Minutes of the AOPA Committee of the Natural Resources Commission

November 18, 2008

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

NRC Staff Present
Stephen Lucas
Sandra Jensen
Debra Michaels

Call to Order

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 1:31, EST, on November 18, 2008 in The Garrison, Fort Harrison State Park, Indianapolis, Indiana. With all five Committee members present, the Chair observed a quorum.

Consideration and Approval of Minutes for Meeting held on September 16, 2008

The Chair called for consideration of the minutes of the meeting held on September 16, 2008. Mark Ahearn moved to approve the minutes. Robert Wright seconded the motion. On a voice vote, the motion carried.

Consideration of Findings of Fact and Conclusions of Law with Partial Non-Final Order of the Administrative Law Judge and of any Objections to the Non-Final Order in *DNR v. Shields*, Administrative Cause No. 07-234F

At the request of the Chair, Sandra Jensen, Administrative Law Judge provided background regarding the proceeding. The ALJ stated for consideration is what is sometimes called the "Timber Buyers Statute" at IC 25-36.5. "It involves the allegations by the Department of Natural Resources that Riley Shields harvested timber off of DNR property without having paid for the same. Really, the only issue that you're dealing with here today has to do with the statute of limitations as it relates to the Department's complaint. The Department did, in fact, file its complaint seeking compensation for both the trees and for some actual damage done to real property. This is a partial nonfinal order on summary judgment because it only relates to the damages for the tree harvest. My determination was that the statute of limitations had passed as it related to the actual

harvest of the trees and the damages related to the trees, themselves; however, the statute of limitations had not run as it related to the damage to real property."

Judge Jensen said the issue was a "matter of first impression for the Commission". If the AOPA Committee affirmed her findings with respect to damages to timber, a hearing would be scheduled to consider damages to real estate. "There is nothing specific" in the Timber Buyers Statute with respect to a statute of limitation. Her opinion concluded that damages to severed timber were governed in the two-year statute of limitations provided by IC 14-34-11-2-4.

Eric L. Wyndham spoke as attorney for the Department of Natural Resources. He had filed objections on behalf of the agency and also provided written materials to assist the AOPA Committee in considering oral argument.

Wyndham said the Department alleged that in late 2002, Riley Shields entered Washington-Jackson State Forest in Washington County, Indiana and wrongfully cut trees and removed timber. "There was no permission whatsoever for Shields to enter onto the State Forest to do this. The DNR is seeking damages pursuant to the Timber Buyers Statute. As Judge Jensen said, this involves a statute of limitations."

Wyndham stated the Department sought relief under IC 25-36.5-1-3.2 which allows for an administrative adjudication proceeding, under AOPA and under the Timber Buyers Statute, for the Department to file a complaint and to obtain redress for damages for the wrongful actions of the Respondent and also for three times the value of the stumpage value for the timber wrongfully removed."

Wyndham continued, "The question here is that Judge Jensen indicated that there are two statutes of limitations because there are two remedies. It's the position of the Department that this is one proceeding." He urged that if any statute of limitations applied to this administrative proceeding, the applicable was a "catch-all provision" in IC 34-11-1-2(a). This provision indicates any action not limited by another statute "'must be brought within ten years.' That is the position of the Department. AOPA does not state a statute of limitations. The Timber Buyers Statute does not state a statute of limitations, so it's the Department's position that there's no other statute of limitations and the ten year limitation would apply." He also said it was problematic whether any statute of limitations applies to an administrative proceeding.

Wyndham added, "If the Committee decides" IC 34-11-1-2(a) does not apply, "this is basically damages to real estate, and as cited in the packet is *Owens v. Lewis*", which is an Indiana Supreme Court decision concluding "growing trees are part of the land to which they're attached. Our position is that the trees standing are part of the real estate."

Wyndham reflected that Judge Jensen adopted the Respondent's argument based on *Brink v. Warner*, which is an Indiana Court of Appeals decision, stating that trees severed from the land become personal property. He said *Brink* applied an oral contract for the sale of severed timber, but the case was inapplicable here because the Department had no

written or oral agreement with Shields for the sale of severed timber. "There was no contract for sale. There were damages to real estate." The statute of limitations for damages to real estate would be six years as anticipated by IC 34-11-2-7(3).

Wyndham stated that the Timber Buyers Statute "defined 'timber' as 'trees, standing or felled, and logs'" so "standing trees or cut trees are considered the same thing." He said the Department's position was "there can't be two statutes of limitations for one proceeding."

Wyndham continued, "Judge Jensen has used, and the Respondent has used" a provision in IC 25-36.5-1-32 authorizing recovery where a timber buyer "has not paid 'the value of the timber as determined under IC 26-1-2', which is a Uniform Commercial Code sales provision. However, I don't think the use of that statute makes the trees in this case chattels. IC 26-1-2-102 states: 'Unless the context otherwise requires, IC 26-1-2 applies to transactions in goods.' It's the Department's position that exclusionary clause applies in this case. Under the UCC, the definition of 'goods" are 'all things removable at the time of identification to the contract for sale.' There was no 'identification' of this timber. It was just taken without any authority. Further on in IC 26-1-2-107, which gets into timber, a contract for the sale of 'timber to be cut is a contract for the sale of goods' if there is an 'identification'. If the trees were grown for that purpose or sold for that purpose, there has to be a definite 'identification' for it to be considered 'goods' under the UCC. It's the Department's position that that's not the case."

Wyndham also cited *Commercial Logistics Corporation*, as standing for the proposition that when more than one statute of limitations could be applied to the evidence, the court must require which of the "two competing statutes of limitations more closely fits the situation at hand. It is the Department's position that the Timber Buyers Statute can involve timber buyers and timber growers and sales and contracts. In this case, it does not. The situation is a person goes on another person's property and cuts down trees. Standing trees are real estate. There's no question about that. The first remedy under the Timber Buyer Statute is damage for the wrongful acts. 'Wrongful acts' is coming on property and damaging property. It could be real estate. It could be fences. It could be anything for the purpose of cutting down trees. The second remedy is for three times the stumpage value of the trees. That damage section doesn't relate to the UCC. It doesn't mention the UCC."

Mark Ahearn interjected a question. "Are you saying that damage section" in IC 25-36.5-1-3.2(f) provides in subdivisions (1) and (2) for a timber grower to receive compensation for both subdivisions.

Wyndham responded, "I consider it one remedy. It's the Timber Buyer Statute. It's adjudication for a timber buyer going on the land of a timber grower and cutting timber. I consider that all part of one proceeding. The statute says a proceeding under AOPA and under the Timber Buyer Statute."

Mary Ann Habeeb asked, "Are you saying that "in (f)(1) the damages could include the actual wrongful cutting, but that (f)(2) is a way to determine the amount of the damage. That the damage could be proved as a cause of action under (f)(1)? Loss of the use of the trees? Loss of the tree itself?"

Wyndham responded that subsection (b) was directed to the basis for filing an action. Part of this subsection was that a contract may have been entered for the sale of timber, and the timber "was not paid for pursuant to UCC." Subsection (f) provides for remedies, "and the remedy section doesn't mention the UCC. I think it's all together: damages to compensate for the wrongful act, and treble damages to remove the timber unlawfully. I think the *Owens* case and the *Brinks* case go into if there's a license and part of the trees are removed."

Habeeb asked, if IC 34-11-1-2(a) were inapplicable, was it the Department's position that the six-year statute of limitations for realty applied?

Wyndham responded, "Yes, I think there are enough exclusionary provisions in the UCC that it doesn't make this a personal property situation."

John W. Mead spoke as attorney for Riley Shields. "This hearing today basically involves a determination of what is the applicable statute of limitations. All actions are governed by a statute of limitations except for murder. That's the only action I know of that does not have a statute of limitations. All other crimes and all other civil actions have a statue of limitations. Administrative proceedings are in the nature of civil proceedings, and there is ample case law on that."

Mead offered "an example of an analogous situation to show you why I think this is two separate proceedings and has two separate statutes of limitations. Several years ago, I defended a drunk driver in Bedford. He got drunk on Friday or Saturday night, lost control of his vehicle in Bedford, hit the curb, run up a little embankment, went airborne, traveled 26 ½ feet, went through the bedroom window of a residence, and landed on the owner of the residence who was asleep in bed. She filed suit. Now, that's one incident, but in that one incident, there are two separate damages. There's damage to the person through the injuries to the lady. There's damage to the house which is real estate. Clearly, personal injury is a two-year statute of limitations. Damages to the real estate is a six-year statute of limitations. Both of those may be brought in one proceeding. That's what the Department has done in this situation. They've brought two actions in one proceeding which they're compelled to do. You would be compelled to do so in a personal injury action if you have other claims under the Trial Rules. In the accident situation, you can bring both the claim for the personal injury and the claim for the real estate in one proceeding. That would be what you're expected to do. Does anyone think that if you waited four years, and brought your action for damages, that the personal injury action wouldn't be subject to a proper summary judgment motion for breach of the statute of limitations? Clearly, that's what would happen. You could proceed with the real property action, but the personal injury action would be barred. I think that's exactly the situation that's here. We have one proceeding brought for damages to the real estate,

which the Department contends are skidder trails and ruts and these kinds of things on the land, and then the separate proceeding, which is compensation for loss of the timber determined at the stumpage."

Mead urged "the two cases, *Owen v. Lewis* and *Brink v. Warner*, that I've cited and Mr. Wyndham has cited, both clearly state that once trees are severed, like ore from the ground, corn from the field, dirt from the property, it becomes a chattel. Chattels are personal property in that context. I feel, also, that's why the Legislature in the other section of this statute refers to the UCC as a means and basis for determining damages. The Legislature has said under the UCC all items are goods. Goods are personal. It does not apply to real estate. I think it's clear, and the opinion was well-analyzed by Judge Jensen, that even though we have one proceeding, we have two separate statutes of limitation that apply. I don't dispute that a six-year statute applies for damage to the real estate, but the two-year statute applies to the value of the timber because once the trees are cut they become personal property. The basis for determining that value is the stumpage value."

Mead added, "The way the complaint is written—the way it's characterized—is for wrongfully selling, disposing of the timber, without payment for the timber. They're looking at a conversion basis without paying for the timber. To pay for the timber, you've got to harvest it. When you harvest it, the timber becomes personalty. It becomes a chattel. I believe Judge Jensen's partial order was correct in this case, and I believe it's appropriate to impose a two-year statute of limitations with respect to the timber value and a six-year statute with respect to damage on the real estate. The real estate is damaged when the timber is cut because at that point the timber becomes personalty."

Mead concluded, "Our greatest renewable resource is timber. I think it would be a very difficult argument to make that somehow the real estate is damaged when you cut the tree because it's a renewable resource. The Department of Natural Resources goes all over the State cutting trees and harvesting timber. If that were damaging the real estate, I don't think that would be their *modus operandi*. They do it to improve the real estate."

Robert Wright asked, "Do you think there is a distinction between whether the owner cuts his trees, and whether a trespasser cuts the trees, as to whether trees are personal property or part of the real estate?"

Mead responded, "No, I think it's clear under the law of the State, two cases cited, and even under the UCC, that once they're cut, the logs become personalty."

Mary Ann Habeeb asked, "Is there anywhere in the Timber Buyers Statute that says damages are limited to damages to real estate?"

Mead responded, "No, they can claim damages to the real estate, through skidder trails or ruts or disturbance of the surface, all destruction of fences and the like."

Habeeb continued, "Loss of use?"

Mead answered, “I think it would be difficult under the Timber Buyers Statute to claim loss of use.”

Habeeb continued, “Loss of habitat?”

Mead responded, “Arguably.”

Mark Ahearn asked, “Are you saying there is a different statute of limitations” for IC 25-36.5-1-3.2(f)(1) and for IC 25-36.5-3.2(f)(2)?

Mead answered, “Yes. I’m saying there is a six-year statute of limitations for (1) and a two-year statute of limitations for (2).”

Ahearn continued, “If the trespasser ran into one of DNR’s trucks in harvesting the trees, are you saying there would be two-year limitation for damages to the truck?”

Mead answered, “Yes.”

Ahearn continued, “So, a complaint for damages” under IC 25-36.5-1-3.2(f)(1) could include damages to other than real estate?

Mead answered, “The way the DNR filed this complaint, and what they’ve stated is, they’re seeking damages for skidder trails and erosion and those kinds of damages to the land.”

Habeeb asked why IC 25-36.5-1-3.2(f)(2) wasn’t “just a way to calculate damages and not a separate cause of action?”

Mead answered because the DNR seeks “damages under both of those provisions. They seek damages for the land under (1) and then they seek damages for the loss of the timber under (2).”

Wright asked, “Would you agree that property which has trees growing on it is worth more than property with stumps?”

Mead answered, “If you look at it at two points in time, yes. But if you look at it as real property with trees, and the same property with stumps and logs, it’s probably worth more…. The correct measure for damages to real property is the value before and the value after” an event.

Ahearn reflected that the Indiana General Assembly defined “timber” in IC 25-36.5-1-1 as including “trees, standing or felled”. He asked, “Is that irrelevant to our discussion here?”

Mead responded, "I don't think it's irrelevant, but the issue is the damages for which they're seeking relief. They're seeking relief for conversion of the timber, and loss of the value of the timber, and at that point, it is personal property."

Habeeb asked, "So you don't see any special meaning in the definition of 'timber', which is a very special definition? The Legislature could have said cut logs or something else but it said the whole ball of wax, whether it's still sitting on the tree or whether it has been cut."

Mead responded, "Yes."

Wright observed the statute authorized three times the stumpage value for logs. "That's the only real way for measuring the log value is to look at the stumps. I don't think that the Legislature intended to create chattel by [IC 25-36.5-1-3.2(f)(2)]. I don't understand any logic why they would."

Mead responded, "When you look at your CADDNAR decisions, they've basically treated [IC 25-36.5-1-3.2(f)(1)] as applying to what I would call 'miscellaneous damages' such as erosion, survey costs, fencing, signage, ditches, and skidder trails. I don't claim to have done a thorough search, but I've not seen a CADDNAR decision that interprets that section as attempting to value the real estate based upon loss of the timber."

Habeeb observed, "But that could have also been because that wasn't what was claimed by the plaintiffs in those cases."

Mead responded, "It could be, but that's what's there."

The Chair then offered an opportunity for Eric Wyndham to provide rebuttal.

Wyndham began, "From speaking and from listening today, I think there's a real confusion as to what that statute does say. That's why the Department's position is there is no statute of limitation covering this situation—which brings it into the ten-year catch-all clause." [Under IC 25-36.5-1-3.2(f)(1)] for the wrongful activity, Mr. Mead's position that if a truck is damaged by somebody going in to cut trees, that makes personal property a two-year statute under remedy (1) and any damage to real estate under the same provision, a six-year statute. I don't think you can delineate out different statutes of limitations for that first provision of damages. I think there's also an argument for the wrongful activity, the value of the trees could be part of (1), and (2) is kind of a penal for the wrongful activity. I also want to cite some more language in *Owens v. Lewis*, it says 'the transaction takes its character as realty or personalty from the principle subject matter of the contract and the intention of the parties. Growing trees are part of the land, but a verbal contract for sale of them changes their character as property.'" He concluded, "I just think that this is a clear case where there's no statute that's applicable."

Chairwoman Stautz then called for discussion by members of the AOPA Committee. She observed there were several options for addressing the ALJ's nonfinal order and the

Department's objections to it. "We can affirm. We can remand. We can modify. I am looking for some comments or guidance as to what this Committee would like to do."

Mark Ahearn said he agreed with Mead's proposition that all statutes have a statute of limitations. Since no statute of limitations is included in the Timber Buyers Statute, the Committee was required to look outside it to identify the appropriate statute of limitations.

The Chair reflected, "Right."

Ahearn said his initial thought was that the wrongful harvest of timber constituted damages to real estate, and the six-year statute of limitations should apply. After considering the argument of counsel, however, his perspective was doing so left citizens and the Department to decide in each instance whether an activity was in the nature of an action for real estate or not. Lacking specific direction from the General Assembly, the simpler and better approach might be to uniformly apply the ten-year statute of limitations.

Habeeb said her "concern was that if we go with the six-year limitation, we're left with issues where there isn't a clear application of damages to real estate." Since the apparent legislative intent is to address all "wrongful activities" pertaining to timber harvests in a single action, she also had come to the conclusion the ten-year statute of limitations "made the most sense."

Bob Wright added, "I think this statute was created for the purpose of protecting real property, particularly timber on the real property. There is no question but that when timber is taken, the real property has less value than what it had before. Often, if they're stolen, the logs will no longer be available for measurement or inspection, so as a deterrent, and a method to evaluate the timber, the Legislature just said three times the value of the stumps. I think you can have two statutes of limitations in a case. But this is the Timber Buyer Statute so they're might be another cause of action to cover the other damage."

Doug Grant observed, "The trees are part of the real estate. It's hard to imagine you come back in three years with just stumps, and you have real estate which is worth as much as it was before. Listening to you, I agree with the ten-year statute of limitations."

The Chair then offered the floor to the Administrative Law Judge.

Judge Jensen reflected the case law provides "that statutes of limitations should be determined based on the primary nature of the case. More importantly, the quandary I have with the idea that timber" under IC 25-36.5-1-3.2(f)(2) is part of the real estate is that under (f)(1), a landowner is entitled to damage to the real estate and for any other resulting damages. Does that mean a landowner is entitled to diminution in the value of the real estate as a consequence of the wrongful timber harvest "plus an award of three times the stumpage for the timber itself? Are you talking about this in two pieces? Or

would the timber strictly be considered real estate, in which case if you devalue the real estate, now you cannot also award the stumpage value?"

The Chair observed, "This case is complex, and we understand what it is before us now." She offered to counsel for the parties an opportunity to lend further guidance.

John Mead stated, "I think there is phraseology in the statute that you're missing when you talk about valuing real estate with or without trees. The phraseology in the statute is when it has been cut or acquired 'without payment'. In the situation where the person comes in and cuts the trees, you don't have an action unless you have 'without payment'. I think that keys you to the fact that these are alternative things that the Legislature is looking at as personalty. If it wasn't alternative, they'd just say 'damage to the property', and then you could do the real-estate-before-and-real-estate-after thing. It's not just the damage. It's appropriating without payment."

Eric Wyndham offered, "I think the treble damages provision is so the timber cutters will exercise due care and protect landowners from the careless felling of trees. I don't think it's meant to compensate value, necessarily. I think it's more of a punitive thing or a requirement for due care on the part of the timber cutter."

The Chair observed there appeared to be a consensus that the nonfinal order should not be adopted by the AOPA Committee. She asked the members if they wished to amend the nonfinal order or to remand the matter to the Administrative Law Judge for further proceedings.

Robert Wright expressed a preference for remand, with which Habeeb concurred.

Mark Ahearn asked whether the Committee should ask Judge Jensen to draft a new opinion consistent with application of the ten-year statute of limitations.

Judge Sandra Jensen stated, "I certainly could do that. I might ask, since that's the Department's position, if they could be asked to submit proposed findings for me to work with."

Mary Ann Habeeb offered a motion. "I move that we remand this back to the Administrative Law Judge for an order consistent with a determination that a ten-year statute of limitations applies with regard to actions brought under the Timber Buyers Statute." Mark Ahearn seconded the motion.

Ahearn added, "I think the discussion about the UCC is not helpful. I think the decision should reflect that notwithstanding the applicability of provisions from the UCC concerning value, the issue for determining the proper statute of limitations is not about value, it's about the character of the proceeding. I think the discussion of the UCC is confusing and would suggest we take those clauses out."

Habeeb said, “I would agree with that and would amend my motion to instruct the Administrative Law Judge that references to IC 26-1-2 be excluded from any statute of limitations issue.” Ahearn then seconded the amended motion.

The Chair called for a voice vote on the motion. The motion carried unanimously.

John Mead asked whether the decision of the AOPA Committee was now subject to appeal.

Judge Jensen said the consequence of the action was to deny partial summary judgment. “It’s basically going to put this whole case back for a complete hearing. Ultimately, the motion for summary judgment would be denied.” After further consideration, she clarified, “It’s going to be a finding of a ten-year statute of limitations, a consequence of which allows the entire proceeding to go forward toward a hearing.”

Mead asked, “Administratively, is the next step from this Committee to the Natural Resources Commission?”

The Administrative Law Judge responded, “No, it’s judicial review.”

The Chair concurred. “It would be judicial review.”

Habeeb added. “We represent the Commission in AOPA matters. We speak for the Commission.”

Judge Jensen said the question becomes whether the decision of the AOPA Committee becomes one which John Mead could “take to judicial review now, or is today’s decision something that gets incorporated into the findings following the completing of a hearing on the merits.”

The Chair reflected, “That could be appealed later?”

Ahearn reflected, “I would say that’s something Mr. Mead would need to advise his client on. For our purposes, I think we come out with not a partial but a nonfinal order which says the DNR may proceed with its complaint. Wherever the status of that procedure was, prior to coming here on the statute of limitations question, that’s where it goes back to.”

The Chair granted the floor to Stephen Lucas, Director of the Commission’s Division of Hearings. Lucas said, “Historically, in the few instances where our agency has come to this procedural junction, the Commission or its AOPA Committee has stated whether the disposition is ripe for judicial review.” He offered one example in which the matter was remanded to the ALJ with a clarification the matter was “not ripe for judicial review. This is a remand to the ALJ, and when the ALJ completes the hearing process, the ALJ shall do new findings of fact and conclusions of law with a nonfinal order. The ALJ shall

then send the new nonfinal order to the parties, and all the parties would have another opportunity to file objections and come back to the AOPA Committee."

Ahearn asked Lucas how this result would be accomplished.

Lucas responded that if the remand model were what the AOPA Committee wished to accomplish, it would remand to Judge Jensen with any instructions. Judge Jensen would follow-up with an entry to the parties memorializing the remand and rescheduling the matter as appropriate to advance toward any hearing. She would reflect that she would do new findings of fact and conclusions of law, with a nonfinal order, and those would later be subject to filing objections and reconsideration by the AOPA Committee. "That way the parties can be secure they are procedurally correct."

Judge Jensen observed, "In that way, in the same nonfinal order, I could address the AOPA Committee's decision regarding application of the ten-year statute of limitations."

Habeeb reflected, "That would seem to make more sense."

The Chair agreed, "That would."

Judge Jensen said, "That way it would all be in one piece."

Ahearn reflected, "That's, of course, what we want."

Mary Ann Habeeb moved to augment her previously-adopted motion "to instruct the ALJ to move forward with the hearing, with regard to the substantive issues, applying the ten-year statute of limitations, in a nonfinal order that would encompass both substantive issues and the statute of limitations." Mark Ahearn seconded the motion. On a voice vote, the motion carried unanimously.

The Chair thanked counsel, the ALJ, and the Committee members "for their patience and consideration on a very interesting and complex matter."

Adjournment

At 2:55 p.m., the meeting was adjourned.