

STATE OF NEW YORK SUPREME COURT
COUNTY OF ALBANY

CATSKILL HERITAGE ALLIANCE, INC., PINE HILL
WATER DISTRICT COALITION, INC., BENJAMIN AND
IDITH KORMAN,

Petitioners / Plaintiffs,

Index No.

v.

**VERIFIED
PETITION/COMPLAINT**

STATE OF NEW YORK, GOVERNOR ELIOT SPITZER,
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, NEW YORK
STATE DEPARTMENT OF HEALTH, NEW YORK STATE
DEPARTMENT OF TRANSPORTATION, CITY OF NEW
YORK, NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION, CROSSROADS
VENTURES, LLC, CATSKILL CENTER FOR
CONSERVATION AND DEVELOPMENT, INC.,
NATURAL RESOURCES DEFENSE COUNCIL, INC. NEW
YORK PUBLIC INTEREST RESEARCH GROUP, INC.,
RIVERKEEPER, INC., THEODORE GORDON
FLYFISHERS, INC., TROUT UNLIMITED, ZEN
ENVIRONMENTAL STUDIES, INSTITUTE, INC.,

Respondents / Defendants.

1. Petitioners / Plaintiffs (“Petitioners”) through their attorneys Bond, Schoeneck & King, PLLC allege the following for their verified petition / complaint.

2. This is a combined action for a declaratory judgment and special proceeding pursuant to Article 78 of the Civil Practice Laws and Rules.

3. The declaratory judgment action seeks a determination that the September 5, 2007 Agreement in Principal (“AIP”) entered into by the Respondents / Defendants (“Respondents”) State of New York, Governor Elliot Spitzer, the City of New York and New York City

Department of Environmental Protection was entered into illegally, requires illegal action by the units of the governments of the State of New York, and requires the use of procedures that are illegal and therefore should be declared null and void.

4. The Article 78 proceeding seeks review of the execution of the AIP by Respondents State of New York, Governor Elliot Spitzer, the City of New York and New York City Department of Environmental Protection which is alleged to be in excess of their jurisdiction, in violation of lawful procedures and affected by errors of law and also seeks review of actions that are being taken or will be taken by Respondent New York State Department of Environmental Conservation as a result of the execution of the AIP which actions are in excess of its jurisdiction, in violation of lawful procedures and affected by errors of law.

5. Any attempt by Petitioners to address these illegalities in the context of any administrative proceeding is futile because of the binding nature of the terms of the AIP.

Identity of the Parties

6. Petitioner Catskill Heritage Alliance, Inc. is a not-for-profit corporation organized under the laws of the State of New York.

7. Petitioner Pine Hill Water District Coalition, Inc. is a not-for-profit corporation organized under the laws of the State of New York.

8. Petitioners Benjamin and Idith Korman (“Kormans”) are natural persons residing as husband and wife. They maintain a residence at 352 Galli Curci Rd., in Highmount, N.Y.

9. Respondent State of New York is a state of the United States and is a party to the AIP.

10. Respondent Eliot Spitzer is the duly elected Governor of the State of New York and is a signatory to the AIP.

11. Respondent New York State Department of Environmental Conservation (“DEC”) is an agency of the State of New York.

12. Respondent New York State Department of Health (“DOH”) is an agency of the State of New York.

13. Respondent New York State Department of Transportation (“DOT”) is an agency of the State of New York.

14. Respondent City of New York is a municipal corporation of the State of New York and is a party to the AIP.

15. Respondent New York City Department of Environmental Protection (“DEP”) is an agency of the government of the City of New York and is a signatory to the AIP.

16. Upon information and belief, Respondent Crossroads Ventures, LLC (“Crossroads”) is a limited liability corporation organized under the laws of the State of New York. Crossroads is the sponsor of the project, Belleayre Resort at Catskill Park, and is a signatory to the AIP.

17. Upon information and belief, Respondent Catskill Center for Conservation and Development, Inc. is a not-for-profit corporation organized under the laws of the State of New York and is a signatory to the AIP.

18. Upon information and belief, Respondent Natural Resources Defense Council is a not-for-profit corporation organized under the laws of the State of New York and is a signatory to the AIP.

19. Upon information and belief, Respondent New York Public Interest Research Group, Inc. is a not-for-profit corporation organized under the laws of the State of New York and is a signatory to the AIP.

20. Upon information and belief, Respondent Riverkeeper, Inc. is a not-for-profit corporation organized under the laws of the State of New York and is a signatory to the AIP.

21. Upon information and belief, Respondent Theodore Gordon Flyfishers, Inc. is a not-for-profit corporation organized under the laws of the State of New York and is a signatory to the AIP.

22. Upon information and belief, Respondent Trout Unlimited is a not-for-profit corporation organized under the laws of the State of New York and is a signatory to the AIP.

23. Upon information and belief, Respondent Zen Environmental Studies Institute is a not-for-profit corporation organized under the laws of the State of New York and a signatory to the AIP.

Venue

24. Venue in this action is based upon CPLR §7804(b) and §506.

Standing

25. Petitioner Catskill Heritage Alliance, Inc. sought and was granted full party status in the adjudicatory proceeding pending before the DEC Office of Administrative Hearings and Mediation Services (“OHMS”) that relates to the review of a proposed major new resort in the Catskills known as Belleayre Resort at Catskill Park (the “Original Project”), said resort being sponsored by Respondent Crossroads.

26. Petitioner Pine Hill Water District Coalition, Inc. sought and was granted full party status in the adjudicatory proceeding pending before the OHMS that relates to the review of the Original Project being sponsored by Respondent Crossroads.

27. In order to attain full party status under the rules governing adjudicatory proceedings, the Petitioners referenced above had to affirmatively demonstrate that, among other things, they had an adequate environmental interest in the matter under adjudication (6 NYCRR 624.5(d)).

28. Pursuant to their status as full parties to the adjudicatory proceeding, they have the right to

- a. participate at the hearing in person or through an authorized representative;
- b. present relevant evidence and to cross-examine witnesses of other parties;
- c. present argument on issues of law and fact;
- d. initiate motions, requests, briefs or other written material in connection with the hearing, and receive all correspondence to and from the ALJ and to and from all other parties which is circulated to the parties generally;
- e. appeal adverse rulings of the ALJ; and
- f. exercise any other right conferred on parties by this Part or SAPA.

6 NYCRR 624.5(e).

29. The execution of the AIP has caused injury in fact to the these Petitioners in that it (a) improperly limits the scope of the adjudicatory proceeding and the environmental review process under the State Environmental Quality Review Act (“SEQRA”) which is a part thereof, and, as a result, its rights with respect to continued participation in the adjudicatory proceeding have been adversely affected; (b) creates inherent and unavoidable conflicts of interest for the

decision-maker in the adjudicatory proceeding, making it impossible to obtain the unbiased decision to which it is entitled to as a party; (c) creates illegal and improper procedures for resolving disputes that are binding on the decision-maker in the adjudicatory proceeding; and (d) impairs its rights to participate in the public review of permits and entitlements that will be required from Respondent DEP for the project that the AIP substituted for the Original Project (the AIP Project).

30. Petitioners Benjamin and Idith Korman are the owners of a home located on Galli Curci Road (County Route 49A) in Shandaken, Ulster County.

31. Petitioners Korman use this home frequently on weekends and vacations.

32. The Kormans purchased this second home because of the physical beauty and tranquility of the site, the surrounding area, its isolation and its historic significance.

33. The home was built by Amelita Galli-Curci, a renowned opera star from the early 20th century.

34. On information and belief, the house is eligible for listing in the state and national register of historic places.

35. County Road 49A is identified in the AIP as the main roadway for access to the proposed project (AIP at ¶ 40).¹

36. Currently County Road 49A is a winding, two-lane road that is very steep. It cannot support the traffic from the proposed project in its present state.

37. The proposed project threatens to cause severe disturbance to the during construction and during operations and thereby unreasonably interfere with the Petitioners' quiet enjoyment of their home.

¹ The text of the AIP and all exhibits thereto are attached to the Feller affidavit supporting this Petition.

38. The blasting needed to rebuild County Road 49A and to construct the sites on Highmount could threaten the structural integrity of the Petitioners' home.

39. The construction of the AIP Project has a substantial potential to cause severe drainage and runoff problems in the vicinity of the Petitioners' home.

Background

40. Respondent Crossroads proposed the Original Project, a resort complex in 1999 to be known as the Belleayre Resort at Catskill Park. The Original Project would be located on both the east and west sides of the state-owned Belleayre Ski Center in the towns of Shandaken, Ulster County and Middletown, Delaware County. The Original Project was to consist of:

a. Big Indian Plateau (East of Belleayre Ski Resort)

- i. The Original Project proposed a development of approximately 331 acres of Big Indian Plateau, east of the Belleayre Ski Resort. It would consist of the Big Indian County Club, including a 150-room hotel with two restaurants, a ballroom, and spa (known as the Big Indian Resort and Spa). Adjacent to the hotel would be an 18-hole championship golf course.
- ii. The Original Project proposed 55 buildings containing 95 detached lodging units to be built east of Giggle Hollow. There would be a satellite golf maintenance building and a wastewater treatment facility.
- iii. The Original Project proposed development of an area known as Belleayre Highlands to the west of Giggle Hollow. This development would consist of 22-four unit buildings containing a total of 88 detached lodging units. An existing mansion would be preserved and used as a social and

activities center. Recreational amenities such as swimming and tennis would be provided. Existing outbuildings associated with the mansion would be maintained and adaptively reused as offices and storage areas.

- b. Wildacres and Highmount Development (West of Belleayre Ski Resort)
 - i. The Original Project proposed development of approximately 242 acres consisting of a 250-room hotel complex together with shops, two restaurants, a conference center and a spa;
 - ii. The Original Project proposed an 18-hole championship golf course;
 - iii. The Original Project proposed twenty-one buildings containing 189 detached lodging units.
 - iv. The Original Project proposed a children's center, lodging unit clubhouse, a gold maintenance building complex, a satellite golf maintenance building, a wastewater treatment plant and a potable water treatment plant.
 - v. The Original Project proposed renovating the existing Marlowe Mansion which would be used as a restaurant.
 - vi. A 21-lot residential subdivision with lots ranging from approximately 2-16 acres, west of the former Highmount Ski Area.
 - vii. The Highmount Ski Area would be used as a wilderness center.
41. Several involved agencies vied to become lead agency for purposes of the SEQRA.
42. In a decision issued on March 20, 2000, the Commissioner of DEC determined that DEC should act as lead agency for the proposed resort project.

43. On or about December 10, 2003, a draft environmental impact statement (“EIS”) was accepted for public review.

44. Thereafter, the review of the draft EIS and the related permits pending before DEC were referred to an adjudicatory hearing before the OHMS.

45. By the end of 2006, the adjudicatory hearing had progressed to a determination of the issues that were to be adjudicated.

46. The parties to the hearing agreed to attempt to negotiate a settlement of the contested matters in late 2006. Starting in 2007, the negotiation process was aided by the office of Governor Eliot Spitzer.

47. On or about September 5, 2007, some of the parties reached executed a document known as the AIP. It is the terms of the AIP that gives rise to the instant litigation.

48. The AIP describes a project (the “AIP Project”) which differs significantly from the Original Project.

49. The AIP Project completely eliminates development on the Big Indian Plateau, east of the Belleayre Ski Resort.

50. The AIP Project includes the following key elements that are totally different than the Original Proposal:

- a. the development of a Highmount Spa, lodge buildings and detached lodging units with ski-in, ski-out facilities connected to the former Highmount Ski Center and with a ski lift and ski trails to provide access to the state-owned Belleayre Ski Center (AIP at ¶¶16-17);
- b. the use of sewage treatment plants owned and operated by the DEP to support the development at Wildacres and Highmount (AIP at ¶23);

- c. the revision of unit management plan for the Belleayre Ski Resort and the construction of significant capital improvements at the Belleayre Ski Resort, including the ski lift, ski trails and snow making equipment to accommodate the private development (AIP at ¶¶28-29);
- d. the sale of lands from Crossroads through an intermediary to the State of New York and the deed restriction of other lands owned by Crossroads (AIP at ¶¶24-27); and
- e. the upgrading of trailheads and increase usage of lands state-owned under the jurisdiction of the DEC (AIP at ¶39).

51. At the time the AIP was executed, none of the components of the AIP Project that differed from the Original Project had been subjected to any public review.

FOR A FIRST SEPARATE AND DISTINCT CAUSE OF ACTION:

THE AIP ILLEGALLY COMMITS THE AGENCIES IN THE EXECUTIVE BRANCH OF STATE GOVERNMENT AND DEP TO A COURSE OF ACTION WITHOUT FIRST COMPLYING WITH SEQRA

- 52. The allegations in paragraphs 1-51 of this Petition are realleged herein.
- 53. The parties executing the AIP include Governor Spitzer on behalf of the State of New York and DEP.
- 54. The AIP is binding on all parties to it and upon their successors and assigns (AIP at ¶48).

55. The inclusion of the State of New York as a party to the AIP and the execution of the AIP by Governor Spitzer effectively binds all the executive agencies of the State of New York which include DEC, DOH and DOT.

56. The terms of the AIP effectively commit the parties to the approval of a project whose design is substantially consistent with the project described in the AIP (AIP at ¶34).

57. The AIP commits DEP to take certain actions including providing wastewater treatment capacity at its Pine Hills plant.

58. The AIP commits the State of New York and DEP to accept the conveyance of certain interests in land from Crossroads.

59. Any attempt by the Petitioners to reverse or modify in any significant way the decisions taken in the AIP is futile.

60. Although the AIP references the fact that the Project is still subject to additional review and approvals, as discussed in detail immediately below, some of the most important decisions related to those approvals are already made in the AIP.

Selection of Alternative that Minimizes or Avoids Adverse Impacts

61. The AIP already makes findings about the Project that are almost identical to those that must be made under SEQRA. It states,

“... the Parties agree that the modified project [i.e. the one described in the AIP] represents a new, lower impact, alternative which **minimizes or avoids the potential for significant adverse environmental impacts identified by several of the Parties and others during the public comment period and issues conference ...** (AIP at ¶10, emphasis added).

62. The impacts referenced in the paragraph above are those that were, among others, those identified in the draft EIS.

63. Hence this finding is tantamount to one holding that the “modified project” is the alternative that minimizes or avoids the potential environmental impacts revealed in the EIS.

Balancing of Social, Economic and Other Considerations under SEQRA

64. In making SEQRA findings, involved agencies are obligated to take into account social, economic and other relevant factors (ECL 0109(8); 6 NYCRR 617.11(d)).

65. In August 2006, the Comptroller of the State of New York issued a report concerning the economic impact of the proposed resort (Exhibit 2 to the Feller Affidavit).

66. That report found that the Crossroad’s economic analysis was based on faulty assumptions about profitability and comparable developments.

67. Notwithstanding, with respect to the “modified project,” the AIP goes on to state that,

“...the State has determined [the modified project] will provide significant economic benefits to the Central Catskills region.” (AIP at ¶10, emphasis added).

68. It is the intent of the Petitioner’s to challenge the alleged economic benefit of the Project in the context of the pending adjudicatory hearing before OMHS.

69. The finding in AIP demonstrates that the agencies of the State of New York and the City of New York that are involved agencies for the SEQRA review of the AIP Project have improperly and prematurely performed the balancing of economic considerations required by SEQRA.

70. This constitutes further evidence that the DEC and DEP have committed themselves prematurely to a course of action.

Dispensing with Further Adjudication

71. The review of the draft EIS for the originally proposed project is pending in an adjudicatory hearing before the OHMS of the DEC.

72. Based on the AIP, the Administrative Law Judge (ALJ) presiding in that proceeding ruled that "...further adjudicatory proceedings in this matter are held in abeyance, without date, pending supplementation of the administrative record"

73. The new permit applications and a so-called "supplemental draft EIS" when submitted will still be subject to the pending adjudicatory hearing.

74. Notwithstanding, the AIP holds that,

.....the Parties recognize that agreement on this lower impact alternative [i.e. the so-called modified project described in the AIP] **will eliminate the inherent uncertainty of continuing the NYSDEC Adjudication, and the inevitable expense of time and resources associated with further administrative and legal proceedings.** [AIP at ¶10, emphasis added].

75. This demonstrates the intent of AIP to avoid the approval processes that apply to all matters pending for adjudicatory hearing before the OHMS of the DEC.

76. The AIP prevents the DEC from submitting comments in opposition to the Project or to seek adjudication of issues related to the Project (i.e. issues arising out of the permit applications or the "supplemental" draft EIS) providing that the supplemental draft EIS and the new or modified draft permit applications are "substantially consistent" with the project described in the AIP (AIP at ¶34).

77. Without an adjudicatory hearing on the permit applications and draft “supplemental” EIS, there is no mechanism for the DEC to deny or condition approvals for the Project in response to public input.

78. This constitutes further evidence that AIP commits the DEC to the approval of the AIP Project.

AIP Prescribes Particular Conditions for the Project and Is Well Beyond a Mere Conceptual Agreement.

79. The AIP is framed as a “conceptual agreement.” (AIP at ¶1)

80. In fact, the AIP provides detailed conditions for the AIP Project and any further ability to revise the AIP Project is within very narrow boundaries.

81. The AIP provides detailed requirements for, among other things:

- a. the development at Wildacres (AIP ¶15 and AIP Exhibits A and B);
- b. the development at Highmount Spa (AIP ¶16 and AIP Exhibits B and C);
- c. the access road to Highmount Spa (AIP ¶17)

82. This demonstrates that the AIP commits its signatories to the approval of the AIP Project with very narrow discretion to vary any of the agreed-upon parameters.

FOR A SECOND SEPARATE AND DISTINCT CAUSE OF ACTION:

THE AIP IMPROPERLY LIMITS THE SCOPE OF DEC REVIEW OF THE AIP PROJECT.

83. The allegations in paragraphs 1-82 of this Petition are realleged herein.

84. SEQRA requires that the lead agency consider a reasonable range of mitigation measures and alternatives to minimize or avoid adverse environmental impacts to the maximum extent practicable taking into account social, economic and other considerations (6 NYCRR 617.9(b)(5)).

85. The AIP determines that the AIP Project is the one that minimizes or avoids potential significant impacts. (AIP at ¶10).

86. The AIP determines that the AIP Project properly balances Crossroads' concerns for the economic viability of its proposed project with the avoidance and mitigation of the environmental impacts of the Original Project. (AIP at ¶10).

87. These determinations were made outside of any public review process.

88. These determinations effectively preclude the review of other alternative projects that would (a) reduce the type or capacity of the resort facilities, (b) not involve development at Belleayre, (c) restrict development to areas other than those identified in the AIP or (d) require modifications in the design that are not substantially the same as the design laid out in Exhibits A, B and C to the AIP.

89. Other findings in the AIP effectively preclude imposition of permit conditions that would require Crossroads to build on slopes any less steep than 20% or construction of the roadway access on slopes less than 15%. (AIP at ¶¶16, 17 which set the steep slope standards and ¶34 which binds the parties to the AIP to accept a project that is "substantially consistent" with the AIP).

FOR A THIRD SEPARATE AND DISTINCT CAUSE OF ACTION:

THE AIP IMPROPERLY MAKES DECISIONS ABOUT THE AIP PROJECT THAT CAN ONLY BE MADE BY THE ALJ OR THE DEC COMMISSIONER IN THE CONTEXT OF THE PENDING ADJUDICATORY HEARING

- 90. The allegations in paragraph 1-89 of this Petition are realleged herein.
- 91. The review of the Original Project is pending in a DEC adjudicatory hearing.
- 92. In the context of the adjudicatory hearing, only the ALJ or the DEC

Commissioner have the authority to make decisions regarding the permit applications and the associated draft EIS.

- 93. The AIP was negotiated outside the context of the adjudicatory hearing.

94. Notwithstanding, the AIP makes several binding determinations regarding the AIP Project, which it characterizes as a “modification” of the Original Project.

95. Among other things, the AIP determines that a supplemental draft EIS will be required for the AIP Project and the minimum scope of that document.

96. In the context of an adjudicatory hearing, these and other decisions regarding a “modified” project can only be made by the ALJ or the Commissioner.

97. The AIP takes action affecting matters pending in the adjudicatory hearing without the approval of either the ALJ or the Commissioner and does so in way that is intended as binding on all components of the DEC.

98. The exercise of exclusive authority over the permit proceeding by the ALJ and the Commissioner is a particularly critical principle where, as here, several of the entities who are full parties to the adjudicatory hearing oppose the actions required by the AIP.

99. The action taken in the AIP violates this principle and thus is improper and *ultra vires*.

100. In the alternative, if the AIP describes a new project, (i.e. one completely independent of the one pending in the adjudicatory hearing), then it improperly and illegally omits the important required procedural step of the determination of the lead agency for the “new” project for purposes of SEQRA, among others.

FOR A FOURTH SEPARATE AND DISTINCT CAUSE OF ACTION:

THE AIP ESTABLISHES UNAUTHORIZED PROCEDURES FOR BINDING DISPUTE RESOLUTION MECHANISMS WITH THE DEC WHICH EXCLUDE ALL BUT THE PARTIES TO THE AIP.

101. The allegations in paragraphs 1-100 of this Petition are realleged herein.

102. Even though the development is subject to an adjudicatory hearing before the DEC, the AIP establishes dispute resolution mechanisms for the exclusive use of the parties to the AIP and are not open to other parties to the hearing nor members of the public.

103. The mechanisms are established for disputes concerning the DEC construction activity stormwater permit (AIP ¶17.d.); the assumptions and inputs for the stormwater modeling protocol (AIP ¶20.d.); and DEC draft water supply permit (AIP ¶22.d.).

104. The AIP indicates that, once these disputes are resolved through these mechanisms established in the AIP, the parties to the AIP are bound by the determination and agree that such determination will not be subject to further administrative proceedings or judicial review.

105. In the case of the mechanism established under AIP ¶17.d., the terms indicate that the determination resolving the dispute will not affect or diminish the regulatory authority of DEP or the DEC Commissioner.

106. The other dispute resolutions mechanisms do not have any such limitation.

107. There is no authority for the DEC to bind itself through this mechanism.

108. These mechanisms are inconsistent with the procedures for resolving disputed questions that are in existing rules and regulations that apply to DEC (see 6 NYCRR Part 624).

109. Even where the terms of the AIP indicate they are not binding on the DEC Commissioner, they effectively are binding.

110. Unlike agreements that are routinely reached by DEC Staff which are not binding on the Commissioner, the AIP was signed by the Governor on behalf of the State of New York, of which DEC is an agency thereof.

111. Further if the terms were only binding on the DEC Staff and not on the Commissioner, they would be improper as they violate the obligation of the DEC Staff to take public comments on permits and on draft EIS's into account.

112. If implemented, the terms of these dispute resolution mechanisms improperly would preclude the DEC Staff from considering the filings by other parties to the adjudicatory hearing or even by the public at large, no matter how substantive or persuasive such filings might be.

**FOR A FIFTH SEPARATE AND DISTINCT CAUSE OF
ACTION:**

**THE AIP COMPELS CERTAIN PROCEDURES FOR THE
REVIEW OF THE AIP PROJECT THAT ARE CONTRARY
TO LAW.**

113. The allegations in paragraphs 1-112 of this Petition are realleged herein.

114. The AIP establishes procedures for the review of the AIP Project that are inconsistent with the procedures provided for by law.

115. The AIP mandates that, for SEQRA purposes, the AIP Project be treated as a modification to the Original Project and that the changes be analyzed through the submission of a supplemental draft EIS to DEC as the lead agency (AIP at ¶¶ 11 and 13).

116. This precludes consideration of the AIP Project as a new project which would require compliance with all SEQRA procedures, including the establishment of a lead agency pursuant to 6 NYCRR 617.6(b).

117. The SEQRA rules set forth limited circumstances where a supplement EIS can be used (6 NYCRR 617.9(a)(7)).

118. None of those circumstances are present in this instance and it is therefore improper to require a supplemental draft EIS for the AIP Project.

119. Moreover, there is no authority for determining whether a supplement EIS is required through a contractual agreement among a limited number of parties, as was done in the AIP.

**FOR A SIXTH SEPARATE AND DISTINCT CAUSE OF
ACTION:**

**THE GOVERNOR'S EXECUTION OF THE AIP ON
BEHALF OF THE STATE OF NEW YORK IMPROPERLY
BINDS THE EXECUTIVE AGENCIES AND /OR CREATES
AN INHERENT AND UNAVOIDABLE CONFLICT OF
INTEREST FOR THE STATE AGENCIES CONCERNING
DECISIONS THEY ARE REQUIRED TO MAKE ON THE
AIP PROJECT.**

120. The allegations in paragraphs 1-119 of this Petition are realleged herein.

121. Governor Spitzer executed the AIP on behalf of the State of New York.

122. Accordingly, the terms of the AIP is binding on the State of New York (AIP at ¶47).

123. Even though neither the Governor nor the State of New York participated in the adjudicatory hearing on the proposed project, the AIP identifies the State of New York as one of the Parties to the AIP and, in turn, states that the Parties to the AIP were all parties to the DEC Adjudication (AIP at ¶10).

124. It can be concluded that the Governor's execution of the AIP is intended to and, in fact, does bind all agencies of the State of New York under the Governor's control.

125. Pursuant to the AIP, no executive agency of New York State can make a determination regarding the applications for the project or relating to the draft EIS that is inconsistent with the AIP.

126. The Governor's execution of the AIP circumvents the statutory and regulatory procedures that each of the individual state agencies would have to comply with in order to so bind themselves.

127. The Governor's execution of the AIP also prevents any state agency that is under the Governor's control from objectively reviewing the substance of any filing which opposes the

terms of the AIP or maintains that the terms of the AIP are inconsistent with laws, rules or regulations that agency is bound to implement or the agency's obligations pursuant to SEQRA.

FOR A SEVENTH SEPARATE AND DISTINCT CAUSE OF ACTION:

THE EXECUTION OF THE AIP ITSELF COULD NOT LEGALLY OCCUR UNTIL SEQRA WAS SATISFIED.

- 128. The allegations in paragraph 1-127 of this Petition are realleged herein.
- 129. SEQRA must be satisfied before any agency takes an action (6 NYCRR 617.11).
- 130. Agencies include state and local agencies (6 NYCRR 617.2(c)).
- 131. Although, by rule, the Governor is exempt from SEQRA, that exemption should not apply when the Governor takes actions that are, by law, reserved for the DEC.
- 132. The execution of the AIP constitutes an action as, by its very terms, it binds all of the signatories to its terms (AIP at ¶ 48).

FOR AN EIGHTH SEPARATE AND DISTINCT CAUSE OF ACTION:

THE AIP IMPROPERLY COMMITTS THE STATE OF NEW YORK TO PROVIDE A BENEFIT TO A PRIVATE PARTY SOLELY TO MAKE ITS PROJECT ECONOMICALLY FEASIBLE.

- 133. The allegations in paragraphs 1-132 of this Petition are realleged herein.
- 134. Upon information and belief, prior to the negotiations that led to the AIP, the State of New York had no intention of building the improvements to the Belleayre Ski Center described in the AIP.

135. Upon information and belief, in the course of the negotiations over the AIP, the State agreed to the capital improvements to the Belleayre Ski Center without any public input.

136. Upon information and belief, the principal reason for the State's agreement to install these capital improvement improvements was to provide additional consideration needed to obtain the agreement of Crossroads to the AIP.

137. The improvements to the Belleayre Ski Center required by the AIP will confer a substantial private benefit to the Respondent Crossroads.

138. Crossroads is providing no consideration to the State for the construction of these improvements.

139. The State's agreement to build the capital improvement to the Belleayre Ski Center constitutes an unconstitutional gift of state funds.

FOR A NINTH SEPARATE AND DISTINCT CAUSE OF ACTION:

THE AIP IMPROPERLY RESTRICTS THE DISCRETION OF THE STATE AND CITY ADMINISTRATIVE AGENCIES TO OPPOSE THE AIP PROJECT AND TO SEEK JUDICIAL REVIEW.

140. The allegations in paragraphs 1-139 of this Petition are realleged herein.

141. AIP ¶34 states,

NYSDEC Adjudication and Judicial Review. The Parties [to the AIP] will seek suspension of the pending NYSDEC Adjudication, and motion for reconsideration, pending submission and review of the SDEIS and new or modified permit applications and any NYSDEC draft permits related to the modified project/lower impact alternative. The Parties may participate in the public process and comment period regarding the SDEIS and new or modified draft permits. The Parties agree not to submit comments in general opposition to the project or seek adjudication of issues

provided that the SDEIS and new or modified draft permits are substantially consistent with the modified project/lower impact alternative described in this Agreement in Principle. The Parties may also participate in the environmental review process for the new Belleayre Mountain Ski Center unit management plan and agree not to object to those portions of the unit management plan only to the extent that they are identified in and substantially consistent with this Agreement in Principle. The Parties agree not to seek judicial review of the FEIS, SEQRA findings statement or final permits for the modified project/lower impact alternative, or of the FEIS, SEQRA findings statement, or approved unit management plan for improvements to the Belleayre Mountain Ski Center, provided that they are substantially consistent with this Agreement in Principle. Conversely, the Parties reserve all rights to challenge the FEIS, SEQRA findings statement or final permits for the modified project/lower impact alternative, or of the FEIS, SEQRA findings statement, or approved unit management plan for improvements to the Belleayre Mountain Ski Center, to the extent that they are not substantially consistent with this Agreement in Principle.

142. The execution of the AIP preceded the submission of any permit applications for the AIP Project or any environmental impact review of the AIP Project that may be required by SEQRA.

143. Due to the Governor's signature on behalf of the State of New York, the AIP effectively binds all state agencies under the control of the executive branch. This would include DEC, DOH and DOT.

144. There is no authority for any state or city agency to unconditionally agree not to oppose a project or to agree not to seek judicial review of permit decision prior to even an application for such project being submitted.

145. AIP also effectively commits DEC to issue permits for the AIP Project as it is barred from "...seek[ing] adjudication of issues of issues [related to the AIP Project] provided that the SDEIS and the new and modified draft permits are substantially consistent with modified project / low impact alternative described in the Agreement in Principle." (AIP at ¶34).

146. If the required review of the AIP Project demonstrates that it cannot be permitted consistent with the terms of the AIP, seeking adjudication of issues that give rise to this conclusion in the context of the DEC adjudicatory proceeding is the only mechanism available to the DEC to fulfill its statutory obligation.

147. State and city agencies involved in the review of the AIP Project have regulatory obligations which cannot be contractually limited.

148. Facts may come to light in the public review of the AIP that demonstrate either that (a) it will not meet permit standards; (b) it will have unacceptable adverse environmental impacts; or (c) it should not be approved taking into account social, economic and other considerations.

149. In such a case, the state or city agencies would be obligated by contract to take action or make decisions that are contrary to their statutory obligations.

150. AIP ¶34 demonstrates that the state and city agencies bound by the AIP have judged the AIP Project prior to the submission of any permit application or the performance of the required environmental impact review.

151. The state and city agencies have thus improperly abrogated their statutory responsibilities.

FOR A TENTH SEPARATE AND DISTINCT CAUSE OF ACTION:

THE AGENCIES OF THE STATE AND CITY OF NEW YORK, PARTICULARLY THE DEC AND THE DEP, HAVE A CONFLICT OF INTEREST IN MAKING A DETERMINATION ON ANY PERMIT APPLICATION AND IN FULFILLING THEIR OBLIGATIONS UNDER SEQRA BECAUSE THE ACQUISITION OF LAND FOR THE FOREST PRESERVE AND FOR WATERSHED EASEMENTS IS MADE CONTINGENT ON THE PRIVATE PROJECT'S APPROVAL.

152. The allegations in paragraphs 1-151 of this Petition are realleged herein.

153. The AIP provides for the acquisition of substantial land by the State of New York in the Forest Preserve (AIP ¶¶24-25) from lands now owned or lands which will be acquired by Crossroads.

154. Acquisition of lands by the State in the Forest Preserve is a long-term goal of the State of New York.

155. It is New York State's policy to make such acquisitions through voluntary sales.

156. The AIP also provides for the conveyance of Watershed Conservation Easements to the City of New York pursuant to the 1997 New York City Watershed Memorandum of Agreement ("MOA") (AIP at ¶ 26).

157. It is New York City's stated goal to obtain land or rights in lands to protect its watershed.

158. The obtaining of such lands or rights is a factor in its ability to continue to obtain and renew a filtration avoidance determination ("FAD") from the United States Environmental Protection Agency ("EPA") from the requirements of the federal Safe Water Drinking Act.

159. If New York City were not able to renew this FAD, it would have to filter its potable water supply, potentially costing New York City billions of dollars.

160. New York City is prohibited by the terms of the Watershed MOA and the terms of its DEC water supply permit from acquiring lands and rights in land to protect its watershed through means other than voluntary purchases.

161. Upon information and belief, all of the aforementioned land acquisition is dependent upon the approval of the private development project described in the AIP.

162. This dependency places the State of New York and its agencies and the City of New York and its agencies in a conflict of interest when exercising their regulatory jurisdiction over the private project.

**FOR AN ELEVENTH SEPARATE AND DISTINCT CAUSE
OF ACTION:**

**THE DEP HAS IMPROPERLY CONCLUDED THAT THE
STORMWATER POLLUTION PREVENTION PLAN CAN
BE APPROVED.**

163. The allegations in paragraphs 1-162 of this Petition are realleged herein.

164. The AIP states that DEP has reviewed the modified project and has determined that a stormwater pollution prevention plan can be prepared consistent with its rules and regulations. (AIP at ¶12).

165. There is no basis in DEP rules for the agency to issue a determination about whether a permit can be prepared consistent with its rules and regulations, particularly when the agency has no application before it.

166. This determination represents an improper commitment by the agency to approve the permit (albeit potentially with conditions) prior to receiving an application.

FOR A TWELFTH SEPARATE AND DISTINCT CAUSE OF ACTION:

THE COMMITMENT ON BEHALF OF THE DEP TO PERMIT THE USE OF ITS PINE HILL SEWAGE TREATMENT PLANT IS INCONSISTENT WITH ITS POLICIES GOVERNING THE USE OF THE PLANT BY OUTSIDE USERS.

167. The allegations in paragraphs 1-166 of this Petition are realleged herein.

168. The AIP calls for the use of the New York City owned and operated Pine Hill wastewater treatment plant for the wastewater generated by the Project.

169. Upon information and belief, DEP has rules, regulations and guidelines concerning the use of the wastewater plant it owns and operates.

170. The use of one of its wastewater plants for a private development is inconsistent with those rules, regulations and guidelines.

FOR A THIRTEENTH SEPARATE AND DISTINCT CAUSE OF ACTION:

THE DEC HAS COMMITTED TO IMPROVING LAND IT OWNS WITHOUT FIRST COMPLYING WITH SEQRA.

171. The allegations in paragraphs 1-170 of this Petition are realleged herein.

172. The AIP requires DEC to make improvements to trail head parking and information kiosks to enhance opportunities for hiking and fishing access on State lands on the Route 28 Corridor between the Towns of Olive and Andes (AIP ¶39).

173. As this action is part of an integrated proposal set forth in the AIP, it must be reviewed as part of the overall action which will be the subject of an EIS.

174. Because the overall action will be subject to an EIS, the commitment by DEC to take this action prior to the adoption of a final EIS and findings thereon, is a violation of SEQRA.

WHEREFORE, the Petitioners request a determination:

1. Declaring the AIP null and void;

The following further and consequential relief is requested:

2. Enjoining any agency of the State of New York or the City of New York from complying with the terms of the AIP; and
3. Providing such other and further relief that is warranted under the circumstances.

Robert H. Feller

BOND, SCHOENECK & KING, PLLC
Attorneys for Petitioners/Plaintiffs
111 Washington Avenue
Albany, New York 12210
Telephone: (518) 533-3222

Dated: January 3, 2008