AOPA COMMITTEE OF THE
NATURAL RESOURCES COMMISSION

Meeting Minutes of November 16, 2010

MEMBERS PRESENT

Jane Ann Stautz, Chair
Mark Ahearn
Doug Grant
R. T. Green

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Sandra Jensen
Jennifer Kane

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

Eric Wyndham	Legal
Linnea Petercheff	Fish and Wildlife

GUESTS PRESENT

CeAnn Lambert

Call to order

Jane Ann Stautz called the meeting to order at 8: 50 a.m., EST on November 16, 2010 at The Garrison, Fort Harrison State Park, 6002 North Post Road, the Gates Room, Indianapolis, Indiana. She reported Committee member Robert Wright was unable to attend . With the presence of four members, the Chair observed a quorum.

Consideration and approval of minutes for meeting held on July 20, 2010

Doug Grant moved to approve the minutes of the meeting held on July 20, 2010 as presented. Mark Ahearn seconded the motion. Upon a voice vote, the motion carried.

Consideration of Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Rebecca Rockey v. Department of Natural Resources,* Administrative Cause No. 10-110D

Sandra Jensen, Administrative Law Judge, introduced this item. She stated that the Department's objections are to "certain findings and not necessarily the outcome of the case". Jensen said the Claimant, Rebecca Rockey, was not present at today's meeting. She read from an email filed by Rockey: "We don't have anything else to add to the case. We do not want it postponed, but it would be hard for us to be there on this date. We would like for it to go on so Zoe can be settled." Jensen explained that "Zoe" is the name given by Rockey to the coyote that is at issue.

Jensen also noted that CeAnn Lambert was present at today's meeting. Jensen explained that Lambert was allowed to testify at the hearing as an interested nonparty. Lambert, "as I understand it today, is not intending to speak. She just wanted to observe. So essentially I think you are going to hear presentation from Mr. Wyndham today."

The Chair then recognized Eric Wyndham, attorney for the Department of Natural Resources.

Wyndham began by stating, "Judge Jensen is correct that the Department is not objecting to the final decision here regarding the denial of the wild animal possession permit." The Department objects to the reference in Finding 38 of "coy dog, as being a hybrid of a domestic dog and a coyote, would not be within the jurisdiction of the Department." The Department's objection "to that Finding 38 is that there was no testimony, evidence, or anything in the record at all regarding a coy dog or whether the coyote in question was, in fact, a coy dog or a coyote." Rebecca Rockey "basically stipulated at hearing that the animal in question was a coyote. The Department feels that any reference to a 'coy dog' is not based on any evidence or testimony at the hearing and it would be improper."

Wyndham said CeAnn Lambert was allowed to introduce a DNA breed analysis report from Canine Heritage over the Department's objection. "The objection basically was that [Lambert] was not the proper person to introduce that. [Lambert] did not make the report or do the testing. Also, the objection was that the Department later filed with the Administrative Law Judge to exclude that report, because the database Canine Heritage uses does not include coyote. All it was was domestic breeds of dog." Wyndham said the Department's position is Judge Jensen should have excluded the Canine Heritage report, "because there is no way that it was a valid report since it has no breed database for coyotes that it utilized to examine DNA." The report did not include a primary breed analysis but included a secondary breed analysis of a Siberian Husky, as well as a Doberman Pincer. "Even that report did not make any mention the animal in question was part coyote; therefore, any reference to a 'coy dog' in the findings wasn't proper."

Wyndham said a DNA report conducted by the DNR, Division of Fish and Wildlife, was included on the Department's exhibit list, but the report was not available at hearing. "Basically, the report was done just in case any breed question came up. Again, Ms.

Rockey, on the record, did not question the fact that the animal she took possession of was not a coyote." He said the Claimant's exhibit list did not include a DNA report. "Ms. Lambert was not a party even though she was allowed to testify. It's our feeling that it kind of put the Department at a disadvantage. [Lambert] comes in the day of the hearing, introduces this DNA report from Canine Heritage to which the Department was not even aware of and really could not respond to. Besides the fact, I think it was improperly admitted through Ms. Lambert."

Wyndham cited IC 4-21.5-3-27(b), and explained that "findings of ultimate fact must be accompanied by a concise statement of the underlying basic facts of record to support the findings." Findings must be based upon evidence that is substantial and reliable. "It is the Department's position that that Canine Heritage DNA report should never have been admitted into the record at all."

Mark Ahearn asked, "How does the Department view the last sentence in 36 where it appears the Judge looks at the report and then makes the determination that the evidence is not entitled to great weight in terms of this proceeding?"

Wyndham stated, "Well, that's fine. I don't think it should have been admitted at all. Nobody from Canine Heritage was there to testify. The person who did the report was not there to testify. It was introduced through an interested party that had nothing to do with the DNA testing from Canine Heritage at all. I'm not putting any blame on Ms. Lambert, but I think, under the law, it would be improper for her to introduce a DNA report to which the Department had no knowledge prior to the hearing. Judge Jensen did require that the parties submit witness and exhibit lists prior to the hearing, and anything that wasn't on that list could have been excluded." The Canine Heritage DNA report should have been excluded, "which would mean that there is no question at all regarding the breed of the animal in question." Lambert, a licensed rehabilitator, submitted an application for a wild animal possession permit with the Division of Fish and Wildlife for the animal at issue. Her application describes the animal as a "coyote". Wyndham said, "The finding regarding a 'coy dog' was improper, not part a part of the record, and I think just muddies the water that didn't need to be muddied."

The Chair asked, "Counselor, at the time that this evidence was introduced, did you, on behalf of the Department, make any objections?"

Wyndham answered in the affirmative, and noted that the evidence was admitted over the Department's objection.

Wyndham said *Stafford Trustee of Deer Creek Township v. Cullen*, 123 N.E.2d 191 (Ind. App. 1954) dealt with a person filing an action to enjoin a trustee from selling bonds for remodeling the school building. "The trial judge indicated that the action was arbitrary and capricious, but the appellate court said that that was an improper conclusion because there were no findings in the record to support the conclusion." Finding 38 "more or less is not a part of the evidence, because there was nothing introduced at the hearing regarding a coy dog." Wyndham noted the remaining portion of Finding 38 concludes

that, if the animal in question was a coy dog, the Commission would not have jurisdiction. "I think that basically is also a conclusion of law. There is "nothing in the facts or in the record that make even an issue of whether the animal was part coyote or part dog or whatever."

Ahearn reflected, "My struggle is this: Is there any, in your mind, in the Department's mind, connection between…Paragraph 38 and then the objections to 21 through 26 that impact the Conclusions of Law, the Order? Are these relevant? How are these relevant to the Order?"

Wyndham responded, "The final order will become precedent. The issue at hand was whether or not an application of wild animal possession permit should have been granted. It was denied by the [Department]. Ms. Rockey appealed that. It is our position that there is nothing in the record to show there was any issue of whether it was a coy dog or not. The other issue regarding whether the animal was imprinted or non-releasable, the Department's position is that that is totally immaterial and irrelevant to the issue at hand of whether a permit should have been granted or not."

Wyndham said the Department is concerned about the welfare of wild animals, but there are strict rules regarding obtaining possession of wild animals. "There was a lot of emphasis here, and there were six findings and a definite finding that the animal was non-releasable. However, I think it is Information Bulletin #45 of the Commission that there is a nonrule policy that any rehabilitator or anybody before it can be determined whether or not an animal is definitely releasable or not. It would have to be certified by a veterinarian, and it wasn't in this case. There was no testimony that the animal was socialized. There was no expert testimony. Ms. Lambert testified that she felt [the animal] was non-releasable, but it's our position that that was not backed by a licensed veterinarian. We think whether the animal imprinted or not is totally immaterial and irrelevant to whether a permit should have been granted."

Ahearn asked, "In both of your objections, how are we not having a discussion about what's strikes me as being the functional equivalent of dicta? It happens all the time…. Courts make findings and talk about things that end up not being supported by the final order. When you ask what that case was about, the case is about its holdings, what happened in the final order. That's what I am struggling with. I don't see the stake in the outcome here."

Wyndham said, "Obviously, we are not contesting the outcome. We just felt that there were matters in the findings that really shouldn't be there. This will be precedent and somebody else might read it and create issues of socialization and imprinting, and the possibility of breeding questions, which should have been excluded in this case and should not be part of the record."

The Chair stated, "But there was no determination or conclusions associated with that, so I'm struggling. What's the harm or the issue here?"

Ahearn noted that Finding 45 "lays the facts" that the Claimant took possession of the coyote on April 10, 2010, which is outside the season for taking coyotes from the wild. In Finding 46, Judge Jensen found the Department's denial of the Claimant's application was appropriate for the reason that the coyote was taken outside the legal season. "It seems to me it would be a challenging stretch, in fact, anyone relying on this case for something other than what it stands for sets themselves up to have the Department, or us, or someone read back these two paragraphs to them…and say 'You are stretching this case for something it doesn't stand for.' I'm just trying to see what bad happens because of the inclusion of either 38 or 21 through 26."

Wyndham responded, "I understand your argument. I think it's the Department's position that this will be precedent, and that any reference to a 'coy dog' is not part of the record. And, basically that provision should be excluded. I think all findings have to be based on the record. I think we are looking at it from a future reference. If petitioners aren't questioning the breed of an animal, I don't think the Department wants to be put in a position where it will have to do a DNA test every time we have a wild animal possession denied. If the issue is raised, validly raised, then fine…. Judge Jensen allowed the Department, after the hearing, to submit a DNA report that we put on the Witness and Exhibit List, and if there was a contest then [Judge Jensen] would re-open the hearing.… We are looking at it from a practical standpoint that…I'm not sure Ms. Rockey could have afforded an expert to come in and justify a DNA test. It would have been hugely expensive for the Department to do so. I think that the mere fact that we put something on the Witness and Exhibit List does not mean we have to use it or we want to use it."

The Chair reflected, "Correct, and in this case, whether or not it was included, you already had the Conclusions of Law based on the fact of the timing of when the [the Claimant] took possession of the coyote pup."

Wyndham stated the Department "would like to see the findings cleaned up to reflect what was actually in the record. We feel that imprinting and socialization is irrelevant to the issue and appeal of whether the permit should be denied or not."

The Chair said, "But during the hearing, there was discussion and evidence presented with regard to socialization, correct? So, if it's in the evidence, it's appropriate to include it."

Wyndham agreed there was "some opinion testimony" entered by Lambert and a conservation officer. The conservation officer testified that imprinting and socialization of the coyote pup "was a possibility". Wyndham said the Nonfinal Order contains six findings addressing the imprinting of the coyote, and a finding by Judge Jensen that the animal was non-releasable "without any testimony at all from a licensed veterinarian, which is basically what your nonrule policy requires."

Judge Jensen asked for permission to address the AOPA Committee. She said the application for a permit to possess a wild animal filed by Lambert was offered into the

record by the Department. The permit application "clearly stated that this animal was highly socialized—I am certain that I am quoting those words from that document—and could not be released, so it was more than just testimony" given by Lambert and the conservation officer.

The Chair said, "Thank you for the clarification."

Wyndham responded, "I'm going to question that. What was put in was basically a copy of the application for the purpose of the record that may have had a statement from Ms. Lambert. It wasn't the Department's testimony."

The Chair said, "I understand that, but if that information has been put forth, it is appropriate to take that into account." She continued, "I want to be careful that we don't re-open the full question of what was entered into evidence or not, but I do want to make sure we get any questions answered."

Ahearn asked, "With respect to your objection to Finding 38, if the Judge had granted your objection motion at the hearing level, we wouldn't be having this [discussion], because that wouldn't have come into the record."

Wyndham said, "Right".

Ahearn then said, "In some respects, we are re-hearing the objection to the evidence motion. I'm a little uncomfortable…the AOPA Committee is not really a court of appeals, but we are the [ultimate authority for the] agency. With respect to those kinds of motions, judges are entitled to a lot of deference, not carte blanche but certainly deference. That's the struggle I'm having with respect to 38. It feels to me like we are having a discussion about something that is not relevant or distinguishable from the final findings. It also sounds like we are re-trying an objection to a motion and evidence. I think we want to be careful about that precedent. If we open it up absent really compelling reasons, I think we will have many come before us wanting to re-try or re-hear the case."

Wyndham noted that Judge Jensen granted the Department's motion to correct Finding 18, which addressed the locations where the animal was placed after removal from the Claimant—Hardy Lake Recreation Center, and subsequently with CeAnn Lambert. "It's our position that there was no evidence at all to justify a finding regarding any reference to a 'coy dog'. I don't think that's re-trying it. It's basically we want that corrected and removed, because there was no reference to a mixed breed of dog…and coyote."

R. T. Green said, "Let's assume that we don't change things, and we accept the proposed Findings of Fact, Conclusions of Law, and Nonfinal Order, would that in any way endanger on appeal this finding, this order? In other words, is there still enough in there to be able to support the denial of the application?"

Wyndham answered, "I don't think there is any question that Judge Jensen properly denied the application, because Ms. Rockey did not have a permit when she took possession of the animal, which is a requirement under the rule.… We are not disputing the final result here, but we think there are items in the record in the Findings of Fact and Conclusions of Law that are not based in the record."

Green continued, "It's my understanding that if this were a domestic dog, then the Department has no jurisdiction over the application at that point."

Wyndham responded, "That's right. It wouldn't be a wild animal."

The Chair indicated that she agreed with the Conclusions of Law. "I am comfortable with that, and I am struggling to try to re-write the Findings at this point based on the information that we have before us. Truly, evidence was raised that there was an inference that [the animal] might be a coy dog. Then it stands that that would be included in the Findings."

Wyndham stated, "I would have to disagree with you there, because there was no reference made at the hearing of a coy dog, none at all."

The Chair asked, "No inference at all?"

Wyndham answered, "No. The only possibility would be the DNA report from Canine Heritage, which we objected to and which we don't feel should have been in evidence at all. Even it did not say, 'part coyote'. [Canine Heritage's] database on dog breeding is basically domestic dogs, 106 breeds for domestic dogs. There's no way that they could've come up with a report saying that [the animal] was part coyote or part dog. Their report was all dog."

Ahearn asked, "I think you can tell, counselor, we are struggling with this. How does 38 not bring certainty, in one respect, tie up the case? Could it not start with the words, 'Unless anybody think to the contrary, a coy dog is a hybrid…?' It seems to me like it ties up potential loose ends that are in the record, because you stipulate that you objected to the admission of the DNA Heritage report. It strikes me that 38 ties up and finalizes the inference. You can't walk away from that and be confused about the status of this dog with respect to the Canine Heritage Report. What am I missing?"

Wyndham stated, "Well, again, I would disagree that there was any inference of a hybrid here. The Canine Heritage Report basically said a secondary breed of Husky or Doberman. 38 indicates a 'coy dog means part coyote and part dog, or something else'. There is no evidence in the record to support that even for an inference. Plus it is our position it was error to admit the DNA Report from Canine Heritage through Ms. Lambert…. It is our position that it should have been excluded".

Jane Stautz asked whether the Department had further argument regarding its objections to Finding 38, as well as its objections to Findings 21 through 26.

Wyndham said whether an animal is releasable is "not a basis under the rules for either granting or denying an application. There were six findings regarding that issue, plus a specific finding by Judge Jensen that the animal was, in fact, non-releasable and highly socialized. There was no expert testimony, i.e. a veterinarian, to serve as a proper basis for that.… It's my position if there was some mention that there was evidence produced regarding non-releasability, that issue is not at issue here today or that has no relevancy, then I wouldn't object to that at all. Yes, there was evidence submitted, but to create six findings and a definite finding by the Judge that the animal was definitely not releasable without expert testimony from a veterinarian, I think muddies the water in this case and shouldn't be part of the findings."

Ahearn noted that Judge Jensen in the "Notice of Filing Revised Findings of Fact and Conclusions of Law with Nonfinal Order" dated September 24, 2010 reflects that the concept of "releasable or not" or "imprinted" originates from Respondent's Exhibit A. Ahearn then asked why the Department sought to admit Respondent's Exhibit A.

Wyndham responded that Respondent's Exhibit A was Lambert's application for a wild animal possession permit. "We admitted that because [the application] involved this coyote in question. [Lambert] called it a 'coyote'. She testified and submitted evidence of a DNA report that says otherwise. Our purpose in that was showing that even [Lambert] considered [the animal] a 'coyote' at the time she made the application."

Ahearn asked, "In admitting that, could you not have admitted it and described the admission as for the limited purpose of what you just described?" Without this qualification "it seems like it pulls other evidence into the record."

Wyndham responded that Respondent's Exhibit A was admitted during the cross-examination of Lambert and was not a part of the Department's evidence in chief.

The Chair observed, "But again, it was evidence before and presented at the hearing. I'm really struggling as to why that wouldn't be appropriate" for inclusion in the Findings.

Wyndham said, "But [Lambert] knew and admitted that [the animal] was a coyote along with Ms. Rockey".

Ahearn said, "I'm really a little curious…how this didn't turn into a discussion about the calendar, because that's where the conclusion goes. Here is the time period that you can take the animal. You are outside the time period. Ergo, that's sufficient to support the denial. I'm not asking for an answer. It just strikes me as curious that it grew into lots of other stuff rather than sticking with what would have finished off and ultimately did finish off that the permit was properly denied."

Wyndham stated, "I think it's relevant whether this animal was a coyote or not. It's the Department's position that all that was valid was that [the animal] was a coyote."

The Chair said, "Again, I point out that in Finding 36, on the bottom of page 6, the Administrative Law Judge says 'This evidence is not entitled to great weight in terms of this subject matter of this proceeding.' She noted that [the evidence] was before her and presented during the hearing."

Ahearn brought attention to Judge Jensen's September 24, 2010 "Order on Department of Natural Resources' Motion for Correction or Amendment of Findings of Fact," on page two, the second to last paragraph. "I'm not quite as critical as Judge Jensen is because it is critical that all of us understand what the law is. Citing a statute and the requirement under statute does not necessarily introduce new evidence, or citing an information bulletin, or policy."

Mark Ahearn then made a motion that the AOPA Committee "accept the Findings, Conclusions, and Nonfinal as written."

The Chair asked, "For clarification, that's the revised Findings?"

Ahearn said, "With the revision of 18". He noted a possible typographical error in Finding 38, second sentence, which reads, "Absent evidence regarding the actually breeding…." "Actually" should read "actual". Ahearn then stated, "With those changes, I move that we adopt the Findings of Fact, Conclusions, and make final the Nonfinal Order".

R.T. Green asked, "Can I make a comment before I second the motion?"

The Chair answered in the affirmative.

Green reflected, "The way I understand this—and the reason why I would second the motion that is now on the table—the Cajuns have a word 'lagniappe', which means 'something extra'. I think appellate orders call it 'dicta'. I don't see one way or the other that this hurts this order. In fact, I see that it perhaps in many respects helps the order and perhaps helps the Department of Natural Resources. I also see that the fact that the Department did put its own DNA report in evidence…."

Wyndham interjected, "That's not true. Well, that was after…."

Green continued, "But nonetheless, it was prepared and anticipated to be because it was listed on the document list, which suggests to me that at least that fundamental issue of whether it's a wild animal or not was always a concern and should have been a jurisdictional concern. So, I think when it comes time when folks review this they may look at it as a dicta, but from my standpoint, when you sit and analyze it, I look at it as something extra that supports it and says conclusively that there is jurisdiction. We have the right to make this decision. The Department has the right to issue the permit or deny the permit.

Green then seconded the motion. The Chair called for a vote. Upon a voice vote, the motion carried.

Adjournment

The meeting adjourned at 9:30 a.m., EST.