Minutes of the AOPA Committee of the
Natural Resources Commission

December 19, 2007

AOPA Committee Members Present
Jane Ann Stautz, Committee Chair
Mark Ahearn
Robert Wright
Mary Ann Habeeb

NRC Staff Present
Sandra Jensen
Stephen Lucas
Jennifer Kane

Call to Order

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 1:07 p.m., EST, on December 19, 2007 in the Conference Room, Suite N501, Indiana Government Center North, Indianapolis, Indiana. With four members of the Committee present, the Chair observed a quorum.

Approval of Minutes for Meeting Held on September 18, 2007

Mary Ann Habeeb moved to approve the minutes for the meeting held on September 18, 2007. Mark Ahearn seconded the motion. Upon a voice vote, the motion carried.

Consideration of "Findings of Fact and Conclusions of Law and Nonfinal Order of Summary Judgment" with "The Vorndrans' Objections to the Findings of Fact and Conclusions of Law and Nonfinal Order of Summary Judgment, Dated November 2, 2007" in *Roebel, et al. v. Vorndran, et al.*, Administrative Cause No. 07-030W

Chairwoman Stautz reported this matter was continued on the motion of the Vorndrans' attorney. She added that both parties wished to have the oral argument rescheduled following the regular meeting of the Natural Resources Commission set for January 22, 2008 at The Garrison, Ft. Harrison State Park. After discussion by those Committee members who were present, and a review of their individual calendars, they agreed to set this matter for January 22 at 1:00 p.m., EST, at Ft. Harrison State Park.

Consideration of "Findings of Fact and Conclusions of Law with Non-Final Judgment" with September 26 objections by Rodney Ellis and with September 28 objections by Danny Brading and Tina Hortenberry in *Ellis v.Brading, et al.*, Administrative Cause No. 06-074F

Sandra Jensen, Administrative Law Judge, introduced this item. She said Raymond and Ann Terry purchased real estate in Washington County, Indiana for the "sole purpose" of selling the property to Danny Brading and Tina Hortenberry on land contract. Brading harvested timber from the property believing incorrectly that property actually owned by Rodney Ellis was included within his acquisition. In the process of the timber harvest, 76 trees were cut from the Ellis real estate without the consent of Rodney Ellis. Jensen reported that Raymond Terry and Ann Terry informed her they would not attend the oral argument on objections due to Raymond Terry's ill health.

Rodney Ellis said his objections were set forth in the "Re: Notice of Filing Findings of Fact and Conclusion of Law Non Final Judgement". He then read these objections to the AOPA Committee. He complained about the absence of from oral argument of Raymond Terry and Ann Terry.

Robert Wright asked Ellis whether he obtained an estimate as to how much it would cost to repair damages to his property caused by the timber harvest. Ellis responded, "Not full estimate, no." He added that there were ruts and inferior logs were left behind on the site.

Ellis said he never saw a land contract from the Terrys to Brading and Hortenberry. Chairwoman Jane Stautz responded that the matter before AOPA Committee was liability for and damages measured as stumpage value and incidental damages to the Ellis real estate. The AOPA Committee did not have jurisdiction to decide the terms of the land contract.

Mary Ann Habeeb added that the number of Respondents did not determine the amount of damages. Brading was ordered to pay triple stumpage value, and this amount is the maximum that the Commission could award under the Timber Buyers Act for loss of timber.

Ellis complained that the sole non-attorney member of the AOPA Committee was not present. The Chair responded that with four of five members, a quorum was present. There is no requirement that a non-attorney participate in a particular matter. "We meet statutory requirements, and we will try and do the best of our ability here."

Tina Hortenberry said Ann Terry was her mother. She said their absence was "because my step-father is in real bad shape. He's on oxygen." She said her mother and step-father had nothing to do with the timber harvest. "They put up the money" to buy the real estate, and "that was it." Hortenberry said she and Brading did "not mind paying" Ellis for the actual value of stumpage, but they objected to paying triple stumpage value because the person who sold them the property "walked the property lines five times with

us, and we thought [the Ellis real estate] was ours." She added, "As far as the ruts and all that, we was going to clean that up. I'll get rid of the tops in the woods."

Mark Ahearn asked Hortenberry if she or Brading talked with Ellis before they began the timber harvest. Hortenberry answered, "No, we started doing what we needed to do with all the septic, until I got a phone call from Mr. Ellis, several times, cussing and ranting and raving that we was on his property, that he was going to sue us. He even told me he was going to shoot Danny Brading if he come on his property." She added that after the telephone calls from Ellis, Brading ceased harvesting timber.

Ellis denied swearing at Tina Hortenberry. He said, "I was a perfect gentleman."

Carl Miller spoke as the attorney for International Wood. "The findings of the Administrative Law Judge have to be made upon evidence which is actually introduced at the hearing. In this instance, with respect particularly to the objections of Mr. Ellis are made in a proceeding in which he had the burden and received a negative judgment" as to International Wood. "That presents no issue with regard to International Wood, and, therefore, other than entering our appearance and noting that were here, we don't have to go on."

Ellis said International Wood paid one of the truck drivers that went on his property. "That should go for something."

David Nachand spoke as the attorney for Koetter Woodworking, Inc. "What really happened on the property when the timber was cut, as you've heard, Koetter doesn't know and International doesn't know. Mr. Ellis wasn't there either, but from the admissions that were made in the hearing and before you here today, Mr. Brading apparently simply made a mistake. I'm not for certain that the evidence at the hearing actually proved beyond a shadow of a doubt that all of the trees were actually on Mr. Ellis's property. Even assuming that, it appeared to have been an honest mistake on the part of Mr. Brading and Ms. Hortenberry." Nachand added the liability "was extremely clear in this case. After Mr. Ellis provided his testimony, both Koetter and International Wood moved for judgment on the evidence which was granted. He directed the attention of the AOPA Committee to Finding 73 which illustrates that Ellis himself testified he had no proof that either Koetter or International Wood purchased standing timber or conducted or directed the timber harvest. Nachand reflected that Ellis is not without recourse. He will have a judgment against Brading in the amount of more than $16,000.

Ahearn said his inclination was to approve the nonfinal judgment of the Administrative Law Judge. While the Committee was in deliberations, however, he asked, "Would we consider remanding the portion of this that has to do with damage to the property for the purpose of submitting evidence, exclusive of the stumpage value of the trees portion of the evidence?"

Mary Ann Habeeb responded, "I'm kind of troubled with that only because the [Claimant] was given the opportunity to present evidence at the hearing, and that's what

the hearing was all about. To reopen the evidence again doesn't seem fair to the other parties who have already expended time and resources coming forward to hearing and forward yet today. I understanding where you're coming from, but I don't understand how we do that fairly today since the evidence was closed. That's my concern on that, and the precedent that would be set."

Mark Ahearn moved to approve the "Findings of Fact and Conclusions of Law with Non-Final Administrative Judgment" by the Administrative Law Judge as the Findings of Fact and Conclusions of Law with Final Administrative Judgment of the Natural Resources Commission. Robert Wright seconded the motion. Upon a voice vote, the motion passed 4-0.

Rodney Ellis expressed dissatisfaction with the decision of the Administrative Law Judge and the AOPA Committee not to hold Raymond Terry and Ann Terry responsible for the timber cutting and the resulting damages. Ahearn responded that the AOPA Committee action "becomes an appealable judgment in the courts. There are plenty of people that do that. They take our determination and say 'thank you, very much', and then they take our judgment to court. This is the next step."

Ellis asked, "Then what would happen next. The final AOPA decision would come in the mail?" The Chair responded, "Yes." Judge Jensen added, "You'll probably get the final agency decision in the mail shortly after Christmas."

Consideration of "Modified Findings of Fact and Conclusions of Law and Nonfinal Order of Summary Judgment" with "Objections of Jack and Susan Griffith to Notice of Entry of Modified Findings of Fact and Conclusions of Law with Nonfinal Order of Summary Judgment" in Galbreth, et al. v. Griffith, et al., Administrative Cause No. 07-122W

Steve Lucas, Administrative Law Judge, introduced this matter. He identified a typographical error in the Nonfinal Order on page 16, the fourth sentence of the paragraph enumerated as (2). He said the reference to "IC 35-21.5" should be to "IC 25-21.5". He asked that the findings be considered with this error corrected.

Matthew Yeakey spoke as the attorney for Jack and Susan Griffith and presented their objections. He said the primary basis for the objections is that the Elkhart Superior Court, Cause No. 20DO-1001-PO-00114, resolved the dispute in an order entered July 9, 2001. The order set forth the dividing line between parties for their riparian rights. An enforcement order was entered by the Elkhart Superior Court on August 5, 2002. He said, "The doctrine of *res judicata* has long been the law to bring finality to disputes." Yeakey argued that if the Administrative Law Judge's nonfinal order were not set aside and replaced by an Order which reflected the order of the Elkhart Superior Court, continuing litigation would be invited between the Galbreaths and the Griffiths. He said, "The ALJ did properly find that *res judicata* applied but then went on to enter an order which would be substantially different than the Superior Court Order." Yeakey also

urged that the summary judgment was procedurally flawed because it would provide for administrative review but there is no order from the Department of Natural Resources to review.

Yeakey referenced the Elkhart Superior Court Order of July 9, 2001. He said the Order provided that Galbreath must "refrain from interfering with or obstructing the use of Petitioner's riparian rights to Simonton Lake. Said riparian rights shall be defined as a point commencing from the property line of the Petitioner 90º out and into the middle of the lake." He said it was also at that time that the survey, which is included in the Nonfinal Order, was admitted into evidence. Yeakey said the Galbreaths were ably represented at the hearing before the Elkhart Superior Court, and they had the opportunity to present evidence. They did so, and their contention was the riparian boundary was the line identified in the survey as the "rope fence line".

Yeakey said the Griffiths specifically objected to the Administrative Law Judge's finding of fact in paragraph 26 which limited the scope of the proceeding to (1) identifying the appropriate riparian boundary between the Griffiths' real estate and the Galbreaths' real estate; and, (2) entering an order as to activities by the Griffiths and Galbreaths (which can also bind their successors or assigns) in relation to the riparian boundary. He said the line had already been identified by Division One of the Elkhart Superior Court. Yeakey said the ALJ also erred in having the Galbreaths employ a registered land surveyor to prepare a survey "as to how the ALJ defined that line. Once again, that's improper. Regardless of whatever survey Mr. Galbreath and Mrs. Galbreath present, it won't be in conformance with the line adopted by the Elkhart Superior Court."

He said in two key paragraphs, the Elkhart Superior Court stated that in defining the riparian rights of the parties, "the Court now sets the dimensions of the property extending straight out from the seawall at the point determined in the survey. The Griffiths' extension shall be 67.47 feet at its widest point in the lake. The Galbreaths' extension shall be 42 feet at its widest extension in the lake. Said off-shore boundary shall extend into the lake in a line perpendicular to the shore where the shoreline approximates a straight line." Yeakey then contended that the survey in the Nonfinal Order "sets out those very dimensions." He said, "Obviously, the trial court adopted that survey."

Yeakey said his clients also objected to the finding that the Elkhart Superior Court had adopted the second element of *Nosek v. Stryker*. What the Court did was determine, while the lots on North Shore Drive are not perfectly rectangular, they meet at what are very close right angles to the shore. The easiest way to define that line is "as set forth in the *Bath* decision, which basically says to extend out the property lines into the lake." He said he thought it was over-looked by the ALJ that the Elkhart Superior Court found in its Finding 10 that the parties were ordered to "establish a line running parallel from their respective property lines so as each party and their respective piers, boatlifts or boats would not encroach upon the others." Yeakey said the ALJ stated that if the Elkhart Superior Court had intended to say he was extending onshore property lines into the lake, he would have ordered the extension of onshore property lines into the lake. Yeakey

urged that in Finding 10, that's what the Court provided. "The Elkhart Superior Court adopted a common sense approach by extending onshore property lines."

Mary Ann Habeeb asked Yeakey to clarify his procedural argument. Yeakey responded that under the Lakes Preservation Act, the Commission can "resolve disputes of riparian rights between landowners in, basically, an original action. What could have happened in this case five years ago" is that the Galbreaths could have initiated an action before the Commission. "In this circumstance, there was no determination at that level. Basically, what the Galbreath pleading asked was a request for administrative review asking an administrative agency to review an order from a court of general jurisdiction. My training has always been that courts review administrative agencies. It's not the other way around. In this circumstance, I believe there was already a procedural defect at the beginning. What the Natural Resources Commission should have done is simply say 'There is already a decision by a court. We adopt its findings. If you think there is a violation, go back to the Elkhart Superior Court.'"

Habeeb asked why the Griffiths would not consider this proceeding as a determination of status under IC 4-21.5-3. What the Administrative Law Judge determined is that the Elkhart Superior Court had made a decision and that the decision was *res judicata*. How does the ALJ's determination actually differ from the order of the Elkhart Superior Court?

Yeakey responded that the Administrative Law Judge was entering a new decision because he was asking for another survey. The Elkhart Superior Court had already adopted the survey referenced in the Findings. "The survey that Mr. Galbreath presents, ultimately, is going to be different than the survey line that was adopted by the Elkhart Superior Court Division Number 1."

Habeeb asked Yeakey how he reconciled that the Elkhart Superior Court "talks about a line perpendicular to the shoreline?"

Yeakey responded, "Very simply, where it approximates a straight line, the only line that's approximately perpendicular, that is the line that extends along the property shore. I think anybody…. This is not a geometry test. Anybody would say that that line that extends out into the lake is perpendicular to the shore. Without getting the protractor out and without trying to determine exactly where it is."

Mark Ahearn asked, "And yet you surmise that a surveyor will bring back something different?"

Yeakey responded, "I surmise that, sir. I surmise that because, basically, I think it's probably going to be very close to what the rope fence line is as depicted in the survey, right there. That was the argument that Mr. and Mrs. Galbreath had made previously."

Ahearn directed attention to Finding of Fact 21 by the Administrative Law Judge. He asked why Yeakey believed having a survey depict the line described in Finding 21

would be contrary to the order of the Elkhart Superior Court. Would not having a survey be consistent with and memorializing the order?

Yeakey responded, "Because, basically, what you do depends on where you place that perpendicular line." He referenced the initial language of part G of the Elkhart Superior Court's order which states "For the purpose of defining the riparian rights of each" of the parties "the Court now sets the dimensions of the property extending straight out from the seawall at the point determined in the survey."

David Morrical spoke as the attorney for Thomas J. and Julia Galbreath. He said the Elkhart Superior Court originally resolved a dispute between the Galbreaths and the predecessors-in-interest of the Griffiths in an Order entered July 9, 2001. The Court determined that the riparian rights of the parties commence from the property line of the petitioner 90º out to the middle of the lake. The Elkhart Superior Court clarified its ruling on August 5, 2002 when it defined the riparian boundaries of the parties "as a line perpendicular to the shore where the shore approximates a straight line." Since the Griffiths encroachment of this line indicated either that they did not understand the Court's order, or that they chose to ignore it, they brought this action to have the line "made crystal clear" and consistent with the order of the Elkhart Superior Court.

Morrical reflected that the Griffiths now urge that the principles of collateral estoppel preclude the instant administrative proceeding. "However, this action makes no attempt at re-litigation of any claims or issues but was merely brought to clarify and settle the boundary consistent with the orders of the Elkhart Court. In fact, the Administrative Law Judge gave full deference to the Elkhart Superior Court, specifically limiting the scope of his review to identifying the appropriate riparian boundary and entering an order in relation to that boundary."

Morrical identified the three-tier approach of *Nosek v. Stryker* upon which *Bath v. Courts* is founded. He observed that the NRC had recently adopted a nonrule policy document, just posted on its website, which mirrors the *Nosek* decision and provides additional guidance concerning the delineation of riparian lines. Based on the facts, the Administrative Law Judge determined the Elkhart Superior Court determined to apply the second tier of *Nosek*. "Under the second tier, where the property lines intersect the shoreline at obtuse or acute angles, as in this case, the boundary should be drawn at a right angle to the shoreline." On this basis, the Administrative Law Judge ordered that a land surveyor be engaged to memorialize the line formed by a perpendicular from the point previously determined as the division between the two riparian owners at the shoreline. "This order is hardly at odds with the 2001 and the 2002 Orders of the Elkhart Superior Court. In fact, it merely gave the previous orders a physical implementation in the name of clarity."

Morrical said the order of the Administrative Law Judge has been carried out, and at 10:00 a.m. this morning, "we were able to get the survey drawings. If you'd like to see those, I'll make those available."

Robert Wright indicated he would like to see the survey drawings. Yeakey objected. The majority of the AOPA Committee sustained the objection. The Chair observed the drawings had "not been in the record."

Morrical urged, "Since the ALJ's nonfinal order is in complete accord, and merely clarifies the Elkhart Court's Order, the current action is not a re-litigation of the claims and issues previously determined by the Elkhart Superior Court. In fact, if anyone is attempting to re-litigate the decision of the Elkhart Court, it is the [Griffiths] since the perpendicular line ordered by the Elkhart Court is at odds with their desired extension of the onshore property line. The Griffiths claim that an extension of the onshore property line is minutely, imperfectly perpendicular. It's a gross mischaracterization of a property which would encroach by 20º the perpendicular boundary ordered by the Elkhart Superior Court…. Even a person with an elementary school understanding of geometry would recognize that the extended onshore boundary of the property line is not perpendicular. In fact, the property lines aren't even parallel. If you extended those out into the lake, the farther out you go, the wider they get. The nonfinal order of summary judgment does not change the line determined by the Elkhart Superior Court. It merely orders a new survey, of the line by the Elkhart Superior Court, be drawn and that a physical line be placed to identify the line in the water." We ask the AOPA Committee to affirm the nonfinal order of summary judgment.

Ahearn asked Morrical, "Why not go to Court." Morrical responded that the Lakes Preservation Act now gives jurisdiction to the NRC to decide riparian boundary disputes. Because there was a dispute as to implementation of the previously determined line, the Galbreaths determined the Commission was the proper entity to address implementation.

Habeeb observed that she was surprised there was not a motion to dismiss, for failure to exhaust administrative remedies, filed in the original action before the Elkhart Superior Court. The Administrative Law Judge observed that the breadth of the Lakes Preservation Act had been expanded significantly since 1997, with the beginning of the expansion occurring in 2000. The jurisdiction of the Commission to decide riparian rights disputes regarding pier placement has been clarified, but it was probably still uncertain at the time the civil action was initiated.

In response to the arguments by the Galbreaths, Yeakey urged "the argument that this new survey is going to be a physical implementation of an existing order is wrong-headed. There is already a physical implementation of the order as evidenced by the Elkhart Superior Court specifically referencing and adopting the survey that you have before you." He asked that the AOPA Committee reverse the findings of the ALJ to adopt the final order of the Elkhart Superior Court.

In replying to the response, Morrical stated, "We want the Orders of the Elkhart Superior Court upheld. He dictates a perpendicular line. That's what we want."

Habeeb observed, "I'm not seeing why we would change the Order if we believe that it's consistent with the Elkhart Court. If it's not consistent with the Elkhart Court, I guess the

Judge later will tell us. But it looks to me like it is consistent. I'm not seeing a procedural defect because I think this forum has the ability to make a determination of status" in exercising its jurisdiction.

Chairwoman Stautz added that she concurred with Habeeb's perspective.

Ahearn observed the controversy is not whether the Orders of the Elkhart Superior Court should be given *res judicata* effect. "Everyone seems to agree with that they should." The controversy is because the parties have markedly different postures as to what the Orders provide.

Yeakey stated the Elkhart Superior Court may have failed with mathematical precision when he "says something is perpendicular to the shore. That property line, if you look at it, from a layman's perspective, and not getting a protractor out, is perpendicular to the shore. It looks it to me. At first glance, if you're looking at that as a judge, it would be perpendicular. Even Judge Lucas, in his opinion, he even opined in a footnote that, if, in fact, they got an exact 90º, that Mr. and Mrs. Galbreath's pier would still be over the line and would infringe on the riparian rights" of the Griffiths.

Habeeb observed, "Maybe you just answered it when you said the Judge was failing in mathematical precision. Maybe it takes an agency with expertise in riparian issues to implement the Order. Whether a layman would have a different idea of perpendicular, and I consider myself a layman with respect to mathematics, but I've always believed from third or fourth grade mathematics in the idea that 90º is perpendicular, so I'm having no problem with giving that interpretation to perpendicular."

Ahearn asked Morrical, "How does the survey that [Yeakey] represents the Court has adopted fail your clients?"

Morrical responded, "I'm not aware of anything in any decision by any Court in the record of any official adoption of the survey. There has been no official recognition of the survey."

The Chair asked the Administrative Law Judge to provide his perspectives on the survey referenced in the findings.

Judge Lucas responded, "I think the Elkhart Superior Court decided the survey does identify the point on the shoreline that separates the two riparian properties." In this regard, the survey is critical.

The Chair asked, "The 'V' point?"

The ALJ continued, "Yes, the 'V' point." I think the decision of the Elkhart Superior Court says that from the "V" point "you draw a perpendicular". The survey does depict extended property lines for the properties at issue, and for all other properties in the neighborhood for that matter, but the Elkhart Court ruling does not say the extended

property lines into Simonton Lake determine of riparian ownerships of the parties or any of their neighbors. "It was and is my intention to give collateral estoppel or *res judicata* effect to the decision of the Elkhart Superior Court, but I don't think the Court ever says to identify the riparian boundaries by extending the property lines into the lake."

Yeakey again cited to language in paragraph G of the Court Order "extending straight out from the seawall at the point determined in the survey" and in the Court's Finding 10 referring to a "line running parallel to their two property lines so that each party's property lines would not encroach on the other's imaginary property line extending into the lake."

The ALJ reflected that these Court directives were part of what he looked to. First of all, "straight out" isn't at the angle the property line approaches the shore. "Perhaps more importantly", an extension of the property lines depicted in the survey cannot be parallel. The survey "does not show lines that are parallel." The lots depicted in the survey are not rectangles or even parallelograms. There are no parallel lines into the lake.

Ahearn inquired of Yeakey. The property lines would all "intersect, would they not, if you went away from the lake?" Yeakey responded, "If you go way into the lake, they would converge."

The Chair reflected, "No, they would converge if you go back from the lake." The widths of the properties are shorter away from the lake than at the shoreline.

The ALJ added that if you draw perpendicular lines from the intersections of property lines at the shoreline, the delineations of riparian zones in the lake would be parallel. Applying the Elkhart Superior Court's Order to draw perpendicular lines from a straight shoreline would result in parallel lines. Extending the property lines into the lake would not result in parallel lines.

Morrical added, "The only thing the [Elkhart Superior Court] references in paragraph G is the point on the seawall. That's where the perpendicular line is supposed to extend. He didn't adopt any existing property lines going out into the water. The original survey didn't have those property lines. [The predecessor-in-interest to the Griffiths] had those property lines added back in 2001. If you look at the recording date of the survey, it's in 2001 prior to the Court Order."

Ahearn asked whether the survey purported to show the riparian boundary at a 90º angle from the "V" point into the lake.

Yeakey responded, "No, what it purports is exactly what it is, sir, an extension of the property lines into the lake."

The Chair observed, "That's really the issue before us. Did the Judge intend to have a perpendicular from that 'V', or did he intend an extension of the property line?"

Habeeb reflected, "I think the Judge's very precise use of the word 'perpendicular' is a very precise use of a term of art. That would be the controlling term. I don't see a discrepancy between the proposed Findings of Fact and the Court's Order."

Ahearn added, "Nor do I. It seems to me that Findings 21 and 22 control." He asked Morrical if he was saying the Griffiths were not now adhering to the boundary formed by a perpendicular line from the "V" point.

Morrical responded, "What originated this action is the Griffiths were putting their pier across that imaginary perpendicular line. What we've asked for, in this action, is some kind of clarification and monument to mark that line so as not to have an encroachment."

The Chair observed that as currently fashioned, this proceeding was only to clarify the status of the riparian line. The Commission was not considering an enforcement action with respect to the pier placement.

Yeakey added, "Mr. and Mrs. Griffith certainly have a right to go to the Elkhart Superior Court No. 1 and seek enforcement because there are rocks and cattails and Mr. Galbreath's pier encroaching on the Griffiths' riparian area."

The Chair repeated that the administrative proceeding is not an enforcement action, and any violation of riparian zones is not now before the AOPA Committee.

Ahearn reflected that he believed the ALJ's findings and nonfinal order were correct. Giving final approval to the nonfinal order provides a fine point on the decision of the Elkhart Superior Court. He said his intention was "not to encourage more litigation," but it allowed "a court to say, 'I've reviewed the material and looked at it, and the Commission made a correct analysis, or they did not." In either event, "I think that we T-it-up for a decision by a court, either way," upon which the parties can have no questions. The AOPA Committee regularly reviews riparian disputes, and to achieve finality, we're learning we must have clarity and specificity.

Ahearn went on to reference "an oblique reference to mediation. Has that ship left the harbor?"

Morrical responded, "It is my understanding the parties were offered mediation" by the ALJ, "and both parties said, 'No'."

Yeakey responded, "From my clients' position it's somewhat different from what we're discussing. My clients want to be friendly with Mr. and Mrs. Galbreath. They do. From their perspective, Mr. Galbreath is someone who is difficult to get along with. I think that they would try to resolve their differences, try to do that. Obviously, from a prior litigation, you can probably infer Mr. Galbreath has had difficulty with his neighbor right next door to him. I represented the prior neighbor, but the short answer is 'No, they haven't foreclosed trying to resolve this.' Quite frankly, as I indicated in my argument, this is a lot of litigation and a lot of expense for both of these parties. It's continually

going on like this. What my clients want, and I expect what Mr. Galbreath wants, is what he paid for. They want their 67.47 feet of frontage along Simonton Lake. They want to be able to use their pier and be in peace. That's what they want. They don't want rocks and cattails along their shore. I imagine Mr. Galbreath wants to use his 42 feet, since he has 42 feet, and I'm sure he wants to maximize all of it. But the bottom line is that these folks have to live with each other, and my folks haven't foreclosed that."

Morrical said all his clients wanted was the right to use their riparian area as defined by the perpendicular line determined by the Elkhart Superior Court.

Yeakey said all his clients wanted was the right to use their riparian area based upon an extension of property lines into Simonton Lake as determined by the Elkhart Superior Court. "That's what they want."

Yeakey also observed there was no initial determination by the Department of Natural Resources "so Judge Lucas was not reviewing a DNR proceeding determining riparian rights." An interpretation of riparian rights was being made by the Commission in the absence of a DNR initial determination, "and that troubles me."

Ahearn inquired, "So you're asking under what authority Judge Lucas heard this."

The Administrative Law Judge responded that the Commission sometimes reviewed licensure determinations and sometimes considered disputes among or between riparian owners in the absence of a licensure determination. The Commission's responsibility to adjudicate riparian rights disputes is in the Lakes Preservation Act. "It's a somewhat unusual provision, and it's a relatively new provision."

He said he believed here there is a very narrow issue, the delineation of a riparian boundary. Even that issue has already been decided by the Elkhart Superior Court, and the AOPA Committee must properly give the decision *res judicata* effect. A determination of the riparian boundary is often the prerequisite to answering other more complex questions pertaining to usage among riparian owners and between riparian owners and the general public on public freshwater lakes. Memorializing a riparian boundary has direct significance to the riparian owners and also has regulatory significance to the DNR in the exercise of its responsibilities.

The ALJ referenced his "Entry with Respect to the Claimants' Motion to Strike" and that the absence of the DNR as a party made a complete adjudication of rights impossible. He suggested that the DNR is the regulatory authority and a party needed for just adjudication, particularly with reference to consideration of navigation issues and the public trust. He said he had intended to communicate with this Entry that, if the AOPA Committee intended to have riparian rights fully adjudicated, the dispute probably should be remanded to DNR before a Commission action. The Commission would then be providing administrative review of the DNR's determination, if a party sought review. "The reason it would go to the DNR is that memorializing this riparian line isn't the only thing." By illustration, if the DNR is a party, the regulatory agency may say, "You know,

we need five feet or ten feet of space along this riparian line where neither person can construct a pier. We need it so the parties won't continue to have a battle, and we need it because the public trust requires that space to be available." If the AOPA Committee were to determine the appropriate thing was to have a full adjudication, then remand to the DNR is what may be needed. "But if the totality of this proceeding is to memorialize the riparian line, that action is primarily a private matter, which has jurisdictional ramifications, certainly, but the DNR might not be necessary and having just a status determination to memorialize the line might be accomplished without the DNR. I think it's for you to decide what is enough."

Habeeb observed that the most efficient approach might be to have a full adjudication by the DNR and then provide any administrative review. Since neither party has requested a remand to the DNR, she was disinclined to "unilaterally have us do that since it wasn't before us in the first place." She added that she disagreed with any interpretation the current proceeding was reviewing the decision of the Elkhart Superior Court. "What we are doing is something different. What we are doing is looking at that Order and going the next step. It's not a review. A review would imply that we're changing it in some way or making a decision as to whether it was good or bad." What the Commission is doing is applying the decision in a manner that is clear to the parties and even to the DNR in acting upon a particular riparian line.

The Chair called for any further discussion by the Committee or for a motion.

Mary Ann Habeeb moved to adopt the "Modified Findings of Fact and Conclusions of Law with Nonfinal Order of Summary Judgment", including the correction of the typographical error referenced by the ALJ during the meeting, as the "Findings of Fact and Conclusions of Law with Final Order of Summary Judgment" of the Commission. Mark Ahearn seconded the motion. The motion carried 4-0.

Information Item: Natural Resources Commission Adoption of Nonrule Policy Document to Identify Riparian Zones within Public Freshwater Lakes and Navigable Waters (Information Bulletin #56), Administrative Cause No. 07-045A

Steve Lucas introduced this item. He indicated "this is a project that involved lots of folks with lots of special expertise." The Advisory Council created an informal workgroup or committee that included Council Members, professionals within the DNR and our staff at the Division of Hearings. A document was prepared using the reported decisions such as *Bath* and *Nosek* heard today, but it also included decisions in Caddnar from the AOPA Committee and statutes and rules to help clarify how riparian lines are drawn into public freshwater lakes and into navigable waters. He thanked the efforts of those who put the document together and said he believed it would be helpful to the DNR, the Division of Hearings, the AOPA Committee and the general public in fostering a clearer understanding of what principles would be applied in resolving disputes as to riparian lines. The *Galbreath v. Griffith* case just heard was a good example. Lucas said the nonrule policy document was a first effort, and with cases now on judicial review and

coming before the Court of Appeals of Indiana, he expected additional guidance in the near future. Changes to the document were inevitable. "But it's our collective best first effort, and I think it's a good one." He then outlined the document with particular reference to the drawings contained in the document.

Chairwoman Jane Ann Stautz said, "I think this has been great work by the Advisory Council, all the different DNR Divisions and particularly Law Enforcement and Water, and Steve Lucas with the historical perspective he brings.

Mark Ahearn added that he thought this effort was very helpful and should help improve an understanding of what we're doing where we have to draw riparian lines. Perhaps affected persons may come to see that if the result of their idea for drawing the line is a harsh one, that idea may not be what we implement.

Adjournment

At approximately 3:10 p.m., the meeting adjourned.