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Joe Martens
Acting Commissioner

February 4, 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 a brief supporting Staff's request for clarification of the Commissioner's May 19, 2009, decision in this matter are enclosed. The five points for which the Acting Commissioner granted Staff's motion for clarification are:

1) The obligation of Keene and North Elba to improve the route;

2) The implied authorization for ATV and snowmobile use of Old Mountain Road;

3) The criteria for statutory abandonment stated in the decision;

4) The extent to which hiking, skiing, snowshoeing, and similar recreational activities are indications of ". . . travel or use as a highway. . ." under Highway Law §205(1);

5) Whether Staff presented a *prima facie* case.

When drafting the brief, I became aware that the order in which these issues should be addressed was different from the order in which the motion presented them. I offer the following general explanation of the order of arguments in the brief to avoid confusion in this regard.

The brief begins with the statutory criteria for highway abandonment because evaluation of the decision's dismissal of Staff's case depends on a correct understanding of Highway Law §205(1).

An explanation of facts and law demonstrating that Staff presented a *prima facie* case naturally follows the discussion of the statutory criteria for highway abandonment. Whether recreational use constitutes "travel" or use for "highway purposes" under Highway Law §205(1) could be considered an aspect of whether Staff presented a *prima facie* case. Therefore, the discussion of whether staff presented *prima facie* evidence of highway abandonment includes an

evaluation of the application of Highway Law §205(1) to recreational uses of the route. ATV and snowmobile operation are forms of recreational use, and they are discussed in this portion of the argument in that context.

The questions flowing from the decision's asserted obligations of the towns regarding Old Mountain Road are placed after the discussion of whether the Commissioner dismissed Staff's case as a matter of law. If Staff's case was not dismissed as a matter of law, the decisions premise that the towns have obligations *a priori* regarding the road would fail. As a final matter related to the decision's discussion of the towns' obligations, the brief notes that the towns have no obligation to allow ATV or snowmobile use of a town road.

In summary, the enclosed brief discusses each of the issues identified for clarification in Staff's motion and the Acting Commissioner's Ruling, but its presentation stands on its own. Thank you for your consideration.

Respectfully submitted,

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RCY:als

Enclosure

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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:

JAMES W. McCULLEY

Respondent.

BRIEF SUPPORTING MOTION FOR CLARIFICATION

VISTA Number: R520050613-505

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I. STATEMENT OF THE CASE

On May 22, 2005, Respondent backed his pickup truck onto Jack Rabbit Ski Trail east of the end of Mountain Lane in the Sentinel Range Wilderness, North Elba, Essex County, New York. [Hearing Report ¶9] Ranger Joseph LaPierre issued a ticket to Respondent for violation of 6 NYCRR Part 196.1. [Hearing Report ¶10] Staff commenced this administrative proceeding on June 10, 2005, by Notice of Hearing and Complaint. [Hearing Report ¶12]

6 NYCRR Part 196.1 prohibits the operation of motor vehicles on the Forest Preserve with only limited exceptions. The Sentinel Range Wilderness is owned by the state and is managed by the Department as Forest Preserve pursuant to Article 14 section 1 of the New York State Constitution. Respondent did not have a permit authorizing him to operate his truck on Forest Preserve lands. [Hearing Report ¶12]

Staff filed a motion for dismissal of affirmative defenses and for order without hearing on September 20, 2006. On September 7, 2007, Staff's motion for dismissal of affirmative defenses was granted in part and Staff's motion for order without hearing was denied. In denying Staff's motion for order without hearing, the Chief ALJ stated that ". . .conflicting statutory provisions and circumstantial evidence require further legal argument and evidentiary proof . . ." [Ruling of Chief ALJ September 7, 2007, at 14]

An evidentiary hearing was held from November 13 through November 15, 2007. [Hearing Report, 2] Respondent moved for dismissal of Staff's case at the close of Staff's direct case. The Chief ALJ reserved decision on Respondent's motion and Respondent presented his direct case regarding the allegations in the complaint. [Hearing Report, 2] On May 19, 2009, the Commissioner issued a decision dismissing Staff's case against Respondent.

On June 5, 2009, Staff filed a motion requesting that the Commissioner issue a clarification of his May 19, 2009, decision with regard to five points:

1) The obligation of towns of Keene and North Elba to improve the route

Staff requested clarification of that portion of the decision starting at page 5 discussing the obligations of the towns of Keene and North Elba to improve and maintain the route taking into consideration the extent of the currently maintained way and possible violations of Article 14 of the New York State Constitution, Executive Law section 816, the Adirondack Park State Land Master Plan that would ensue from expanding the route. Staff also questioned whether this portion of the decision exceeded the scope of the administrative proceedings.

2) ATV and snowmobile use of Old Mountain Road

At page 5, the decision states that the towns have an obligation to maintain the route for a variety of uses, including use by all terrain vehicles and snowmobiles. Staff requested clarification of this passage to eliminate any implication that ATV or snowmobile use of highways is lawful where a town has not opened the highway to such use pursuant to requirements of Vehicle and Traffic Law and Parks, Recreation and Historic Preservation Law. Staff also asserted that activities prohibited on highways should not be considered highway use for purposes determining whether abandonment occurred pursuant to Highway Law §205(1).

3) Criteria for statutory abandonment

Staff requested clarification of that portion of the decision that states:

> *. . . 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 . . .*

Case law applying Highway Law section 205 uniformly states that a highway is abandoned in-fact when it is not ". . . traveled or used for highway purposes for six years . . . ."

regardless of whether a certificate of abandonment was filed. See e.g., *Pless v. Town of Royalton*, 185 A.D. 2d 659 (4th Dept. 1992); Aff'd 81 N.Y. 2d 1047; *Dwyer v. Town of Rodman*, 1 A.D. 3d (4th Dept. 2003). To the extent that the statement from the decision quoted above indicates otherwise, Staff believes the decision is affected by an error of law and should be clarified.

4) Hiking, snowshoeing, and skiing

Staff requested clarification of the extent to which hiking, skiing, snowshoeing, and similar recreational uses promoted by the Department pursuant to the Adirondack Park State Land Master Plan and/or Unit Management Plans are indications of ". . . travel or use as a highway. . ." under Highway Law §205(1).

5) Dismissal of Staff's case as a matter of law

The decision states as a basis for dismissal that "Department staff did not meet its burden in the matter." [Decision at 2] However, the decision also adopts the ALJ's report that dismissed the case as a matter of law. Staff believes that this creates an ambiguity and requires clarification. Further, based on the considerations set forth in items 1 through 4 above, Staff believes the Chief ALJ erred in holding Staff did not present a *prima facie* case.

Staff did not seek reinstatement of the proceedings against Respondent.

Assistant Commissioner for Hearings and Mediation Services, Louis A. Alexander set a deadline of July 3, 2009, for filing of a response to Staff's motion for clarification. Respondent submitted a reply opposing Staff's motion on July 2, 2009.

On June 29, 2009, the Adirondack Council filed a notice of motion for leave to intervene in the proceedings. On July 9, 2009, the Adirondack Park Agency ("APA") also filed a motion for leave to intervene. On July 13, 2009, Assistant Commissioner Louis A. Alexander set July 24, 2009, as the deadline for filing responses to both motions for permissive intervention. On July 23, 2009, Staff filed a reply to the motions for intervention. Staff supported the request of

the Adirondack Park Agency to intervene, but did not take a position regarding the Adirondack Council's request.

On December 30, 2010, Acting Commissioner Peter Iwanowicz granted Staff's motion seeking clarification of five points raised in the May 19, 2009, Commissioner's decision and gave Staff until February 4, 2010, to file a brief supporting its request for clarification of those points. The Acting Commissioner's ruling also granted the requests for leave to intervene by Adirondack Park Agency and the Adirondack Council as to issues raised by Staff's motion for clarification.

II. STATEMENT OF FACTS

In the early 1800s, land speculators and settlers attempted to create a road from Northwest Bay on Lake Champlain to the town of Hopkinton in eastern St. Lawrence County. [See, L 1810 ch CLXX & CLXXVII] The legislature appropriated money for repair and completion of the road and declared a right-of-way to exist. [Id. See also, L 1812 ch CXCV, L 1814 CXXVI, and L 1816 ch CCXXXIII] However, the statutes regarding the road did not specifically provide for compensation to the landowners, nor did the statutes direct the state to acquire ownership of the land crossed by the right-of-way. Instead, landowners were taxed to pay for its completion and unappropriated lots were to be sold to raise additional money. [See, L 1810 ch CLXX] Maintenance of the road was to be turned over to the towns through which it passed after it was completed and surveys of the route were filed with the town and the county clerks. [L 1810 ch CLXXVII]

The road passed into what is now the town of North Elba near Pitchoff Mountain. [Hearing Record ¶27-30] By the mid 1800s, two roads passed Pitchoff Mountain. One went north of the mountain and one went south. The southern route by the Cascade Lakes became the preferred route and was developed into what is now State Highway 73. [Hearing Report ¶30]

From 1877 to 1900, the state acquired the land in Great Lots 146 and 153 of the Old Military Tract that would become a portion of the Sentinel Wilderness Range over which the road passes in the town of North Elba.[1] [Hearing Report ¶6] This is the current location of the western end of the route in question. Id.

In 1921, the legislature omitted the route north of Pitchoff Mountain from its list of highways to be improved in the state. [L 1921 ch 18] In 1931, the state began improving the southern route into what would become the modern State Route 73. [Hearing Report ¶30] By 1935, the legislature had classified the section of the road north of Pitchoff Mountain between North Elba and Keene as a "Class IV temporary road pending reforestation." [Staff's Exhibit 62] The area is now reforested and is part of the Forest Preserve. [Hearing Report ¶6 & pg. 2, see also, Staff Exhibits 2 & 35] In 1972, the Adirondack State Land Master Plan classified the Sentinel Range as a Wilderness Area. [Hearing Report ¶6]

Today, the town of North Elba maintains a section of the road about a mile long designated as Mountain Lane or Mountain Road. [Hearing Report ¶2] This portion of the road is used by residents to access private property west of the Sentinel Range Wilderness. Mountain Lane begins at an intersection with State Route 73 south of the village of Lake Placid. At this intersection, Mountain Lane is clearly marked with a "Dead End" sign. [Hearing Report ¶3] Mountain Lane proceeds roughly eastward for one mile and terminates with a second "Dead End" sign and a wide area where cars can park or turn around. [Hearing Report ¶4] The route then becomes a trail of varying width and quality, 3.5 miles long. [Hearing Report ¶¶13-21, see also, Staff Exhibits 2 & 35] This route through state land has devolved into what anyone observing it would call a path rather than a road – if it was ever more than what modern people

[1] The legislature reserved this tract of land for compensation to veterans of the Revolutionary War. L 1786 ch 67.

would call a trail. [Id. See also, Tr 274 ln 2-7; Tr 371 ln 12-15; Tr 352 ln 4-17; Tr 358 ln 3-9; Tr 370 ln 5-371 ln 24; Tr. 471; Staff Exhibits 2 & 35]

At the hearing, Staff presented evidence that the route had been abandoned as a highway from 1976 onward. [See point III(b)(i)(*b*) below] In North Elba, no maintenance occurred from the late 1960s until the Adirondack Ski Touring Council decided to re-establish the route as a ski trail. [Tr 343 ln 22-344 ln 1; Tr 348 ln 1-5; Tr 349 ln 4-350 ln 10] In 1976, a bridge over a stream was out and a beaver pond inundated the road. [Staff Exhibit 63A] It appears that this bridge was not replaced until 1986. The town of Keene did not perform maintenance on the road between 1975 and 1986. [Hearing Report ¶40; Tr 743 ln 22-745 ln 7] By 1986, four major bridges were out along with several smaller ones. [Tr 431 ln 1-432 ln 3] From at least 1976 to the present, beaver ponds have covered the road, forcing people who wish to traverse the route off the roadbed. [Hearing Report ¶16-17] From 1976 until 1986, brush grew in the route, fallen limbs and trees – "blowdown" – were left in the road, and bridges and ditches deteriorated. [Tr 431, ln 22-25; see also, Tr 743 ln 22-745 ln 24]

In 1986, the Adirondack Ski Touring Council undertook work to restore the route as a ski trail because skiers "had used it for many years until it fell into disrepair." [Tr 431 ln 6] The Adirondack Ski Touring Council replaced several bridges, cut the brush that had been growing in the road, and removed "several years" of accumulated blowdown. [Tr 431 ln 22-432 ln 10]

The state has clearly marked the western boundary of Forest Preserve at the trailhead with a line of blazed trees and signs bearing the Department's logo, the words "Forest Preserve," signs reading "No Motorized Equipment . . . [etc.]," and a sign saying "No Bicycles NYSDEC Albany NY 12233."[Hearing Report ¶7, see also, Staff Exhibit 2, photograph 8]

The eastern end of the trail is marked with signs similar to the western end. [See, Staff Exhibit 2, photo 72] It terminates in the backyard of the Rock and River Resort in the town of

Keene. [Tr 418 ln 13-15; Tr 423 ln 4-5] From there, one must walk across the yard to the Rock and River Resort's parking area at the end of what is known as Alstead Road in the town of Keene. [Id.] The route is marked along its length as a ski trail with the Department's trail markers. [See, Staff Exhibits 2 and 35 & 36]

The Adirondack Ski Touring Council has maintained the route as a ski trail since 1986. [Tr 431-432] The trail is also used by hikers, hunters, and others. [Hearing Report ¶22-23] "The road has seen virtually no personal automobile use in over 50 years." [Hearing Report ¶25]

In May 2005, Ranger Joseph LaPierre heard that some people were planning to use motor vehicles on Jack Rabbit Trail. Ranger LaPierre contacted Respondent to learn if he knew or had heard anything about this. Respondent said he would see Ranger LaPierre at the trail around 10:00 a.m. the next day. About 9:30 a.m., May 22, 2005, Ranger LaPierre arrived at the trailhead. He made sure it was appropriately marked with Forest Preserve signs and signs stating that the use of vehicles were prohibited. Respondent arrived as promised and backed his truck up passed the dead end sign at the eastern end of Mountain Lane, passed the Forest Preserve and "No Motor Vehicle" sign, and onto Jack Rabbit Trail inside the Forest Preserve. [Hearing Report ¶9-12]

III. ARGUMENT

A. THE DECISION MISSTATES THE REQUIREMENTS FOR HIGHWAY ABANDONMENT UNDER HIGHWAY LAW §205(1) AND SHOULD BE CLARIFIED TO STATE THAT ABANDONMENT BY NONUSE OCCURS REGARDLESS OF WHETHER A TOWN FILES A CERTIFICATE OF ABANDONMENT

The decision appears to misstate the requirements for abandonment of a town highway pursuant to Highway Law §205(1) by indicating the town controls whether a highway is

abandoned by filing (or not filing) descriptions of highways to be abandoned. The decision states:

> New York Highway Law §205 provides that a town can affirmatively abandon a road in one of two ways. Under the first way, when a road has not been used for six years, *the road is deemed abandoned when the town superintendent, based on a written consent of the town board majority, files a description of the highway abandoned with the town clerk.*
>
> Highway Law §205(1), states:
>
> . . . 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. (Emphasis added.)
>
> The decision goes on to state:
>
> . . . Department staff attempts to establish that Old Mountain Road has been abandoned under the common law through nonuse.

This indicates that the Commissioner did not recognize that abandonment by nonuse occurs by operation of Highway Law §205, not common law. Staff's brief did contain an argument regarding common law associated with rights-of-ways. However, nonuse is specifically provided for as the statutory basis for abandonment.

The courts have uniformly held that abandonment occurs – or does not occur – independently from filing of the certificate of abandonment by the highway superintendent. See, *inter alia*, *Pless v. Town of Royalton*, 185 A.D. 2d 659 (4th Dept. 1992) aff'd 81 N.Y. 2d 1047; *Matter of Faigle v. Macumber,* 169 A.D. 2d 914 (3d Dept. 1991). "So long as the evidence establishes that a road has not been traveled or used as a highway for six years, it will be deemed abandoned by operation of law and not by the filing of a certificate." *Matter of Willis v. Town of Orleans*, 236 A.D. 2d 889 (4th Dept. 1997). For a road to be considered traveled or used as a highway, there must be evidence that "travel [has] proceed[ed] in forms reasonably normal . . ." *Id* at 890, quoting *Matter of Faigle v. Macumber* at 916.

Similarly, if a highway continues to be used for travel and highway purposes, the town's filing of a description of it as abandoned will not terminate its existence as a highway. "[T]he 'written description' does not prove the abandonment of the road in question . . . because it has been said by the Appellate Division of this department that a public highway ceases to be such from nonuser . . . by force of the statute, and not because of the writing filed pursuant to . . . [Highway Law]; and if the road had not been abandoned for six years, there was no jurisdiction to file it." *Matter of Avoca Soil Improvement Co., v. Wilber*, 137 Misc. 827 (Sup. Ct. Columbia Co. 1930), citing *People ex rel DeGraot v. Marlette* 94 A.D. 592, 594.

Therefore, the statement that "*the road is deemed abandoned when the town superintendent, based on a written consent of the town board majority, files a description of the highway abandoned with the town clerk.*" is incorrect. The decision should be clarified to make it consistent with judicial application of Highway Law §205(1), and the Commissioner should revisit any aspect of the decision that flowed from a belief that towns control the status of a highway by filing a certificate of abandonment.

B. THE DECISION SHOULD CLARIFY THAT STAFF'S CASE WAS NOT DISMISSED AS A MATTER OF LAW

In dismissing Staff's case, the decision states, "Department Staff did not meet its burden in this matter." [Decision at 1-2] However, the decision adopts the Chief ALJ's report that dismissed Staff's case as a matter of law or alternatively for failure to meet its burden of proof. The decision does not state which basis offered by the Chief ALJ for dismissal of the case was adopted by the Commissioner.

Additional ambiguity exists because the decision misstates the statutory requirement for abandonment of a highway. If the decision could be construed as unambiguously dismissing Staff's case as a matter of law, then the incorrect statement of the law upon which the decision

was based creates a question regarding the validity of the premise of that dismissal. On the other hand, if the decision was based on Staff's failure to meet its burden of proof, then no basis exists to assume that the towns are obligated to maintain the road as stated at page 5 of the decision.

Therefore, on its face and in application, the decision contains inconsistencies regarding the basis for dismissal of Staff's case. The decision should be clarified to make clear whether Staff's case was dismissed as a matter of law. If Staff's case was dismissed as a matter of law, the Decision should be reviewed to determine whether that determination was valid in light of the apparent misunderstanding of the requirements for highway abandonment and after consideration of relevant facts in the record.

1. Staff presented evidence that would support a finding that Old Mountain Road ceased to exist as a highway before Respondent drove into the Sentinel Range Wilderness

The decision should be clarified to state that it rejects the provisions of the hearing report that recommended that Staff's case be dismissed as a matter of law. Staff presented evidence from which one could reasonably conclude that Old Mountain Road was abandoned pursuant to Highway Law §205(1). The record shows that present public use of the route is not "*travel*" or use "*as a highway,*" as stated in Highway Law §205(1) (Emphasis added). Further, the record contains evidence that Old Mountain Road was abandoned by ten years of nonuse before construction of the ski trail that currently traverses the same route.

Judgment as a matter of law is only appropriate when, drawing all inferences favorable to the nonmoving party, that party has not made a *prima facie* case. *Szczerbiak v. Pilat*, 90 N.Y. 2d 553, 556 (1997). The courts have consistently held that this means that granting a decision as a matter of law is only appropriate "where, based on the evidence presented, there is no rational

process by which [the court] could find for the nonmoving party." *Holy Temple First Church v. City of Hudson*, 17 A.D. 3d 947 (3d Dept. 2005), citing *Calafiore v. Kiley*, 303 A.D. 2d 816, 817.

But for the asserted existence of Old Mountain Road as a highway, Staff presented evidence to prove each element of its cause of action. 6 NYCRR Part 196.1(b). As explained in detail below, drawing inferences favorable to the Department, one could have concluded that the public had not used Old Mountain Road as a highway for more than the statutory period of six years prior to the Respondent driving on it.

"So long as the evidence establishes that a road has not been traveled or used as a highway for six years, it will be deemed abandoned by operation of law and not by the filing of a certificate." *Willis v. Town of Orleans*, 236 A.D. 2d 889 (4th Dept. 1997). For a road to be considered traveled or used as a highway, there must be evidence that "travel [has] proced[ed] in forms reasonably normal . . ." *Id* at 890, quoting *Matter of Faigle v. Macumber* at 916.

Although the Hearing Report cites a witness who stated that the trail receives "a tremendous" amount of use, [HR at 30, 34] that does not necessarily mean the use was normal highway travel. "[N]ormal highway travel does not traverse over embankments, into ditches, or under culverts." *O'Leary v. Town of Trenton*, 172 Misc. 2d 447, 451 (Sup. Ct. 1997).

In this case, the record shows that at the Keene end, no continuous thread of a highway exists. Alstead Road terminates at the parking lot of the Rock and River Resort. About 500 feet of the Rock and River Resort's yard intervenes and then the Jack Rabbit Trail – the erstwhile Old Mountain Road -- begins. [Tr 418 ln 11-15; Tr 423 ln 4-5] This prevents through travel by the public in a normal manner one would expect for a highway. Similarly, Mountain Lane in North Elba terminates in a dead end sign and parking area where people park in order to use the trail. [HR 3; Tr 159 ln 22-160 ln; Tr 727 ln 12-20]

Further, beaver ponds across the road require hikers and others to leave the old roadbed and climb around boulders and into the woods before returning to the road. [Hearing Report ¶17; Tr 423 ln 4-11; Tr 566-570; Staff Exhibit 2, photo 37-44; Staff Exhibit 35, photographs 13-16, 19, and 25-27; Staff Exhibit 36, photographs 44- 57] Although the hearing report found that skiers could traverse directly over the frozen ponds without leaving the route followed by the roadbed, the skiers themselves access the trail by car, get out, put on skis, and then proceed rather than engaging in uninterrupted travel. [See, *inter alia* Tr 418 ln 13-15; Tr 423 ln 4-5; Tr 159 ln 14-21; and Tr 160 ln 15-22]

Furthermore, cross-country skiing is not a mode of travel normally found on a highway. But, they are the only users who frequently traverse the entire length of the road without leaving the route at some point. There was testimony regarding snowmobile use, but the record indicates snowmobile use is infrequent at best. [See, e.g. Tr 443 ln 2-19; Tr 423 ln 25- 425 ln. 25; Tr 771 ln 11-25] This means the finding of non-abandonment of the entire length of the route must have depended on use by skiers.

Other evidence indicated that people leave the historic route followed by Old Mountain Road and scatter off to enjoy the fields and woods of the Sentinel Range. The "roadbed" is wider and the vegetation compacted near the ends. Farther from the ends, it becomes a single narrow foot track through tall grass. [See, Staff Exhibit 2 & 36 and Tr 535 ln 9 -18] This supports an inference that many people do not traverse the entire route; instead they scatter off into the wilderness. *O'Leary v. Town of Trenton,* 172 Misc. 2d 447, 451 (Sup. Ct. 1997) presented similar facts regarding use of a one-time highway and the Supreme Court of Oneida County found it was abandoned because "the most numerous users of the road . . . failed to follow 'the lines of the ancient street' when they scattered over the fields and meadows upon plaintiff's

property . . ." Therefore, the bare presence of numerous people entering onto the route does not preclude a finding of abandonment.

With respect to normal highway uses, Old Mountain Road has been impassable to cars for half a century. [Hearing Report ¶25, Tr 348, 423-423, 566] Although use by bicyclists is cited as a basis for keeping the road open, [HR 29] the record contains a dearth of evidence showing use by bicyclists. ATV use is also cited as a highway use that weighed against a finding of abandonment. [HR 34, Decision at 5] However, ATV use is illegal on highways.[2] Nor does the record contain evidence of any significant amount of through travel by anyone traveling between Keene and North Elba, or points beyond, for any reason other than recreation.

One could conclude from the completely vegetated condition of at least some portions of the route that it receives very little use overall. The east end of the "highway" is the lawn of the Rock and River Guide Service. This indicates a lack of highway travel as such even after the substantial clearing of the route by the Adirondack Ski Touring Club in1986. [Tr 512-513] Therefore, the finding of non-abandonment depends on a subjective judgment regarding the nature and extent of the use since 1986. Because this determination involved a subjective evaluation of the evidence, dismissal of Staff's case as a matter of law would be inappropriate.

i. *The physical condition of the route indicates it is not used for travel in forms reasonable and normal*

The relevant cases indicate that the courts consider factors such as the condition of the road and the efforts of the landowners to exclude the public when determining if the public has ceased using a highway for reasonable and normal forms of travel.

In relevant cases, the courts have made specific findings regarding the condition of the roads in question when determining whether they were abandoned as highways. See e.g., *Pless v.*

[2] This segment of Old Mountain Road does not connect any ATV trails – it connects two parking areas at the ends of other highways. Therefore, it cannot be open to ATV use as a matter of law. VTL §§2403, 2405.

Town of Royalton, 185 A.D. 2d 659, 659-60 (4th Dept. 1992); *Matter of Faigle v. Macumber*, 169 A.D. 2d 914, 915 (3d Dept. 1991); *Hallenbeck v. State*, 59 Misc. 2d 475 (1969), aff'd 40 A.D. 2d. 1081; *Horey v. Village of Haverstraw*, 124 N.Y. 273 (1891).

In the present case, the route in question is in much worse condition than highways that the courts have found to be abandoned. The road in *Pless* was a dirt road passable to motor vehicles and used by hunters and farmers. Never-the-less, the court found the highway to be abandoned. *Pless v. Town of Royalton*, 185 A.D. 2d 659. Old Mountain Road is not and has not been passable to motor vehicles for decades. [Hearing Report 25, Tr. 348 ln 16- 349 ln 1, 371 ln 15-18] Nor has it been used for vehicular traffic. [Id.]

In the *Matter of Faigle v. Macumber*, the court held that a road that was difficult to travel and barely passable except by foot or a four-wheel drive vehicle was abandoned because travel had not proceeded by reasonably normal means. *Matter of Faigle v. Macumber*, 169 A.D. 2d 914, 915 (3d Dept. 1991), *Abess v. Rowland*, 13 A.D. 3d 790 at 792 (3d Dept. 2004). Similarly, the Court of Appeals considered presence of about 200 feet of marsh blocking a road as evidence of abandonment. *Horey v. Village of Haverstraw*, 124 N.Y. 273 (1891).

In *Hallenbeck v. State*, the Court of Claims relied heavily on the physical character of the supposed highway to determine that it was abandoned.

> Claimants have proved that there were washouts, a fence, stones, and boulders, springs, and reservoirs, brush and sizable trees within the highway boundaries which prevent its use for travel in any logical, sensible, and equitable understanding of the statutory requirement for travel or use as a highway. *Hallenbeck v. State*, 59 Misc. 2d 475, 479-480 (1969) aff'd 40 A.D. 2d 1081

To compare with the cases above, what remains of Old Mountain Road has been completely obstructed by beaver ponds and the yard of the Rock and River Resort; seventy year old trees grow in the roadbed; and vegetation completely covers the route in places.

In *Abess v. Rowland*, 13 A.D. 3d. 790 at 792 (3d Dept. 2004), the court held a highway had been abandoned because, "the road ha[d] been impassable by vehicles, that no public work or maintenance ha[d] been performed on the road and that individuals attempted to walk or bike on the road only 15 times."

The Chief ALJ rightfully points out that Old Mountain Road currently receives more use than the highway in *Abess;* however, it fails to consider that the court in *Abess* found the condition of the road and lack of use by motor vehicles significant. Nor does *Abess* stand for the principle that less than a specific limited number of attempts to use a highway must be proven by the proponent of abandonment. Although the court cites fifteen occasions of use as grounds for abandonment, the reference to the condition of the road and a lack of vehicular use indicates that the court comprehensively evaluated the facts to determine whether the public used the road for travel or highway purposes.

The Court of Appeals has held that fencing that obstructs a highway, although illegal, will cause abandonment if it hinders (not prevents) public access for more than six years. *Grace v. Town of East Hampton*, 20 A.D. 2d 788 (2d Dept. 1964). Although the Department has not fenced the road to exclude the public, it has posted the route against motorized vehicles and effectively curtailed public uses that conflict with the Adirondack Part State Land Master Plan for more than six years. [Hearing Report at ¶25, Tr 379 ln 17-380 ln 9] The town of North Elba posted Mountain Lane as a dead end road indicating that the route passed the parking area at the end of Mountain Lane prevented public use of the trail as a highway. [Hearing Report at ¶3]

Courts have held that construction of an alternate route indicates an intention to abandon the segment of road bypassed. See, *Schuyler v. Town of Angelica*, 137 Misc. 190, 195-196 (Sup. Ct. Allegany Co. 1930); *Hallenbeck v. State*, 59 Misc. 2d 475 (1969) aff'd 40 A.D. 2d 1081.

As in *Schuyler*, the present case involved towns discontinuing maintenance of a segment of road and construction of a preferred alternate route between two locations. *Schuyler* also involved continued recreational use of the old route. However, the court in *Schuyler* found that the recreational use of the old route did not prevent the former highway from becoming abandoned. Similarly, in *Hallenbeck v. State*, to determine that a highway was abandoned, the court found:

> Claimants have proved that there were no persons serviced by this town highway except at its northwest and southeast termini; and, that those residences were serviced by the existing use and maintained termini of said highway. *Hallenbeck v. State*, 59 Misc. 2d 475, 480 (Ct. of Claims 1969), aff'd 40 A.D. 2d 1081.

This is analogous to the segment of Old Mountain Road at issue in this case.

Nearly a century ago, the public began using an easier route south of Pitchoff Mountain to travel between North Elba and Keene. In 1921, the legislature omitted the route north of Pitchoff Mountain (Old Mountain Road) from its list of roads to be improved into a highway system. [L 1921 ch 18] The state improved the southern route and it is now a modern state highway -- State Route 73 -- linking North Elba and Keene. [Hearing Report ¶30] When asked if he would drive on Old Mountain Road, a former highway superintendent from North Elba said "First off, I wouldn't have any reason to." [Tr 348 ln 20-24]

The parallel existence of State Route 73 and Old Mountain Road supports the conclusion that the public ceased to use Old Mountain Road as a highway long ago. The contrasting ways in which the public uses State Route 73 and Old Mountain Road shows that what happens on Old Mountain Road in the Sentinel Range is not travel or highway use.

The courts have never dealt with a situation exactly like the one presented in this case; however, in all cases, the question is whether travel has proceeded in forms reasonable and normal. Examining the facts of this case, one could conclude that the condition of Old Mountain

Road as a wilderness trail is evidence that the public does not use it for "travel or use for highway purposes" in forms reasonable and normal. See Highway Law §205(1).

In evaluating a case with facts very similar to the facts of this case, the Supreme Court of Oneida County held, "Plaintiff has met her burden of establishing the old road passing through her property has been abandoned for six years or more . . ." *O'Leary v. Town of Trenton*, 172 Misc. 2d 447 (Sup. Ct. 1997), see also, *Hallenbeck v. State*, 59 Misc. 2d 475 (Ct. of Claims 1969), aff'd 40 A.D. 2d 1081. Dismissing Staff's case as a matter of law would be incongruous.

ii. *Recreational use of state land is not travel or use for highway purposes*

The hearing report recommended a finding that the extensive recreational use of Old Mountain Road for hiking, snowshoeing, and skiing precluded a finding of abandonment. However, Highway Law §205 requires "travel or use as a highway" to prevent abandonment. Recreational uses such as snowshoeing, skiing, hiking, and even snowmobiling and ATVing do not constitute travel or use of a route for highway purposes. At the very least, the nature of the specific use of a particular trail or road should be weighed in determining whether it is used for off-road recreation or used for travel and highway purposes.

In the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered. *Long v. Adirondack Park Agency,* 76 N.Y. 2d 416 (1990). This means that in determining what "travel or use as a highway" means for the purpose of Highway Law §205, one must consider the purpose of a highway and the reason the people use the route in question. The purpose of a highway is to allow the public unobstructed transit from one location to another using normal modes of travel. In the present case, the public is using the trail for forms of recreation that conflict with the normal uses of a highway.

The hearing report and the decision in this matter recognize that the current uses of the route would conflict with use of the route as a highway. [Decision at 5, Hearing Report 36] The finding that snowshoeing, skiing, hiking, and other recreational uses preclude highway abandonment contains an inherent contradiction; the uses by which the trail was determined to be a highway could be eliminated by management of this route as a highway – which includes making it suitable for motor vehicle use as stated in the decision itself. Id. [3]

The state has preempted motor vehicle regulation through the Vehicle and Traffic Law, *People v. Grant*, 306 N.Y. 258, 260 (1954). The specific delegations of authority to towns do not include the authority to permanently exclude motor vehicles from highways. VTL §1660; 1992 Op. Atty. Gen (I)92-6 & 1980 Op. Atty. Gen 209-80. In other words, if the decision is correct that Old Mountain Road is a highway, the towns cannot preclude cars from using it and they may be compelled to maintain it for their use. However, the decision recognized that vehicular use would conflict with the existing uses of the trail. [Decision at 5.] Yet, when deciding whether this route remains a highway, the decision ignored the fact that it has been impassable to cars and used for recreation for decades. This inherent contraction justifies a reexamination of the criteria relied upon in determining that Old Mountain Road continues to be a highway.

"A basic consideration in the interpretation of a statute is the general purpose and intent underlying its enactment. . ." Statutes §96. "The courts are to avoid literal construction when it leads to either a frustration of the over-all design of the Legislature . . . or an ineffectually absurd result." *Matter of Kelly v. Jorling*, 164 A.D. 2d 181, 183 (3d Dept. 1990), citing *Long v. Adirondack Park Agency*, 76 N.Y. 2d 416. The inherent contradiction of calling a trail a highway

[3] Ironically, snowmobiles could be excluded from trails currently open to their use if those trails are located over routes of historic highways. Under the reasoning of the hearing report as adopted by the decision, continued recreational use by snowmobiles would mean the highway continues to exist, and snowmobiles may only operate on highways under limited circumstances. See PRHPL§§25.05 and 25.09.

because of recreational uses that are either prohibited by[4] or inconsistent with highway use indicates that "travel" and "use as a highway" for the purposes of Highway Law §205 does not include recreational use.

a. Hiking, Skiing and Snowshoeing on a trail is not use of the trail as a highway

The cases cited to support a finding that pedestrian uses of roads preclude abandonment can be distinguished from the present case. The precedent that most directly supports the idea that pedestrian use precludes abandonment is *Smith v. Town of Sandy Creek*, 12 Misc. 2d 916, 924 (1958). In that case, the plaintiffs sought to have a section of highway leading through their property to the shore of Lake Ontario declared abandoned. The court had held that pedestrian use of the highway precluded a finding of abandonment, stating -- "the road . . . had as its obvious purpose the creation of a means by which the public might travel to the shore of Lake Ontario. . . people have continuously intended to pursue their right of travel . . . ." *Smith v. Town of Sandy Creek*, 12 Misc. 2d 916, 924 (Sup. Ct. 1958).

Unlike Old Mountain Road, the public used the highway in *Smith* to traverse private land to reach a specific place. Id. at 924. Thus, the court's finding of non-abandonment in *Smith* rested on the public's continuing passage over the highway to reach the destination for which the highway originally was created to provide access. In the case of Old Mountain Road, the "road" is not used to reach a destination; it is the destination. People travel to the trail and use it for their recreational activities. Many people leave one car in the parking area at the North Elba end of the trail and leave another in the lot at the Keene end of the trail and then take the trail from one car to another. [Tr 159 ln 14-21] Their objective isn't to reach a destination; they are experiencing recreation on the trail itself. [See, *inter alia*; Tr 160 ln 15-22]

[4] VTL §2403 and 2405 preclude ATV use on highways unless specific criteria are met. As explained in point III F below, those criteria cannot be met on this route.

Another distinction exists between the present case and cases such as *Smith*, relied upon for the hearing report's recommended finding that Staff failed to present a *prima facie* case. In *Smith* (as well as most other highway abandonment cases) use of the road by the public was hostile to the interest of landowners who were trying to exclude the public from their properties. In this case, the state has encouraged the recreational use of the route by the public and a finding of abandonment would protect the continued use of the trail for those purposes, not thwart it.

The use of Old Mountain Road is more analogous to *O'Leary v. Town of Trenton*, 172 Misc. 2d 447 (Sup. Ct. 1997), than *Smith v. Sandy Creek, supra*. In *O'Leary*, the court found that a highway was abandoned even though the paved roadbed continued to exist and people jogged, bicycled, and rode snowmobiles and motorcycles on it. In that case, the court held that the public was not traveling on or using the road as a highway. Similarly, other cases have held that recreational use may be insufficient to prevent a highway from being abandoned. See, *Pless v. Town of Royalton*, 185 A.D. 2d 659, 659-60, (4th Dept. 1992); *Abess v. Rowland*, 13 A.D. 3d 790 at 792 (3d Dept. 2004).

Although the courts have found that pedestrian use of a sidewalk will keep a highway open where a street is closed to motor vehicle use, the courts consider the context of the case in determining what constitutes "use as a highway" under Highway Law §205 and its predecessors. The Court of Appeals has determined that the circumstances of use must be considered, stating:

> We have held that an unobstructed sidewalk *may* preserve a highway, though vehicles are barred. . . . But travel in such cases proceeded along defined and constant lines. . . . That is not the situation here. There may have been use, but not a use 'as a highway.' Use 'as a highway' involves something more. Travel must proceed, in forms reasonably normal, along the lines of an existing street. *Town of Leray v. New York Central R. R. Co.*, 226 N.Y. 109, 113 (1919). Emphasis added.

The Court of Appeals has also found that in general, "Highways are for public use to enable the public to pass and repass with *teams and vehicles*, such as are ordinarily

used . . ." *Horey v. Village of Haverstraw*, 124 N.Y. 273, 277 (1891). Emphasis added.

There is a difference between a sidewalk used by pedestrians for transit in an urban setting and a path through the woods connecting two parking lots. In a very similar situation, the Court of Claims relied on *Town of Leray v. New York Central R. R. Co., 226 N.Y. 109*, to hold that a deteriorated highway that the state had posted as a trail was abandoned despite horseback riding and hiking. In *Hallenbeck v. State*, 59 Misc 2d 475, 480 (1969), aff'd 40 A.D. 2d 1081, the Court of Claims said:

> The State placed substantial emphasis on *Smith v. Town of Sandy Creek*, [internal citations omitted] . . . However, the factual proof in that case as to continued user and travel, *and the reason for public use*, take it well outside the scope of the evidence presented in this claim." Id., emphasis added.

In other words, the courts consider *why* the public uses a road in determining whether it has been abandoned as a highway. Accordingly, hiking, skiing, snowshoeing, and other recreational uses that include clambering around beaver ponds, pushing through chest high weeds, and waiting for snow to fall and ponds to freeze do not preclude a finding of abandonment. [Hearing Report ¶16, Staffs Exhibits 2, 35, 36, Tr 423, 535, 569-574]

Skiing, snowshoeing, hiking, snowmobiling, and ATV use are not uses directly tied to the existence of a highway. In fact, they are primarily off road recreational activities. And, other than skiing, snowshoeing, and snowmobiling, all other users must abandon the roadbed to traverse the route. Accordingly, one could easily conclude that the remnants of Old Mountain Road are not used for travel by normal and reasonable means and has, therefore, been abandoned.

b. Use of off-road recreational vehicles does support a finding that Old Mountain Road exists as a highway

The decision should be clarified to state that use of off-road vehicles on a trail is not travel or use of the trail as a highway. In considering whether Old Mountain Road continues to

be used as a highway, the hearing report adopted by the decision cites the use of ATV and snowmobiles as uses that precluded a finding of abandonment. [HR at 34] However, ATV use on highways is illegal. See, VTL §§2403 & 2405. Vehicle and Traffic Law prohibits ATV use on highways except to cross the highway at a ninety degree angle or if the highway has been opened to ATV use pursuant to VTL §2405. See, VTL §2403(1)(a). Highways can only be opened to ATV use when the governmental body with jurisdiction over them determines that "it is otherwise impossible for ATVs to gain access to areas or trails adjacent to the highway." VTL §2405.

Old Mountain Road through the Sentinel Range Wilderness cannot, as a matter of law, be opened to ATV use because there is no land open to ATV use along its length. ATV use is prohibited in the Sentinel Range Wilderness, and the route does not connect ATV trails. At either end, Old Mountain Road connects to parking areas at the termini of public highways – Mountain Lane in North Elba and Alstead Road in Keene. Therefore, ATVs are prohibited on Old Mountain Road as a matter of law and cannot be authorized pursuant to VTL §2405. See also, *In Re O'Brien-Dailey v. Town of Lyonsdale*, CA2009-000293 (12-23-2009) 2009 NY Slip Op 52753(U); Ops. Atty. Gen No. 2005-21.

Furthermore, by design, ATVs are adapted and intended for use off-roads. That is, their purpose is to carry people places where there are no highways. Saying that using an off-road vehicle on a trail through the woods constitutes travel by means reasonable and normal on a highway or that driving an ATV on a trail is using the trail for highway purposes is inherently contradictory.

Snowmobiles are also off-road vehicles by their nature and their use of a particular route does not necessarily indicate that route is a highway. Vehicle and Traffic Law §125 specifically excludes snowmobiles from the definition of motor vehicles, and use of snowmobiles on

highways is illegal except under specific circumstances set forth in Parks, Recreation and Historic Preservation Law §25. The exclusion of snowmobiles from the VTL and their regulation under Park and Recreation Law indicates a legislative determination that riding a snowmobile is a form of recreation, not a normal method of travel nor a highway use.

Towns may not authorize operation of snowmobiles on highways except as allowed by Parks, Recreation and Historic Preservation Law §§25.05 and 25.09. However, towns are not required to open eligible highways to snowmobile use. Even if a highway is unplowed, operating snowmobiles on the highway is illegal unless a town has specifically designated it as open for their use. PRHP Law §25.05(5).

The limited circumstances under which snowmobiles may be authorized to operate on certain highways indicate that snowmobiling is not considered travel in normal form, nor is it a highway use. Snowmobiles may only operate on the area adjacent to highways, on highways that are not plowed if the route is designated for such use by the town, or on highways during certain emergencies. In short, snowmobiles may only operate on highways when the highway is not suitable for normal travel or highway use. PRHPL §25.05.

The legal framework regarding the use of snowmobiles on highways shows that their use on highways is the exception rather than the rule. That is, snowmobiles may sometimes operate on roads despite the fact that the road is a highway, not because it is a highway. Therefore, use of snowmobiles should receive little, if any, consideration for determining whether a route is traveled or used for highway purposes under Highway Law §205.

Traditional off-road recreational uses -- whether motorized or pedestrian -- are incompatible with maintenance and normal use of a highway by their nature. The physical condition of the remains of Old Mountain Road following its rehabilitation as a trail support recreation -- not travel or use as a highway. The two are incompatible with each other and the

decision should clarify how recreational uses that are incompatible with normal highway uses should be weighed in any similar future cases regarding violations of 6 NYCRR Part 190 or 196.

In determining whether Staff presented a *prima facie* case, the hearing report relies on recreational use for its finding that Old Mountain Road continued to be used as a highway. However, ATV use is illegal on highways. Hiking, skiing, snowshoeing, ATVing, and even snowmobiling are incompatible with highway use. [Decision at 5] Even if one considered snowmobiling a highway use, the record contains evidence of only sporadic snowmobiling and little evidence of bicycle use. [Tr 554 ln 7; 733 ln 8; 776 ln 2-9] When asked if he had seen bicycles on the trail, Mr. Christopher Fadden testified "No, never seen them." Mr. Jubin provided the only testimony that bicycles use the route saying: "Sometimes we see bicycle tracks." [776 ln 2-9] And he would see a snowmobile ". . . occasionally. . . " Id.

In light of the foregoing, a person weighing all the factors could have found that the recreational uses of Old Mountain Road are not travel by means reasonable and normal, nor is the public using it for highway purposes as contemplated by Highway Law §205(1). Therefore, the decision should be clarified to state that Staff's case was not dismissed as a matter of law.

2. The record contains evidence that Old Mountain Road was not used for ten years before 1986, ceased to be a highway as a matter of law, and does not exist regardless of the present use of the same route

The record contains evidence that Old Mountain Road was completely obstructed from at least 1976 to 1986, more than the six years required for abandonment to occur. This extinguished Old Mountain Road as a highway. See Highway Law §205(1). Subsequent public use could not recreate any public easement or right-of-way because the law prohibits adverse possession of any interest in state land. See, *Orchard Grove v. State of New York*, 1 Misc. 3d 810 (2003). Nor can the trails around the beaver ponds that obstructed the road after the state obtained ownership of

the land be considered part of a highway by use. Id. See also, New York Constitution, Article 14 §1.

In other words, the present use of Old Mountain Road is irrelevant to the determination of whether Old Mountain Road remains a highway. These facts applied to the relevant law show that Staff presented a *prima facie* case. Neither the hearing report nor the decision specifically reference these facts from the record. Neither appears to consider the prohibition against adverse possession of state land or the constitutional prohibition against alienation of Forest Preserve.

According to the hearing report's findings, the towns' last maintenance on the road prior to construction of the ski trail was 1975. [Hearing Report ¶40] He also found that the road has received virtually no motor vehicle use for the last fifty years. He finds use of the route for hiking through the 1970s by citing a 1978 letter from the supervisor of the town of North Elba. [Staff's Exhibit 63, tab B] This letter does not quantify the use in any way, nor does it provide evidence of the use or condition of the route.[5] The ability of a hiker to traverse the route does not show that the route taken is a highway. See, *inter alia*, *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).

More importantly, by 1976, the roadbed was impassable due to a bridge being out about 3/4 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 town of Keene did not undertake any maintenance from 1975 until assisting the Adirondack Ski Touring Council in 1986 – far more than six years. [Tr 743-744] And the bridge was not replaced until then. [Tr 433 Ln 4-10; Tr 744 ln 22-745 ln 7]

Although the hearing report finds that partial obstructions of a highway do not terminate the public's right-of-way, an obstruction that completely blocks the width of the highway for six

[5] A 1993 article by the Franklin Historical Review regarding Old Mountain Road stated: "Today there is only one significant abandoned segment. It lies between Keene and Lake Placid . . ." Staff's Exhibit 34 at 9. "Locals called it six miles, six hours." Id.

years or more causes abandonment.[6] Speaking for the Court of Appeals, Justice Cardozo stated simply, ". . . if the entire width is blocked, the obstructed section ceases to be a highway . . ." *Barnes v. Midland R.R. Terminal Co.*, 281 N.Y. 91, 98 (1916); citing *Horey v. Village of Haverstraw*, 124 N.Y. 273. See also, *City of New Rochelle v. New Rochelle Coal & Lumber*, 224 N.Y. 696 (1918); *Grace v. Town of East Hampton*, 20 A.D. 2d 788 (2d Dept. 1964). The absence of a bridge for more than six years has specifically been held to cause abandonment of a highway. *Matter of Schuyler v. Town of Angelica*, 137 Misc. 190 (Sup. Ct 1930).
Nor is it necessary for the obstruction to be insurmountable. *Leray v. New York Central R.R. Co.*, 226 N.Y. 109, 113 (1919). A barricade across the entire width of the roadbed for six years caused abandonment of the highway even though people were able to circumvent the obstruction. Id., see also, *O'Leary v. Town of Trenton*, 172 Misc. 2d 447 (Sup. Ct 1997).

The hearing report does not address the absence of this bridge. It considers beaver ponds that force people off the roadbed as partial obstructions because skiers may cross over them when the water is frozen. However, as previously stated, the courts consider an obstruction across the entire width of a highway to be a complete obstruction even if the obstacle can be circumvented. Further, one can conclude from nature and extent of obstructions that normal use of the highway for travel has ceased. Missing bridges and continual flooding from beaver ponds, for example, are not things one associates with a highway in use by the public.

In the context of determining whether Staff presented a *prima facie* case, the Chief ALJ should have accepted the facts presented in the 1976 letter and drawn appropriate inferences favorable to the Department. That is, for purposes of deciding Respondent's motion to dismiss, he should have concluded Staff had demonstrated that Old Mountain Road was completely

[6] The hearing report does not appear to consider the absence of several bridges between 1976 and 1986. [Tr 432 ln 4-5]

obstructed in 1976. From that time forward, the record shows that the obstructions and lack of use continued for more than six years.

Mr. Tony Goodwin, Executive Director of the Adirondack Ski Touring Council, testified that his organization 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)]

Mr. Goodwin also testified that 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.

When asked what was done to re-establish that route in 1986, he said, "The 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)] And, "We repaired washouts. *We rebuilt four major bridges and a number of minor bridges.*" [Tr 432 ln 4-5 (Emphasis added)]

Mr. Kenneth Jubin, a witness for the Respondent, corroborated Mr. Goodwin's testimony regarding the condition of Old Mountain Road in 1986 when the ski trail was built. When asked what the Adirondack Ski Touring Council did to establish the trail, he testified: "A tremendous amount of work, I think, when initially around 1986 they had to go through and remove a bunch of trees."

From Mr. Goodwin's and Mr. Jubin's testimony that the route had been used by skiers until it fell into disrepair for several years, and trees and brush had to be removed from the route, one would conclude that prior to 1986, the public, including skiers, had stopped using the route. One can also infer from Mr. Goodwin's testimony that the route could not be used by skiers

without bridges. And based on the uncontradicted evidence in Exhibit 63, tab A, and the testimony of Mr. Goodwin and Mr. Reed, such bridges were missing for at least ten years. In sum, one could conclude that Old Mountain Road was not physically, practically, or legally, a highway in 1986.

From the preceding evidence alone, one could reasonably conclude that Old Mountain Road had ceased to exist as a highway -- much less a ski trail -- for more than six years prior to 1986. But, there was more evidence supporting a finding of abandonment prior to 1986.

There was no personal automobile use during this period. [Hearing Report ¶25] In 1980, the phone lines along the route were removed [Hearing Report ¶43] and the route was dropped from the town of North Elba inventory of highways in 1981.[Hearing Report ¶42] And, the Adirondack State Master Plan of 1987 noted that Old Mountain Road had been eliminated as a nonconforming use in the Sentinel Wilderness Range.

From all of this, one could have concluded that Old Mountain Road ceased to be used for travel or highway purposes for more than six years prior to 1986. Unless these undisputed facts were rejected for some reason that does not appear in his hearing report, Old Mountain Road ceased to exist by operation of Highway Law §205(1) before the Adirondack Ski Touring Council constructed the presently existing ski trail over the route.[7]

Once Old Mountain Road ceased to exist as a highway, the public easement over the state land ceased to exist and no amount of public repair or use could recreate it as a highway. Highways by use may not be created on state land. See, *Orchard Grove of Dutchess, Inc. v. State of New York*, 1 Misc. 3d 810 (2003). Additionally, the state has invited the public to use the route

[7] If the decision's finding of non-abandonment were specific to that location, the discussion of the towns' obligations at page 5 of the decision would not have included the town of Keene. Further, the hearing report considers the route as a whole. A finding that a specific segment of the route continued to exist would have to include a discussion of whether that particular segment standing alone continued as a highway under Highway Law §205(1) and judicial decisions that have applied it.

for skiing, hiking, and snowshoeing. Because these uses are not adverse to the state, they cannot recreate a proscriptive right of public passage. Finally, the land in question is Forest Preserve where no interest in the land can be alienated by any means. NY Const art XIV §1.

In sum, Staff presented evidence that Old Mountain Road ceased to exist as a highway prior to the date on which Respondent drove his truck into the Sentinel Range Wilderness. Rehabilitation of the route as a ski trail and subsequent maintenance did not recreate the highway right-of-way, and therefore, Staff presented a *prima facie* case that Mr. McCulley drove onto Forest Preserve land that was not a highway, a public right-of-way, or otherwise exempt from the provisions of 6 NYCRR Part 196.1(a).

The decision adopted the hearing report as the basis of the Commissioner's dismissal of Staff's case. However, neither the hearing report nor the decision explicitly apply facts that show abandonment of the Old Mountain Road before 1986 to the law that preclude establishment of highways by use on state land. Therefore, the decision should be clarified with regard to its adoption of the hearing report's application of the facts to the law and its recommendation for dismissal of Staff's case.

C. Article 14 of the New York State Constitution, Executive Law §816, and the Adirondack Park State Land Master Plan prohibit the construction that would be necessary to make the physical remnants of Old Mountain Road suitable for motor vehicle use

Staff requests reconsideration and clarification of the portion of the decision that suggests the towns of North Elba and Keene are required to improve Old Mountain Road to make it suitable for motor vehicle use. [Decision at 5] This portion of the decision suggests actions that would conflict with Article 14 of the New York State Constitution, Executive Law Section 816, the Adirondack State Land Master Plan ("Master Plan"), and judicial precedent. Upgrading the route to make it suitable for vehicle use would require cutting of trees and vegetation, removal of

materials, filling of wetlands such as the beaver ponds and streams, and destruction of its natural state in violation of Article 14 of the State Constitution and Articles 15 and 24 of the Environmental Conservation Law, and Executive Law §816. [See, *inter alia*, Tr 348, 371; Staff Exhibits 2, 35, 36]

1. Creating a highway suitable for motor vehicles on this route would violate the "forever wild" clause of the State Constitution

The land in question is part of the Forest Preserve protected by the "forever wild" provision of the State Constitution.

The Forest Preserve was created by chapter 283 of the laws of 1885. Section 7 of that act states:

> All lands now owned or which may hereinafter be acquired by the state of New York within the counties of Clinton, excepting the towns of Altona and Dannemora, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan, shall constitute and be known as the forest preserve.

The lands in Dannemora and Altona were accepted to provide for the continued existence of the state prison built there in 1845 and to allow the cutting of trees for firewood to heat the prison and fuel the ironworks where the prisoners worked. [See, L 1844 ch 245 and L 1845 ch 70]

The legislature amended the definition of Forest Preserve in chapter 332 of the laws of 1893 to create two additional exceptions.

> §100. Forest preserve. The forest preserve shall include the lands now owned or which may hereinafter be acquired by the state of New York within the counties of Clinton, excepting the towns of Altona and Dannemora, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan, except:
>
> 1. Lands within the limits of any village or city, and;

> 2. Lands not wild lands, acquired by the state on foreclosure of mortgages made to the commissioners for loaning certain moneys of the United States usually called the United States deposit fund.

That was the definition of the Forest Preserve when the Constitutional Convention of 1894 met and proposed that the Forest Preserve receive the extraordinary protection of the Constitution. The voters approved the proposed amendment protecting the Forest Preserve and since 1895, the Constitution of the State of New York has provided the following promise:

> The lands of the State, now owned or hereinafter 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. [NY Const. art. 7 §7 (1895)]

This provision now resides in Article 14 of the State Constitution and the essential requirement to keep the Forest Preserve ". . . as wild forest lands . . ." remains unchanged.

According to the Court of Appeals, this provision meant, "[t]rees could not be cut or the timber destroyed, even for the building of a road. This seems to be a fair conclusion to be drawn from the adoption of these constitutional amendments after the Constitution of 1894." *Association for the Protection of the Adirondacks v. MacDonald*, 253 N.Y. 234 (1930).

The Constitution is specific and restrictive regarding roads in the Forest Preserve.

> Nothing herein contained shall prevent the state from constructing, completing and maintaining any highway *heretofore specifically authorized by constitutional amendment*, nor from constructing and maintaining to federal highway standards . . . [the Northway] . . . taking not to exceed a total of three hundred acres of state forest preserve land . . . nor from relocating, reconstructing and maintaining a total of not more than fifty miles of existing state highways for the purpose of eliminating the hazards of dangerous curves and grades, provided a total of no more than four hundred acres of forest preserve land shall be used for such purpose and that no single relocated portion of any highway shall exceed one mile in length. . . . [New York Constitution Article 14 §1; Emphasis added.]

This specific limitation regarding highways shows that any other taking of Forest Preserve land for highway purposes would require a constitutional amendment.

The maintenance of existing roads does not include a right to expand existing highways. A long standing precedent holds that the width of a highway by use is determined by the extent of the public use. *Flacke v. Town of Fine*, 113 Misc. 2d. 56 (1982); citing *Schollawski v. State of New York*, 9 N.Y. 2d 235; *People v. Sutherland*, 252 N.Y. 86; *Walker v. Caywood* 31 N.Y. 51; *Van Allen v. Town of Kinderhook*, 47 Misc. 2d 955. As the Attorney general has expressed the state of the law:

> . . . if a road or way be established by prescription or user, the public use defines the extent of the easement.... Where a town seeks to improve a highway by use beyond the extent of actual use, for example, by widening the roadway, constructing ditches, or removing trees, the town should obtain the permission of the fee holder or pay just compensation... In sum, we conclude that the width of a town highway by use, established in accordance with Highway Law §189, is determined by the extent of actual use. 1995 N.Y. Op. Atty. Gen (Inf) #95-31.

Because the landowner in this circumstance is the state, and the land in question is Forest Preserve, permission cannot be granted for expansion of what remains of the traveled way of Old Mountain Road. NY Const art XIV. See also, *Association for the Protection of the Adirondacks v. MacDonald*, 253 N.Y. 234 (1930).

For significant portions of length over the Sentinel Wilderness, Old Mountain Road is nothing but a narrow trail barely discernable through the vegetation. [Tr 274, 348, 371, 418, 423, 535; Staff Exhibits 2, 35, 36] It passes through or around beaver ponds, delves into the forest, crosses by rills and streams, winding around boulders and crowding trees. Most of the road itself is vegetated. What remains of the so called roadbed is less than five feet wide in places. [Tr 726 ln 9-14] The only improvements are planks and narrow wooden bridges and ancient culverts that make the route suitable for skiing and hiking, [Staff Exhibit 36] but impassible to motor vehicles. [Hearing Report ¶18] The route passes between trees that are seventy years old and no more than seven feet apart. [Hearing Report ¶19] The construction necessary to make this track

through the woods a highway suitable for vehicular use would destroy these natural features of the Forest Preserve in contravention of the Constitution.

Whatever obligation the towns have regarding Old Mountain Road, the paramount obligation of towns and the state is obedience to the Constitution. Accordingly, towns may not take Forest Preserve land for the purpose of widening and improving the route followed by Old Mountain Road for motor vehicles.

Further, placing the issue in context, improvement of this route for use by motor vehicles would conflict with the purpose of the Forest Preserve. The public uses of this trail that supposedly kept it open as a highway were skiing, hiking, and snowshoeing. These are public recreational activities for which the Forest Preserve was created. Opening the route to motor vehicles would be inimicable to those recreational uses. This route does not lead to lands where people recreate, it *is* where people recreate. Therefore, construction of a modern highway would be anathema to Article 14 of our State Constitution. The Commissioner should clarify the portion of the decision in this matter to specify that maintenance or repair of the existing route must be done in compliance with all laws regarding such activities on Forest Preserve.

> 2. Executive Law §816, the Adirondack State Land Master Plan, and Article 14 of the Constitution prohibit the state from approving the improvements necessary to make the route suitable for use by motor vehicles

Section 816 of the Executive Law states:

> 1. . . . Until amended, the master plan for management of state lands and the individual management plans shall guide the development and management of state lands in the Adirondack Park.

Pursuant to former Executive Law §807 and §816 of the Executive Law, state land in the Sentinel Range Wilderness Area is classified as wilderness. [Hearing Report ¶6] The basic management guidelines for wilderness areas provide the primary goal to be to achieve and

perpetuate a natural plant and animal community where man's influence is not apparent. Foot trails and foot trail bridges constructed of natural materials – such as the small bridges on the Jack Rabbit Trail -- are compatible uses in wilderness areas. Further, the Master Plan prohibits establishing nonconforming uses, including use of motor vehicles in wilderness areas. The current maintenance and use of the route for skiing, hiking, and snowshoeing is consistent with the purposes of the Forest Preserve and the Master Plan. Widening and hardening this route for motor vehicle use conflicts with the Master Plan.

The Department regulates activities on Forest Preserve through the use of temporary revocable permits. This includes any road maintenance that may occur off the traveled surface of a highway by use. *Flacke v. Town of Fine*, 113 Misc 2d. 56 (1982).[8] Accordingly, the work needed to widen the road would require a permit from the Department.

Because cutting of trees and taking of forest preserve land to create a highway suitable for travel by motor vehicles contravenes the purpose of the Forest Preserve and the terms of the Master Plan, the Department could not issue a permit authorizing the work that the decision suggests the towns must undertake. NY Const art XIV §1; Exec Law §816(1), Master Plan, 20, 65.

If the work in question required disturbance of any freshwater wetlands larger than one acre in size or contiguous to a permanent flowing stream, the towns would be required to obtain a permit from the Adirondack Park Agency. ECL §§24-0701; 24-0703; 24-0801 and Executive Law §802(68) However, the Agency might deny any such applications. ECL §24-0801 states:

[8]Vehicle and Traffic Law, the Master Plan, and the Department's regulations define highway or road as a way maintained for vehicular use. Additionally, the Highway Law defines the duties of town and county highway superintendents in terms of maintaining highways for motor vehicle use. This is inconsistent with the wilderness classification of the Sentinel Range.

> The Agency shall . . . determine prior to the granting of any permit that the proposed activity will be consistent with the Adirondack park land use and development plan and would not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic recreational or open space resources of the park.

Based on the factors above, even if the Department was to somehow allow work on the Forest Preserve, the Agency could deny any application for a permit to fill wetlands to create a motor vehicle highway in a Wilderness Area that is used for recreation.

> D. THE PASSAGES OF THE DECISION REGARDING THE POTENTIAL LIABILITIES AND OBLIGATIONS OF THE TOWNS EXCEED THE SCOPE OF THE PROCEEDING AND DO NOT REQUIRE ANY ACTION BY THE TOWNS NOR BIND THE DEPARTMENT TO AUTHORIZE OR FOREBEAR ANY ACTIVITY THAT MAY DAMAGE OR TAKE FOREST PRESERVE

At page 5, after accepting the Chief ALJ's determination that Old Mountain Road was not abandoned as a highway, the decision states that the towns of Keene and North Elba face significant potential liabilities created by the condition of the *highway* and the likelihood of conflicting uses. The decision suggests that the towns must upgrade the remnants of the roadbed to accommodate motor vehicles.

The scope of any decision is limited to addressing the rights and responsibilities of the parties to the proceeding. If the responsibilities of the towns regarding the highway were not directly relevant to or determined by resolution of the Department's cause of action, then the towns' potential liabilities were outside the scope of the Department's proceeding. Under those circumstances, the towns' liabilities and obligations should not be part of the decision in this matter.

6 NYCRR Part 622.18 states:

Final decision.

> . . . (e) The final determination will be embodied in an order which must contain findings of fact and conclusions of law or reasons for the final determination and may provide for:
>
> (1) a finding of liability or the dismissal of the charges;
>
> (2) assessment of penalties or other sanctions consistent with the applicable provisions of the ECL;
>
> (3) direction for abatement of restoration or provision for financial security;
>
> (4) a combination of any or all of the foregoing; and
>
> (5) any determination deemed appropriate under the circumstances, *and consistent with applicable provisions of the Environmental Conservation Law* or the rules and regulations promulgated thereunder. [Emphasis added.]

The towns' purported obligations as discussed in the decision are not associated with any application of the Environmental Conservation Law to the towns or the road. The Commissioner's consideration of whether Old Mountain Road remained a highway in this location was ancillary to determining Respondent's liability under 6 NYCRR Part 196.1 and the ECL.

Only the phrase ". . . any determination deemed appropriate . . ," in Part 622.18(e)(5) provides a potential basis for discussion of the towns' obligations in the decision. However, the words ". . . any determination deemed appropriate . . ." are limited by the additional phrase, ". . . consistent with applicable provisions of the Environmental Conservation Law. . ."

In determining whether this decision affected the interests of the towns, one must bear in mind the purpose of the proceeding, the context in which the status of Old Mountain Road as a highway was considered, and the limited affect of the decision.

The Department's Staff initiated this proceeding to adjudicate whether James McCulley operated a motor vehicle on Forest Preserve lands in violation of 6 NYCRR Part 196. Staff, therefore, bore the burden of proving each element of the offense. Among the elements of the

offense were that the location was not a public highway under the jurisdiction of State Department of Transportation, or a county or town highway department, nor was it a right-of-way open to his use. 6 NYCRR Part196.1(b).

The Department's authority is limited to determining whether violations of the ECL or attendant regulations occurred. 6 NYCRR Part 622.18. Nothing indicates that the towns' lack of maintenance of Old Mountain Road violated the ECL. Accordingly, pronouncements about matters of laws outside the ECL might affect parties who were not determined by this proceeding.

The towns' obligations regarding this area, pursuant to General Municipal Law, are not ascertainable on the record in this proceeding and it was inappropriate to speculate as to those obligations. Section 125-a of the General Municipal Law states:

> It shall be the duty of every municipal corporation and persons charged with the duty of maintaining any street or other roadway whenever such street or other roadway terminates in a dead end or at the embankment of a river, lake, canal, reservoir, stream or other body of water to post and keep posted a sign readily visible by day and night. Such signs shall be installed in accordance with the state manual of uniform traffic control devices and shall be illuminated from one-half hour after sunset to one-half hour before sunrise. Where either the background or letters of the sign are of reflecting material so that such sign is readily visible at night when motor vehicle headlight rays of approaching vehicles will strike it, no additional illumination shall be necessary.

A "Dead End" sign marks Mountain Lane – the portion of "Old Mountain Road" that the town of North Elba maintains – at its junction with State Route 73 and another dead end sign marks the end of Mountain Lane at the parking area at the trailhead for this section of Jack Rabbit Trail. [Tr 370, Exhibits 2, 36] Arguably, anyone driving up Mountain Lane is on notice from the town that the route is impassable to motor vehicles beyond the end of Mountain Lane. Therefore, the town's statutory obligations regarding automobile use of Old Mountain Road

appear to have been fulfilled.[9] Further, a myriad of common law issues would have to be evaluated to determine what, if any, obligations the towns might have related to potential users of Old Mountain Road.

The parties did not create a record regarding facts associated with what the supposed liabilities of the towns might be. Nor did the parties prepare a brief on the application of the Constitution, statutes, and case law to the re-establishment of a road suitable for motor vehicles. Accordingly, the discussion of the towns' obligations exceeded the scope of the proceeding.

Even if one argues that the passages of the decision are mere dicta, they are inappropriate and should be excised. Dictum may be appropriate in some cases to provide guidance regarding how a tribunal expects the parties or the public to implement its decision. It may also offer insight into how the court or a judge might address a question that it expects to come before it in the future. In this case, the superfluous passages were addressed to nonparties regarding questions outside the scope of the proceeding and beyond the department's jurisdiction.

E. DESIGNATION OF OLD MOUNTAIN ROAD AS A HIGHWAY DOES NOT, IN ITSELF, LEGALIZE ATV AND SNOWMOBILE USE OF THE ROAD

At page 5, the decision states that "both towns bear a responsibility to maintain the road in a way that will allow safe passage for the multitude of uses on it, . . . the operation of all terrain vehicles, snowmobiles, and motor vehicles."[10] Staff seeks clarification of this passage to eliminate any implication that ATV or snowmobile use of highways is lawful where a town has not opened the highway to such use pursuant to requirements of Vehicle and Traffic Law or Parks, Recreation and Historic Preservation Law, respectively.

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[9] The state has preempted the field of motor vehicle regulation and the towns do not have the authority to close their highways to motor vehicles. *People v. Grant*, 306 N.Y. 258 (1954); VTL §1660. If the decision is correct that the route continues to be used as a highway, the towns have no authority to abandon it nor may they close it to motor vehicles. However, this is a different question from whether they are required to it suitable for motor vehicle traffic.

[10] Strangely, the decision goes on to say that motor vehicle use of the Old Mountain Road is incompatible with the existing uses. One must question how skiing, hiking and snowshoeing could be considered highway uses that precluded a finding of abandonment if they are incompatible motor vehicle use and highways must open to motor vehicle use.

Vehicle and Traffic Law prohibits ATV use on highways except to cross the highway at a 90 degree angle or if the highway has been opened to ATV use pursuant to VTL §2405. See. VTL §2403(1)(a). Highways can only be opened to ATV use when the governmental body with jurisdiction over them determines that "it is otherwise impossible for ATVs to gain access to areas or trails adjacent to the highway." VTL §2405.

Snowmobiles may not be operated on a highway except as authorized pursuant to Parks, Recreation and Historic Preservation Law §§25.05 and 25.09. Towns are not required to open roads to snowmobile use; even unplowed roads must be specifically designated as open snowmobile use. Parks, Rec. & Hist. Preservation Law §25.05(5). The decision should be clarified to avoid creating the impression that snowmobile use or ATV use became legal on the route by virtue of the finding that the route remains a highway.

F. RE-OPENING AND CLARIFYING THE DECISION IS APPROPRIATE AND NECESSARY

The Commissioner of Environmental Conservation has inherent authority to reopen or otherwise reconsider a final decision. *Matter of National Tractor Trailer School, Inc., v. Commissioner of NYS Dept. of Motor Vehicles*, 191 A.D. 2d 961 (4th Dept. 1993), citing, *H.D.I. Diamonds v. Frederick Modell, Inc.*, 86 A.D. 2d 561, *appeal dismissed*, 56 N.Y. 2d 645. See also, *Matter of Mohawk Valley Organics, LLC*, Commissioner's Ruling on Motion to Suspend Order and Reopen the Hearing Records, September 18, 2003; citing *Matter of Charles Pierce, Sr.*, Commissioner's Ruling on Motion for Reconsideration, June 9, 1995. See also, *Matter of Erie Boulevard Hydropower, L.P.*, Ruling of the Deputy Commissioner, June 17, 2005.

CPLR §2221 provides that a tribunal may reconsider its own decisions. Such action is appropriate upon a showing that the court overlooked or misapprehended the facts, misapplied the law, or for some other reason mistakenly arrived at its earlier decision. *Mayer v. National*

Arts Club, 192 A.D. 2d 863 (3d Dept. 1993). Whether to reconsider a prior 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). As explained above, the May 19, 2009, decision was based on a hearing report that overlooked the legal significance of key facts and misapplied the applicable law.

Although Staff does not seek reversal of the result, the standard applicable to reconsideration should be applied to this request. Whether one calls revision of errors in a decision "clarification" or "reconsideration" is immaterial to the necessity of allowing tribunals to promulgate decisions that accurately state the law and properly apply it. Logically, if Staff meets the threshold for reconsideration of a decision, a clarification which does not prejudice the former Respondent would be appropriate.

Reviewing the May 19th decision would be a sound exercise of discretion. Unlike a court whose jurisdiction over any matter terminates with a proceeding, the Commissioner and the Department have continuing jurisdiction over the lands affected by the decision. In this instance, the decision does more than settle the issues between the parties, it defines how members of the public may use trails on Forest Preserve, how Staff should manage trails on public lands, and under what circumstances Staff may enforce 6 NYCRR Part 190 and 196.

ECL §§1-0101(3)(d), 3-0301(1)(d), and 9-0105(1)&(9) require the Commissioner of Environmental Conservation to ensure the proper care, custody, and control of the state lands under the jurisdiction of the Department. A part of the Commissioner's duty to care for the state lands under the jurisdiction of the Department is to correctly apply the law, regarding use of state land and to guide Department Staff regarding implementation of decisions.

The decision in this matter contains erroneous statements of the legal standard applicable to resolution of one element of Staff's cause of action. It contains ambiguities regarding whether

Staff presented a *prima facie* case and relied on a hearing report that omitted consideration of facts that if accepted as true, demonstrated that Old Mountain Road was abandoned by operation of law prior to 1986. The decision also contains an internal contradiction concerning whether recreational use should be considered use for "highway purposes" pursuant to Highway Law §205(1). Clarification of these matters would fulfill the Commissioner's authority and duties under the ECL.

IV. CONCLUSION

The decision materially misstated the standard for highway abandonment under Highway Law §205(1) and should be clarified to state that highway abandonment occurs by nonuse regardless of the actions of a town. The Commissioner should clarify the extent to which this apparent misapprehension of law affected the basis for dismissal of Staff's cause of action.

The Staff presented evidence that Old Mountain Road was abandoned by nonuse for more than six years before 1986, but neither the hearing report nor the decision appear to recognize the legal significance of this. Therefore, the decision should be clarified to apply the facts in the record regarding abandonment of the road from 1976 to 1986 with consideration for the legal prohibition against creation (or recreation) of a highway by use on state land.

Even if one determined that the evidence did not provide a basis on which one could find Old Mountain Road was abandoned before 1986, one could conclude from a weighing of all the factors relied on by the courts in applying Highway Law §205(1), that the public does not use the route for travel or highway purposes and that staff presented a *prima facie* case.

The Commissioner's decision should be further clarified to state that uses of a route that would be illegal or incompatible with normal use of a highway are not factors to be weighed in determining whether a trail purported to be a highway continues to be used for travel or highway purposes. The decision should also clarify how recreational uses that are incompatible with

highway travel should be weighed in determining whether a purported highway has been abandoned for purposes of enforcement of 6 NYCRR Part 196.

The decision should be revised to accurately and completely state the applicable law, including the following:

- that highway abandonment occurs as a matter of law if a highway is not traveled or used for highway purposes for six years pursuant to highway law §205 as uniformly applied by the courts;
- once abandoned by nonuse, a highway on state land cannot be re-established by redevelopment or resumption of use;
- a town has no obligation to allow ATV use of a highway;
- a town has no obligation to allow use of snowmobiles on highways under its jurisdiction.

Finally, the decision should make clear that Article 14 of the State Constitution, the Environmental Conservation Law, and the Adirondack Park State Land Master Plan continue to apply to maintenance or improvement of this route.

Respectfully Submitted,
February 4, 2011

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