Minutes of the AOPA Committee of the
Natural Resources Commission
April 7, 2009 Meeting Minutes

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

NRC Staff Present
Sandra Jensen
Stephen Lucas
Jennifer Kane

Department of Natural Resources Staff Present
Ihor Boyko
Eric Wyndham
Jim AmRhein

Guests Present

Tom Young	Jeff Price
Deborah Albright	Paul Refior
Stephen Snyder	Cynthia Soames

Call to Order

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 8:28 a.m., EDT, on April 7, 2009 in the Garrison, Fort Harrison State Park, 6002 North Post Road, Indianapolis, Indiana. With all five members of the Committee present, the Chair observed a quorum.

Approval of Minutes for Meeting Held on January 13, 2009

Doug Grant moved to approve the minutes for the meeting held on January 13, 2009. Mark Ahearn seconded the motion. Upon a voice vote, the motion carried.

Oral Argument to Consider "Findings of Fact and Conclusions of Law with Nonfinal Order" of Administrative Law Judge, as well as "Objections to Proposed Order" by Cynthia Soames in the matter of *Young Oil Company v. DNR and Cynthia Soames*; Administrative Cause No. 07-191G

Stephen L. Lucas, Administrative Law Judge, introduced this item. He noted that Deborah Albright represents Cynthia Soames, Jeff Price represents Young Oil, and Ihor Boyko represents the Department of Natural Resources.

Judge Lucas said that two proposed amendments to the order were forwarded to the AOPA Committee members through email with respect to Finding 37 and Finding 43. He also asked the AOPA Committee to consider amending the final sentence in Finding 27 of the nonfinal order to read "Weeds growing within a firewall can weaken the integrity of structures at a well site." He said the use of "its" in the language to be substituted is indefinite and could be confusing. "With those three modifications, I would present [the nonfinal order] to the AOPA Committee."

Mark Ahearn asked for clarification in the use of "this order" contained in the last sentence in Footnote 1. Lucas explained that "this order" refers to the nonfinal order and what would "ultimately be a final order if the Committee accepted it." He said issues regarding the legal status of Young Oil were addressed in a preliminary order following party motions.

Deborah Albright began argument on behalf of Cynthia Soames and in support of her objections. Albright said the proceeding "has kind of a long and convoluted history between the parties. If there are factual issues that you want addressed, I will probably ask Ms. Soames to address them for you." She said the case is "very simple" factually, but the history between the parties has made it "difficult to resolve." At issue is whether three wells on Soames's property "should be plugged. What makes it complicated is that Ms. Soames and Young Oil, which was the permittee and which has the obligation to plug the wells, have a long history of litigation between them."

Albright said Young Oil leased the Soames property in order to produce oil. Soames and Young Oil ended up in the Indiana Court of Appeals "no less than twice before they got the issue of the lease resolved." Soames owns the property where the three wells are located. "There are many, many wells in this area." Albright noted that Soames wants to produce the three wells. Her "goal is not to plug and abandon the wells, but to make them productive, which is a good thing. I think the Indiana Department of Natural Resources rules and statutes definitely recognize that it is in both her interest and the interest of the State to make oil and gas resources productive." She said Soames was "blocked for an extended period of time" from doing anything for the wells because of the litigation between Soames and Young Oil. "Now the DNR wants the wells plugged. My client wants to make them productive, but the problem is the price of oil has bounced around like a rollercoaster since the time she and Young were able to get a final order from the Court of Appeals and from the Miami Circuit Court. [Soames] has not been able to find a lessee that is willing to take on this project." Albright said several persons have been interested in the wells, and this fact was brought to the attention of the Administrative Law Judge.

Albright said the price of oil is still "bouncing around." The "latest suitor for the operation of the wells has indicated that, because the price of oil is not very good right now, he doesn't want to take over the wells." He added that "if things change his interests in the wells will change, but that's been the history of this." Albright said the proceeding has been complicated because her client "believes with very good reason not

to trust Young Oil" to properly complete plugging and abandonment of the wells. During the course of the administrative hearing, "we bought up the fact that [Soames] was fearful that Mr. Young would take some of the equipment off of her well, and she bought the tract of land and the equipment from her mother's estate." Young testified when he closes wells for the DNR he "gets to keep everything." The nonfinal order "thankfully finds" that Young Oil does not acquire the equipment. "These aren't abandoned wells that [Young Oil is] closing for the DNR, these are wells that [Young Oil] permitted, and, therefore, [is] obligated to close properly." Young Oil is not entitled "to keep any of the equipment. To be fair, there are things we like about this order, and we appreciated Judge Lucas putting that in because I think that sends a message to Mr. Young that he is not to take the equipment, if, in fact, he goes forward to plug and abandon well."

Albright added that if the Commission were to order the wells plugged, "We had asked that the wells be plugged by a third party at the cost of Mr. Young. We had asked that the wells be in consideration for temporary abandonment, since Ms. Soames's intent was to continue making the wells productive. The [Administrative Law Judge] rejected those things. We don't agree with his rejection from a legal or practical perspective." Albright asked that the AOPA Committee not yet order Soames to close and abandon the wells. "That you give her a fair chance under these circumstances to make [the wells] productive again. That's not a legal judgment. That's a practical judgment."

Albright said the second objection to the nonfinal order is that "we don't think there is anything that would stop you from ordering a temporary abandonment of the well so that the owner could reopen them at the appropriate time when she gets a lessee that will be willing to take over the wells." She urged that the record reflects contradictions regarding the affect of temporary abandonment versus permanent abandonment. Young Oil "argued that it would be more complicated and expensive to temporarily abandon than permanently abandon." The DNR representative testified "in the opposite". Young also testified that "it would be really simple to re-drill and reopen a permanently abandoned well. I have some doubts about that, but that was [Young's] argument."

Albright said the third objection is to a conclusion that "my client could not interfere with the abandonment of the wells. We were concerned about that because of the prior history of the parties, and Mr. Young's statements in the hearing, [Ms. Soames has] good reason to be fearful that if Young goes forward and does this work it might not be done correctly and/or [Young] might, in fact, try to take some of the equipment that [Young] thinks is his." The word "interfere" was "too general and too vague" as to Soames's rights to observe the work going on so that Soames could protect her interests. The Administrative Law Judge did "kind of" clarify, and "we are appreciative of that." The Administrative Law Judge indicated he would amend the language of Finding 43, which addresses the issue, to allow Soames, at her own expense, to select a licensed professional geologist, or another qualified professional approved by the DNR, to observe and record the plugging and abandonment of the wells. "I think that's sort of good because it does kind of give [Soames] guidance on what she can do to try to protect her interests in the event Young is ordered to go forward with this. However, we had brought up the fact that we might want to videotape or photograph this. The finding

doesn't really address that. We're really not sure why we need DNR permission to watch this process or to select a professional to watch this process." She indicated that Soames "might not want a geologist, she might want some security guard who is trained in videotaping techniques…. We don't see that there is any reason why it should be a professional approved by the DNR." She requested that Finding 43 be amended to reflect Soames's right to have a representative of her choosing record the plugging and abandonment of the wells.

Albright concluded, "It's a simple case, but it's a rather complicated solution. In sum, we want to keep these wells open. We want to keep them productive. My client bought these wells and bought the equipment in order to make them income producing. We just haven't been able to secure a lessee under the economic circumstances we have been working in. Plus we were hampered by the protracted litigation. If Young is to go forward, we want the right to go out and watch him and make sure that he does it properly. We would be asking that we would be entitled to choose that person" for the observation. "We think that that is my client's right." Albright said Cynthia Soames was present to answer any questions.

The Chair asked whether Committee members had questions for Albright. Hearing none, the Chair called Jeff Price.

Jeff Price presented oral argument on behalf of Thomas Young who he said was also present. Price agreed with Albright that there was a "long history" between Young and Soames, but the history with regard to what was before the AOPA Committee was "relatively straight forward. I don't know that the prior history really bears on the questions that should be before you." Price said his client "would like to get out of the middle of this." The lease Young Oil held was terminated in either 2005 or 2006. "So, for quite a long time the landowner has known that [Young] is not going to be operating the wells. In our view, [Soames] has had plenty of time to decide what to do."

Price said Soames's choices are "relatively straight-forward." She can take control of the wells, and assume legal responsibility with the Department, or she can allow Young to plug and abandon the wells. "It's that simple. That choice has been presented to [Soames] more than once. I think it may have occurred in front of Judge Lucas. Unfortunately, [Soames's] answer each time is, 'No. You have responsibility. No. I don't want to take control, but no, you can't close the wells.' This, if you can say it this way, this mantra has been going on for a long time."

In the "most conservative" figures, the wells "have not been in production or 'operating,' as the term is used," since 2006. "Three years is long enough." Price said Soames has threatened to have Young arrested if he attempted to close the wells. "That's in the record." Letters from Soames to Young Oil and to the DNR's James AmRhein were entered into the record, and these contain "outrageous statements in my view. 'It's my land. These are my wells. You are going to do it my way.'" Price said this evidence is the reason "we asked that there be a directive to [Soames] that she not interfere with the closing of the wells. My client is prepared at anytime to come in a close the wells."

Price said the January nonfinal order directed Young to close the wells by June 30, 2009. "Well, gee, it's now April. If we assume that we need six months, that window of time, we are going to have to reset the clocks. Secondly, I thought 'interference' was pretty straight forward. The object is for my client to come onto the land and close the wells. We don't want [Saomes] to interfere with either [Young Oil's] entry onto the land or the plugging of the wells." Price said if Soames wished to have an observer present, "that's fine. It's the interference with the action in question. I don't know that we need any clarification on it."

Price said that Young has often plugged and abandoned orphan wells leased to other operators at DNR's request. "So, he is very familiar with the process. He is concerned about what's going to happen. If he is instructed not to remove the equipment, that's fine. If he's instructed to remove the equipment, that's fine. But, to date, it appears that whatever [Young] is ordered to do, Cynthia Soames may have some quarrel with that. We just want to be clear. We will do whatever my client is told to do. All we ask is that we are supported in that effort in following your directive."

Price added that when a well is plugged, "very likely there will be oil in the system. Again, all my client wants is a directive" regarding treatment of the oil. Price said his client was concerned that "if he does anything that is not to Cynthia Soames liking, then he is going to hear about it later when [Soames] sues him again. [Young] just wants to be done with this. That, I think, is the most important thing".

Price said he agreed with Judge Lucas's nonfinal order. "We've been waiting a long time to basically finish what was started a long ago with the initial lease. My client is prepared to go forward just as soon as he can receive the directive. It's very important that we reset the clock so that [Young] has enough time to get in." Price noted crop season is approaching. "These wells are surrounded by arable land. So, whatever you decide is fine, but we simply have to act based on your directive. If it's to go in now, then I guess the farmer will have to wait to plant. If we are to go in later—I don't know how we cope with that, but we believe it's high time the wells be closed. And I think that's a clear message from Judge Lucas's order."

The Chair asked about the length of time it "normally" takes to plug and abandon a well.

Thomas Young explained one well is in the middle of a "muddy field", and weather conditions can impact the length of time to complete the work. He said the wells were constructed in the 1980s, and "sometimes things are stuck in the wells…. You never know what you are going to run into." He said DNR requires the equipment to be removed from a well in order to plug the well with cement. "Every well is different, so I hate to put an exact timeframe on it. It could take days to pull the things, or it could take hours, or sometimes it could take weeks. You just really never know."

Mark Ahearn asked, "Was there evidence in the record to somehow suggest that June 30 was an appropriate setting of time?"

Price answered, “What I sensed it was just an arbitrary six month period.”

Judge Lucas added, “That would be correct. It was an arbitrary six months.”

Price said an extension from the June 30 date “makes sense because of the vagaries of the weather, and the fact that you never know what you are going to find in the well.”

Mary Ann Habeeb asked whether Young Oil objects to a request to temporary abandon the wells.

Price responded, “To the extent that [Young] remains liable, yes.”

Habeeb then asked, “To what extent would [Young] remain liable?”

Young responded, “I’ve never temporary abandoned a well before, but the way I understand it, there would be a testing process. The testing process could cost me as much as it would cost to abandon the well. So, I really don’t want to spend the money. Just because you go and pressure test one of these wells, it doesn’t mean it’s going to pass. If it doesn’t pass, then it still has to be plugged. I really don’t want to incur the cost of testing a well, and then I’m still liable to come back and plug it if nothing happens with it in the future. I carry a bond with the State, and that has an added cost. There are added costs, and there is no guarantee that there can be temporary abandoned. Eventually, I still have to come and abandon the well if [Soames] can’t find somebody.” He added that Soames could take over the wells and complete temporary abandonment on the wells or “do whatever she wants with them.”

The Chair then called upon Ihor Boyko, attorney for the Department of Natural Resources, to provide oral argument.

Boyko explained the matter began as a notice of violation against Young Oil Company. He said Cynthia Soames was added to the proceeding, at the request of Young Oil Company, as a necessary third party. Boyko said the Department “pretty much” agrees with the nonfinal order as written and the suggested modifications.

Boyko added, “There’s really a simple solution to this case. All that needs to happen, if it’s that important for these wells to remain open to Mrs. Soames, she can just transfer the permits to her name. That’s all she has to do. That’s a relatively simple process.” He said the DNR has heard “for months and months” that Soames was looking for a new lessee. “Nothing has happened. We heard this even at the hearing. Even with the price of oil down, there are probably hundreds of wells in the State of Indiana that are still being operated, even new wells that people are taking over.” He said Soames could transfer the wells to her name after posting a bond. “Other than that, she would have to pay annual well fees, but there is nothing really preventing [Soames] from taking over these wells, in which case she could decide whether to temporary abandon the wells or to keep them open until she finds someone to lease them.”

Boyko responded to the second objection by Soames in which she sought to have Young Oil provided temporary abandonment rather than to plug and abandon the wells. "The Department's view on this is that Mr. Young and Young Oil Company do not have the legal ability to temporary abandon the wells at this point." Temporary abandonment is an interim status for a lessee to hold a well for later production. He said Young Oil no longer had the leases to produce oil from the wells. "We agree with the conclusion of Judge Lucas on this. And, again, if Ms. Soames takes these wells over, she can go ahead and temporary abandon them."

Bokyo responded to the third objection by Soames. "I think Judge Lucas supplemented his findings with good ideas as to what is interference and what is not. One thing that needs to be mentioned is that by law a DNR representative has to be there to witness the plugging of a well. There is going to be a DNR representative there anyway. That's required by statute and rule. The Department also believes that Young Oil Company has the necessary experience these wells properly. He has done that in the past."

Boyko said, "As far as the June 30 date, the Department does not want to delay this much more if at all. Once you get into the fall weather, and the coming of winter, you get into some weather that isn't decent for plugging." He said the agency might not object to a short extension but "would like to stick with something that is in the summer or early fall."

Robert Wright asked Boyko how long he thought it would reasonably take to plug the wells.

Boyko responded that under ideal conditions, you could typically plug a well in one day. James AmRhein, Assistant Director of the DNR's Division of Oil and Gas, said he agreed and under best-case scenarios, the three wells could be plugged in three days.

Wright asked AmRhein how long plugging would require on the average.

AmRhein responded that "up to three days" per well would be average. "You're going to encounter some problems."

Mark Ahearn added, "We don't want to come up with an order that is going to set us up for failure."

AmRhein added he believed Tom Young was correct. "You don't know what you're going to get until you get over the well. But that [June 30 date] is still two months out. We think that's reasonable" to get the plugging and abandonment completed.

Mary Ann Habeeb said she had a question for AmRhein. "Mr. Price talked about finding oil in the system. Could you talk a little bit about that—what the significance of that would be."

AmRhein responded, "Normally, during the plugging process you're going to be pulling tubing from the hole, and you're going to be pulling some fluids out. He is going to be encountering a little bit of salt water and a little bit of oil. He would dig a pit to contain that. We would recommend that he line the pit in order to minimize any potential contamination. Once the well is plugged, he would be required to remove any free liquids. He would pump them out of that pit and properly close the pit itself."

Habeeb said she had a question regarding the weeds in the well. "That was, as I understand, the reason for the NOVs primarily. This started as an enforcement action. Are we resolving the NOVs in this action?"

Boyko responded that performance of the actions required in the nonfinal order would resolve the NOVs. He said that in addition to uncontrolled weeds, another basis for the NOVs was a "failure to operate the wells".

Habeeb observed that the original NOVs sought one of three options. Young Oil could operate the wells, temporary abandon the wells, or properly plug and abandon the wells.

Boyko responded, "Right," but once the leases to Young Oil "were terminated, the only viable option was to plug and abandon them." The NOVs were issued only to Young Oil Company.

Chairwoman Stautz provided an opportunity to Deborah Albright for rebuttal.

Mark Ahearn addressed Albright. "I would ask what's a reasonable time. You would like more time to have the wells become productive. How much more time?"

Deborah Albright responded, "That's the $64,000 question that every well owner has to try to cope with. I think Mrs. Soames has talked with at least three operators…. All have expressed interest, but all have for one reason or another not wanted to go forward. At this time, she continues to negotiate with them."

Albright continued, "One complication with the issuance of the June 30 closure date is the issue of crops. I think all of these wells, aren't they, are in a crop field?"

Cynthia Soames responded, "Yes."

Albright said, "We have a problem in that, if we try to close them in the middle of June, what does that do to our ability to plant crops and make that field productive?"

Ahearn asked, "What does that do? Will we be running over corn or beans?"

Albright responded, "Yes, basically…. The hearing judge was kind enough when we were initially litigating the case to make sure the wells would be plugged when crops were out of the field. Now, the crops are going to be back in the field. So, we like Mr.

Young's idea to give him additional time so that we can have additional time to, hopefully, figure out what we're going to do in terms of crops in the field."

Ahearn asked, "Whose crops are they?"

Albright responded, "My client's. She bought her mom's property from her estate. It's farmland and sits on top of a big oil field."

Doug Grant asked, "But if we give Young additional time, that doesn't preclude him from closing the well at any time prior to that final date, does it?"

Albright responded, "If you said October, he might still go ahead in June?"

Grant reflected, "Yes, he might still go ahead in June, so what do you get?"

Albright continued, "I understand that point. We would hope that if the AOPA Committee decides to let him do that, it would give him a reasonable window of opportunity that would allow for crops."

The Chair enquired. "Help me with the proximity of the three wells and access to those wells. Are they fairly close together? In the same field?"

Albright responded, "One is kind of in the middle of the field behind her house. The other two are fairly close together."

Ahearn asked, "If the wells were operated, how would people get to the wells to get equipment in or to service the wells?"

Albright responded, "They'd go through the field."

Ahearn asked, "Is there a challenge to closing them in the winter?"

Soames responded, "No, the best time would be in November, December, or January. The ground is frozen, and there would be less damage."

Albright added, "We also want to point out the wells have been in this state for the last eleven years. It's not like there's suddenly an urgent need to do this quickly nor has there been any allegation that there were environmental problems."

She reflected that Boyko argued Soames could sign papers with the DNR, and she could then operate the wells. "But there's liability that goes with that. There are quite a number of issues between the parties as to whether Mr. Young had actually damaged the Soames property. She doesn't know for sure what kind of liability she would be getting herself into."

The Chair asked, "By that statement, am I correct that the possibility of transferring the wells to your client's name, in going through the official licensure process, is not of interest to her at this time?"

Albright responded, "Well, obviously, part of this is going to depend on the outcome here. She could do that at any time. If she decides that's best for her, she could do that, but she would certainly ask not to be ordered to do it. The liability should be on the permittee."

Habeeb asked, "Wouldn't that liability end at the time" Young Oil performs plugging and abandonment?

Albright responded, "Yes, as soon as DNR certifies it."

Habeeb continued, Soames would "have the responsibility for it at that point in time?"

Albright responded, "Unless she re-leases the well field. If they're properly abandoned, that shouldn't be a big issue."

Ahearn asked Albright to explain her client's objections to the Administrative Law Judge's proposal for additional language to Finding 43: "Soames may, at her own expense, select an Indiana licensed professional geologist (or another qualified professional approved by the DNR) to observe and record the plugging and abandonment of the subject wells."

Albright responded, "Why should the person who's going to be out there have to be a professional of a certain stripe or approved by the DNR?" As long as Soames's designee does "it reasonably, and if they want to take pictures or whatever, that's okay, as long as they don't interfere. I think that will satisfy us. We just didn't understand why, if she didn't want to hire a professional geologist, she wanted to hire a local police officer or whatever, why that shouldn't be all right."

Stautz asked, "Is the concern around proper technique and closure and abandonment of the wells, or is it around security—whether you'd want a trained geologist versus a security guard?"

Albright answered, "I think that's a very good question. I think probably it's a little bit of both, but obviously the big issue before us is him not taking any of our equipment."

Habeeb asked whether the integrity of the plugging and abandonment could be handled by the representative from the DNR's Division of Oil and Gas.

Albright responded, "Well, we don't know who that is going to be, and we don't know how qualified he will be. That is certainly a help to us to know that will occur. We appreciate that. She might because of the history of this and because of the apparent

close relationship between the inspector and Mr. Young, who does a lot of work for the DNR, she might want someone independent."

Habeeb continued, "So she may want the geologist in addition to the security guard?"

Albright responded, "Yes, that's possible."

Habeeb asked, "What's wrong with the language that just says she doesn't interfere, because that leaves open the possibility, it seems to me, to be able to bring on anybody she wants without any qualifications?"

Albright responded, "If that's how you interpret that, then we would be happy with that. Our concern is that if she or somebody shows up with a video camera, they're going to say that's interfering. Oh, you know, you're watching us. You're interfering, whatever. We don't want there to be any further issues between these parties. We feel that we have to be very careful."

Habeeb asked, "Do you have a proposed definition of 'interfere' or anything like that. What I think the Administrative Law Judge was trying to do was strike a balance between the objections you had on 'interfere' versus what Young now wants. I'm struggling with a way to satisfy your concern about the word 'interfere' and his concern" that interference might otherwise occur.

Cynthia Soames stated, "I'm leaning more toward having a supervisor of an oil company come in and film this and make sure it's done properly. That way we can reopen the well, which we will do. We will have to re-drill that well, and I want to make sure Mr. Young did not damage that well to the extent it can never be reopened. The companies I've talked to have indicated that they would take responsibility for the entire field, which is 136½ acres and 24 wells. They're not interested in parceling it out per well. I don't want those wells damaged to the point where I cannot deal with it."

Habeeb asked whether the phrase "licensed professional geologist" would address this circumstance.

Soames responded that she doubted the supervisor for a petroleum production company would be a licensed geologist.

Albright responded, "If you would want to say it was okay for us to have people out there to watch the closure," that would be satisfactory.

Soames continued, "But if something is not being done properly, let's say the field representative shows up for ten minutes and leaves and says, 'Okay, Tom, go ahead,' and it's not being done properly, I feel like I have the legal right to stop the action."

The Chair asked for DNR clarification as to proper plugging protocol.

AmRhein responded, “Our division field inspector will be there for the entire plug to insure that it’s done to our satisfaction” with respect to the statutes and rules. “With respect to insuring that the well would be able to be drilled out, there have been times when you couldn’t get, say, some of the tubing out of the hole for various reasons. Alternate plugging methods are approved by the Division [of Oil and Gas] Director. If there’s some steel that’s left in the hole, and it has happened, you wouldn’t be able to go back in and drill it out very easily. To drill it out would take all kinds of money and all kinds of time to do that. I don’t want it to be thought that it would be easy to drill out these wills in the future if they’re all plugged. More than likely, they’ll be able to get all of the equipment out, but there could be occasions where you couldn’t go back in and drill it out.”

Ahearn asked, “If in plugging the well it becomes a matter of preference, here’s what we run into, I now need to make a decision, who does [Young Oil] ask? How can [Young Oil] walk away from that saying ‘I did it the way at least one of the people wants me to.’?”

AmRhein responded that Young Oil “would essentially ask for an alternate plugging method from our Division Director. We would require [Young Oil] to make several attempts to get all of the tubing out of the hole, and make sure that it’s clear, so he could fill it with cement like it’s required to be. If for some reason, [Young Oil] can’t remove the tubing, after many attempts, then he could ask for that alternate plugging.”

Ahearn asked, “Are we now to the place where whomever plugs and abandons the well, the burden is on them to do it to your satisfaction and not necessarily to the owner’s satisfaction?”

The Chair reflected, “That’s statutory.”

Habeeb confirmed, “Yes.”

Ahearn added, “If there’s an argument somehow that property damage has been done that’s for a court? That’s not relevant in terms of our focus?”

Habeeb responded, “Yes, I think that’s right.”

Price said there was a nuance that he wanted to be certain the AOPA Committee caught, “and I believe Mr. Ahearn’s questions or comments may have touched on it. In the record, there’s a letter that Cynthia Soames sent to Mr. AmRhein. There’s also a letter in there that she sent to my client telling him, in no uncertain terms, he’d be arrested if he came on the land. When we had the hearing in front of Judge Lucas, at one point, and again it’s in the record, Ms. Soames actually suggested that if the order came down to plug the wells, that she might take action to stop that. There was some question about ‘You mean file a lawsuit against the DNR.’ So, probably, as you suggest, my client intends to plug well per your order and to your satisfaction. I have the feeling the landowner doesn’t see it that way. The concern is we’re going to do it as you direct, and

if she's not happy with that, I think she has no one to blame but herself. She has had at least since 2007, and probably since 2006, to take responsibility for these wells, and then temporarily abandon or operate, whatever she wants to do. And, yet, today she continues on with 'I just need some more time. I'm going to find an operator.' I think that's why the Department is tired of waiting."

Price continued, "One other question that came up earlier, and I don't think you heard from my client. The problem with the June 30 deadline is that we don't know what we're going to get. It's down in the ground. We'll just have to see. It could take an hour. It could take a day. We don't know, and as I think you suggested, he does have a business to run. It's not like he's just standing around waiting to do this, so we need some time. The suggestion that we wait until this fall, or do it this winter, I guess that's your call. There are going to be crops in the field, but, again, my client's concern is 'I'm following the Department's directive, and I don't want to be exposed to liability,' in other words, another claim by Mrs. Soames that we've damaged the crops. We're trying to follow your directive, whatever that is. Mr. Young's thought as we were listening to everybody talk about the deadline was maybe some time in the fall, but the crops…may not come out until October or November. Whatever you think works. We just need enough time to get organized to get out there. Thank you."

Ahearn asked, "Who would pay for crop damage? What happens if an operator goes over the field with equipment and damages crops?"

Young responded, "The oil and gas lease usually states that an operator will pay a reasonable amount for crop damage, but unfortunately we have no lease."

Price added, "The lease was terminated" between Young Oil and Soames.

Young continued, "The lease gave me the right to go and terminate the well or whatever." With termination of the lease by the civil court, "I don't enjoy the rights under that lease."

The Chair reflected, "With regard to planting dates, if it's corn or soy beans, you have time. You can plant in May or sometimes as late as June. It's not ideal yield, I know, but sometimes you can do that. There is, I think, opportunity here if the rain would stop, and fields dry out, to have some access there. Keep that in mind, as well."

Ahearn addressed Debra Albright, "Why would injunctive relief not be available to your client, if she perceives there is some sort of irreparable damage occurring for which there is no remedy available at law, rather than interfering or telling [Young Oil] to stop and putting up barricades?"

Albright responded, "I would certainly never advise a client, legally, to disobey a DNR order. As to whatever the Commission issues by way of an order, her choices are whether to obey it or to take an appeal. That's going to be up to her, but we wouldn't recommend or advise her not to obey an order. But the second aspect of it is, is there a

civil suit available? Is that how we could seek to resolve things? Yes. That's not really your concern." She added that if issues arose during the plugging between Young Oil and Soames as to property damage or loss, "that is not your concern, that would be a civil matter."

Ahearn added, "It's our concern to that extent that 'don't interfere' means 'don't interfere' if that is the order. Your client is not left with no remedy. Your remedy would be with the courts."

The Administrative Law Judge added. "Procedurally, if Ms. Soames determined to take judicial review of the Commission's order, it's not called an 'injunction', it's called a 'stay', but the court on judicial review could issue a stay, and it has essentially the same effect as an injunction."

Price urged, "There's a follow up point to what you're talking about. When we were in state court trying to rap up that…litigation, one of the statements made (not by Ms. Albright but by another attorney representing Ms. Soames) to the State court judge was that any question regarding operation, abandonment, or plugging of these wells was not before the court and had to be before" the agency. That was the Soames "position from the word 'go'. At least as to that issue, we're in the right place."

Robert Wright asked the Administrative Law Judge, "Would we have the authority to order the operation of these wells back to the owner."

Judge Lucas responded, "As Mr. Boyko pointed out, and seemingly all the parties agree, the owner has the opportunity to take control of the wells herself through a permitting process, if she wishes. She does not wish to do that."

Wright continued, "And we don't have the authority?"

The Administrative Law Judge responded, "I don't think the Commission can order Ms. Soames to permit the wells. No, I don't think you have the authority to mandate that she become the licensee."

The Chair added, "No, I don't believe we can do that. These have been good discussions. I think it's time we moved forward."

Cynthia Soames interjected, "I'd like to speak. First of all—"

Chairperson Stautz responded, "If you can clarify briefly or through your attorney."

Soames stated, "My family bought this land in 1945. We've produced oil on this land since 1947. We've never been asked to take responsibility for a well when an operator has left. In addition, we've never been asked to plug wells or have the operator plug wells when they have left. Now, my own profession is I am a certified public accountant. Although Mr. Price has implied that I will disobey the law, he is quite incorrect. I don't

appreciate his allegations. I do obey the law, and I will follow whatever I am ordered to do, but Mr. Young has damaged my property. He has already damaged a number of wells, and the oil companies have estimated it will cost between $150,000 and $200,000 to come back in put the field back where it was when he came on the property. The litigation has gone on since 1998, quite a long time."

Jane Ann Stautz observed, "I don't know if all of that is in the record. We respect the fact that you adhere to orders and obey them. With that good discussion, any further discussion by the Commission. If not, the Chair would obtain a motion."

Mark Ahearn stated, "I'm a little bit reluctant to change the time for compliance with proper plugging and abandonment. To the extent that the DNR is there, if either party could come back and explain why the June 30 date doesn't work, it could be extended. But as a policy matter, it seems to me the sooner we can achieve a conclusion, the better."

Mary Ann Habeeb expressed concurrence. With the June 30 "timeframe, Ms. Soames would know what she can do in terms of putting the crops in."

Ahearn asked, "Is it conceivable that if we know where equipment must go to perform plugging, there are areas that just don't get planted rather than causing damage to growing crops? They could come to some sort of plan to mitigate damages."

The Chair responded, "Yes, that's right."

Robert Wright moved to affirm the nonfinal order of the Administrative Law Judge, as the final order of the Commission, with inclusion of the Judge's recommendations for amendments to Finding 37 and Finding 43 set forth in his entry of February 16, 2009.

Chairwoman Stautz stated, "There's a motion. Do we have a second?"

Doug Grant responded, "Second."

Mary Ann Habeeb asked whether the Committee wished, also, to amend Finding 27 as the Judge recommended earlier during the meeting.

Wright responded, "Yes, I would also include that. I had thought we already made that amendment."

The Chair responded, "I don't think we had official action on that."

Grant consented in the modification to include the amendments to Finding 27.

The Chair observed "we have a motion on the table" and asked for further discussion by the Committee.

Habeeb stated she had a concern with respect to the added language suggested by Judge Lucas for Finding 43. "I think that we can maybe wordsmith that for more clarity because I'm not sure that she needs to have a professional geologist or a qualified professional approved by the DNR." She added, "I'm sensitive to another way to phrase that so it's not so limiting."

Ahearn responded, "This is the risk that we go to when we try to define 'interfere'. When we say 'don't interfere' we mean 'don't interfere'. Be adults. Don't interfere."

Habeeb continued, "I think we could clarify to say that having someone on site to observe and photograph is not interference, as long as they maintain a reasonable distance from the well."

Wright reflected, "I would think 'record' includes or means 'photographing'."

The Chair said, "Yes."

Habeeb offered, "Maybe if we just say 'or another person' to observe instead of 'another professional approved by the DNR' who could observe and record. I just think we're limiting ourselves when we say 'or a qualified professional'. I think it could be a security guard." Habeeb said she did not know what the DNR would approve in terms of "another professional", but in her perspective that person would be "something like" a geologist, engineer, or an experienced operator, and a security guard might not meet the standard.

Wright added, "You certainly wouldn't want to leave it up to these two people to agree."

Habeeb responded, "I understand."

Ahearn said, "My concern is that, in one respect, by adopting" the suggested limitation to a geologist or another petroleum production professional, "we're addressing the quality of the evidence we're going to see" if compliance by Young Oil with plugging and abandonment requirements is a future issue for the Commission.

The Chair stated, "Exactly."

Habeeb reiterated, "I continue to be concerned by the term 'qualified professional approved by the DNR'. In every other respect, I concur. I think it's too limiting if the intent is to have someone there who knows how to take photographs."

The Chair reflected, "That goes back to the question is it whether these wells are going to be properly capped?"

Ahearn responded, "I think the Judge suggested we put this in at her request. To help Soames understand what 'interfere' means. I would feel more comfortable, rather than trying to define it more, just to strike the added language offered by the ALJ. Saying

'don't interfere' means 'don't interfere', and either party can create whatever evidence they want."

Habeeb asked, "Why can't it say, 'Ms. Soames may select a professional, at her own expense, to observe plugging and abandonment'? That would not be considered interference."

Ahearn responded, the qualification language might be "just going where the evidence is going to be someday."

Habeeb said, "If she picks a geologist, he may not know how to use a video recorder."

The Chair said, "I want to bring us back to the issues. We have three wells that have not been operated for a number of years. We have leases that have expired or rather have been terminated. We have before us a nonfinal order, with suggested amendments from the ALJ, to have those wells properly plugged and abandoned. We have a motion and a second. We need to take action on that. If you want to modify the motion, [Robert Wright] may offer to modify his motion. Otherwise, I'll call for a vote on the motion on the table."

Wright stated, "My feeling about" the suggested additional language by the Administrative Law Judge to Finding 43 "is that it's not compulsive. She may do this if she wants. I would say that the less wiggle-room there is in this order, the better off it is. No, I would not approve an amendment."

Chairwoman Stautz then called for a vote on approval of the nonfinal order with the amendments to Finding 27, Finding 37, Finding 43 as recommended by the Administrative Law Judge. The motion carried unanimously.

The Chair thanked the parties for their participation and ordered a five-minute recess of the meeting.

Oral Argument to Consider "Findings of Fact and Conclusions of Law with Nonfinal Order" of Administrative Law Judge, as well as Claimant's "Objections to Findings of Fact and Conclusions of Law with Nonfinal Order" and "Third Party Respondent Department of Natural Resources' Objections to Entry of Findings of Fact and Conclusion of Law with Nonfinal Order" in the matter of *Island Lake Property Owners Association, Inc. v. Clemens, et al. and DNR*; Administrative Cause No. 08-075W

Chairwoman Jane Ann Stautz called the proceeding for consideration by the AOPA Committee. She reported that Paul Refior of Warsaw was the attorney for the Claimants and would present their objections. Eric Wyndham was the attorney for the DNR and would present the objections of the Department of Natural Resources. Stephen Snyder of Syracuse was the attorney for the Clemens family and would respond to those objections.

Mark Ahearn noted technical or clerical corrections in Finding 44 with the replacement in the citation of subsection (e) for subsection (c) in IC 4-21.5-3-5 and in Finding 60 of "2006" for "2005". Mary Ann Habeeb noted similar corrections in the third sentence of Finding 7 of "Party" for "Part"; in Finding 54 of "no" for "on"; in Finding 70 of "ILPOA" for "ILPA"; and, in Finding 74 with the addition of language for sentence structure in the first sentence.

The Administrative Law Judge, Steve Lucas, noted that he had granted the Claimants a stay of effectiveness from April 1 to April 17, 2009 within Paragraph (3) of the Nonfinal Order. He informed the parties, when granting the stay, that he would recommend the AOPA Committee modify the Final Order to make the same change of date in Paragraph (3) from April 1 to April 17.

The Chair then called upon Paul Refior to present the objections of the Claimants.

Paul Refior said he would discuss facts in the record, which supported the validity of the objections, and would then state what the nonfinal order should have been. "About 30 years ago," the group pier used by the Claimants "first went in. It remained in continuously until the present." From 2006, the configuration as permitted by the DNR was placed in Winona Lake "as far as the main pier going out and then some perpendicular walkways. It was 143 feet, and it had been that way for more than 20 years, in that place, and, in fact, Adam Clemens grew up in that neighborhood. He is in his 20s. He knew of the existence of that group pier all that time." He then used Exhibit 1 to illustrate the location of the group pier and the location of the pier placed by Adam Clemens. Refior said Exhibit 43 showed the location of Adam's house and that he would have a view of the pier. "When the boats are on the pier, and you're looking out that house, there wouldn't be any difference for 143 feet and 175 feet. One thing is crystal clear. The 'notice' seemed to be the big turning point for Judge Lucas, but as far as the existence of the pier, the view from that property, when Ms. Orban was looking at the property, and decided to buy it, and when she lived there the whole time, that is exactly what she looked at and was well aware of the existence of that group pier."

Refior contended that "Another very important fact is that on this easement on Adam's property then to the lake there never before had been any pier. If we compare the two, there was an easement that never had a pier. We have a lot owned by the Association, and for more than 20 years before they applied for the permit, there had been the group pier there, and then in 2006, they said they wanted to extend, and they did the right thing. Wanting to abide by the law, they filed their application to get this group pier permit. Much of the decision now relates to the notice. But we have in the record that Orban received the notice twice in writing. It was published, that is in the record. But then we have her testimony that she had actual notice of it. Although Judge Lucas said she had no reason to protest because she had some environmental reason, what she actually said, in her testimony, was that she was aware of the fact that it was being extended, and, although she said that 'I assumed it must have been for some environmental issue, if someone would protest''—in other words she had clear knowledge in her head that she

could protest, but in her own testimony, and this is not referred to in the decision, but in her own testimony, she said that she had notice that the pier was going to be extended, and then she repeated it saying that the length would be extended. So, when you think in terms of what notice she had, since looking out from her place, there was going to be no change in the width. There actually would be no change in the appearance, from her, it wouldn't matter as long as she was aware of the fact that it was going to be extended. It wouldn't matter if it was being extended for the purpose of growing pumpkins at the end of the extension, or for some environmental issue, or for no reason. Much seemed to be made about this that she had some perception about environmental issues. That is really a red herring and is totally irrelevant to anything. She had actual notice. So the question is should these people who had, before they applied for their permit, they would have just continued on at 143, and they would have been grandfathered in, and they would have had their permit. Rather than the Judge just say, 'We're going to undo the permit process, and they have to go back to 143 feet," he said the pier had to come out. A pier that, not just by clear and convincing evidence, it's totally uncontroverted evidence that that pier was there for more than 20 years and that everybody had notice of it and that they were doing it as a matter of what they considered to be their right."

Refior continued, "I take shorthand so actually I wrote this down verbatim of what Ms. Orsban said in her testimony. She said, 'There was a hearing concerning the Association group pier and extending its length, that the Association was going to make the group pier longer.' That's what she had notice of. So, again, this environmental thing is just off the chart. The fact that it's across the street is direct notice. She had notice and then she decided not to do anything. The rest of her testimony is that she actually did not put a pier in because she had started a family and so she was tending to that rather than doing something with the pier. So, all of that together, it's clear that, if there was any error, it was harmless error. But I'd respectfully suggest that the notice itself, the fact that it was using the DNR form, State Form 50354, which was revised in 2002, Form N2, if one would say just by using the form provided by the State, that that makes a pier permit invalid, and should be revoked, we have what, four or five years of pier permits that are invalid, and someone who just doesn't like it can say, 'Oh, that was during that period of time, I'm going to claim that they used the wrong form. That form left off a couple of the things out of the statute, so, therefore, we're going to throw out all of those permits.' I would say that that is grossly unfair. We have the Association wanting to do things right and follow the law. Later you have Adam putting a pier in 2008 for the first time, and by his own testimony, again, this is not in dispute in the record, by his own testimony, he knew that when he put in his pier, he would interfere with the access of the Association, and he admitted, on the record, that he knew it would impair navigation in that area. So that's what we're comparing. The Association who had a grandfather in 143-foot pier, does the right thing, uses the State form, and then now, at a later date, a person who never had a pier is complaining, and so the person who actually didn't qualify for a general license because he knew that he was going to be interfering, he would have needed to file for a permit, and that he then is the same, in other words, your pier is going to have to be removed, as the Association. That's just not fair. But we have the fact that in this case, if we step back, that what any harm was de minimis, and it was harmless. In fact, there was no place in the testimony of Ms. Orban where she indicated, nor was she asked a question

about, 'By the way, did it bother you when they started to extend it? Did you think something was wrong or funny?' No, because it was a non-issue. She was about having her family."

Refior urged, "So, we have a case where this lack of notice was treated as if it was this great big gorilla, and you're going to undo 30 years worth of use by an Association that has been, not just an easement, but has ownership of that and has been a good lake user. I would respectfully suggest that what you should do is find that (1) the Association had a prescriptive right with its pier to 143 with the side wings, which is actually the same width that is permitted, but that would be a fall-back position. We would suggest that there was a technical error in the DNR form, but it was harmless, because the record shows that there was the written and published notice. There was actual notice that she knew that it was to extend or lengthen the pier and so there wasn't anything that would question 'should I object to that?' If she had had an objection to extending it, she knew it was an extension, and she didn't object. I would ask you to overturn Judge Lucas's order that revoked the group pier, and then put in place, so they can put their pier in, finally, their continuing right to their pier permit. Thank you."

Mary Ann Habeeb asked, "Was there ever any permit for the 143 feet pier?"

Refior answered, "No, there was not."

The Chair then called Eric Wyndham to provide the objections of the Department of Natural Resources.

Wyndham distributed to the AOPA Committee members a color map of the area that was admitted into evidence. "It gives you an idea of the layout. It also has the two notices that was given to Ms. Orban, and a copy of BLACK'S LAW DICTIONARY which gives you definitions that I intend on stating."

Wyndham said "DNR's first objection is on the finding that notice sent to Ms. Orban did give her insufficient notice of the application of the Association. Again, as Mr. Refior said, Judge Lucas said, that because she testified that she thought it was some kind of environmental notice, that that was not sufficient. I won't necessarily go into repeating Mr. Refior's argument in that respect, but I agree that she testified that she knew about the group pier, while she lived there, and the notices state that she received, and it's a part of the record, that the first notice in which it said" there was a group pier extending from Lot 42 in Yarnell's Point into Winona Lake approximately 175 feet from the shoreline. The first notice was sent out by Association's attorney before submission of the application to the DNR, "which, by law, sufficient notice has to be after the application is filed. To comply with that, the Association sent the second notice to Ms. Orban, and there is no dispute that she did receive both of them, basically indicating the erection and maintenance of a group pier. It is also the Department's position that this is harmless error, and it does not justify Ms. Orban's so-called perceptions of an environmental matter. In fact, I think a reasonable inference could be deducted from the evidence that, if the other two statutory elements were put in the notice, Ms. Orban would have easily

still considered it an environmental proceeding or whatever. But I agree with Mr. Refior that she did receive two notices. It was basically the erection or the extension of a group pier, and she was aware of the easement. In fact, she told Adam Clemens when she sold the property that there was an easement so she was aware of the circumstances of the existence of the Association pier."

Wyndham continued, "I disagree with Judge Lucas's order in that the notice did not sufficiently advise her which lead to her no response to the application. In my objections, I cited a criminal case, *Alford v. State*, which is a 1998 Indiana Supreme Court opinion. In that case, the Supreme Court held '…we review for harmless error based only on the record before us and not on the basis of what might have happened had the erroneous evidence not been admitted.' I think it's highly speculative to indicate, had those other two statutory jurisdictional statements been in the notice, would that have changed Ms. Orban's actions. Again, I don't think that anybody knows what Ms. Orban would do in that case. So, based on that Supreme Court opinion, so that you can only classify an error based on what was admitted in the record. It was clear that she knew about the easement and that she knew about the group pier. I think it was clear based on her testimony that she knew that the application involved an extension of that pier by the Association."

Wyndham said, "I've also cited another case, *Linton v. Davis*, which was a civil case, a malpractice case, and the court in that case cited 'any error caused by the admission of evidence is harmless error for which we will not reverse if the erroneously admitted evidence was cumulative of other evidence appropriately admitted.' There was other evidence appropriately admitted. Again, to repeat, she knew about the pier, she knew about the easement, and she had two different notices of the application."

Wyndham added, "The Department would also disagree with Judge Lucas's finding that the notice was fundamentally flawed and lacked specificity. I think the notice, itself, that was admitted into evidence, speaks for itself—that it was an application for an extension and maintenance of a group pier. I think it was very clear in that respect, and Ms. Orban knew what was going on."

Wyndham urged that in Finding 65, "Judge Lucas indicated that there was not sufficient notice to the people of the actual issuance of the permit. The AOPA Act in 4-21.5-3-5(b)(5) indicates that notice is to be given to each person who has 'a substantial and direct proprietary interest in the subject of the order.' I've indicated two different definitions of 'proprietary interest' from BLACK'S LAW DICTIONARY. Basically, that means an actual ownership of the property of Lot 42 which would mean the property in question where the pier was to be extended and where the pier existed. BLACK'S LAW also defines 'proprietary rights' as 'those rights an owner of property has by virtue of his ownership. The Hashemi Trust, Ms. Orban and Roger Clemens do not have any proprietary interest in Lot 42 where the group pier was. I also cite to you *Black Beauty Coal Company v. DNR*, 8 Caddnar 129, a 1999 decision, which basically held that someone who has a direct interest in the property of the applicant, which could be a mineral interest or a leasehold interest, would be entitled to notice. I also cite 4-21.5-3-5(f) which states failure to notify each person who has a substantial proprietary interest is

not error as long as, basically, there is no substantial prejudice to that person. I think the record is clear there is no substantial prejudice to the Hashemi Trust, Adam Clemens, or Roger Clemens, or Ms. Orban."

Wyndham continued, "Judge Lucas also contended that Roger Clemens and the Hashemi Trust and Janine Orban were denied due process because they were not given sufficient notice of either the application or the permit itself. I believe that is contrary to law. Error resulting from technical noncompliance with notice requirements is waived where the complaining party had actual notice and participated in the proceeding. Also, if somebody does not participate in the proceedings after receiving actual notice, basically they waive their right to any objection. Roger Clemens, the Hashemi Trust and Janine Orban all received notice of the application. In fact, Janine received it twice. None of these parties were prejudiced by the group pier or the extension. In fact, there was a stay ordered by Judge Lucas prior to the hearing which ordered Adam Clemens to reduce the size of his pier to 60 feet, and there was testimony at the hearing by Association members that situation worked well with Adam Clemens having a pier of 60 feet long. They could access their pier without any problem, and Adam Clemens could also have a pier likewise. Therefore, I think that there is no prejudice at all to the surrounding property owners of the Lot 42 which is where the group pier is."

Wyndham stated, I also cited *Green Tree Servicing, LLC v. Random Antics*, LLC, 869 N.E.2d 464, where a party took no interest to protect his property interest after receiving notice, they were not denied due process. I would also agree with Mr. Refior that the Association did totally comply with the law. They put in their group pier that allowed them to do so because of the length, without obtaining a permit, because of the length. They wanted to extend it to 175 feet. They applied, and they received their permit. Adam Clemens started to put in a pier knowing, by his own testimony, that his pier would affect the access to the group pier, and, therefore, I think the public rights and the public trust would be served by the Judge's stay order of allowing the Association to have its pier and Adam Clemens, if he would apply for properly, then he could have a pier of up to 60 feet, and each party would have access to the lake. Thank you, very much."

The Chair thanked Wyndham for his presentation and asked whether members of the AOPA Committee had questions for him.

Doug Grant asked Wyndham for the width of the Adam Clemens easement.

Wyndham responded, "That's a good question. I think Mr. Refior at the hearing questioned that, the legality of it. I think, basically, its three feet. And, I think Roger Clemens, the owner next door may have extended it to six feet. I think Mr. Refior can probably answer that better than I could, but that's basically his argument, but I think it was three feet."

Grant said, "Maybe we're getting ahead of ourselves."

Chairwoman Stautz said, “Yes. With regard to representation for the Clemens [family members], we have Mr. Snyder.”

Stephen Snyder presented the response of Roger (“Rocky”), Karol, and Adam Clemens to the objections by the Claimants and the DNR. “Thank you, I’m going to look at this a little differently than either Mr. Refior or Mr. Wyndham did because I laud the Judge for protecting property rights, and that’s really what this case is about.”

Snyder stated, “The Association property is a platted lot of roughly 39 feet on the lakefront. It’s owned, in fee title, by the Association which, I believe, is a corporation, whose members are persons who have residential properties off the lakefront. I think it serves approximately 40 lots so there is never enough space for all of those users at the same time.”

Snyder continued, “The Clemens easement was established in the early 1990s, and neither Adam Clemens nor Rocky Clemens, currently owners of the dominant and servient estate for that easement, were involved in the creation of it. Mary Clemens created it for the benefit of her son, Gordon, who at the time owned the house which is now owned by Adam. At the time Adam bought the property, he asked Rocky, who is now the owner of [Adam’s] grandmother’s property” about the sufficiency of space to moor a boat or boats. “The establishment under my recommendation of sufficient space to place a boat required a grant from Rocky to Adam of an additional 6½ feet of riparian easement. The easements Adam now has are three feet over Rocky’s land and 9½ feet over Rocky’s riparian area. It gets wider when it gets into the water. There was a contest from Mr. Refior’s standpoint as to whether you can grant an easement in a riparian area, but the law is pretty clear that you can do that. It’s no different than any other area, it’s a property right.”

Snyder added, “But what I find most intriguing is an understanding about how this group pier works. This group pier is on a 39-foot wide lot. It has a single pier running perpendicular to the shoreline and then numerous lateral piers at which boats are moored. They can’t get in and out in 39 feet of width. They have chosen over the years to utilize everybody’s spaces. This controversy is not just with Adam. It was originally with Rocky, who, when he bought his property from his mother’s estate, moved his pier a little closer but still in excess of 20 feet from his property line. But he received all kinds of complaints from the Association members because they couldn’t get their boats in and out, and they needed at least 30 feet, is the evidence in the record, of Rocky Clemens’s riparian area to get in and out of their lateral pier spaces. If you notice on the other side of, on the north side of the Association pier, they park perpendicularly because they couldn’t get in and out of there because the Hashemi property would prevent them from using it on the north side. What we have is roughly 15 watercraft crammed onto a 39-foot wide lot. That’s 2.7 feet per boat. They’re saying because we have 40 lots that need this space offshore, we want to use the riparian area of our adjacent property owners. Rather than limiting it and parking the boats in a parallel fashion to the pier, they want to utilize Adam Clemens’s easement rights, which are equally as valid as their fee simple title rights, and actually Rocky Clemens’s property rights on his frontage, and say,

'Rocky, you can't put your pier where you want even though it's more than twenty feet away from the common property line.'"

Snyder continued, "What Judge Lucas did in this case is said this is not the normal case for which a notice is issued. There is a point of clarification. If you look at the record, the record had introduced into it, a complete record of the DNR file. That DNR file included the notices that were issued to Janine Orban. The record shows that she only received the first page. There is nothing in the record to indicate she received the second page. Mr. Wyndham's documents that he handed out contained both the first and the second page of that notice. But, actually, the record shows she only received the first page. We don't know from her testimony because she didn't retain a copy of it, but the record says she didn't receive that second page. That's significant because it describes how you can appeal later orders from the DNR."

Snyder queried, "From a more practical standpoint, when you involve property rights, how can you say we're going to give away your property rights to Janine Orban without providing you notice that we're going to do so? The description of the project was wholly inadequate in the notices that went out to Ms. Orban. One of them said we're going to make it longer. One of them said erection and maintenance of a group pier. Neither one of those said, 'The group pier requires usage of your three-foot wide riparian easement for access to the south side of the pier; and, therefore, the issuance of this group pier will result in a loss of property rights to you.' Something close to that has to be said. How could the Indiana Department of Transportation come in and condemn your right-of-way without telling you they were going to do it? That's exactly what happened in this case."

Snyder continued, "I don't know that Ms. Orban can be charged with knowing how you get in and out of a pier. She didn't have a pier. She was starting a family, and this was the first property they bought that had any connection to a lake, although they bought it because it did have that connection and access to the lake. When the permit was issued it said nothing about the fact that this group pier will require the usage of adjacent riparian property. It's no different than land property. It is a property right that runs with the fee simple title. Yet, here we are. Adam is being told, 'You can't have pier, because if you put a pier where you legally have a right to place a pier as a riparian owner, it will prevent us from using your property, and your uncle's property, for getting in and out of our pier."

Snyder urged, "There have been numerous cases from this Commission and from this Committee which have said first in time is not necessarily first in right in riparian disputes. You don't leave tracks in the water. There are several cases, *Barbee Villa* comes to mind, and it was a similar case where there were tight spaces. The guy who had the easement said, 'I need some of your space because I don't have room enough to put my boat.' Judge Lucas could throw half a dozen more out. That's what we're dealing with here, although Adam Clemens took the time to acquire an additional riparian easement on the other side of his pier, away from the group pier, in order to secure enough space for his pier within his three-foot riparian easement that was there and

another 6½ feet that he obtained from his uncle, for a total of 9 ½ feet, which was sufficient for his proposal."

Snyder continued, "I haven't even looked at my outline because I think those are the real questions that have to be confronted in this case. What Judge Lucas's opinion did was say, 'You can't take away Janine Orban's, now Adam Clemens's property rights, without giving proper notice. Each person who has a 'substantial and direct proprietary interest' in the subject is entitled to notice. The property necessary for the issuance of this group pier permit was the riparian property of Janine Orban. She did not receive a notice of the issuance of the permit, which took away her riparian rights, and I think that's a clear violation of IC 4-21.5-3-5(e)(5). That notice has to go out if it is affecting a person who has a substantial and direct proprietary interest. Without due process, we all know what the consequences are. There is no validity to the issuance of this group pier permit."

Snyder said the agency adopted an emergency order that is effective January 1, 2009 with regard to group pier permits. "It places some significant restrictions on group pier permits that are going to be issued from this point forward. That new regulation actually provides some protection for these kinds of situations, but it also says you can't use more than 50% of your lakefront for the placement of a group pier. I think it's a shocking regulation, but one that is probably necessary, especially when you look at situations just like this, where you have a 39-foot lakefront, and people want to cram 15 boats in a 39-foot lot and utilize the adjacent property owner's property for their access and sole benefit to the exclusion of the adjacent property owner."

Snyder concluded: "I would suggest that Judge Lucas's decision was extremely well thought out based on the law, based on some constitutional protections that Janine Orban had, based on simple real estate law, and should be sustained. The parties can come back before the DNR, with the DNR having full knowledge of the situation—in other words, the existence of the interests of Adam Clemens. Each can apply for a permit. It will be up to the Department of Natural Resources to determine what the appropriate compromise or solution to this problem is. I can't imagine the DNR would not combine both of these applications for review at the same time to decide adequate protections."

Mary Ann Habeeb asked, "What if anything do you think is the legal significance that the Island Property Owners had a pier in for many years at a length of 143 feet?"

Snyder responded, "If you examine the cases in regard to prescriptive easements, they're all over the ballpark, whether they're cases made by the Natural Resources Commission or cases made in court. The most famous one was the prescriptive easement on a private lake for use by jet skis. On a private lake, you can only use the portion of the lake that's above your own property. They said, 'We've been running boats and jet skis over there for years.' The court said they don't leave any evidence of where it is. This pier may have been there, and the pier may be appropriate. But is the access to that pier utilizing a significant portion of the riparian area of Rocky Clemens's property and 100% of Adam Clemens's easement established by prescription? I question that."

Doug Grant asked, "Under the old group pier, were those boats all parked parallel to the pier?"

Snyder answered, "No. The evidence was that, for a significant portion of time, and I don't remember the dates, those have been laterals. They either weren't used significantly, or they were smaller boats, or there were no boat lifts there, so they didn't create a problem. But Judge Lucas made this observation in one case. There are those people who have riparian rights and prefer to use them by leaving the space open. They like it open and not cluttered with piers. The mere fact that there wasn't anything on either Rocky Clemens's property or Adam Clemens's property that prohibited the unfettered access, which those perpendicular lateral require, I don't think establishes a legal right, even if it goes back to the 70s."

The Chair asked whether Paul Refior or Eric Wyndham wished to provide "any rebuttal or follow-up".

Paul Refior stated, "Just very briefly. First of all, at the hearing, actually Mr. Snyder introduced his Exhibit B which was the notice to Janice Orban, and it's two pages, the whole thing, and that's in the record, Exhibit B of the Clemens and so that argument actually missed the reality."

Refior continued, "The *Barbee Villa* case actually stands for the exact opposite of what Mr. Snyder just said. If I can quote, 'The Claimants need ready ingress and egress to their pier and to their shoreline. That enjoyment may reasonably require temporary usage of the waters of a public freshwater lake located in the riparian areas of the Claimants' neighbors for the purpose of loading and unload a boat. A temporary use of this nature does not unreasonably infringe on the riparian rights of the respondents and is consistent with the Lakes Preservation Act.' In that case, it was because they moored a boat that was over in the neighbor's riparian area. In other words, this case actually stands for the fact that you can go into another riparian area in order to go in and out of your riparian area, and actually that is not an unreasonable infringement."

Refior added, "Going back to the notice, there wasn't anything close to a due process violation here. She received the notice—had actual notice twice, and there was the published notice. But then her own testimony is that she knew that it was for the extension of the pier, and she knew the width all along, because it was always there. She knew about it before she bought it and while she owned it. She had actual notice. There's no lack of due process. In fact, any error from the technical standpoint should be considered harmless error. We'd ask that the group pier be permitted. Thank you."

The Chair asked, "Eric Wyndham, any comments."

Wyndham responded, "Just briefly. I would second Mr. Refior's side of the *Barbee Villa* case, which is a Caddnar case. I'd also indicate that the evidence was clear that when the Association boats moored in the lateral portions of that Association pier—that at no time did any of those boats invade the riparian areas of Mr. Clemens or the easement. The

Barbee case was pretty clear that reasonable use of somebody else's riparian boundaries, for purposes of loading and unloading boats, and for putting into piers and taking them out, is a reasonable use of that riparian area. The testimony at the hearing was that it would be the matter of just a few seconds, an invasion of those riparian areas for the use of their piers. The fact that there were lateral piers for a long period of time, I still don't think that is a violation of the riparian area because it was reasonable, based on *Barbee* for the use of the Clemens riparian area for access to the pier."

The Chair observed, "I agree with that. But I think the question really is the question of riparian rights to be exercised by Clemens going forward. Are there additional comments or questions?"

Wyndham responded, "If I could have one more statement, I also think and agree with Mr. Refior. There was a stay order. This thing was pending for a long time before the stay order. At no time did Adam even attempt to put in a pier, or he did put in at 60 feet, I don't remember. But the public trust, I think as I said before, both interests could be served by limiting Adam Clemens's pier to 60 feet, based on the Judge's preliminary stay order. That would give all parties access to the lake."

Mark Ahearn said, "I have questions for Mr. Wyndham and Mr. Refior. Let me start with Mr. Wyndham. Is it the position of the Indiana Department of Natural Resources that adjoining landowners in riparian rights issues don't have a substantial and direct proprietary interest in a proceeding that affects the property that they adjoin?"

Wyndham responded, "Yes, I think it's our interpretation that, based on the one case I cited, it has to be an interest in the land itself which is the subject of the application."

Mary Ann Habeeb asked, "Doesn't that conflict with IC 14-11-4 which says that you have to give notice to all adjacent landowners? I'm troubled by that position."

The Chair added, "Wow. Yes."

Wyndham continued, "Basically, I think Judge Lucas said the basis for his objection was that they have a direct and substantial proprietary interest."

Paul Refior stated, "I believe that they're entitled to notice."

Habeeb continued, "Under AOPA as well as under IC 14-11-4?"

Refior responded, "I believe they are entitled to both notices."

Habeeb continued. "Okay. The notice in IC 14-11 talks about adjacent landowners, and that's DNR's enabling statute. And then you have AOPA which puts on another layer of notice once the permit is issued. You have the pre in 14-11 and then you have the post in AOPA. AOPA's language is proprietary interest. Putting the two together, because this is a DNR matter—

Wyndham interjected, “I think basically under the facts of this case this wasn’t the installation of a new pier. It was an extension of a pier that was already there—a pier that everyone knew existed.”

Ahearn reflected, “I think we’re concerned about this. At least I am concerned—I won’t speak for others—with the concept that an adjoining landowner isn’t entitled to notice based on a proprietary interest with respect to riparian issues.

The Chair said, “I think we are concerned. Yes.”

Ahearn asked, “Was Ms. Orban entitled under IC 14-26-2-23 to be informed of rights to participate in licensure under subdivision (4) [management of watercraft operations under IC 14-15] and (5) [interests of a landowner having property rights abutting the public freshwater lake or rights to access the public freshwater lake]…, not just that there was a permit event occurring, but that that was part of the substance of what might have occurred, as a consequence of that permit?”

Wyndham responded, “The Department would have to state that she would be entitled to notice, but I think under the facts of this case, she basically had knowledge, and this was a form that by inadvertence wasn’t updated. I don’t think that she could claim a substantial deprivation of rights just based on her impression of an environmental matter. I mean she did receive two notices that indicated it was a pier permit.”

Habeeb reflected, “I’m troubled by your statement about the second notice. The second notice doesn’t state extension, it states erection.”

The Chair said, “Yes.”

Habeeb continued, “I’m troubled by that because if you look at notice one, it clearly says an extension to 175 feet. The second one only says erection.”

Wyndham responded, “I think Mr. Refior would have to explain that because I would probably agree with you that I don’t know why the first description wasn’t used in the second notice. I don’t know what the reason for that was but I can’t disagree with you there.”

Paul Refior responded, “I think in evaluating the notice, because everything seems to resolve in the Judge’s decision around Ms. Orban, if you go back to her actual testimony, that she knew that the notice was saying that it was to extent the pier. That’s actual knowledge. We’re definitely not dealing with a due process issue. Also, that’s what makes it a harmless error. There’s no substantial prejudice from any of that. She knew, and she said so—her own testimony, that’s what’s in the record. We don’t have to speculate about that aspect. It’s in the record.”

Habeeb asked, "What about the Hashemi Trust? They didn't get notice. The second notice that the Hashemi trust got was that it was erection not an extension. We don't know what their knowledge was."

Refior answered, "Right, but I don't believe a decision should be made based upon speculation. If you're going to make any reasonable inference, you take a look at what one of the people at the time, Ms. Orban, was noticed of and what she thought that it meant. That's the reasonable or closest thing if you're going to speculate."

Ahearn asked, "Does any party here think that notice was done properly?"

Refior answered, "Well, clearly those two elements were not on the form."

Ahearn continued, "Either the AOPA notice or the Title 14 notice? And I get there because I ask, aren't we all now sort of speculating and backfilling about who knew what and who assumed and who had which view?"

Refior responded, "Well, weren't not speculating about Ms. Orban because she testified."

Snyder added, "She testified to more than what Mr. Refior is saying. She testified on direct examination that she was not aware that the issuance of the permit, for which she received notice, would eliminate her ability to utilize her easement. She was not aware of that. She just thought it was an environmental notice."

Refior added, "Well, certainly she wouldn't have been aware of that if those other two things were on there. That would not have caused her to think any differently…. The actual notice, I think totally blows out of the water any thought of lack of due process. But before you, there is the precedent that if it's harmless error, even if it's defective notice, if it's harmless error, and there's nothing to indicate that there was any substantial prejudice of any kind whatsoever, and there's no reason to think that there would have been any protest, and her own words were that she knew a protest could be given, and she stated that she didn't proceed."

Ahearn asked, "Other than delay, is a substantial long-term harm worked by re-noticing everyone fully and committing" permit applications back to the DNR for review?

Refior responded, "Obviously, we're talking about a whole new set of regulations as Mr. Snyder pointed out. First of all, I think we never should have been to the point where Judge Lucas went back to zero for the Association. The minimum that they were entitled to maintain was the 143 feet with the same laterals that they had before 2006. Would there be substantial harm? Yes, there would be substantial harm because they have a permit that is valid, and they just continue on as they have since the permit. It's sheer speculation if the emergency regulations continue to be in effect what that is going to mean. Clearly, they go from having the rights that are well-known and well-defined to unknown rights and, perhaps, substantially different rights."

Doug Grant reflected, "If this was re-permitted, then I suppose we start thinking about piers being limited to 150 feet. We start thinking about the width of the pier over the width of the lot which doesn't fit. If my memory serves me right, if after the boats are in, we hopefully are going to require ten more feet of rights for passage for both piers. If you look at that, none of this fits in anything that we would approve under current guidelines. I guess the question on Clemens pier there is that it goes right out on the property line, it looks like it's drawn that it goes right outside the property line, and can't park a boat on the other side of it. You're not allowing ten feet of clearance. I guess that doesn't enter into the Judge's decision—any of these things."

The Chair responded that under the ALJ's nonfinal order, the matter would go back to the DNR and "the permitting process to consider" all factors pertaining to licensure. "That would not be sorted out today."

Granted continued, "So much of this seems to depend on whether the notice was legal or not. I've got to listen carefully to that."

Robert Wright reflected that he assumed the existing piers would be grandfathered. He asked how the Association lost its 143-foot pier.

Snyder responded, "If you look at the regulations, you're going to be required, I think, starting in 2011, to register nonconforming uses. The DNR has the right to approve that or reject that even though it may have been in existence as a pre-existing nonconforming use. We're dealing with group piers for the Association. We're dealing with an individual for which those requirements do not apply in the Clemens's case. I suppose you can look at this if you have the record in front of you and ask what other alternatives are there, other than to what Judge Lucas suggested, which was no AOPA notice was given to Orban. I suppose you can try and redesign these piers as you would see fit, but I think that's a function more for the process through the DNR, unless you really want to try and sit down with a pencil and paper and draw them out."

The Chair observed, "There are other property owners which might potentially be affected by any action we would take other than the parties here."

Judge Lucas added that the DNR could consider all pertinent factors in newly reviewing the license applications of the parties. "In my perception part of what the DNR could consider are what are existing uses, because lawful nonconforming uses are part of the puzzle, and that's part of what they would look at."

Ahearn asked if the Association was "going from something to zero."

The Administrative Law Judge responded, "What it says is you go back to the point of beginning for licensure consideration. It doesn't necessarily mean 143 feet is out the window. The opinion says you go back to the DNR and take this whole mass, and have the DNR decide to the best of its ability, how to allocate these two piers on these two competing properties."

Ahearn asked what happens between now and a licensure decision.

Refior said, "Right now there's no pier, but my people who tried to abide by whatever the procedure was to get the extension from 143 to 175, suddenly, instead of it being bumped back to 143 until licensure, they have their whole pier thrown out that they've had for 30 years. That's fundamentally unfair. I do believe that even though there is a higher standard of evidence for establishing a prescriptive easement, it is uncontroverted, all the testimony in the record, was about this continuous use that started back in 1976 or 1977. I would respectfully suggest that the minimum that the Association would be entitled to is the 143 feet. But I would urge you strongly that there's no harm here. I mean it's like a windfall for Rocky Clemens to get rid of this pier he has wanted to get rid of because of what has developed. It's just not right.

Ahearn asked Snyder why this proceeding should eliminate the 143-foot pier until licensure is completed.

Snyder responded, "For the same reason that the procedure got rid of the 150-foot pier that Mr. Clemens put in pursuant to his riparian rights. There are disputed riparian claims here. I don't think it makes any difference whether it was there for 80 years or eight years. The Judge has determined that nobody has a right to do anything because permitting is required for both piers at this point. Neither one of them can go in under a general permit, whether it's the group pier or the individual pier [of Adam Clemens]. So, we go back through the permitting process. For all we know, the DNR, which has the authority to do this, may say 'You guys should share a pier.' It may require a totally different configuration from what's there now. We have competing interests, neither of which can be established without a permit being approved."

Refior urged, "One could see that the group pier, if they did no application, they would have been grandfathered in. They would have been entitled to continue their use. No one can say that Adam Clemens, in 2008 putting that pier in for the very first time, would be grandfathered to anything. They are not the same."

Habeeb asked Wyndham for the DNR's perspective on grandfathering the 143-foot pier.

Wyndham responded, "Honestly, I guess I can't speak for the DNR. They issued a permit for the extension. The only thing I can say is the DNR probably didn't have any objection to the 143-foot pier that was previously existing. I think that under the rule, Adam Clemens could not put in a grandfathered pier because the testimony was undisputed that would have an adverse effect to access to the lake which, under the rule, I think, requires licensing by Adam to put in any kind of a pier."

Habeeb continued, Adam Clemens "didn't qualify for a general permit is the issue for that.

Wyndham responded, "Right."

The Chair observed. "Let's be careful here about whether he would or would not have qualified for a general permit because it's if there was interference or potential interference with ingress or egress from the existing pier. If he had done the shorter pier, it might have not triggered any issue…. That's where you kind of get back to let's get the piers permitted appropriately."

Wyndham added, "That's basically what Judge Lucas did in his stay order. He allowed Adam a 60-foot pier. There was undisputed testimony by the Association that that allowed full access to their pier."

The Chair asked for the status of the stay. The Administrative Law Judge responded the stay was no longer effective. He continued, "I think the AOPA Committee does have legal discretion to grant some kind of stay or stays until licensure can be completed. The challenge, for me after hearing the evidence, would be coming up with what is fair. If you think you can come up with something that is fair, for this boating season, I think you could write the final order to include a stay for what is fair." He said determining what would be fair is difficult "because I don't think there is a universal picture" of what the Association pier physically was before DNR licensure or its legal status, "and then you have the additional question of what would be fair for Adam Clemens, as well. I did come up with a stay," but it "was pretty arbitrary."

The Chair asked, "What is the water depth here? Is there an issue of water depth in order to have the length of the pier able to move boats in and out."

Stephen Snyder stated, "The record contains detailed measurements every twelve feet or ten feet of the Clemens pier. At 60 feet, it's less than 18 inches deep."

Chairwoman Stautz reflected, "That explains the 150-foot long pier placed" by Adam Clemens.

Snyder added, "At 110 feet, it was roughly 30 inches deep, depending on the time on the lake, of course, and that would be sufficient for a boat. If you were looking to do something to solve the problem this boating season, you could put a 110-foot pier on Adam Clemens's easement. It would eliminate 1½ or two pier spaces on the Association pier, but the rest of them would be usable."

Paul Refior said, "The rebuttal evidence, including pictures of a pontoon boat and the daughter of one of the Association members showing depths, demonstrate that the pontoons could go almost right up to shore and be useful."

Judge Lucas added, "What you've just heard is why I wouldn't be comfortable writing a stay."

The Chair reflected, "Exactly, and then it becomes what kind of boats and use. We're opening it up to a whole other set of facts and information that would need to come

before us. With that, I think we have a picture of the circumstances here. We appreciate everyone's comments and responses to help us with our clarifications before us. I would entertain a motion." She reminded the AOPA Committee a nonfinal order with amendments was ready for consideration.

Ahearn asked whether the "piers are already out" of the water.

Refior responded there were "pier poles" for the Association pier in the water. "That's why the extension [until April 17] was requested."

Mary Ann Habeeb moved to approve the nonfinal order and findings of the Administrative Law Judge, as the final order and findings of the Commission, with the technical and clerical clarifications described by Committee members and with the extension of the removal date until April 17, 2009. Mark Ahearn seconded the motion.

Doug Grant asked what the consequences would be for people with piers and boats for this season. The Chair answered that it would mean they were not entitled to put the piers in until the DNR approval of licensures. "They would need to apply and go through the licensing process for placement of the piers."

Habeeb suggested a specific finding should be made to state the Adam Clemens does not qualify for a general license. Ahearn concurred with the amendment.

Grant asked, "Isn't there a way that we could allow the pier in this summer and still require a permit before next summer? I don't know why we would disrupt all these people."

Stephen Snyder asked if he might offer a suggestion. "In light of Judge Lucas's comments that he wasn't comfortable crafting that compromise, and yours trying to figure it out, why not simply say that if the parties can agree on the placement of piers for this season, they can have it ending" after this year.

Habeeb added, "Provided it's agreeable to the DNR because we don't want the neighbors crafting an agreement that is unacceptable to the agency."

Snyder said, "Sure, the DNR is a party."

Robert Wright asked, "What about just staying the effectiveness of this order until September 15, 2009?"

Habeeb responded, "Because that doesn't give any rights to Adam Clemens."

Mark Ahearn said he wished to make a statement for the record. "I thought notice was deficient for something as important as property rights. That's the first point that drives my vote here. The other is that I think that it's extremely difficult for this Committee to

reweigh evidence and substitute a judgment for the trier of fact, who saw the witnesses, who gets to take into account their credibility and their experience."

The Chair asked, "If we issue a stay, does that have to be independent, or should that be part of the final order?"

Habeeb responded, "I would say just an amendment from the nonfinal order. I would so move" to add a Paragraph (6) to further provide that nothing in the order would preclude an amicable agreement among all the parties for pier placement to cover the boating season of 2009.

Grant observed, "You know, I can't help think if I was Rocky Clemens, and I didn't want that Association pier to go in, I'd never agree."

Habeeb reflected, "Well, I guess we have to leave that up to them."

Snyder interjected, "Knowing that you know Rocky, I can tell you that Rocky will not play a part in the decision. It will be Adam's decision."

Grant reflected, "I hate to see so many people's boating season get disrupted because we can't figure a way around it."

Ahearn reflected, "We're setting up that procedure for finding a way around it."

Habeeb added, "We are concerned for trying to substitute our decision for the DNR."

Chairwoman Stautz added, "I do not feel comfortable, not knowing all the water depths, the present configurations, the particular boats, without the testimony of the affected people, what boats have been there, what they want to use. I don't think that's our place today to do that."

Granted asked, "I know it's not relevant, but is Adam Rocky's boy or Gordy's boy."

Snyder answered, "George's boy."

The Chair interjected, "You know what? We have a motion that has been amended multiple times. It has been seconded. We will call for the question on the table. All those in favor signify by saying 'aye'."

Ahearn, Grant, Habeeb and Stautz voted in favor of the motion.

She asked for those opposed.

Wright voted against the motion.

The Chair reported the motion carried and was approved. She thanked counsel for their participation and ordered a five-minute recess of the meeting.

Oral Argument to Consider "Findings of Fact and Conclusions of Law with Nonfinal Order" of Administrative Law Judge, as well as "Respondent DNR's Objections to Findings of Fact Conclusions of Law and Nonfinal Order" in the matter of Allen, d/b/a A&S Logging & Sawmill v. DNR; Administrative Cause No. 09-008F

The Chair reported the next matter scheduled for consideration was *Allen v. DNR* (Administrative Cause No. 09-008F). She said Ihor Boyko was present as attorney for the DNR, but Todd Wallsmith, attorney for Cheyenne Allen, was not present. She said Boyko informed her there "may be some confusion based upon rescheduling of the Committee meeting from April 1 to April 7. Mr. Boyko suggested there be a continuance here and that the Administrative Law Judge be instructed to set the proceeding for a telephone status conference."

Mary Ann Habeeb offered a motion consistent with Boyko's suggestion and the Chair's description. Mark Ahearn seconded the motion. On a voice vote, the motion carried unanimously.

Ahearn asked what, then, would be the status of the nonfinal order. The Chair responded that the oral argument was continued, and the nonfinal order would remain a nonfinal order. Disposition of the nonfinal order would remain in effect pending a resolution between the parties or the consideration by the AOPA Committee at a future meeting. "It may come back before us at which time would hear it."

Boyko said he and Wallsmith might be close to achieving a procedural resolution. But a resolution had not yet been achieved.

Deliberations to Consider "Findings of Fact and Conclusions of Law with Nonfinal Order" of Administrative Law Judge, as well as "Respondents' Objections to Findings of Fact with Conclusions of Law and Nonfinal Order" in the matter of *McCulloch v. Day and Schramm, et al*.; Administrative Cause No. 08-044W

Chairwoman Stautz called for consideration *McCulloch v. Day* (Administrative Cause No. 08-044W). She said the Administrative Law Judge had issued findings and a nonfinal order, to which Day and Schramm filed objections. The proceeding considers the placement of piers on Jimmerson Lake, a public freshwater lake located in Steuben County. The Chair asked the ALJ to provide a brief overview.

Steve Lucas reminded the Committee that the parties had agreed to waive oral argument in this proceeding and to present their arguments through briefs. Other than Ihor Boyko, who was the attorney for the DNR, the parties were not present in person or by an

attorney. He said that although the DNR was a party, the agency did not actively participate. Central to the disposition was a pie-shaped parcel along the shoreline identified on a plat as the "Public Boat Landing". McCulloch is a riparian owner who owns a parcel adjacent to the Public Boat Landing. Day and Schramm jointly claim adverse possession to the Public Boat Landing. The evidence was that McCulloch may or may not have paid taxes on the Public Boat Landing, but the Respondents never have.

Mark Ahearn asked whether the Commission had jurisdiction to determine whether the Respondents had adverse possession. The Administrative Law Judge responded that ordinarily it would be a civil court determination, but since the DNR and Commission sometimes had to determine riparian ownership to make decisions under the Lakes Preservation Act, the agencies probably could decide this ancillary issue under the "doctrine of primary jurisdiction". Whether a person enjoyed riparian rights might depend upon whether the person had adverse possession to riparian lands or had lost title due to the adverse possession of another.

Lucas said he believed the evidence was insufficient to establish adverse possession to the Public Boat Landing in favor of the Respondents. They might well have some proprietary interest in the Public Boat Landing as back lot owners in the subdivisions. They might alternatively demonstrate an equitable proprietary claim at a future date, but the primary issue sought to be resolved by McCulloch was a riparian delineation between his property and the Public Boat Landing. Although nothing was agreed prior to hearing, during conduct of the hearing, the parties essentially stipulated that a straight-line extension of the common boundary was appropriate. Subject to the *Zapfee* "reasonableness test", the nonfinal order adopted this delineation. The nonfinal order also imposed a ten-foot set back from the line for the placement of a pier or structures. He said McCulloch did not object to the set-back requirement.

Ahearn asked who could enforce the determination the Respondents currently had no legal standing to extend piers from the Public Boat Landing. The Administrative Law Judge responded that he believed the other parties could pursue a civil action for enforcement. DNR could probably also issue an NOV.

Ahearn observed that in Finding 47 a reference to "Lot 1" should be modified to "Lot 7". After the Committee reviewed the pertinent segment of the plat, as set forth in the nonfinal order, all agreed this correction should be included in the final order.

The Chair asked if there were other questions or discussion.

Ahearn reflected, "Having read the objections, I did not find them persuasive."

Mary Ann Habeeb concurred and asked, "Was there anything significant at hearing to identify the title owner of that triangle? Did anyone go to the Recorder's office?"

Judge Lucas responded, "There was nothing definitive at hearing. For these older subdivisions, it's not uncommon. The triangle is depicted on the plat, and that may be

the most recent record. If someone did a title search, an owner would presumably be found who would predate the plat."

Habeeb asked, "Is it recorded at all?"

The Administrative Law Judge responded, "The plat is recorded."

Ahearn observed, "This parcel is screaming for a quiet title action."

Habeeb agreed, and she then asked, "Do you have to jump across the adjacent property lines" to get onto the Public Boat Landing?

Judge Lucas responded, "That's a very good question. I expected to hear the answer during the hearing but did not."

The Chair observed, "When I first looked at the plat, I thought that was probably the issue with McCulloch. The neighbors went across his land to get to the parcel."

Habeeb said, "My thought is they're walking across Lot 7 to get on there. They might have a prescriptive easement across Lot 7."

The Administrative Law Judge responded, "I don't know. That wasn't the testimony. As a practical matter, in recent years, my understanding from testimony was they have their piers and other items that they store on the parcel in the winter. They put the piers back in the water in the spring."

Habeeb added, "But how do they get there?"

The ALJ said they could access the parcel by boat.

Habeeb asked if the Respondents obtained quiet title to the parcel, would they be landlocked and thus obtain a right to cross Lot 1 or Lot 7 for access.

Judge Lucas responded, "I don't know if they would be landlocked because they could gain lawful access, by boat, from the public freshwater lake. It would be similar to someone owning a parcel adjacent to a navigable watercourse."

The Chair observed, "Like an island. The owner of an island isn't landlocked" if the island is located on public waters. She then asked if there were "further comments or questions for clarification."

Robert Wright moved to approve the findings and nonfinal order as the findings and final order of the Commission, with the amendment of "Lot 1" to "Lot 7" in Finding 47. Mark Ahearn seconded the motion. Upon a voice vote, the motion carried unanimously.

Information Item: Judicial Review and Appellate Updates to AOPA Commission; Administrative Cause No. 09-047A

The Chair reported the last item for the AOPA Committee was the report on judicial reviews and appellate updates.

Steve Lucas said he would speak briefly and then yield the floor to Judge Jensen. "She has more of interest to tell you. I would point out, though, there is one case in the packet for which there is an update. In *Roebel v. Vorndran*, Special Judge Monte Brown of the Steuben Superior Court affirmed, on April 3, the decision of the AOPA Committee. When the draft minutes are forwarded to the Committee, I'll include a link to what is a pretty detailed and extensive decision by Judge Brown."

Sandra Jensen, Administrative Law Judge, said with respect to the *Cruse* case, the matter remained pending before the U.S. Bankruptcy Court. She reflected the Committee would recall that for consideration was a DNR enforcement action against a dam located in Morgan County. Judge Jensen said she had recently spoken with Cruse's attorney, Larry Kane, who indicated settlement negotiations were underway with the Deputy Attorney General representing the DNR. Kane told her that he was optimistic a settlement could be achieved.

Judge Jensen said *HEC v. DNR* had again been remanded with instructions to pay litigation expenses and attorney fees. The Marion Superior Court affirmed the award by the AOPA Committee and added another $21,000. "That essentially put the pending matter to rest since the DNR did not appeal. However, at this point, it was remanded for the consideration of additional fees" associated with efforts to collect the original fees. "We're dealing with that under the same Cause Number. It will strictly be fees that accrued through May 2002." She said HEC recently submitted its supplemental petition, and the DNR had 60 days to review the petition and to respond. She said she would then identify what issues might yet require resolution.

The Chair asked if there were questions on the other matters contained in the information item. There were none.

She concluded, "I appreciate these summaries. I think it's helpful to know where things are."

Mary Ann Habeeb added, "Yes."

Adjournment

At 11:43 a.m., EDT, the Chair declared the meeting adjourned.