STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 9 of the Environmental Conservation Law ("ECL") and Part 196 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

JAMES W. McCULLEY,

Respondent.

RULING ON MOTION FOR ORDER WITHOUT HEARING

DEC Case No. R5-20050613-505

Appearances of Counsel:

-- Briggs Norfolk LLP (Matthew D. Norfolk of counsel), for respondent James W. McCulley

-- Alison H. Crocker, Deputy Commissioner and General Counsel (Randall C. Young, Regional Attorney, Region 6, of counsel), for the Department of Environmental Conservation

Staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent James W. McCulley by service of a notice of hearing and complaint dated June 10, 2005. In its complaint, Department staff alleges that on May 22, 2005, respondent operated a motorized vehicle in the forest preserve in violation of section 196.1(a) of title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York ("6 NYCRR"). The alleged violation arose from respondent's operation of a pickup truck on a single-lane road, variously known as "Mountain Lane," "Old Mountain Road," "Old Military Road," or "Jackrabbit Trail" (hereinafter "Old Mountain Road"), located in the Towns of North Elba and Keene, Essex County. The road runs through the Sentinel Range Wilderness Area of the Adirondack Park.

Respondent filed an answer dated July 1, 2005, denying the violation, and raising seven affirmative defenses. Department staff now moves for dismissal of certain affirmative

defenses and for an order without hearing on its complaint. For the reasons that follow, Department staff's motion for dismissal of certain affirmative defenses is granted in part and otherwise denied. Staff's motion for an order without hearing is denied and the matter is set down for a hearing.

FACTS AND PROCEDURAL BACKGROUND

Prior to the commencement of the present administrative enforcement proceeding, the Department and respondent have been involved in other proceedings in other forums concerning respondent's alleged use of motorized vehicles on Old Mountain Road. In March 2003, respondent was charged with operating a snowmobile on forest preserve land in violation of 6 NYCRR 196.2. The charge, which was contained in a simplified information and later, in March 2004 in a long form information, arose from respondent's alleged operation of a snowmobile on a portion of Old Mountain Road located between the Town of Keene's westerly boundary with the Town of North Elba and "the big beaver ponds" on March 20, 2003.

After a bench trial in Town Court, Town of Keene, the Town Court convicted respondent on the charge. That conviction was overturned, however, on appeal to County Court, Essex County. County Court reversed the Town Court judgment of conviction on the ground that the People failed to prove beyond a reasonable doubt that respondent violated a valid regulation prohibiting snowmobile use on Old Mountain Road (see People v McCulley, 7 Misc 3d 1004A, 801 NYS2d 240, 2005 Slip Op 50439[U] [unpublished disposition decided March 23, 2005] [2005 WL 756582]).

The Department subsequently served its June 10, 2005 administrative complaint upon respondent, based upon the May 22, 2005 incident. Respondent filed his answer dated July 1, 2005, denying the allegations of the complaint. He also raised seven affirmative defenses: (1) res judicata and collateral estoppel, (2) failure to state a claim, (3) documentary evidence, (4) validity of Executive Law § 816, (5) unlawful enforcement of rules and regulations, (6) abuse of process, and (7) laches.

Respondent then moved in the United States District Court, Northern District of New York, for a temporary restraining order against the Department. The Department moved to dismiss respondent's federal complaint and requested that the court abstain from exercising jurisdiction over respondent's claims. The Department argued that State administrative proceedings and State court review were the proper avenues for relief in the

first instance.

U.S. District Court referred the matter to a United States Magistrate Judge for an evidentiary hearing and the issuance of a report and recommendation concerning the Department's bad faith and other exceptions to abstention under the Younger and Pullman abstention doctrines. The hearing was held and the magistrate subsequently issued his report and recommendation.

The District Court approved and adopted in part the magistrate's findings concerning Younger and Pullman abstention, denied the Department's motion, abstained under the Younger and Pullman doctrines from determining the issues presented by respondent's claims, and stayed the federal proceedings until such time as State administrative proceedings and State court proceedings and appeals were completed (see Memorandum-Decision and Order, McCulley v N.Y.S. Dept. of Envtl. Conservation, US Dist Ct, NDNY, May 17, 2006, Kahn, J., No. 8:05-CV-0811).

Thereafter, Department staff filed its present motion with the Department's Office of Hearings and Mediation Services. In its motion, dated September 20, 2006, Department staff seeks dismissal of the first, fourth, fifth, sixth and seventh affirmative defenses, and for an order without hearing on its June 2005 complaint, among other things. Department staff also filed a brief with exhibits in support of its motion.

Respondent filed a November 2, 2006 brief in opposition to Department staff's motion, with exhibits.[1] Upon Department staff's request, I authorized the filing of a reply brief, and I granted respondent leave to file a sur-reply brief. I also accepted for consideration on this motion a November 21, 2006 letter with enclosures and a December 8, 2006 letter filed by respondent and Department staff, respectively.

Department staff filed its reply brief dated March 30, 2007 (denominated "Sur-Reply Brief"). Respondent filed his sur-reply brief dated April 9, 2007 (denominated "Respondent's Response to DEC's Sur-reply Brief").

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[1] Prior to serving his responsive papers, respondent moved for recusal of the Commissioner and the Administrative Law Judge. I denied respondent's recusal motion in a ruling dated December 4, 2006. No expedited interlocutory administrative appeal was taken from the ruling.

DISCUSSION

Motion to Dismiss Affirmative Defenses

Department staff moves to dismiss the first, fourth, fifth, sixth and seventh affirmative defenses pleaded in respondent's July 1, 2005 answer. Each defense is discussed in turn.

1. First Affirmative Defense -- Res Judicata/Collateral Estoppel

In his first affirmative defense, respondent asserts that the present administrative enforcement proceeding is precluded under the doctrines of res judicata and collateral estoppel by the determination of County Court, Essex County, in the criminal proceeding in People v McCulley. Department staff moves to dismiss respondent's first affirmative defense upon the ground that it lacks merit. I agree.

The Commissioner has recognized that dispositions in criminal proceedings may have a preclusive effect in Departmental administrative enforcement proceedings (see, e.g., Matter of Locaparra, Commissioner Decision and Order, June 16, 2003, at 5-6). The Commissioner has also recognized, however, that an acquittal on a criminal charge does not bar, or otherwise have a claim or issue preclusive effect in, a subsequent civil administrative enforcement proceeding (see Matter of Liere, Commissioner Decision and Order, April 17, 2006, at 2-3; see also Reed v State, 78 NY2d 1, 7-8 [1991]; Helvering v Mitchell, 303 US 391, 397-398 [1938]). An acquittal on any basis that does not involve the defendant bearing part of the burden of proof merely stands for the proposition that the People failed to meet the higher burden of proving the defendant's guilt "beyond a reasonable doubt" in the criminal proceeding (see People ex rel. Matthews v New York State Div. of Parole, 58 NY2d 196, 202-203 [1983]). As such, the acquittal is not a finding of innocence and does not prevent the State from seeking to establish a respondent's liability for statutory violations under the lower "preponderance of evidence" standard applicable to civil proceedings, such as the Department's administrative enforcement proceedings (see Reed v State, 78 NY2d at 7-8).

Moreover, the prior criminal proceeding involved a different transaction occurring after the criminal proceeding concluded, and different regulatory provisions than are involved here. Thus, claim preclusion does not bar the present charges (see O'Brien v City of Syracuse, 54 NY2d 353, 358 & n 2 [1981]

[claims based upon acts occurring after prior law suit not barred by res judicata]; see also Matter of Liere, supra, at 3 [citing ALJ Ruling, Sept. 30, 2004, at 8-10]).

Similarly, even if the prior acquittal has any issue preclusive effect in this enforcement proceeding, the County Court made no findings on at least one of the key issues presented here. Whether the Department has jurisdiction pursuant to Vehicle and Traffic Law § 1630 to regulate motor vehicle traffic on the Old Mountain Road was not presented in the criminal proceeding and, therefore, was not necessarily decided by County Court (see People v Goodman, 69 NY2d 32, 37-40 [1986]). Thus, the prior acquittal has no issue preclusive effect on this issue.

Accordingly, respondent's first affirmative defense is dismissed. Although County Court's decision is persuasive authority, it lacks the claim and issue preclusive effect respondent urges.

In rejecting respondent's first affirmative defense, I take no notice of, nor place any reliance upon, the affidavit of Carolyn L. Wiggins, in which Ms. Wiggins claims she was present at a meeting during which Judge Halloran explained the preclusive effect of his ruling in People v McCulley. My conclusions concerning the preclusive effect of Judge Halloran's decision are based solely upon settled legal principles governing the effect of criminal acquittals in subsequent civil proceedings (see cases discussed above). Accordingly, I need not reach respondent's objections to the Wiggins affidavit, which merely challenge the affiant's credibility, in any event.

2. Fourth Affirmative Defense -- Validity of Executive Law § 816

In his fourth affirmative defense, respondent alleges that "Executive Law § 816 violates the New York State Constitution and was never properly enacted, ratified or adopted by the State of New York." Thus, respondent contends that the area purported to be the Sentinel Range Wilderness Area is not and cannot be considered a wilderness area.

Department staff moves to dismiss the fourth affirmative defense on the ground that administrative tribunals may not pass on the constitutionality of laws.

Subject to certain exceptions, under the principle of exhaustion of administrative remedies, the general rule is that

respondents are required to raise constitutional issues and objections at the agency level (see Young Men's Christian Assn. v Rochester Pure Waters Dist., 37 NY2d 371, 375-376 [1975] [YMCA]; Matter of Leogrande v State Liq. Auth. of State of New York, 19 NY2d 418, 424 [1967]; Matter of Vasquez v Senkowski, 186 AD2d 847, 848 [3d Dept 1992]; Matter of Celestial Food Corp. v New York State Liq. Auth., 99 AD2d 25, 27, n [2d Dept 1984]). This rule allows the agency to consider and avoid the alleged constitutional error and to provide a remedy, if available (see YMCA, 37 NY2d at 375; People ex rel. McDaniel v Travis, 288 AD2d 940, 941 [4th Dept 2001], lv denied 97 NY2d 613 [2002]; Matter of Bates v Coughlin, 145 AD2d 854 [3d Dept 1988]). Thus, constitutional challenges to an agency's interpretation of a statute (see YMCA, supra), its application of a statute (see Matter of Roberts v Coughlin, 165 AD2d 964, 965-966 [3d Dept 1990]), or constitutional challenges to an agency's regulations (see Matter of Alston v New York City Tr. Auth., 186 AD2d 649 [2d Dept 1992]) must be raised during administrative proceedings to allow the agency to consider the validity of those challenges and promptly provide a remedy.

An exception to this exhaustion requirement is where the respondent seeks to raise a facial constitutional challenge to a statute, i.e. seeks to challenge the statute as invalid under all circumstances (see Loretto v Teleprompter Manhattan CATV Corp., 53 NY2d 124, 138-139 [1981]; Matter of Gordon v Planning Bd. of Town of Ramapo, 30 NY2d 359, 365-366 [1972]). Although an administrative agency has the power to rule on as-applied constitutional challenges, an agency lacks the power to declare a statute and, therefore, an act of the Legislature, unconstitutional (see Matter of Perrotta v City of New York, 107 AD2d 320, 323-324 [1st Dept], affd for reasons stated below 66 NY2d 859 [1985]). Thus, such facial constitutional challenges are not properly raised before the agency.

Accordingly, to the extent respondent contends that Executive Law § 816 was not properly adopted by the Legislature and must therefore be struck as unconstitutional, such relief is beyond the Department's power to grant. Accordingly, that portion of respondent's fourth affirmative defense must be dismissed.

On the other hand, to the extent respondent's defense is that Executive Law § 816 as interpreted by the Department and applied to respondent's case deprives him of his constitutional rights, such an issue may be addressed by the Department. However, to the extent respondent seeks to raise such an as-applied constitutional challenge, the facts and legal theory upon

which respondent's defense is based are unclear. In particular, to the extent that respondent's defense is that the Department's interpretation of Executive Law § 816 and its application of that statute against him through section 196.1(a) of the Department's regulations operates to deprive respondent of a constitutional right, the nature of the constitutional right allegedly infringed is not clearly stated in respondent's answer.[2] Accordingly, if respondent seeks to pursue such a defense, he must clarify the defense.

3. Fifth and Sixth Affirmative Defenses -- Malicious Prosecution/Abuse of Process

In his fifth affirmative defense, respondent alleges that Department staff initiated this proceeding in bad faith and out of personal animosity toward respondent. In his sixth affirmative defense, respondent alleges that commencement and maintenance of this administrative proceeding is an abuse of process warranting dismissal.

Department staff moves to dismiss the fifth affirmative defense on the ground that the motives of a party do not nullify proceedings regular on their face. Staff also contends that the issue of its motives in commencing this proceeding were litigated in the federal court and decided against respondent. Accordingly, staff asserts that collateral estoppel, or issue preclusion, bars this defense.

With respect to the sixth affirmative defense, Department staff moves to dismiss on the grounds that the commencement of an administrative enforcement proceeding by service of a notice of hearing and complaint does not provide a basis for an abuse of process claim, the Department's alleged improper motive in commencing the proceeding was litigated and resolved against respondent in federal court, and respondent fails to allege any improper collateral objective for the service of the notice of hearing and complaint beyond the proper purpose of obtaining jurisdiction over respondent.

The precise nature of respondent's fifth affirmative

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[2] I note that in the federal litigation, respondent raised free speech, substantive due process, and equal protection challenges to the Department's June 2005 complaint (see McCulley v N.Y.S. Dept. of Envtl. Conservation, supra, at 8-9). It is not clear from respondent's answer that he is raising these defenses in the present administrative enforcement proceedings.

defense is unclear. To the extent respondent's fifth affirmative defense sounds in malicious prosecution, it must be dismissed. An essential element of a malicious prosecution claim is that the proceeding terminated in favor of the defendant or respondent (see Curiano v Suozzi, 63 NY2d 113, 118 [1984]). Accordingly, such a claim cannot be interposed as a defense in the very civil action or proceeding that is claimed to be wrongly instituted (see Sasso v Corniola, 154 AD2d 362, 363 [1989]).

Similarly, to the extent respondent's fifth affirmative defense is a claim of discriminatory enforcement, such a claim is not an affirmative defense to the administrative proceeding, but must be raised in a judicial forum (see Matter of 303 West 42nd St. Corp. v Klein, 46 NY2d 686, 693 & n 5 [1979] [citing Matter of DiMaggio v Brown, 19 NY2d 283, 292 (1969)]; see also Matter of Town of Norfolk, Executive Deputy Commissioner's Order, Oct. 31, 1985, at 1).

To be successful on respondent's sixth affirmative defense of abuse of process, respondent must establish: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective (see Curiano v Suozzi, 63 NY2d at 116-117). With respect to the third element, if the legal process is used for the immediate purpose for which it is intended, the motives of the party, even if malicious, will not give rise to an abuse of process claim (see id. at 117; Hauser v Bartow, 273 NY 370, 373 [1937]).

In this case, the abuse of process respondent claims is the commencement of this proceeding, which was initiated by notice of hearing and complaint. A claim for an abuse of process may not be based, however, on the mere institution of a proceeding by service of a notice of hearing and complaint (see Curiano v Suozzi, 63 NY2d at 116; Ginsberg v Ginsberg, 84 AD2d 573 [1981]). Moreover, respondent does not allege that the notice of hearing and complaint was subsequently used for any illegitimate purpose resulting in any unlawful interference with his person or property. Respondent's contention that staff's maintenance of this administrative proceeding is an abuse of process is, in essence, a claim of malicious prosecution, which I have previously addressed. Thus, respondent fails to state a vaild abuse of process defense.

In any event, respondent is collaterally estopped from litigating Department staff's alleged bad faith in instituting and prosecuting this administrative enforcement proceeding by the

determination in federal court. Collateral estoppel prevents a party from relitigating in a subsequent State action or proceeding an issue clearly raised in a prior federal action or proceeding and decided against that party (see Pinnacle Consultants, Ltd. v Leucadia Nat. Corp., 94 NY2d 426, 431-432 [2000]). The doctrine applies if the issue in the second action was raised, necessarily decided and material in the first action, and if the party had a full and fair opportunity to litigate the issue (see id.). The proponent of collateral estoppel bears the burden of demonstrating the identicality and decisiveness of the issue, while the opponent bears the burden of demonstrating the absence of a full and fair opportunity to litigate the issue in the prior action (see Parker v Blauvelt Volunteer Fire Co., Inc., 93 NY2d 343, 349 [1999]).

While respondent is correct that claims of malicious prosecution and abuse of process were not litigated before the federal court, the issue of the Department's alleged bad faith and harassment of respondent was litigated and rejected by that court in the context of the federal Younger abstention doctrine (see McCulley v N.Y.S. Dept. of Envtl. Conservation, supra, Mem-Dec and Order, at 20; Report-Recommendation and Order of the Magistrate, at 13-18). Whether the present State prosecution was undertaken in bad faith or for harassment purposes is a mixed question of law and fact that was material and necessary to the U.S. District Court decision whether to apply the "bad faith" exception to the mandatory Younger abstention doctrine (see Diamond "D" Constr. Corp. v McGowan, 282 F3d 191, 197-199 [2d Cir 2002]). The U.S. District Court's memorandum-decision and order adopting the magistrate's findings of a lack of bad faith by the Department in prosecuting the June 2005 complaint is a sufficiently final determination on the merits of the bad faith issue for collateral estoppel purposes (see id.; Moore v Aegon Reinsurance Co. of America, 196 AD2d 250, 257-259 [1st Dept 1994] [discussing finality of U.S. District Court and U.S. Magistrate orders], cert dismissed sub nom Stephens v Instituto de Resseguros do Brasil (IRB), 512 US 1283 [1994]). Moreover, respondent had a full and fair opportunity to litigate the issue, including a full evidentiary hearing before the federal magistrate on the issue. Thus, respondent is barred by principles of collateral estoppel, or issue preclusion, from relitigating the issue in these proceedings. Accordingly, respondent's fifth and sixth affirmative defenses must be dismissed.

4. Seventh Affirmative Defense -- Laches

In his seventh affirmative defense, respondent claims

that the action is barred by laches. Department staff moves to dismiss the seventh affirmative defense on the grounds that laches does not apply against the State acting in its governmental capacity, and that respondent has failed to allege prejudice sufficient to require dismissal of the proceeding pursuant to State Administrative Procedures Act ("SAPA") § 301.

Department staff is correct that the common law defense of laches is not available against a State agency acting in its governmental capacity to enforce a public right or protect a public interest (see Matter of Cortlandt Nursing Home v Axelrod, 66 NY2d 169, 177 & n 2 [1985]). SAPA § 301 modifies the common law rule to require an agency to provide an adjudicatory hearing "within reasonable time." However, respondent's pleadings fail to allege any facts indicating any actual prejudice in the defense of this case such that any delay since the alleged incident and the commencement of this proceeding chargeable to the Department would be deemed unreasonable (see id. at 177-182). Accordingly, respondent has failed to state a defense and the seventh affirmative defense must be dismissed.

Motion for Order Without Hearing

Department staff moves pursuant to 6 NYCRR 622.12 for an order without hearing on its June 2005 complaint. Motions for order without hearing pursuant to section 622.12 are the Department's administrative equivalent of a motion for summary judgment under the CPLR, and are governed by the same principles (see 6 NYCRR 622.12[d]; see, e.g., Matter of Locaparra, supra, at 3-5).

In its complaint, Department staff alleges that respondent violated the prohibition in 6 NYCRR 196.1(a) against the operation of motor vehicles in the forest preserve by operating his truck on those portions of Old Mountain Road that cross State land. Department staff also alleged that none of the exceptions provided for in 6 NYCRR 196.1(b) and (c) apply to otherwise authorize operation of motorized vehicles on Old Mountain Road.

For the reasons that follow, unresolved issues of law and triable issues of fact remain regarding respondent's alleged violation of section 196.1 requiring hearing. Thus, I deny Department staff's motion for an order without hearing.

1. Operation on State-Owned Land

Respondent does not deny that he operated his truck on

Old Mountain Road on May 22, 2005. He does deny, however, that he crossed the eastern property line of the privately-owned parcel immediately adjacent to and west of the State-owned parcel. Accordingly, respondent contends that he did not cross onto State-owned land and, thus, did not operate a motor vehicle on forest preserve land in the Sentinel Range Wilderness area.

To support its allegation that respondent crossed the boundary into forest preserve land, Department staff provides the affidavit of Floyd Lampart, a licensed land surveyor employed by the Department's Region 5 office (the "Lampart Affidavit"). In that affidavit, Mr. Lampart indicates that in August 2006, Mr. Lampart located monuments representing the northern and southern corners of the western boundary of that portion of Lot 146 owned by the State (see Map of a Part of Township 12 Old Military Tract, Department Exh 47). Mr. Lampart further indicates that "with the assistance of another department employee under my direction, I was able to project a line along the western boundary of the property passed [sic] the head of [Old Mountain Road as it passes onto the State-owned portion of Lot 146]. I found that the actual boundary of State land passes within five feet of the base of the tree to which the Forest Preserve, No Bicycle and No Motor Vehicle signs are affixed" (Lampart Affidavit, at ¶ 4). Mr. Lampart also states that he reviewed a photograph taken on May 22, 2005 showing respondent's truck on Old Mountain Road, and concluded that the truck was on State-owned land at that time (see id. ¶ 5).

I conclude that Department staff's proof is insufficient to satisfy its prima facie burden of showing that respondent crossed the boundary onto State-owned land. The submissions on the motion reveal that the area surrounding Old Mountain Road at the location of the incident, and in particular the area between the monuments, is heavily wooded. Mr. Lampart's affidavit fails to provide sufficient factual foundation to indicate how he was able to "project a line" with the degree of accuracy Mr. Lampart claims (see Romano v Stanley, 90 NY2d 444, 451-452 [1997]). Under the circumstances, Mr. Lampart's conclusory affidavit is insufficient to carry Department staff's initial burden of establishing that judgment in its favor is warranted (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Coley v Michelin Tire Corp., 99 AD2d 795, 796 [1984] [conclusory expert affidavit insufficient to carry movant's initial burden on summary judgment; burden on movant to produce evidentiary facts is greater than on opponent]).

Given Department staff's failure to meet its prima facie burden on this motion, the motion must be denied,

regardless of the sufficiency of the opposing papers (see Holtz v Niagara Mohawk Power Corp., 147 AD2d 857, 858 [1989]; Coley, 99 AD2d at 796). Thus, it is unnecessary to address staff's argument that respondent's submissions are insufficient to raise a triable issue of fact. However, I also conclude that the submissions, including respondent's, do not establish as a matter of law that respondent did not cross onto State-owned land. Thus, respondent's assertion that he is entitled to summary judgment in his favor is also rejected.

2. Department's Jurisdiction To Regulate Motor Vehicle Traffic Over Old Mountain Road

Department staff contends that the portion of Lot 146 owned by the State is part of the forest preserve. Accordingly, staff asserts jurisdiction to regulate motor vehicle traffic over that portion of Old Mountain Road that crosses State-owned land.

Department staff has established that the State-owned portion of Lot 146 is part of the forest preserve. It is undisputed that the State acquired the northern half and southeastern quarter of Lot 146 in 1875 (see Deed, Department Exh 48, at 556). The forest preserve was subsequently created by chapter 283 of the Laws of 1885, which provided in relevant part:

> "All lands now owned or which may hereinafter be acquired by the state of New York within the counties of . . . Essex . . . shall constitute and be known as the forest preserve."

(L 1885, ch 283, § 7). Chapter 283 is now codified at ECL 9-0101(6). Thus, the State-owned portion of Lot 146 was and remains part of the forest preserve.

The existence of Old Mountain Road as a public right of way, however, pre-dates the State's ownership of Lot 146. In the 1810 legislation appropriating money for the repair of Old Mountain Road, the State Legislature declared the road to be a "public highway" (L 1810, ch CLXXVII, § I). Because the Legislature did not provide for acquisition of the fees underlying the public highway, the public acquired merely an easement of passage, the fee title remaining in the landowners (see Bashaw v Clark, 267 AD2d 681, 684-685 [1999]). Thus, when the State acquired its portion of Lot 146 from the prior landowner, it did so subject to a public highway in the nature of an easement (see id.; see also Matter of Moncure v New York State Dept. of Envtl. Conservation, 218 AD2d 262, 267 [1996] [when the

Department acquires forest preserve lands burdened by a leasehold, the Department takes such property subject to that leasehold]).

Department staff asserts that subsequent statutory law vests the Department with jurisdiction over public rights of way crossing forest preserve land. Accordingly, citing the Vehicle and Traffic Law, Department staff asserts that it has the power to "prohibit, restrict or regulate" motor vehicle traffic on any highway under its jurisdiction, including Old Mountain Road (see Vehicle and Traffic Law ["VTL"] § 1630). Pursuant to section 1630, Department staff claims it has the authority to close Old Mountain Road to motor vehicle traffic while allowing pedestrian and other forms of non-motorized traffic (see Adirondack Park State Land Master Plan [updated June 2001], DEC Exh 17, at 66 [indicated that Old Military Road has been closed]).

Respondent, on the other hand, argues that Old Mountain Road was and remains under the jurisdiction of the Towns of North Elba and Keene.[3] Thus, respondent contends that the exception under 6 NYCRR 196.1(b) for roads under the jurisdiction of a town highway department applies in this case (see 6 NYCRR 196.1[b][1]). Respondent contends that the exception for public rights of way over State land also applies (see 6 NYCRR 196.1[b][5]).[4]

VTL § 1630 does not itself vest in the Department jurisdiction over any particular highway. Whether a State agency has jurisdiction to regulate motor vehicle traffic pursuant to section 1630 depends upon whether that agency is otherwise authorized by law to regulate the use and management of the public highway at issue (see People v Noto, 92 Misc 2d 611, 612-613 [1977]; see also Highway Law § 3).

On this motion, it cannot be determined, as a matter of

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[3] If respondent is correct that the Towns of North Elba and Keene have jurisdiction over Old Mountain Road, the VTL provide such towns with broad powers to regulate motor vehicle traffic (see VTL § 1660).

[4] Section 196.1(b) provides: "Operation of motorized vehicles is permitted on roads: (1) that are under the jurisdiction of the State Department of Transportation or a town or county highway department, in accordance with applicable State and locals laws; . . . or (5) where a legal right-of-way exists for public or private use."

law, which entity has jurisdiction to regulate the use and management of Old Mountain Road. When the New York State Legislature declared Old Mountain Road to be a public highway in 1810, it provided that after an initial four-year period of repair and improvement by a commissioner specially appointed for that purpose, the maintenance of the road would be assumed by the several towns through which it passed (see L 1810, ch CLXXVII, § III). Thus, at the time the State acquired Lot 146, subject to the public right of way, that right of way was apparently a town road under the jurisdiction of the Town of Keene and later the Town of North Elba (see Highway Law § 3[5]).[5]

Nothing in the submissions on this motion allow me to conclude, as a matter of law, that jurisdiction to regulate the use and management of Old Mountain Road has transferred from the Towns of North Elba and Keene to the Department. To the contrary, conflicting statutory provisions and circumstantial evidence require further legal argument and evidentiary proof before such a determination can be made.

For example, in support of Departmental jurisdiction to regulate traffic, Department staff notes that when the powers of the Conservation Department were revised in 1916, the "free use of roads" provision from the 1885 law limiting the forest commission's power to prescribe rules and regulations for the forest preserve, was eliminated (see L 1916, ch 451). Staff further notes that the current ECL and Executive Law provisions authorizing the Department to make necessary rules and regulations for the protection of the forest preserve generally, and the Adirondack Park specifically, contain no limitation on regulating the free use of roads (see ECL 9-0105[3]; Executive Law § 816). However, although the Department has the power to regulate uses of the forest preserve generally, and the Adirondack Park specifically, it does not necessarily follow that such power includes the authority to regulate public rights of way under the jurisdiction of other State entities or municipalities.

In contrast, legislation adopted subsequent to 1916 suggests that the Department was not vested with the power to regulate use and maintenance of highways in the forest preserve. In 1924, the former State Commission of Highways was granted the power to maintain existing State and county highways in the forest preserve (see L 1924, ch 275). In 1937, town

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[5] According to respondent, North Elba separated from the Town of Keene in 1850.

superintendents were expressly granted the right to occupy a right of way over State lands as may be required in the maintenance or reconstruction of town highways that cross those lands, subject to the approval of the Superintendent of Public Works and the Conservation Commissioner (see L 1937, ch 488). The grant of a right of way over State land to maintain and repair town highways strongly implies that towns retained jurisdiction over town highways in the forest preserve, notwithstanding the Department's grant of authority to regulate the forest preserve generally (see Flacke v Town of Fine, 113 Misc 2d 56 [1982]).

Department staff also points out that Old Mountain Road has not appeared on either the Town of North Elba or the Town of Keene inventory of town highways. The evidence on this is equivocal, however. Old Mountain Road has not appeared on any inventory of State or county highways either (see L 1921, ch 18 [designating system of State and county highways]). On the other hand, Old Mountain Road did appear on a 1935 Highway Survey Commission map, although its status as a State, county or town highway is not indicated (see Department Exhs 51-53).

Respondent provides some circumstantial evidence suggesting that the Towns of North Elba and Keene retain the jurisdiction to regulate traffic on Old Mountain Road. For example, in 1971, the Town of North Elba adopted a resolution, which is still in effect, regulating the use of snowmobiles on Old Mountain Road (see N. Elba Ordinance [2-12-71], Affidavit of Norman Harlow, Highway Superintendent, Town of North Elba, Exh B). Respondent also provides letters dated June 7 and November 13, 1996, respectively, from Mr. Tom Wahl, former Department Regional Forester, expressing the opinion that Old Mountain Road remains a town highway (see Respondent Exhs 16 and 17).

Finally, research reveals some authority suggesting that Old Mountain Road is under the jurisdiction of predecessors to the Department of Transportation (see People v Paul Smith's Elec. Light and Power and R.R. Co., Sup Ct, Essex County, July 29, 1953, Imrie, J., Decision, at 3-4, 6; 1950 Opn of the Atty Gen 153-154). Whether the portions of Old Mountain Road at issue here are subject to the above authorities, however, is unclear at this time.

In sum, legal and factual issues exist concerning whether the Department has jurisdiction under VTL § 1630 to regulate motor vehicle traffic on Old Mountain Road that require further hearings and legal argument.

3. Request for Relief Pursuant to Highway Law § 212

In its motion for order without hearing, Department staff requests an order of the Commissioner declaring Old Mountain Road between the eastern and western boundaries of the Sentinel Range Wilderness Area closed to all motorized vehicles and motorized equipment. Among the statutory authorities staff relies upon for this request is Highway Law § 212.

Highway Law § 212 provides:

> "If a highway passes over or through lands wholly owned and occupied by the state, the location of such portion of such highway as passes through such lands may be altered and changed, or the same may be abandoned or the use thereof as a highway discontinued with the consent and approval of the state authority having jurisdiction or control over such lands by an order directing such change in location, abandonment or discontinuance"

(emphasis added). The Department is the State authority with jurisdiction to order abandonment or discontinuance of roads over forest preserve lands in order to protect a relevant State interest (see Matter of Kelly v Jorling, 164 AD2d 181 [1990], lv denied 77 NY2d 807 [1991]; see also Matter of Altona Citizens Comm., Inc. v Hennessy, 77 AD2d 956, lv denied 52 NY2d 705). Such authority includes the power to order the discontinuance or abandonment of town highways (see id.).[6]

Department staff does not address this request for relief in its brief in support of its motion. Nevertheless, to the extent Department staff contends that the Department has already closed Old Mountain Road pursuant to Highway Law § 212, I conclude that triable issues exist before the requested relief

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[6] Department staff contends, and I agree, that the question of which agency has jurisdiction to regulate the use and maintenance of a highway is separate from the question of which agency has the power to order abandonment or discontinuance of a highway. The circumstance that the Department has the power to extinguish a highway in its entirety to protect a relevant State interest does not necessarily compel the conclusion, as discussed above, that the Department has the power to regulate the use and maintenance of town highway pursuant to the VTL (see People v McCulley, 2005 WL 756582, at ***15).

may be granted. Staff supplies no evidence that a Departmental order pursuant to Highway Law § 212 has been filed with respect to that portion of Old Mountain Road that is at issue in this case. Accordingly, to the extent Department staff relies upon such a closure order in support of the violation alleged against respondent, staff has not established a prima facie case.

With respect to abandonment, an order of closure is not required to deem a public right of way extinguished by operation of law if the highway has in fact been abandoned by the public for six years or more (see Matter of Wills v Town of Orleans, 236 AD2d 889, 890 [1997]). However, the record reveals triable issues of fact concerning abandonment (see Matter of Smigel v Town of Rensselaerville, 283 AD2d 863, 864 [2001] [a determination of abandonment is a factual determination]). Pedestrian use and even recreational use may support a finding of non-abandonment, even if a highway has not been subject to motor vehicle traffic, as staff alleges in this case (see Town of Leray v New York Cent. R. Co., 226 NY 109 [1919] [pedestrian use may preserve highway though vehicles are barred]; Matter of Smigel, 283 AD2d at 865 [recreational use may preclude finding of abandonment]). The record contains conflicting evidence concerning the degree to which the public has continued to use the road, thereby necessitating a hearing on abandonment.

With respect to discontinuance, assuming Department staff is seeking a prospective order from the Commissioner, such a prospective order would not support the violation alleged here. Moreover, it is not clear what findings, if any, the Commissioner must make and whether such an order can be issued on the present record. Again, Department staff does not address this item of relief in its brief. Accordingly, the request for a prospective order of closure pursuant to Highway Law § 212 is denied, without prejudice.

4. Conclusion

Unresolved issues of law and triable issue of fact remain requiring further hearings. To the extent the parties raise additional arguments in their briefs, I conclude it is unnecessary to rule on such issues until the threshold legal and factual issues identified herein are resolved. Accordingly, Department staff's motion for an order without hearing is denied, and the matter will be set down for hearings.

RULING

Motion by Department staff, insofar as it seeks an order dismissing the first, fifth, six and seventh affirmative defenses, and a portion of the fourth affirmative defense, is granted; motion otherwise denied.

Motion by Department staff for an order without hearing on the complaint is denied. Motion for a Commissioner's order closing Old Mountain Road pursuant to Highway Law § 212 is denied without prejudice.

The matter is set down for a hearing. I will convene a telephone conference at the earliest convenience of the parties to set a date for the hearing, to establish a deadline for clarification of the fourth affirmative defense, and to discuss the need for discovery and any other pre-hearing matters.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: September 7, 2007
Albany, New York