopted.

The Hearing Report correctly states that under Highway Law §205, "... a road or public right of way is abandoned where the road or right of way is not traveled or used as a highway for a period of six years." [HR at 28] The Decision states:

... when a road has not been used for six years, 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. Decision at 3.

This is a material discrepancy between the Hearing Report and the Decision. Abandonment by non-use occurs by operation of Highway Law §205 and not through a common law as stated in the Decision.

B. THE DECISION OVERLOOKED FACTS
THAT SHOW THE PUBLIC RIGHT OF WAY
CEASED TO EXIST BEFORE 1986

Respondent's general claim that the Hearing Report and Decision are correct fails to address Staff's evidence that the Decision overlooked evidence of abandonment by non-use for more than 6 years prior to 1986. The Decision states: "The record does not demonstrate non-use for any six-year period, including the six years prior to Mr. McCulley's ride down Old Mountain Road in 2005."

Staff's February 4, 2011, brief provides detailed citations to specific testimony and exhibits that demonstrate a lack of use and physical impassability of Old Mountain Road from 1976 to 1986. Respondent's reply does not point to any contrary evidence. Therefore, Staff's evidence of abandonment prior to 1986 is uncontroverted.

The towns' last maintenance on the road prior to construction of the ski trail was 1975. [Hearing Report ¶40] The road received virtually no motor vehicle use for the last 50 years. [Decision at 4] By 1976, the roadbed was impassable due to a bridge being out about three-fourths of a mile from the end of Shattuck Road (now Alstead Road [Tr 743 ln 8-ln 16]) and beaver dams inundating it. [Exhibit 63, tab A] The bridge was not replaced until the construction of the ski trail in 1986. [Tr 433 Ln 4-10; Tr 744 ln 22-745 ln 7; Tr 743-744]

As explained in detail in Staff's February 4, 2011, brief, the courts consider an obstruction across the entire width of a highway to be a complete obstruction even if the obstacle can be circumvented – by a hiker for example. *Leray v. New York Central R.R. Co.*, 226 N.Y. 109, 113 (1919); *O'Leary v. Town of Trenton*, 172 Misc. 2d 447 (Sup. Ct 1997).

The Adirondack Ski Touring Council undertook repair and re-establishment of the route in 1986 because “it *was* a traditional route that skiers *had* used for many years *until it fell into disrepair*.” [Tr at 431 ln 5-6 (Emphasis added)] “We were contacted by skiers interested in *reestablishing . . .* that route. . .” [Id, ln 7-8 (Emphasis added)]

The Town Supervisor of Keene and the Highway Superintendent of North Elba at that time “had no problem with the *reopening* of the road.” [Tr 432 ln 21-23] The obvious inference is that the road was not open or passable before the Adirondack Ski Touring Council built its ski trail over the route in 1986.

With regard to what was done in 1986, “[t]he first step was to remove several years of accumulated blowdown and to mow down the accumulated brush that had *grown* in the trail. [Tr at 431(Emphasis added)] We repaired washouts. *We rebuilt four major bridges and a number of minor bridges.*” [Tr 432 ln 4-5 (Emphasis added)] Respondent’s own witness testified “. . . around 1986 they had to go through and remove a bunch of trees.”

This is as clear a picture of an abandoned highway as exists in any case cited as precedent in this matter. Nothing in the Decision or the Hearing Report rejects these facts, and Respondent fails to point to any evidence to the contrary. Accordingly, Staff presented evidence that Old Mountain Road was abandoned by non-use from 1976 to 1986. The Decision’s failure to address these facts is a material oversight.

C. THE ADIRONDACK STATE LAND MASTER PLAN SUPPORTS THE
FACTUAL CONCLUSION THAT OLD MOUNTAIN ROAD
WAS ABANDONED IN FACT PRIOR TO 1986

Staff agrees with the Adirondack Park Agency's position that the Commissioner's May 19, 2009, Decision contradicts the findings made when the Commissioner of DEC concurred in the adoption of the Master Plan. The removal of Old Mountain Road as a non-conforming use in the 1987 Master Plan correlates to the facts in the record that show Old Mountain Road was abandoned by non-use before 1986.

D. REPLY TO THE ADIRONDACK COUNCIL'S BRIEF

The Adirondack Council's brief states that Staff presented "... substantial evidence in the record to support a factual finding that Old Mountain Road had been abandoned long ago except for limited recreational uses." [Council Brief at 8] This is not completely correct.

As stated above, Staff presented facts showing that the route had been completely abandoned by non-use for more than 6 years before 1986. Testimony and exhibits show the route was impassable and unused, even as a trail during that period. This abandonment extinguished the public right of way. The subsequent cutting down of brush that had grown in the road, removal of trees, and replacement of missing bridges does not recreate the public right of way that was extinguished by abandonment before the recreational use resumed.

The subsequent recreational use of the Adirondack Ski Touring Council's trail did not recreate a public right of way. First, there is no prescriptive acquisition of state land generally and Article 14 of the New York State Constitution specifically prohibits any alienation of Forest Preserve land. Second, because skiing and hiking is not adverse to the state's interest, they cannot create a prescriptive right of way.

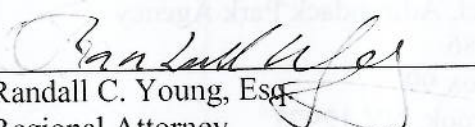
E. HIGHWAY LAW §212

The Adirondack Council's discussion of Highway Law §212 is outside the scope of the matters to be addressed pursuant to the Acting Commissioner's Ruling, and Staff will not address it.

III. CONCLUSION

A tribunal may reconsider a decision upon a showing that it overlooked or misapprehended the facts or the law, or for some reason mistakenly arrived at its earlier decision. *Mayer v. National Arts Club*, 192 A.D. 2d 863 (3d Dept. 1993). Clarification of a decision is a matter within the sound discretion of the decision maker. *William Phal Equipment Corp. v. Kassis*, 182 A.D. 2d 22, 27 (1st Dept. 1992). A review of all the briefs and the record in this matter indicates that the Decision overlooked relevant facts, exceeded the scope of the proceeding, and misapprehended the applicable law. Therefore, the Commissioner's Decision of May 19, 2009, should be clarified as requested in Staff's motion.

Respectfully Submitted,
April 29, 2011


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