TOURO COLLEGE
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Touro Law Review

Volume 32 | Number 3 Article 3

2016

Paddling in Mr. Potter's Backyard: Navigating New York's Navigable-in-Fact Doctrine

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PADDLING IN MR. POTTER'S BACKYARD: NAVIGATING NEW YORK'S NAVIGABLE-IN-FACT DOCTRINE

Matthew Ingber[*]

I. INTRODUCTION

New York's common law navigable-in-fact doctrine, applicable to non-tidal waterways passing through private property, often brings conflict among the interests of landowners and the public.[1] In these cases, generally, members of the public have entered private land to use the non-tidal waterway, leading landowners to bring an action for trespass.[2] The public response; however, is that no trespass was committed because the waterway is navigable-in-fact and, therefore, subject to a public easement to use the waterway for transportation.[3] Accordingly, the outcome of these cases depends on a judicial determination as to whether the waterway is navigable-in-fact, meaning that the waterway is subject to a public easement, thus negating the landowner's trespass cause of action.[4]

The navigable-in-fact doctrine is a remnant of English common law and New York courts have recognized this doctrine since at

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[1] *See, e.g.*, Morgan v. King, 35 N.Y. 454 (1866); Adirondack League Club, Inc. v. Sierra Club, 706 N.E.2d 1192 (N.Y. 1998); Friends of Thayer Lake LLC. v. Brown, 1 N.Y.S.3d 504 (App. Div. 3d Dep't 2015); Dale v. Chisholm, 889 N.Y.S.2d 58 (App. Div. 2d Dep't 2009).

[2] *See supra* note 1.

[3] *Supra* note 1.

[4] *Supra* note 1.

least 1805.[5] Traditionally, New York's navigable-in-fact doctrine examined whether a non-tidal waterway had or was susceptible of having practical commercial utility.[6] As stated by the New York Court of Appeals 1866 decision in *Morgan v. King*,[7] the "public ha[s] a right of way in every stream which is capable, in its natural state and its ordinary volume of water, of transporting, in a condition fit for market, the products of the forests or mines, or of the tillage of the soil upon its banks."[8] However, as waterways have become less commercial in nature,[9] New York and other jurisdictions[10] have expanded their navigable-in-fact doctrine by permitting evidence of a waterway's "capacity for recreational use."[11]

Evidence of recreational use in a navigability determination provides a needed update to the navigable-in-fact approach because it recognizes that rivers "are no longer primarily subjects of commer-

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[5] Palmer v. Mulligan, 3 Cai. 307 (N.Y. Sup. Ct. 1805).

[6] *Morgan*, 35 N.Y. at 458.

[7] 35 N.Y. 454 (1866).

[8] *Id.* at 459. Under New York's statutory Navigation Law, "navigable-in-fact" is defined as a waterway that is:

> Navigable in its natural or unimproved condition, affording a channel for useful commerce of a substantial and permanent character conducted in the customary mode of trade and travel on water. A theoretical or potential navigability, or one that is temporary, precarious and unprofitable is not sufficient, but to be navigable in fact a lake or stream must have practical usefulness to the public as a highway for transportation.

N.Y. NAV. LAW § 2(5) (McKinney 2016). While this definition is similar to the one established in *Morgan v King*, the statute does not apply to waterways whose beds and banks are privately owned. *See infra* Section II. In addition, the statutory Navigation Law applies to "the use of navigable waters of the state," N.Y. NAV. LAW § 1 (McKinney 2016), and the "[n]avigable waters of the state" includes "all lakes, rivers, streams and waters within the boundaries of the state and not privately owned . . . ." *Id.* § 2(4). Thus, common law principles—and not the Navigation Law—control when analyzing whether a non-tidal waterway over private property is or is not navigable-in-fact and thus subject to a public navigable easement. *Friends of Thayer Lake*, 1 N.Y.S.3d at 508. However, the Navigation Law helped persuade the New York Court of Appeals when it held that evidence of recreational use of a waterway may be considered in a navigable-in-fact analysis. *Adirondack League Club, Inc.*, 706 N.E.2d at 1195; *see infra* Section III.B.ii.a.

[9] *Adirondack League Club, Inc.*, 706 N.E.2d at 1195.

[10] *See* State v. McIlroy, 595 S.W.2d 659, 665 (Ark. 1980); State *ex rel* v. Newport Concrete Co., 336 N.E.2d 453, 457 (Ohio Ct. App. 1975).

[11] *Adirondack League Club, Inc.*, 706 N.E.2d at 1194.

cial exploitation."[12] However, by including recreational transportation, New York courts may have broadened[13] the category of waterways subject to the public navigable easement, which may, in turn, "destabilize long-established expectations as to the nature of private ownership."[14] In particular, the New York Court of Appeals decision in *Adirondack League Club, Inc. v. Sierra Club*[15] (*ALC*) and a recent opinion by the Third Department in *Friends of Thayer Lake LLC v. Brown*,[16] have put the scope of the navigable-in-fact doctrine into question. Both cases involved paddlers who entered private property and argued that the waterway was navigable-in-fact, and therefore, subject to a public easement.[17] In both cases, the court considered the recreational use of the waterway in its navigable-in-fact analysis.[18] The courts, however, stated that including recreational use "neither altered nor enlarged the applicable common-law analysis and was in line with the traditional test of navigability, that is, whether a river has a practical utility for trade or travel."[19] This proposition is doubtful. As discussed throughout this Article, the manner in which recre-

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[12] *Id.* at 1195.

[13] The court, in *Adirondack League Club* held that "evidence of the river's capacity for recreational use is in line with the traditional test of navigability, that is, whether a river has practical utility for trade or travel." 706 N.E.2d at 1194. The court then stated it was not "broaden[ing] the standard for navigability-in-fact, but [was] merely recogniz[ing] that recreational use fits within in." *Id.* at 1195.

[14] *Friends of Thayer Lake*, 1 N.Y.S.3d at 512 n.5; *c.f.* Douglaston Manor v. Bahrakis, 678 N.E.2d 201, 204 (N.Y. 1997) (stating that accepting defendant's position "would precipitate serious destabilizing effects on property ownership and precedents").

[15] 706 N.E.2d 1192 (N.Y. 1998).

[16] 1 N.Y.S.3d 504 (App. Div. 3d Dep't 2015).

[17] *Adirondack League Club, Inc.*, 706 N.E.2d at 1193; *Friends of Thayer Lake*, 1 N.Y.S.3d at 506.

[18] *Adirondack League Club, Inc.*, 706 N.E.2d 1192 (N.Y. 1998); *Friends of Thayer Lake*, 1 N.Y.S.3d 504 (App. Div. 3d Dep't 2015).

[19] *Friends of Thayer Lake*, 1 N.Y.S.3d at 509 (quoting *Adirondack League Club, Inc.*, 706 N.E.2d at 1194). It is debatable whether New York courts would have considered recreational use as a practical utility in their navigable-in-fact analysis based on (1) the emphasis that early New York cases placed on commercial utility; and (2) that other jurisdictions were already including recreational use in their navigability analysis as early as 1871, while pre-twentieth century New York cases fail to even mention recreational use of waterways. *Id. See, e.g.*, Attorney General v. Woods, 108 Mass. 436, 440 (Sup. Jud. Ct. 1871) ("If water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has ever been upon it for the purposes of trade or agriculture.").

ational use evidence has been analyzed, beginning with the Court of Appeals decision in *ALC*, has improperly enlarged the navigable-in-fact doctrine and is not in line with its traditional commercial utility foundations.

This Article will examine the navigable-in-fact doctrine as applied in New York with a focus on the types of evidence required for non-tidal waterways to be declared navigable. In addition, the Article will discuss, among others, the decisions in *ALC* and *Friends of Thayer Lake LLC* in connection with whether recreational use alone can support a navigability determination. Although both decisions did not expressly make such a holding, their reasoning suggests that evidence of recreational use—without a showing of commercial utility—is enough for a court to find a waterway navigable.[20] Importantly, the navigable-in-fact standard has changed after these decisions. Instead of the requirements set forth in *Morgan*, it is probable that the evidence now needed to declare a waterway navigable-in-fact include: (1) whether a waterway in its natural state and ordinary volume can permit commercial activity[21] or (2) whether "substantially unobstructed travel on [a waterway] can occur periodically or seasonally."[22] Accordingly, a court will find that a waterway has practical public utility upon satisfying one of these factors, which, in turn, will lead to a determination that a waterway is navigable-in-fact.[23] The proponent of the navigable easement will also be able to meet his or her burden by proffering evidence of recreational use, such as kayaking or canoeing, to satisfy either of the two aforementioned practical utility criteria.[24]

Section II of the Article considers navigable waterways generally by first examining English common law. It then compares waterways that are navigable-in-law and navigable-in-fact. Section III

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[20] *Adirondack League Club, Inc.*, 706 N.E.2d 1192 (N.Y. 1998); *Friends of Thayer Lake*, 1 N.Y.S.3d 504 (App. Div. 3d Dep't 2015).

[21] *Adirondack League Club, Inc.*, 706 N.E.2d at 1197.

[22] *Id.*

[23] For example, the court in *Adirondack League Club* first determined that the evidence did not establish that the subject waterway in its natural state and ordinary volume have the capacity for commercial activity. *Id.* at 1196. Rather than ending its analysis, the court then examined whether the waterway could support "substantially unobstructed travel" either seasonally or periodically. *Id.* at 1197.

[24] *See, e.g.*, *Friends of Thayer Lake*, 1 N.Y.S.3d at 509, 511 (finding that recreational kayaking is sufficient to establish that a waterway can support uninterrupted travel and that it has the capacity for trade).

examines New York's navigable-in-fact doctrine, starting with a comprehensive discussion of New York's navigable-in-fact rule of law and the evidence required to establish that a non-tidal waterway is navigable. It then analyzes New York case law beginning with the Court of Appeals decision in *Morgan v. King* followed by its progeny. This analysis seeks to achieve two objectives. First, it shows that including recreational use as a factor in a navigability determination is consistent with precedent because New York courts have always taken a pragmatic approach to navigability-in-fact law. This is exemplified by the court in *Morgan* breaking English precedent to adopt a rule of law that specifically addressed the needs and concerns of New Yorkers at that time. Second, examining New York precedent reveals that there was originally a focus on practical commercial utility when deciding whether a waterway was navigable-in-fact. However, recent decisions by the courts in *ALC* and *Friends of Thayer Lake* have extended the navigable-in-fact doctrine whereby evidence of recreational use alone is now enough for a waterway to be deemed navigable without considering commercial utility. Finally, the Article concludes that the recent pattern by New York courts of expanding the navigable-in-fact doctrine to include recreational use leaves landowners with an expectation that waterways situated on their property are subject to navigable public easements. It is unlikely that this judicial pattern will change nor is it probable for the legislature to intervene as it is New York's policy to preserve water resources that the state holds in trust, which includes a duty to maximize their enjoyment.

II. NAVIGABLE WATERWAYS: NAVIGABLE-IN-LAW AND NAVIGABLE-IN-FACT

A public easement over navigable waterways is rooted in the public trust doctrine and English common law.[25] Under English common law, navigable waterways included only those waters "in

[25] Timothy J. Zeilman, *Connecticut by Canoe: Navigability in the Nutmeg State*, 84 CONN. B.J. 305, 305-06 (2010); HENRY JOHN WASTELL COULSON & URQUHART ATWELL FORBES, THE LAW RELATING TO WATERS, SEA, TIDAL, AND INLAND 444 (1880) (stating the Crown owns the bed of navigable waterways "for the benefit of the [public], and [the waterway] cannot be used in any manner so as to derogate from or interfere with the right of navigation, which belongs by law to the subjects of the realm") [hereinafter COULSON & FORBES].

which the *tide* flows and reflows; all others are not navigable."[26] These tidal waterways, sometimes referred to as navigable-in-law, which were owned by the king. The king who "held the beds and waters in trust for the public, with all citizens having access to and use of the common resource."[27] Importantly, navigable-in-fact waterways, whether under English common law or New York law, provide the public with: (1) the right to use the waterway "for the purpose of passage or transportation"[28] and (2) the right to take fish from the waters.[29]

On the other hand, those waterways that English law deemed not navigable (non-tidal water) belonged "to the owner of the adjacent soil" rather than the king.[30] According to Chancellor Kent's understanding of Lord Hale's treatise, *de jure mairs*, "fresh [water] rivers, as well as those which ebb and flow, may be under the servitude of the public interest, and may be of common or public use for the carriage of boats, &c. and in that sense may be regarded as common *highways by water*."[31] In addition, and unlike those waterways deemed navigable-in-law, a waterway that is navigable-in-fact does not "divest the owners of the adjacent banks of their exclusive rights to the fisheries therein."[32]

Based on these principles, the English common law distin-

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[26] *Morgan*, 354 N.Y. at 458 (emphasis added). "The common law of *England* considers a river, in which the tide ebbs and flows, an *arm of the sea*, as navigable, and devoted to the public use, for all purposes, as well for navigation as for fishing." Hooker v. Cummings, 20 Johns. 90, 100 (N.Y. Sup. Ct. 1822). For example, in *Palmer v. Mulligan*, 3 Cai. R. 307 (N.Y. Sup. Ct. 1805), New York's highest court was presented with the issue of whether the defendants committed a nuisance when they constructed a mill on the Hudson River. *Id.* at 307. Chancellor Kent stated that "[t]he *Hudson* at *Stillwater* is a fresh river, *not navigable* in the common law sense of the term, for the tide does not ebb and flow at that place." *Id.* at 318 (opinion of Kent, Ch.) (emphases in original).

[27] Zeilman, *supra* note 25 at 305.

[28] *Morgan*, 35 N.Y. at 458.

[29] *See supra* note 14; *Douglaston Manor*, 678 N.E.2d at 203 (stating that the common law did not "divest the owners of the adjacent banks of their exclusive rights to the fisheries therein"). The public easement in navigable-in-fact waterways, however, does not include the right to fish. *See infra* text accompanying note 29.

[30] *Morgan*, 35 N.Y. 458.

[31] *Palmer*, 3 Cai at 319 (opinion of Kent, Ch.); *see also* Maureen E. Brady, *"Navigability": Balancing State-Court Flexibility and Private Rights in Waterways*, 36 CARDOZO L. REV. 1415, 1421-23 (2015).

[32] *Douglaston Manor*, 678 N.E.2d at 203.

guished between tidal and non-tidal waterways. The soil of tidal waterways was owned by the king and held in public trust, and the public had an easement/servitude to use the water for transportation and fishing.[33] In contrast, English law considered fresh water to be non-navigable and the adjacent property owner, rather than the king, owned the soil beneath the water.[34] But even with non-tidal waters, the public, although not having a right to fish in non-tidal water, still retained servitude to use these waterways for transportation of "boats, lighters or rafts."[35]

III. NEW YORK'S NAVIGABLE-IN-FACT DOCTRINE

After the American Revolution, the "people of the State in their right of sovereignty succeeded to the royal title" over the waterways.[36] American courts continued to apply the English common law to tidal waters, but the English definition of navigable waterway was too limited due to the thousands of non-tidal rivers, streams, and lakes of North America that were actually or susceptible of being used as highways for commerce.[37] Accordingly, American courts began to modify the English navigability standard by expanding the scope of the public easement to include non-tidal waterways.[38] The remainder of this Section examines New York's navigable-in-fact precedent and focuses on the type of evidence that will support a navigable-in-fact determination.

A. New York's Navigable-in-Fact Rule

For non-tidal waterways located on private property to be navigable-in-fact, the "paramount concern is the capacity of the river

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[33] *Morgan,* 35 N.Y. at 458.

[34] *Id.*

[35] *Id.*; *see, e.g.*, COULSON & FORBES, *supra* note 25, at 78 (stating that "the right of navigation is . . . similar to the right which the public [has] to passage along a public road, and involves no right of property in the bed or banks.").

[36] People v. New York & Staten Island Ferry Co., 68 N.Y. 71, 78 (1877); *c.f.* N.Y. ENVTL. CONSERV. Law § 15-0103(1) (McKinney 2016) ("The sovereign power to regulate and control the water resources of this state ever since its establishment has been and now is vested exclusively in the state of New York . . . ").

[37] Zeilman, *supra* note 25, at 306-08.

[38] *See Morgan*, 35 N.Y. at 459 (expanding New York's navigable-in-fact doctrine from the English common law to include waterways capable of floating logs in a condition fit for market).

for transport, whether for trade or travel."[39] This practical utility standard requires the proponent of the navigable public easement to demonstrate that the waterway has "actual practical use or evidence of capacity for practical use."[40] In that connection, practical utility for a waterway's capacity for trade or transport is established if the river:

1. Is actually or is capable;[41]

2. "In its natural state;

3. And in its ordinary volume of water;[42]

4. Of transporting in a condition fit for market the products of the forests or mines, or of the tillage of the soil upon its banks"[43] or has the "capacity for recreational use"[44];

5. For a sufficient length of time during the year so that the waterway has practical public utility.[45]

In addition, it is not necessary that property being transported be carried in vessels.[46] If it is so far navigable or *floatable*,[47] in its

[39] *Adirondack League Club, Inc.*, 706 N.E.2d at 1195; Mohawk Valley Ski Club v. Town of Duanesbug, 757 N.Y.S.2d 357, 304 A.D.2d 881, 883 (App. Div. 3d Dep't 2003).

[40] *Adirondack League Club, Inc.*, 706 N.E.2d at 1194. *See also* The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870) (stating that rivers are "navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted").

[41] *Morgan*, 35 N.Y. at 459. Evidence of a river's actual use or evidence of a river's capacity can be established by, *inter alia*, "experts in geology, hydrology, economics, fluvial geomorphology, and even expert canoers and river guides." *Adirondack League Club, Inc.*, 706 N.E.2d at 1196.

[42] As to this factor, the court in *Morgan* only required that a waterway's "navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway" for it to be deemed "subject to the public easement." 35 N.Y. at 459.

[43] *Id.*

[44] *Adirondack League Club, Inc.*, 706 N.E.2d at 1194.

[45] *Morgan*, 35 N.Y. at 459; *Adirondack League Club, Inc.*, 706 N.E.2d at 1196-97.

[46] *Morgan*, 35 N.Y. at 459.

natural state and its ordinary capacity, as to be of public use in the transportation of property, the public claim to such use ought to be liberally supported.[48]

Assuming the five factors above are satisfied, this alone does not establish that a waterway is navigable-in-fact because "[t]he public right to use navigable waters does not entitle the public to cross private land for access to navigable waters."[49] In addition, "the existence or absence of [multiple] termini at and from which the public may enter or leave the waterway"[50] may be determinative as to whether there is or is not a public easement.[51] For example, in *Hanigan v. State*,[52] the Appellate Division, Third Department held that a pond was not navigable-in-fact because it lacked multiple termini.[53] Therefore, the court found that the pond lacked public utility for transportation because "the canoe and small boats that used Stewart Pond traveled nowhere" as there was only one navigable access

[47] For a discussion of the court rationale in *Morgan* for extending English common law by permitting a waterway to be declared navigable-in-fact based on its capacity to float logs to market, see *infra* Section III.B.

[48] *Morgan*, 35 N.Y. at 459 (emphasis added).

[49] Hanigan v. State, 629 N.Y.S.2d 509, 511 (App. Div. 3d Dep't 1995). In *Friends of Thayer Lake*, for example, the "plaintiffs' property is bounded" to the north by a wilderness area. 1 N.Y.S.3d at 506. The wilderness contained two lakes and permitted paddlers to "travel across a network of lakes, ponds, streams, and canoe carry trails" that ultimately encroached onto the waterways situated on the northerly boundary of plaintiff's property. *Id.* This trail would later be known as the "Lila Traverse Section of the Whitney Loop." *Id.* From 1851 to 1997, the wilderness area was privately owned; thus, paddlers lacked a public access point and could not use the Lila Traverse and thus use plaintiffs' waterways without first trespassing on the wilderness area. *Id.* In 1998; however, New York State purchased the wilderness area, thereby permitting kayakers to enter the two lakes located on the now public wilderness area and paddle along the Lila Traverse without having to first cross private land before reaching the navigable waterways situated on plaintiffs' property. *Id.* at 506, 512.

[50] John A. Humbach, *Public Rights in the Navigable Streams of New York*, 6 PACE ENVTL. L. REV. 461, 517-18 (1989); Fairchild v. Kraemer, 204 N.Y.S.2d 823, 826 (App. Div. 2d Dep't 1960); *Mohawk Valley Ski Club*, 757 N.Y.S.2d at 360.

[51] *Compare Hanigan*, 629 N.Y.S.2d at 512 ("[T]he absence of a second access is further evidence that the pond is not suitable for trade, commerce, or travel."), *with Friends of Thayer Lake*, 1 N.Y.S.3d at 512 (finding the waterway at issue to be navigable, in part, because the private property in which the waterway is situated on "adjoins public property at both of its termini").

[52] 629 N.Y.S.2d 509 (App. Div. 3d Dep't 1995).

[53] *Id.* at 512.

point.[54]

The public easement afforded to navigable-in-fact waterways also "carries with it the incidental privilege to make use, when absolutely necessary of the bed and banks, including the right to portage on riparian lands."[55] Therefore, even if the ability to travel along the waterway is interrupted by "occasional natural obstructions," this will not prevent a court from declaring a waterway navigable and subject to a public easement.[56] For example, in *Friends of Thayer Lake*, the Third Department found that neither the recreational kayaker's "relatively short portage around the waterway's rapids nor the presence of other incidental obstacles such as beaver dams and fallen trees rendered the waterway nonnavigable."[57]

Finally, a judicial determination that a waterway located on private property is navigable-in-fact does not amount to a taking under New York's constitution.[58] As previously stated, the navigable-in-fact doctrine is a remnant of the English public trust doctrine and after the America Revolution, New York and the other original twelve states, "inherited ownership of the public trust waters within its boundaries from the king."[59] In that connection, a determination

> that a waterway is navigable-in-fact is that [the waterway] has always been open to the public in that character, even though the riparian owners may not have believed it to be, and no trespass was committed by a traveler who navigated upon it before a court ruled upon its navigability.[60]

B. *Morgan v. King* - Expanding the English Common Law to Satisfy Commercial Needs

The 1866 New York Court of Appeals decision in *Morgan v. King* examined the implications of non-tidal waterways running over

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[54] *Id.*

[55] *Adirondack League Club, Inc.*, 706 N.E.2d at 1197.

[56] *Id.* at 1197; People *ex rel.* Eric R.R. v. State Tax Comm'n, 43 N.Y.S.2d 189, 191 (App. Div. 3d Dep't 1943).

[57] *Friends of Thayer Lake*, 1 N.Y.S.3d at 510 (quotation altered).

[58] Douglaston Manor v. Bahrakis, 678 N.E.2d 201, 204-05 (N.Y. 1997); *Adirondack League Club, Inc.*, 706 N.E.2d at 1196.

[59] *See* Zeilman, *supra* note 25, at 305-06.

[60] *Friends of Thayer Lake*, 1 N.Y.S.3d at 508.

private property, and has become the seminal case in the State in connection with the navigable-in-fact doctrine. The significance of the decision is two-fold. First, it established New York's common law navigable-in-fact rule of law.[61] Second, if not equally important, the Court of Appeals broke away from the English common law by adopting a rule that considered the "peculiar character of [New York's] streams" and the important utility in transporting people and goods to market.[62]

In *Morgan*, the defendants owned land over a portion of the non-tidal Raquette River that passed along their property and were concededly the riparian owners.[63] The defendants, believing they were lawfully exercising their right to use their land, constructed a dam along the river, which ultimately obstructed the passage of the plaintiffs' logs that were being *floated* down the stream.[64]

The issue was "whether the Raquette River is, of public right, a common highway, at the point where its waters are obstructed by the defendants' dam."[65] The court explained that if the water over the defendants' property were subject to a public easement, meaning navigable-in-fact, then the defendants' use of their property (building the dam) would make them liable for interfering with the plaintiffs' right, as members of the public, to use the waterway for transportation.[66]

To answer this question, the court analyzed the characteristics of the 161 mile long Raquette River, paying particular attention to the section of the river between Colton and Raymondsville, the site of defendants' dam.[67] The first twenty miles of the river, from its mouth to Raymondsville, was boatable and had already been declared a navigable public highway.[68] For the next fourteen miles, from Ray-

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[61] *Morgan*, 35 N.Y. at 459.

[62] *Id.* at 458. The New York Court of Appeals in *Adirondack League Club, Inc. v. Sierra Club* used similar reasoning when including recreational use as a factor in the navigable-in-fact analysis by recognizing that rivers no longer serve as "subjects of commercial exploitation and gain but instead are valued in their own right as a means of travel." *Adirondack League Club, Inc. v. Sierra Club,* 706 N.E.2d 1192, 1195 (N.Y. 1998).

[63] *Morgan*, 35 N.Y. at 456, 458.

[64] *Id.* at 456.

[65] *Id.*

[66] *Id.* (finding that if "the river is not a common highway," then the river is not navigable and the defendants would not be liable to the plaintiffs for committing the tort of nuisance).

[67] *Id*. 455-60.

[68] *Morgan*, 35 N.Y. at 455-56.

mondsville to Potsdam, "the bed of the river is rocky, and rises two hundred and fifty feet, and the stream is rapid and rough."[69] From Potsdam to Colton, which consisted of the next nine miles, the river's bed would rise four hundred feet.[70]

The court's analysis began with a clear departure from English common law.[71] Under English law, a river is navigable-in-fact when "boats, lighters or rafts may be floated to market"[72]; nothing under English law provided for floating logs.[73] Accordingly, had the court relied on English law, the Raquette River would not have been navigable because it was not capable of carrying to market "the products of the forest or mines, or the tillage of the soil upon its bank" in any of the three types of craft previously mentioned.[74]

The court found that limiting the evidence to the capacity of a river to float boats, lighters, and rafts was too restrictive given "the peculiar character of [New York's] streams, and the commerce for which they may be used."[75] Thus, English law did not fit the needs of New Yorkers and the court agreed with the plaintiffs that "the natural capacity of the river to *float* sawlogs and timber, in single pieces, to market, in seasons of high water" was of significant public utility.[76] It rationalized this policy determination by emphasizing that expanding the navigable-in-fact criteria was commercially necessary.[77] For example, had the court not expanded the English law and instead limited the public easement to "navigation by boats or rafts," then there would be no avenue for New York's valuable products, primarily timber, to reach the market.[78]

The Court of Appeals then established a new navigable-in-fact standard, balancing the rights of private property owners to exclude others from entering their land and using the waterway against the public need to transport property/goods to market.[79] The court, stressing commercial utility, found "that the public ha[s] a right of

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[69] *Id.* at 456.
[70] *Id.*
[71] *Id.* at 458.
[72] *Id.*
[73] *See Morgan*, 35 N.Y. at 458.
[74] *Id.* at 458-59.
[75] *Id.* at 458.
[76] *Id.*
[77] *Id*. at 459.
[78] *Morgan*, 35 N.Y. at 459.
[79] *Id*.

way in every stream which is capable, in its natural state and its ordinary volume of water, of transporting, in a condition fit for market, the products of the forests or mines, or of the tillage of the soil upon its banks."[80] The court also eliminated the vessel requirement by permitting "the property to be transported" if it could ordinarily float to market without the human guidance.[81] Accordingly, if a waterway is "navigable or floatable, in its natural state and its ordinary capacity, as to be of public use in the transportation of property, the public claim to such use ought to be liberally supported."[82]

The court also provided an evidentiary standard for determining (1) when a waterway can sufficiently float logs to market and (2) when a waterway has a sufficient natural capacity to support the public navigation easement.[83] First, the proponent of the navigable easement may show that "the property to be transported" could be floated along the waterway so long as it could ordinarily float to market without the guidance of man.[84] This criterion, just like the reasoning for expanding the English law, stressed the commercial utility of the waterway because it was necessary that the logs float to market without being damaged.[85] If the logs were capable of floating but during its course would be rendered unmarketable due to damage, then the waterway would lack practical utility. Therefore, the public would not be benefitted and the court would not be justified to interfere with a landowner's private property by subjecting it to a public navigable easement. Second, for a river to have sufficient ordinary capacity to make it useful to the public, it is not necessary "that its ordinary state, at all seasons of the year, should be such as to make it navigable."[86] It is only necessary that the "periods of high water or navigable capacity continue a sufficient length of time to make it useful as a highway."[87]

In applying this new, commercially focused standard, the court analyzed the portion of the Raquette River between Colton and Raymondsville.[88] It held that even under New York's new "liberal

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[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Morgan*, 35 N.Y. at 459.
[84] *Id.*
[85] *Morgan*, 35 N.Y. at 460.
[86] *Id.* at 459.
[87] *Id.*
[88] *Id.* at 460.

rules," the section of the river at issue could not be found navigable based on (a) the river not having the ordinary capacity to transport products for a sufficient amount of time during the year and, (b) even if it the logs could be safely floated to market, they required the aid of artificial improvements.[89]

First, the court determined that the section of the River "was not capable of floating even single logs, except during seasons of high water, which were about two months in a year."[90] Additionally, even during those two months, the river's rapids and rocks made floating goods to market so unpredictable that men were required to aid the logs to ensure that they arrived safely to market.[91] The court stated that "[i]t would be going beyond warrant of either principle or precedent to hold that a floatable capacity, so temporary, precarious and unprofitable, constituted the stream a public highway."[92] Second, the court found that it was immaterial that dams were subsequently built along the Raquette River and logs were now capable of being floated safely to market.[93] The court stated that the capacity of waterway for navigable-in-fact purposes must be analyzed based on the natural state of the river without consideration of any natural improvements made thereto.[94]

C. *Adirondack League Club, Inc. v. Sierra Club* – Recreational Use

The New York Court of Appeals reexamined the State's navigable-in-fact doctrine and evidentiary requirements in *Adirondack League Club, Inc. v. Sierra Club*.[95] The significance of this decision rests in its holding: "that evidence of [a river's] capacity for recreational use is in line with the traditional test of navigability, that is whether a river has a practical utility for *trade or travel*."[96] However,

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[89] *Id.*

[90] *Morgan*, 35 N.Y. at 460.

[91] *Id.*

[92] *Id.* This reasoning reflects the *Morgan* court's commercial focus in its analysis. The court found that such a short term of two weeks whereby the natural state of the river could potentially float logs to market did not serve a practical public utility to justify burdening private land with a public easement.

[93] *Id.*

[94] *Id.*

[95] 706 N.E.2d 1192 (N.Y. 1998).

[96] *Id.* at 1194 (emphasis added).

this holding unnecessarily expanded New York's navigable-in-fact law. First, the court could have reached the same conclusion in overturning the appellate court's summary judgment order without such a broad holding. Second, the holding provided a doctrinal foundation for subsequent lower courts, such as *Friends of Thayer Lake LLC v. Brown*,[97] to find waterways navigable-in-fact by relying, not on commerce, but on evidence relating to recreational use.[98]

In addition, the court in *ALC* found that recreational use is in line with the traditional test of navigability by examining if there is "practical utility for trade *or* travel."[99] This finding is misguided. The traditional test in *Morgan* focused on practical commercial utility, and such utility was determined by whether goods could be transported on a river and thus be traded in the marketplace.[100] In *Morgan*, travelling/floating along the waterway was thus a necessary condition for the goods/timber to be subsequently traded.[101] Nothing in the *Morgan* decision lends itself to the proposition that the traditional test looked to the disjunctive, meaning that practical public utility would be satisfied if goods could be transported or traded on a river.[102] The *ALC* court's assurance "that evidence of [a] river's capacity for recreational use is in line with the traditional test of navigability, that is, whether a river has practical utility for trade or travel"[103] is therefore not an accurate reflection of the navigable-in-fact doctrine.[104] This new practical utility criterion displaces *Morgan*'s commercial utility standard with a utility that can be satisfied solely on travel as a court can now declare a waterway navigable-in-fact based on a finding that a river can support individual canoeing trips.[105] The remainder of this case discussion will provide: (i) the facts and procedural background of the case; (ii) the Court of Appeals' rationale for including recreational use in the navigable-in-fact

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[97] 1 N.Y.S.3d 504 (N.Y. App. Div. 3d Dep't 2015).

[98] *Id.* at 27.

[99] *Adirondack League Club, Inc.*, 706 N.E.2d at 1194.

[100] *Morgan*, 35 N.Y. at 459.

[101] *Id.* at 458-59.

[102] The *Adirondack League Club*'s practical utility criterion of trade or travel was relied on by the court in *Friends of Thayer Lake*, when it stated that the test of a waterway's practical utility "is phrased in the disjunctive," looking to its capacity for trade or travel. *Friends of Thayer Lake*, 1 N.Y.S.3d at 510.

[103] *Adirondack League Club, Inc.*, 706 N.E.2d at 1194.

[104] *Compare Morgan*, 35 N.Y. at 459.

[105] Adirondack League Club, Inc., 706 N.E.2d at 1198.

analysis; (iii) an examination of how the court analyzed the evidence, with particular attention on recreational use; and (iv) how the court's holding was unnecessarily broad.

1. Facts and The Third Department's Decision

The defendants in *ALC* made a single recreational trip along the South Branch of the Moose River (the "South Branch") by kayak and canoe.[106] The trip began and ended with the defendants entering land owned by the State of New York, thus the waterway had multiple termini by which the public could gain access without trespassing onto private land.[107] Relevant to the dispute is that twelve miles of the expedition required the defendants to pass through land owned by plaintiff Adirondack League Club, Inc. (ALC Inc.).[108] According to the defendants, "about 76% of the segment of the river that runs through plaintiff's property is easily paddled by *novice* canoeists and the remainder of the river requires intermediate skill."[109] In addition, the South Branch's depth varied depending on the season, "with an average depth of three to four feet."[110]

Procedurally, the plaintiffs moved for summary judgment arguing that the defendants trespassed on their private property, while the defendants cross-moved for summary judgment on the ground that the twelve-mile stretch of the South Branch is navigable-in-fact and, therefore, subject to a public easement.[111] The record revealed

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[106] Adirondack League Club, Inc. v. Sierra Club, 615 N.Y.S.2d 788, 793 (N.Y. App. Div. 3d Dep't 1994) [hereinafter *ALC App. Div.*], *aff'd as modified by* Adirondack League Club, Inc. v. Sierra Club, 706 N.E.2d 1192 (N.Y. 1998).

[107] *ALC App. Div.*, 615 N.Y.S.2d at 790. This fact, although not in dispute in the case, establishes that the Moose River had multiple termini, and none of which required the defendants to trespass in order to gain access to the waterway. *See Adirondack League Club, Inc.*, 706 N.E.2d at 1193.

[108] *Adirondack League Club, Inc.*, 706 N.E.2d at 1193. The Adirondack League Club, Inc. is a private club with about four hundred members and for over a century has sought to exclude the public from navigating the segment of the South Branch located on its property. *ALC App. Div.*, 615 N.Y.S. at 789.

[109] *ALC App. Div.*, 615 N.Y.S.2d at 789-90 (emphasis added). That novice canoeists could easily paddle the segment of the South Branch at issue. It should have been analyzed by the court as evidence that the waterway has practical public utility because it can be enjoyed by recreationalists of all skill levels. *See* discussion *infra* Section III.D.iii.

[110] *ALC App. Div.*, 615 N.Y.S.2d at 790.

[111] *Id.*

that during the first half of the twentieth century the South Branch had been "one of the five busiest rivers in New York" and was heavily used to transport goods to market.[112] In addition, both parties agreed that the South Branch was used for floating logs to market during the end of the nineteenth century until 1948.[113]

However, the natural capacity of the South Branch was in dispute, as the parties disagreed on whether the pre-1948 commercial transportation was aided by artificial improvements.[114] A network of dams was built during the turn of the century, but because the remains of only a few of the structures still existed and the parties failed to present evidence on how the dams were used, there was a question of fact regarding the natural capacity of the river to float logs to market.[115] The plaintiff, seeking to prove that the South Branch lacked commercial utility in its natural condition, provided an affidavit from an historian showing that the historical log-drives on the South Branch were possible because of the artificial dam system.[116] The plaintiff also argued that the log-drives lasted only a few weeks per year because "the current was unpredictable, and impeded by rocks and rapids."[117]

On the other hand, the defendants argued that the natural capacity of the river was suitable for commercial transportation notwithstanding the construction of the dams.[118] The defendants presented log-drive contracts from 1926 to 1948 that prohibited the construction of dams on the South Branch.[119] Additionally, the defendants argued that the historical log-drives lasted only a few weeks per year because that was all that was bargained for, not because the river was incapable of additional log-drives.[120]

The defendants also presented evidence that recreationalists had recently kayaked the portion of the South Branch at issue.[121] The purpose of the evidence was to show that because the South Branch could be kayaked for recreational use, the network of dams was not

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[112] *Adirondack League Club, Inc.*, 706 N.E.2d at 1195.
[113] *ALC App. Div.*, 615 N.Y.S.2d at 791.
[114] *Adirondack League Club, Inc.*, 706 N.E.2d at 1197.
[115] *ALC App. Div.*, 615 N.Y.S.2d at 791.
[116] *Adirondack League Club, Inc.*, 706 N.E.2d at 1197.
[117] *ALC App. Div.*, 615 N.Y.S.2d at 791.
[118] *Id.* at 792.
[119] *Adirondack League Club, Inc.*, 706 N.E.2d at 1197.
[120] *ALC App. Div.*, 615 N.Y.S.2d at 791.
[121] *Id.* at 791-92.

necessary to enable logs to float safely to market during the pre-1948 log-drives.[122] Therefore, the natural state of the river—since it could support recreational kayaking—could have also supported the log-drives, making the river susceptible to such future commercial use. The Third Department permitted this evidence and found that recreational use in a navigable-in-fact determination is consistent with New York's recent legislative policy of conserving and developing "the waters of this State for all public beneficial uses, which include use for recreational purposes."[123]

The Appellate Division concluded that the South Branch was navigable-in-fact and granted the defendants motion for summary judgment.[124] Its determination was based on the "undisputed evidence of the river's historic use as a major log-driving stream for some 50 years and its recent use by recreational canoeists."[125] Interestingly, it appears that the court could have based its grant of summary judgment establishing the waterway as navigable-in-fact on one of two grounds: either the historical log-drives or the recent recreational use of the river.[126]

2. The New York Court of Appeals

The issue before the Court of Appeals in *ALC* was to "what extent recreational use can be considered in determining whether a

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[122] *Id.*

[123] *Id.* at 791; *see also* N.Y. ENVTL. CONSERV. LAW § 15-0105(2) (McKinney 2016).

[124] *ALC App. Div.*, 615 N.Y.S.2d at 792-93.

[125] *Id.* at 792.

[126] *Id.* However, in a subsequent decision by the Third Department, the court stated that its holding in *Adirondack League Club v. Sierra Club*, 615 N.Y.S.2d 778 (App. Div. 3d Dep't 1994), "did not alter the established standard for determining navigability so as to permit a determination of navigability based solely upon a waterway's suitability and capacity for recreational use." Hanigan v. State, 629 N.Y.S.2d 509, 512 n.* (App. Div. 3d Dep't 1995). Three years after *Hanigan*, Judge Bellacosa's dissent in the New York Court of Appeals decision in *Adirondack League Club* adds confusion to whether recreational use alone can support a public navigable easement when he credited the "Appellate Division majority's double-barreled justification that . . . the river's historic use as a major log-driving stream . . . and its recent use by recreational canoeists" justifies the South Branch's navigable-in-fact status. 706 N.E.2d 1192, 1199-1200 (N.Y. 1998) (Bellacosa, J., dissenting).

river is navigable-in-fact."[127] The plaintiffs predictably argued that navigability contemplates whether a river has commercial utility, and the Third Department should have only analyzed the log-drives that took place on the South Branch until 1948, excluding the evidence relating to recreational use.[128] In that connection, the plaintiffs also argued that expanding the navigable-in-fact doctrine by allowing evidence of recreational use "would disrupt settled expectations regarding private property and would expand the common-law rule beyond its traditional foundation."[129]

The remainder of this case discussion will examine: (a) the court's rationale for including recreational use in a navigable-in-fact analysis and (b) how the court analyzed the evidence when holding that summary judgment was improper. It will argue that allowing recreational use as evidence is not unprecedented, as New York courts have considered recreational boating in navigability determinations since at least 1960.[130] What is new, however, is that the court's holding deemphasized the commercial utility aspect of the navigable-in-fact analysis, and instead measured practical utility on transportation, whether for trade or travel.[131]

a. Recreational Use and The Navigable-in-Fact Doctrine

The Court of Appeals first addressed the threshold issue—whether recreational use could be considered in a navigability determination.[132] In holding that it can, the court found "that evidence of the river's capacity for recreational use is in line with the traditional test of navigability, that is, whether a river has practical utility for *trade or travel*."[133] This holding, however, is put into question because the court later restated its holding but applied a different practical utility standard.[134] The court later stated that it was only holding

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[127] *Adirondack League Club, Inc.*, 706 N.E.2d at 1193.

[128] *Id.* at 1194.

[129] *Id.*

[130] *See Fairchild*, 204 N.Y.S.2d at 823 ("The fact that a stream has been used for pleasure boating may be considered on the subject of the stream's capacity and the use of which it is susceptible."); Humbach, *supra* note 50, at 473-74.

[131] *Adirondack League Club, Inc.*, 706 N.E.2d at 1194.

[132] *Id.* at 1193-94.

[133] *Id.* at 1194 (emphasis added).

[134] *Id.* at 1194-96.

"that such transport need not be limited to moving goods in commerce, but can include some recreational uses. Practical utility for *travel or transport* remains the standard."[135]

The court's two articulations of its holding are inconsistent as the former judged practical utility on trade or travel, while the latter required travel or transport. The latter holding is an even further departure from *Morgan*'s commercial navigable-in-fact doctrine because it likens public utility to travel or transport, two factors with no distinction and completely disregards trade—a critical criterion in *Morgan*.[136] Importantly, a criterion of (a) trade or travel or (b) travel or transport opens the door to recreational use alone supporting a navigable-in-fact determination. Without presenting evidence on whether a waterway is capable of supporting public utility for trade, a party now seeking to hold a waterway navigable-in-fact can simply show that he was able to kayak a river when he recreationally traveled from one access point to the other.

In any event, the court reached its holding by applying a modern approach such as, whether a river serves a practical public utility.[137] The court stated that when *Morgan* was decided in 1866, a river's practical utility was measured by whether it could serve as a commercial highway to transport goods to market.[138] Strictly adhering to the *Morgan* commercial practical utility criteria would ignore the fact that trucks have replaced rivers as the primary mode of transporting goods.[139] It would also ignore the "changing attitudes toward the preservation of our natural resources."[140] For example, when *Morgan* was decided, rivers were primarily valued as "subjects of exploitation and gain," but rivers are now "valued in their own right as a means of travel."[141]

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[135] *Id.* at 1196 (emphasis added).

[136] *Adirondack League Club, Inc.*, 706 N.E.2d at 1194.

[137] *Id.* at 1194-95; *Morgan*, 35 N.Y. at 458.

[138] *Adirondack League Club, Inc.*, 706 N.E.2d at 1194-95.

[139] *Id.* at 1195; Brady, *supra* note 31, at 1426-27 (stating that because waterways are no longer a primary method of transporting goods to market, "courts that measure navigability by floating logs are thus left with a definition that bears no relationship to actual or future use of waters").

[140] *Adirondack League Club, Inc.*, 706 N.E.2d at 1195.

[141] *Id.* It is doubtful that rivers are now valued for traveling but were not when *Morgan* was decided in 1866. The court in *Morgan* focused on the type of traveling at issue, *i.e.*, commercial, when it expanded the navigable-in-fact doctrine to the detriment of private property rights. *Morgan*, 35 N.Y. at 459. The court in *ALC*,

The court also rejected ALC Inc.'s. argument that *Morgan* supports the conclusion that the sole factor in determining whether a waterway is navigable-in-fact is whether it is capable of carrying goods to market.[142] The court explained that *Morgan* and the Navigation Law definition "have as their touchstone the idea that a river must have 'practical usefulness to the public as a highway for transportation.'"[143] In addition, the fact that *Morgan* measured a river's "capacity for getting material to market does not restrict the concept of usefulness for transport to the movement of commodities."[144] Accordingly, "the concept of usefulness for transport" must include the movement of people as rivers no longer serve as a primary method of moving commodities.[145]

The court's rationale for including travel as a guideline for determining if a waterway has practical public utility is unsound and it may have unintentionally expanded the scope of the navigable-in-fact doctrine to the detriment of private property rights. First, the court used New York's current statutory Navigation Law definition of navigability as persuasive authority when interpreting a common-law doctrine originating in 1866.[146] Second, and of greater significance, the court overlooked the importance that *Morgan* placed on commercial utility when the *Morgan* court expanded the navigable easement to include floating logs. The court in *ALC* found even though "evolving necessities and circumstances may warrant a different emphasis regarding a river's usefulness, the central premise of the common-law remains the same—in order to be navigable-in-fact, a river must provide practical utility to the public as a means for transportation."[147] This reasoning; however, does not accurately reflect the central premise of the common law as understood by the court in *Morgan* nor does the law remain the same after its decision. In *Morgan* the central premise was the navigable-in-fact doctrine needed to include

however, failed to distinguish the practical public utility between commercial travel and recreational travel when finding that "recreational use can be considered in addition to commercial use" in a navigable-in-fact analysis. *Adirondack League Club, Inc.*, 706 N.E.2d at 1196.

[142] *Adirondack League Club, Inc.*, 706 N.E.2d at 1195.

[143] *Id.* (quoting N.Y. NAV. LAW §2 (5) (McKinney 2016)).

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Adirondack League Club, Inc.,* 706 N.E.2d at 1195.

floatability to further commerce.[148] In *ALC*; however, the central premise is that *Morgan* is outdated as rivers no longer serve as commercial highways.[149] Thus, evidence of a river's capacity to support recreational use is relevant to determine whether a waterway has practical utility for transportation. By solely focusing on transportation, the court in *ALC* misinterprets the traditional premise of the common law established in *Morgan*—that transportation on a waterway furthered the public's ability to trade goods. The central premise of *Morgan*, even with a liberal interpretation, cannot be construed to mean that a waterway serves a practical public utility if it has the capacity to enable transportation for the purpose of travelling along it.

b. Analysis of the Evidence

The *ALC* court evaluated the South Branch's navigability based on its new criterion: whether the river has practical utility for trade or travel.[150] The court first analyzed the waterway's practical utility for trade by examining the historical log-drive evidence.[151] The court found that the evidence in the record conflicted on the issue of whether "artificial means were necessary to render the South Branch capable of commercial use."[152] Accordingly, the court concluded that it could not find as a matter of law whether the network of dams was necessary to accomplish the pre-1948 log-drives, meaning that the evidence was insufficient "to compel a conclusion that practical, commercial use of the South Branch occurred in its natural state and its ordinary volume."[153]

The court next addressed whether the South Branch could support unobstructed travel either periodically or seasonally based on the evidence of defendants' recreational canoeing and kayaking trip.[154] The court concluded that this evidence was insufficient, finding that the single recreational trip was "not enough to demonstrate that the river periodically has sufficient natural volume for a sufficient portion of the year to make it useful as a means for transporta-

[148] *Id.* at 1194.
[149] *Id.* at 1195.
[150] *Adirondack League Club, Inc.*, 706 N.E.2d at 1194.
[151] *Id.* at 1196-97.
[152] *Id.* at 1197.
[153] *Id.*
[154] *Id.*

tion."[155] In addition, there was conflicting evidence regarding "(a) the river's ability to sustain commercial boating or canoeing operations or (b) its capacity to float individual canoeing excursions for any given period or season."[156]

Although the court did not hold the South Branch was navigable as a matter of law, the court's analysis supports the position that recreational use alone is now sufficient to declare a waterway over private property navigable-in-fact. For example, the court first found that the historical log-drive evidence could not support the conclusion that the commercial activity along the South Branch occurred in the river's "natural state and its ordinary volume."[157] This is a required factor under the *Morgan* navigable-in-fact analysis, and had the court strictly followed *Morgan*, this finding alone could have compelled the court to hold that summary judgment was improper. Instead, the court continued its analysis by examining the recreational use evidence to determine if the South Branch could support unobstructed travel either seasonally or periodically—another element required under *Morgan*.[158] The fact that the court continued its analysis demonstrates that the court's holding and overall reasoning are not truly "in line with the traditional test of navigability."[159] Rather, a party may now seek to have a waterway declared navigable-in-fact without showing that the natural state of a river could support practical commercial use, but may instead demonstrate that only unobstructed travel can occur on the river, even if such travel is evidence of "individual canoeing excursions for any given period or season."[160] Accordingly, the *ALC* decision permits courts to now find a waterway navigable-in-fact based on evidence showing that the natural capacity of the waterway permits individual canoeing trips for a sufficient period of time throughout the year.

The mode of analysis used by the court in *ALC*, with respect to recreational use, also differed from the analysis of recreational use by the lower appellate court and other New York courts have analyzed recreational use. For example, the Third Department in *ALC* examined recreational use to determine if the natural state and ordi-

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[155] *Adirondack League Club, Inc.*, 706 N.E.2d at 1198.
[156] *Id.* at 1198.
[157] *Id*. at 1197.
[158] *Id.*
[159] *Id.* at 1194.
[160] *Adirondack League Club, Inc.*, 706 N.E.2d at 1198.

nary volume of the South Branch had the capacity to support the historical log-drives without the need of dams.[161] In contrast, the Court of Appeals considered the historical log-drives on the issue of the river's "natural state and ordinary volume," and elected to examine the evidence of recreational use on another element, that is, whether "substantially unobstructed travel on the South Branch [could] occur periodically or seasonally."[162]

The Court of Appeals in *ALC* also expanded New York appellate court precedent in connection with how recreational use is evaluated. For example, in *Fairchild v. Kraemer*,[163] the Appellate Division, Second Department considered evidence of recreational use when determining if the waterway at issue was navigable-in-fact.[164] The court stated that "pleasure boating may be considered on the subject of the stream's capacity and the use of which it is susceptible."[165] Evidence of pleasure boating, the court stated, could be used by the proponent of the navigable public easement to show that the natural state or condition of the waterway was susceptible to "trade, commerce or travel."[166] Thus, the court in *Fairchild* would have examined evidence of recreation use on the issue of whether the natural state of the subject waterway had the capacity for a commercial purpose. In addition, the Appellate Division, Third Department in *Mohawk Valley Ski Club v. Town of Duanesburg*[167] found the fact that a pond had "been used to float canoes and small boats for purely recreational purposes . . . insufficient to demonstrate that the pond has any capacity or suitability for *commercial* transportation."[168] Both of these examples considered recreational use on the issue of whether the waterway was susceptible of supporting a commercial purpose, but neither went as far as the court in *ALC*, which would have declared

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[161] *ALC App. Div.*, 615 N.Y.S.2d at 792. The Third Department found that the South Branch's "capacity for floating logs [was] supported by the recreational use of the river by canoeists." *Id.*

[162] *Adirondack League Club, Inc.*, 706 N.E.2d at 1197.

[163] *Kraemer*, 204 N.Y.S.2d at 823.

[164] *Id.* at 826.

[165] *Id.*

[166] *Id.* at 826.

[167] *Mohawk*, 757 N.Y.S.2d at 357.

[168] *Id.* at 360 (emphasis added). The court in *Mohawk Valley Ski Club* found that the pond at issue was not navigable-in-fact because it lacked multiple termini by which the public may enter or leave the waterway and, therefore, lacked utility as a means of transportation. *Id.*

the South Branch navigable-in-fact based on its "capacity to float individual canoeing excursions for any given period or season."[169]

D. *Friends of Thayer Lake LLC v. Brown*

In 2015, the Appellate Division, Third Department in *Friends of Thayer Lake LLC v. Brown* granted the defendants' motion for summary judgment by holding that the waterway at issue was "navigable-in-fact and subject to a public right of navigation."[170] Like *ALC*, this case involved recreational canoeists who entered private property in order to use the waterway.[171] The court's analysis of recreational use relied significantly on *ALC* to support its conclusion that the waterway was navigable-in-fact.[172] In addition, the court's evaluation of the evidence greatly expanded the concept of "practical utility,"[173] thus making it easier for the proponent of a public easement to establish that a waterway is navigable-in-fact with recreational use evidence.

1. Factual Background

In 1851, the State of New York conveyed thousands of acres of land to Benjamin Brandreth, an ancestor of the plaintiffs in *Friends of Thayer Lake*.[174] The Brandreth property, commonly referred to as Mud Pond Parcel,[175] is located in a secluded area of the Adirondack Mountains and has remained in plaintiffs' family since the time of its conveyance.[176] Mud Pond Parcel is surrounded by 20,000 acres of forest preserve land known as the William C. Whitney Wilderness Area (Wilderness Area).[177] Until 1998, the Wilderness Area was privately owned and therefore off-limits to the pub-

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[169] *Adirondack League Club, Inc.*, 706 N.E.2d at 1198.
[170] *Friends of Thayer Lake*, 1 N.Y.S.3d at 512.
[171] *Id.* at 506.
[172] *Id.* at 508-11.
[173] *Id.* at 511 (stating that "recreational and commercial uses are often intertwined" when considering "modern view[s] of a waterway's utility").
[174] *Id.* at 506.
[175] Friends of Thayer Lake LLC v. Brown, No. 6803, slip op. at 1 (N.Y. Sup. Ct. Hamilton Cty. Feb. 25, 2013).
[176] *Friends of Thayer Lake*, 1 N.Y.S.3d at 506.
[177] *Id.*

lic.[178] In 1998; however, New York State acquired the Wilderness Area and opened the preserve to the public.[179] As a result, the public now had the ability to canoe on a network of waterways located within the Wilderness Area known as the Lila Traverse without first having to trespass over private property to gain access.[180]

The focus in *Friends of Thayer Lake* involved a system of streams known as the Mud Pond Waterway (the Waterway), which runs across the northern edge of plaintiffs' private property, Mud Pond Parcel.[181] The Waterway connects two smaller bodies of water, Shingle Shanty Brook to the west and Lilypad Pond to the east, both of which are part of the Lila Traverse.[182] After the Wilderness Area became public, the Department of Environmental Conservation (DEC) created a public carry-trail between Shingle Shanty Brook and Lilypad Pond so that canoers could navigate the Lila Traverse without having to trespass onto plaintiffs' private parcel.[183]

In 2009, defendant Phil Brown, editor of a magazine called the Adirondack Explorer, set out on a two-day canoe trip to investigate whether the Waterway running through Mud Pond Parcel was navigable-in-fact.[184] Brown subsequently published an article in his magazine that documented his trip.[185] The article, appropriately entitled "Testing the Legal Waters," concluded that the Waterway is, in fact, navigable and therefore should be open to the public.[186]

Brown began his recreational canoeing trip at a public access point on Little Tupper Lake, located in the northeasterly portion of the land formerly known as the "William C. Whitney Wilderness Area," and headed west on the Lila Traverse.[187] After a day and a half of travel, Brown reached Lilypad Pond.[188] Just to reach Lilypad Pond, Brown was required to make at least three portages where the

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[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Friends of Thayer Lake*, 1 N.Y.S.3d at 506.
[182] *Id.*
[183] *Id.* A carry trail permits paddlers to carry their canoes on-foot wherever the water becomes too rough or too shallow to paddle through.
[184] *Id.* at 507.
[185] *Id.*
[186] *Friends of Thayer Lake*, 1 N.Y.S.3d at 507.
[187] *See* Phil Brown, *Testing the Legal Waters*, ADIRONDACK EXPLORER (Aug. 24, 2009), http://www.adirondackexplorer.org/stories/testing-the-legal-waters.
[188] Brown, *supra* note 187, at 6.

Lila Traverse was not navigable, the longest being 1.75 miles.[189] When arriving at Lilypad Pond, Brown elected not to use the state-created carry-trail, which avoided plaintiffs' private land, and instead decided to paddle past the no trespassing signs and into the Waterway.[190] Brown admitted that a stretch of rapids made the Waterway impassable for about 500 feet, but he was able to portage around this section on a carry trail that the plaintiffs had constructed for their own use.[191] Other than this portion, the Waterway, in Brown's opinion, "[was] obviously navigable in the everyday sense of the word."[192] Brown summed up his expedition writing, "[o]rdinarily, the trip requires four long carries, but I did it in just three . . . I avoided [the last carry] by canoeing through private land from Lilypad to Mud Pond and down the Mud Pond outlet to Shingle Shanty."[193]

2. Procedural History & Third Department's Decision

After learning of Brown's trip, plaintiffs filed suit "seeking compensatory damages for trespass and a declaratory judgment that the Waterway is not navigable-in-fact."[194] Brown answered and asserted a number of affirmative defenses, primarily that the State was a necessary party.[195] The Supreme Court for the County of Hamilton allowed New York State and the DEC to intervene as defendants.[196] The State defendants asserted that the Waterway is navigable-in-fact and sought an injunction to bar plaintiffs from interfering with travel on the Waterway.[197] Both parties subsequently moved for summary judgment.[198]

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[189] *Friends of Thayer Lake*, 1 N.Y.S.3d at 514 (Rose, J., dissenting).
[190] *Id.* at 507.
[191] *Id.*
[192] *See* Brown, *supra* note 187.
[193] *See* Brown, *supra* note 187.
[194] *Friends of Thayer Lake*, 1 N.Y.S.3d at 507.
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.* Both the Supreme Court and the Appellate Division stated in their opinions that they would have been inclined to "find triable issues of fact as to the navigable character of the Waterway, but did not do so because the parties had asked the court to render a determination as a matter of law." *Friends of Thayer Lake*, 1 N.Y.S.3d at 507. The Supreme Court pointed out one particular issue of fact that existed: "the weight to place upon the size and characteristics of the undisputed 500

The Supreme Court held that the Waterway is navigable-in-fact and granted defendants' motions for summary judgment.[199] The court further found that plaintiffs had created a public nuisance by posting steel cables, no trespassing signs, and motion cameras along the boundary, and enjoined them from interfering with the public right of navigation.[200]

Plaintiffs thereafter appealed to the Appellate Division for the Third Judicial Department.[201] On appeal, plaintiffs argued that only evidence of commercial utility can be considered to prove navigability.[202] Defendants argued that under the New York Court of Appeals' decision in *ALC*, evidence of recreational use may also be considered in the test for navigability.[203]

The appellate court began its discussion by relying on *ALC* and explained that a waterway's navigability must be determined based upon evidence of "its utility for travel or trade."[204] Applying this standard, the *Friends of Thayer Lake* court considered evidence in the form of testimony, affidavits, photographs, historical records, travel guidebooks, and maps.[205] The court found particularly important the testimony of Donald Brandreth Potter, a member of plaintiffs' family, and someone "who has lifelong familiarity with the Waterway and its history."[206] Potter testified that even though the Waterway "is shallow in some areas and narrow, tortuous and crowded with plant growth in others, it is 'generally floatable by canoe' during periods of ordinary water.'"[207] On the other hand, Potter stated that "[t]he rapids below Mud Pond are an exception . . . [and are]

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foot portage around the [Waterway] when determining navigability." *Friends of Thayer Lake*, No. 6803, slip op. at 2-3.

[199] *Friends of Thayer Lake*, No. 6803, slip op. at 5.

[200] *Friends of Thayer Lake*, 1 N.Y.S.3d at 512.

[201] *Id.* at 507.

[202] Brief for the Respondent at 7, Friends of Thayer Lake LLC v. Brown, (No. 518309), 2014 WL 10022708.

[203] *Id.*

[204] *Friends of Thayer Lake*, 1 N.Y.S.3d at 509. Previously, this determination turned on the waterway's ability to support commercial transportation, but in *Adirondack League Club* the Court of Appeals clarified that recreational use can also be considered as a factor in a navigable-in-fact determination. *Adirondack League Club*, 706 N.E.2d at 1196.

[205] *Friends of Thayer Lake*, 1 N.Y.S.3d at 509.

[206] *Id.*

[207] *Id.*

never canoeable."[208] He explained that this section of the Waterway was not navigable and that his family built and maintains a "500-foot carry trail" to avoid the Mud Pond rapids.[209] Accordingly, the court concluded that Potter's testimony established that the Waterway "is capable of canoe travel" and, therefore, "has sufficient natural volume for a sufficient portion of the year to make it useful as a means for transportation."[210] In other words, the court found that Potter's testimony demonstrated that the Waterway has practical utility for travel. It did not matter that the rapids below Mud Pond were never navigable. On this evidence, the court found that the "relatively short Mud Pond rapids" did not render the Waterway non-navigable because "occasional natural obstructions do not destroy the navigability of a waterway."[211] In these circumstances, the navigable easement "gives rise to a public right to circumvent [the natural obstacle] by making use . . . of the beds and banks, including the right to portage on riparian lands."[212]

The court then examined whether the Waterway has practical utility for trade by discussing its actual and susceptible uses.[213] Plaintiffs stated that the Brandreth family only used the Waterway for private, recreational purposes, and argued that this should preclude a finding of navigability-in-fact.[214] The court disagreed on the ground that the *ALC* test examines a waterway's capacity for use, not just its actual use.[215]

The court, in analyzing the actual and susceptible uses of the Waterway, began by noting that the plaintiffs' property is located in a remote area without nearby roads, and that the plaintiffs have "always relied on the Waterway as a primary means of traveling to Mud

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[208] *Id.*

[209] *Id.*

[210] *Friends of Thayer Lake*, 1 N.Y.S.3d at 509.

[211] *Id.* at 510.

[212] *Id.*

[213] *Id.* at 510-11. It appears that this part of the court's analysis is unnecessary. The navigable-in-fact standard established by the Court of Appeals in *Adirondack League Club* is whether a waterway "has practical utility for trade or travel." *Adirondack League Club*, 706 N.E.2d at 600. Once the court in *Friends of Thayer Lake* found that the Mud Pond had practical utility for transportation, the court could have declared the waterway navigable-in-fact without having to discuss whether Mud Pond has practical utility for trade. *Id.*

[214] *Friends of Thayer Lake*, 1 N.Y.S.3d at 510.

[215] *Id.* at 511.

Pond Camp from other parts of their property."[216] Although much of the actual use involved recreational hunting or fishing, the court found that that the family "also regularly used the Waterway for such utilitarian purposes as transporting goods and supplies to Mud Pond Camp."[217] For example, Potter's testimony revealed that the family used the Waterway to transport, *inter alia*, "food, baggage, equipment, bed, a stove and building materials" from the area now comprised of the Wilderness Area southward until reaching their property.[218] The court stated that even though the plaintiffs had used Waterway for their own private purposes, the evidence sufficiently demonstrated that the Waterway "has the capacity to transport similar goods for commercial purposes."[219] The court also noted that recreational and commercial uses are today often intertwined, as demonstrated by the "testimony of the owner of an Adirondack outfitting and guide service, who stated that . . . he will include the Waterway in his commercial activity if it is judicially declared to be navigable-in-fact."[220]

3. Practical Utility and The Implications of the Third Department's Decision in Friends of Thayer Lake

The court's analysis and conclusion that the Waterway has capacity for trade substantially expands the common, everyday meaning of the term "practical utility."[221] The court found that "recreational and commercial uses are often intertwined" based on evidence presented by the owner of an Adirondack tour guide company, who stated that he would include the Waterway in his business "if it is declared to be navigable-in-fact."[222] While it is true that commercial

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[216] *Id.* at 510.
[217] *Id.*
[218] *Id.*
[219] *Friends of Thayer Lake*, 1 N.Y.S.3d at 511.
[220] *Id.* Even assuming, as the majority did, that recreational use today can constitute evidence of a waterway's capacity for commercial utility, the Waterway in *Friends of Thayer Lake* is still impracticable for such use because of its isolated nature and the lengthy trek required to reach it. Further, in the middle of the wilderness, without the availability of emergency medical assistance or even public bathrooms such a commercial operation would likely pose substantial safety risks. *Id.*
[221] *Id.* at 509.
[222] *Id.* at 511.

and recreational can be intertwined in the proper case, the facts presented in *Friends of Thayer Lake* do not compel such a conclusion. Practical utility has not been defined by the courts, therefore the term should be understood in its ordinary meaning without forced construction.[223] In that connection, "practical" is commonly understood to mean "what is real rather than what is possible or imagined,"[224] while "utility" is defined as something with "the quality or state of being useful."[225] However, the court in *Friends of Thayer Lake* expanded the concept of "practical utility" with respect to capacity for commercial use far beyond the term's ordinary meaning of something that actually provides or is readily susceptible of providing the general public with meaningful or useful commerce.[226] It is doubtful, even with a liberal application of the navigable-in-fact doctrine,[227] that meaningful commerce can be conducted by a business providing kayaking expeditions through the Mud Pond Waterway. First, the Waterway is in a remote area, and plaintiff's property, located in the Town of Long Lake, Hamilton County, has a population of just over 700 people.[228] Second, the Waterway is not easily accessible to the public.[229] The court noted that, "access to the Waterway remains difficult, requiring lengthy canoe travel across the Wilderness Area on various component lakes and streams of the Lila Traverse and several portages, the longest of which covers 1.75 miles."[230] As noted by the dissent, these conditions require that any recreationalist travelling along the Lila Traverse "must necessarily [be] physically fit and

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[223] *Cf.* N.Y. STAT. Law § 94 (McKinney 2016) (stating that when interpreting a statute, words are to be construed in their "natural and obvious sense, without resort to forced construction").

[224] *Practical*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/practical (last visited Mar. 5, 2016).

[225] *See Utility*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/utility (last visited Mar. 5, 2016).

[226] *Friends of Thayer Lake*, 1 N.Y.S.3d at 509.

[227] *See, e.g.*, *Morgan*, 35 N.Y. at 459 (stating that when a waterway is "so far navigable or floatable, in its natural state and ordinary capacity, as to be of public use in the transportation of property, the public claim to such use ought to be *liberally* supported") (emphasis added).

[228] *Profile of General Population & Housing Characteristics: 2010 – Long Lake Town*, U.S. CENSUS BUREAU, http://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml?src=bkmk (last visited May 3, 2016).

[229] *Friends of Thayer Lake*, 1 N.Y.S.3d at 514.

[230] *Id.* at 511.

equipped with the necessary gear to paddle and portage through the remote backcountry over the course of multiple days."[231] Thus, the remote location of both the Waterway and plaintiffs' property, the fact that very few people live in the Town of Long Lake, along with the difficulty of even accessing Mud Pond, weaken the court's conclusion that the Waterway has practical public utility for trade.[232] It is unlikely that the Waterway is capable of serving much, if any, practical public utility when only 711 people live in the area surrounding plaintiffs' remote property.[233] Likewise, even those who wish to travel along the Lila Traverse must be in excellent physical condition to even reach the Waterway, thus lessening the number of persons who would benefit from the public navigable servitude. However, the rationale employed by the court in *Friends of Thayer Lake* stretches the concept of practical utility whereby a waterway may be found to have public utility even under circumstances where only a marginal segment of the population would benefit from the navigable-in-fact determination.[234] The fact that an outdoor expedition company can now hypothetically conduct a kayaking business comprised solely of physically fit customers willing to kayak in a remote area significantly jeopardizes any expectation landowners have to exclude others from using a waterway on their private property.

The *Friends of Thayer Lake* navigable-in-fact determination should also be alarming to private property owners because the court failed to acknowledge critical differences in the facts at issue with the facts presented to the court in *ALC*. For example, the court in *Friends of Thayer Lake*—without much discussion—dismissed the "[p]laintiffs' arguments pertaining to the Waterway's remote nature."[235] Instead, the court simply stated that the navigable-in-fact doctrine "is more concerned with a waterway's capacity and characteristics than its location"[236]; however, the only characteristic the court used to support the Waterway's navigable-in-fact status was based on the multiple termini from which the public can gain access.[237] The location of a waterway in navigable-in-fact cases, alt-

[231] *Id.* at 515 (Rose, J., dissenting).
[232] *Id.* at 516 (Rose, J., dissenting).
[233] *Id.* at 516-17 (Rose, J., dissenting).
[234] *Friends of Thayer Lake*, 1 N.Y.S.3d at 517 (Rose, J., dissenting).
[235] *Id.* at 511.
[236] *Id.*
[237] *Id.* at 511-12.

hough not a controlling factor in New York precedent, has generally been on private property in high population areas and the subject waterway typically provides or had at one point served as a highway for commerce.[238] In comparison, although the court in *ALC* could not conclude as a matter of law that the subject waterway, the South Branch, was navigable-in-fact, it was agreed that the South Branch had once been "one of the five busiest rivers in New York for the transport of logs."[239] The South Branch's location as a major commercial highway, a factor important to the Appellate Division, Third Department,[240] advances the position that the location of a waterway strengthens the public's right to a navigable easement because of the waterway's utility as a beneficial highway for trade.[241] The Waterway in *Friends of Thayer Lake*; however, is located in a remote area and the Waterway never served the public with practical utility.[242] The court in *Friends of Thayer Lake* analysis, or lack thereof, of the location of the Mud Pond in the navigable-in-fact analysis and its decision to not treat a waterway's location as a relevant characteristic should cause concern to private property owners.[243] Reliance on this decision by subsequent courts jeopardizes private property rights, as waterways may now be found navigable-in-fact regardless of location and with only marginal evidence showing that the waterway serves a practical public utility for commerce.

The effort required to reach the Mud Pond Waterway was also

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[238] *See, e.g.*, *Palmer*, 3 Cai. at 310 (involving a dispute over whether the defendants committed a nuisance by building a dam along the Hudson River). The Hudson River, unlike the Mud Pond in *Friends of Thayer Lake*, historically has been linked to public travel and commerce. For example, Cadwallader Colden, a surveyor in the English province of New York in 1724, commented that the natural conditions of the Hudson River enabled vessels to "always sail as well by night as by day, and [has] the advantage of the tide upwards as well as downwards." PETER L. BERNSTEIN, WEDDING OF THE WATERS: THE ERIE CANAL AND THE MAKING OF A GREAT NATION 49, 51 (2005). Likewise, the Hudson River served as an artery of commerce connecting Albany and New York City, two populated cities, by only 150 miles. *Id.* at 51; *see also Morgan*, 35 N.Y. at 455-56 (stating that the one hundred sixty mile long Raquette River connected towns located in the Adirondack Region in upstate New York).

[239] *Adirondack League Club, Inc.*, 706 N.E.2d at 1195.

[240] *ALC App. Div.*, 615 N.Y.S.2d at 792.

[241] *Id.* at 792-93.

[242] *Friends of Thayer Lake*, 1 N.Y.S.3d at 510.

[243] *Id.* at 508-11.

not a detriment to the court in *Friends of Thayer Lake*,[244] thus making it easier for a proponent to establish that a river is navigable-in-fact. As previously noted, accessing the Waterway is difficult as the public is required to undergo "lengthy canoe travel across the Wilderness Area . . . and several portages, the longest of which covers 1.75 miles."[245] Thus, those members of the public wishing to travel the Lila Traverse must be physically fit and have a high level of skill to even reach Mud Pond Parcel. On the other hand, the facts presented in *ALC* is more in line with the common understanding of practical public utility for trade as it relates to operating a recreational kayaking business. In *ALC*, over three-fourths of the South Branch that passed "through plaintiff's property is easily paddled by novice canoeists and the remainder of the river requires intermediate skill."[246] Accordingly, even though the New York Court of Appeals in *ALC* did not find the South Branch navigable-in-fact as a matter of law, the segment of the river had the capability of benefitting a wide range of the public as even novice recreationalists were capable of paddling it.[247] This in contrast with *Friends of Thayer Lake* where the court held the Mud Pond Waterway navigable-in-fact on a motion for summary judgment, even though the waterway had the capability of providing utility to only highly skilled canoeists.[248]

IV. CONCLUSION

Navigable-in-fact waterways located on private property subject the realty to a navigable easement in favor of the public. This doctrine first gained attention in 1866 by the New York Court of Appeals in *Morgan v. King* where the court established New York's navigable-in-fact common law.[249] The court in *Morgan* expanded the doctrine from its English common law roots to permit a waterway to be subject to a public navigable easement upon a showing that the natural state of a river had the capacity to float logs in a condition fit for market.[250] Although the court expanded on English law, the court

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[244] *Id.* at 511.
[245] *Id.*
[246] *ALC App. Div.*, 615 N.Y.S.2d at 789-90.
[247] *Id.*
[248] *Friends of Thayer Lake*, 1 N.Y.S.3d at 509-10.
[249] *Morgan*, 35 N.Y. at 459.
[250] *Id.*

carefully balanced the benefit to the public should the waterway be declared navigable against the detriment to the landowner by subjecting the property to a public easement.[251]

The careful balance employed by the court in *Morgan*; however, has been abandoned. In *Friends of Thayer Lake*, the court found that recreational use may be used as evidence to establish that a waterway has the capacity to support commercial recreational business.[252] While this finding may not seem significant as whitewater rafting is a popular recreational activity, the facts in *Friends of Thayer Lake* disrupt any settled expectations that landowners have to exclude others from their private property. In that case, the court held as a matter of law that a waterway located on the private property in a remote area and without any actual history of being used as a highway for commerce as navigable-in-fact.[253] Accordingly, this sets a precedent for a waterway to be declared navigable-in-fact regardless of its location.

The Third Department's decision in *Friends of Thayer Lake* has been granted appeal by the New York Court of Appeals and oral argument was made in March 2016.[254] The court should take this opportunity to reexamine its precedent and begin considering the location of the waterway in its navigable-in-fact analysis. This will help rebalance the public's interest in using waterways for recreation against a landowner's expectation to exclude others from the realty. For example, when weighing the public interest against the landowner's interest, the court can find that the public utility of burdening private property with a navigable easement is greater when the waterway is located in densely populated areas than when the property is located in remote areas. At the same time, the landowners' expectation of excluding the public from travelling on waterways situated on their property is highest when the property is in a secluded area isolated from others and lowest when it is readily accessible to a large segment of the population.

It is unlikely that the Court of Appeals will take this opportunity to rebalance New York's navigable-in-fact law. It is also im-

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[251] *Id.* at 461.

[252] *Friends of Thayer Lake*, 1 N.Y.S.3d at 511.

[253] *Id.* at 510-11.

[254] *Oral Argument Archive*, NYCOURTS.GOV, https://www.nycourts.gov/ctapps/arguments/2016/Mar16/Mar16_OA.htm (last visited May 6, 2016).

probable that the court will reverse the Third Department's decision in *Friends of Thayer Lake* as the appellate court was following the precedent established by the Court of Appeals in *ALC*.[255] Likewise, it is doubtful that the legislature will intervene as it is New York's policy "to develop and manage the basic resources of water . . . to the end that the state may fulfill its responsibility as trustee of the environment for the present and future generations."[256] This responsibility likewise includes the duty of assuring the greatest range "of beneficial uses of the environment . . . ."[257] Thus, a judicial determination that a waterway is navigable-in-fact means that the state of New York holds the water in trust with a duty to preserve the waterway for the widest range of beneficial uses, which includes recreation.[258] Accordingly, without a drastic change in approach by the New York Court of Appeals when it reviews the Third Department's determination in *Friends of Thayer Lake*, landowners should expect their property to be burdened with a navigable public easement.

[255] 706 N.E.2d at 1194 (holding that recreational use evidence "is in line with the traditional test of navigability, that is, whether a river has a practical utility for trade or travel").

[256] N.Y. ENVTL. CONSERV. LAW § 1-0101(2) (McKinney 2016).

[257] *Id.* § 1-0101(3)(b).

[258] *Id.* § 15-2701.