Minutes of the AOPA Committee of the Natural Resources Commission

March 15, 2005

AOPA Committee Members Present

Jane Ann Stautz, Committee Chair
Michael J. Kiley
Linda Runkle

NRC Staff Present

Stephen L. Lucas
Sandra L. Jensen
Jennifer M. Kane

Guests Present

Bill Schmidt
Tom Hazelett
Donna Marron
Stephanie Roth
E. Patrick Walker
R. David Boyer, II
John Urbans
Pat Mansfield
Pat Murphy
Peter Foley
Ken Buchand
Steve Gerber
Daniel McInerny
Joseph S. Northrup
James W. Steen
Ihor N. Boyko
Mike Reeder
Bill Mansfield
Joel Wieneke

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 10:14 a.m., EST, on March 15, 2005 in the Garrison, Fort Harrison State Park, 6002 North Post Road, Indianapolis. With all three members of the Committee present, the Committee Chair observed a quorum.

Approval of Minutes for Meeting Held on January 13, 2005.

The Committee discussed and approved by acclamation the minutes for the meeting held on January 13, 2005.

Consideration of Oral Argument with respect to Objections by Steven Gerber in *Gerber v. Department of Natural Resources*; Administrative Cause Number 01-159L.

Stephen Lucas introduced this item. He reflected that a panel of administrative law judges heard this proceeding. The panel consisted of Cpt. Terry Hyndman and Lt. David

Schwanke of the DNR's Division of Law Enforcement and Sylvia Wilcox of the NRC's Division of Hearings. With the resignation of Judge Wilcox, Lucas said he was addressing administrative matters in his capacity as Division Director. He then outlined how the proposal by the parties' attorneys for the submission of simultaneous briefs instead of participating in oral argument. Also, Steven Gerber's attorney wrote to request a formal disposition of the denial of his client's "Motion to Disqualify Panel Members". He added that Steven Gerber's attorney had asked to commit the matter to mediation, but the DNR's attorney opposed the request.

The AOPA Committee considered the request to formalize the response to Gerber's "Motion to Disqualify Panel Members". Chairwoman Jane Stautz observed this matter was discussed during the public meeting of the AOPA Committee held on January 13, 2005. The disposition was reflected in the minutes for the January meeting.

The Chair said that with regard to the resignation of Lori Kaplan as Commissioner of the Indiana Department of Environmental Management, she was no longer a member of the Natural Resources Commission. As a result, the motion was mooted as to Kaplan.

Jane Ann Stautz observed that the AOPA Committee denied the motion to disqualify Michael Kiley during its January 13 meeting. Committee Member, Michael Kiley, said "there was no basis for his disqualification or recusal." His comments during a previous proceeding under IC 4-21.5, in which Gerber was the subject of another disciplinary action, were responsive to the particulars of the former proceeding. The comments were observations of content and demeanor expressed by the Committee Member during Gerber's oral argument in the former proceeding. By consensus, the AOPA Committee agreed it would, through a written order approved by the Chair, memorialize the determination consistently with the January 13 discussions.

The Chair then opened discussion of the request by the parties that they submit written briefs instead of participating in oral argument. She observed this procedure was by agreement and suggested it should be granted. By acclamation, the members of the Committee ordered, by April 15, 2005, the parties to file simultaneous briefs with respect to Gerber's "objections" to the nonfinal order of the Panel of Administrative Law Judges. The parties would not be required to serve copies of their briefs upon each other. The briefs were to be in lieu of the opportunity for oral argument authorized by 312 IAC 3-1-12(c). This briefing procedure was approved and ordered by the AOPA Committee with the understanding that both parties expressly waived their opportunities for oral argument. Again, the AOPA Committee authorized the Chair to memorialize these orders in writing. Stautz said, "I think that has all been discussed and agreed upon" by the parties.

The AOPA Committee then considered Gerber's request to commit this matter to mediation under IC 4-21.5-3.5. The Chair observed the DNR had indicated it did not wish to participate in mediation. She asked Lucas whether there was any additional matter to come before the Committee in this regard. Lucas responded there was not and that he believed whether to order mediation was within the prerogative of the Committee.

Michael Kiley said, "It's my opinion that the request for mediation is certainly not timely made. The ALJ panel has already concluded the hearing process. The mediation request is supplemented after the fact. In my opinion, a mediation at this time would serve nothing more than to cause further delay with respect to the disposition of this case."

Linda Runkle said, "I do not recommend mediation at this point."

Kiley moved to deny the request to order mediation. Runkle seconded the motion. The motion was approved upon voice vote, with the Chair authorized to memorialize the order in writing.

Consideration of Oral Argument with respect to Objections by Cruse Timber and Real Estate to Findings of Fact and Conclusions of Law with Nonfinal Administrative Judgment in *Pike Lumber Company, Inc. v. Cruse Timber and Real Estate, et al*.; Administrative Cause No. 03-187F.

Stephen Lucas, Administrative Law Judge, introduced this item. He said for consideration were objections by Cruse Timber and Real Estate and others to a nonfinal administrative judgment. He said the Respondents' Attorney, Peter R. Foley, would present oral argument in support of the objections. Joseph S. Northrop, Attorney for Pike Lumber would provide oral argument in response to those objections.

Peter Foley centered the Respondents' objections upon Finding 51 through Finding 57 that addressed the affirmative defenses of adverse possession, mutual mistake of fact, or estoppel. He said the Administrative Law Judge determined these defenses were waived because they were not raised in a timely fashion. "It is true that those defenses were not raised by written motion, but they were tried before the Administrative Law Judge without objection, and implicitly with the consent" of Pike Lumber. "Under rule 312 IAC 3-1-10, it states that, unless inconsistent, the Trial Rules will apply." Foley indicated, "Trial Rule 15(B) allows for issues that are not raised by the pleadings to be tried by the express or the implied consent of the parties." He said Pike Lumber waived any error with respect to failure to plead affirmative defenses in writing because Pike Lumber did not object to testimony pertaining to those defenses. He cited supporting judicial precedent.

Foley said the Respondents raised substantive objections to Finding 54 "which essentially states, in summary, that the Respondents did not sustain their burden of proof with respect to adverse possession." He said the objections described the "numerous facts which we believe do fill the burden on behalf of the Respondents for adverse possession." The land at issue is river bottomland, and Harry Burnett acted consistently with the principle, and with his understanding, that the land was owned by him. The Burnetts raised cattle in the bottomland, placed a fence at the foot of the hill to exercise authority over the land, placed a roadway and levee, gave permission to third persons to hunt in the area. Pike Lumber placed "No Trespassing" signs at the foot of the hill consistent with Burnett's understanding of the property boundary. Foley said that,

although Pike Lumber claims to have pursued, through the Morgan County Prosecutor, an unlawful timber harvest by third persons in the area, Burnett was never informed of the prosecution, and the area for the harvest was farther south. "Also, Pike is a professional land manager and testified to the management of thousands of acres in Indiana." He said the burden "should be higher on them as stewards of the land than the normal land owner" for defending their holdings from the adverse possession of another.

Foley addressed the mistake of fact issue and referenced particularly Finding 55. He said the Burnetts always understood the foot of the hill to be the boundary. He urged that a land contract clarified the intent was that the foot of the hill would be the boundary. Foley indicated his client sought to have these Findings amended and a Final Order issued that was favorable to them and consistent with the evidence.

Joseph Northrop spoke on behalf of Pike Lumber Company. He said it "would be helpful to put the case in some context." The dispute arose in April 2003 when Pike Lumber discovered timber had been cut from its property in Morgan County. A complaint was filed with the Natural Resources Commission seeking triple stumpage value for the harvested timber, as well as for litigation expenses including attorney fees. Originally, the complaint was directed to Perry Cruse and his surety, but the landowner was subsequently joined as well. "The Respondents answered with a general denial. We had two days of trial."

Northrop said, "At the hearing, the main contention" was directed to how the property boundary should be properly drawn between the Burnett property and the Pike property. Pike Lumber Company employed Michael Sheppard to survey the line, and based upon the survey, there was a determination that 55 trees harvested by Cruse were on Pike's land. "The bulk of the trial consisted of the Respondent's surveyor coming in and criticizing Sheppard's survey. The Respondents' expert witness did not do a survey himself, but he criticized Mr. Sheppard's survey" and concluded the legal description was ambiguous and needed to be explained. Pike Lumber subsequently called Gary Kent, "a surveyor who is maybe the premier surveyor in the State, and he agreed that the survey was properly done by Mr. Sheppard." He said the testimony was not going to adverse possession but rather to how properly to determine the property line.

Northrop said Pike Lumber Company "never agreed to litigate adverse possession or any other affirmative defenses." He said, "it wasn't an adverse possession case, and even if it had been, the Respondents would have had the burden of proof to have carried adverse possession as an affirmative defense, and they didn't do that. I think the Administrative Law Judge's opinion makes that pretty clear. He considered all the facts and concluded there were insufficient facts to prove adverse possession."

Northrop said the evidence also did not support the affirmative defense of mistake of fact. Pike Lumber was clear. "There was a clear chain of title straight through Mullendore to Pike." He said the person who placed the "No Trespassing" signs had permission to hunt on the Pike Lumber property, but he had no authority to place signage. When Pike Lumber determined the signs were posted, the person was instructed to remove them,

and, additionally, the signs did not conform to the property boundary contended by the Respondents. "Sometimes people" along the disputed boundary "were acting one way, and sometimes another." Northrop said there were several elements that had to be proven to establish adverse possession, and the failure to establish any one would cause the effort to fail. Included in Indiana was a requirement that the person making the claim pay the taxes on the real estate, and the evidence did not support the finding here. Also, Pike Lumber's pursuit of the timber theft through the Prosecutor's office was consistent with its contention of ownership and its good title.

Northrop pointed out that the Administrative Law Judge did "turn down" Pike's request for litigation expenses. "So the Claimant didn't get everything that it asked for." He said the law and the evidence supported the ALJ's findings and nonfinal order, and he asked the AOPA Committee to sustain the ALJ.

Linda Runkle asked whether there was evidence at hearing that Pike Lumber Company had paid the taxes on the subject property. Northrop responded that the hearing was not directed to adverse possession, and Pike Lumber was not attempting to prove or disprove adverse possession. He did not recall whether evidence offered by Pike Lumber addressed the payment of taxes.

Michael Kiley congratulated both attorneys on their fine presentations. He said, "My general read on this is that the Cruse people, even had they plead the adverse possession issue," that "they failed to make the burden of proof with respect to the various issues that are required in connection with establishing adverse possession." He said it appeared to him that the Respondents did not provide sufficient evidence upon which the Burnetts could factually establish adverse possession. As a result, the issue of whether adverse possession was properly pleaded is not essential to the disposition. The Respondents' claim for adverse possession "simply does not hold water, in my opinion." The ALJ "really makes that determination in his findings of fact and nonfinal order."

Kiley moved to affirm the Administrative Law Judge's Findings of Fact and Conclusions of Law and recommended that his Nonfinal Administrative Judgment be made a Final Administrative Judgment. Linda Runkle seconded the motion. Upon voice vote, the motion was approved unanimously.

Consideration of Oral Argument with respect to Objections by Mahoney and the Hoosier Environmental Council and with respect to Objections by Centre Properties concerning an Intervention Petition in *Centre Properties v. Department of Natural Resources*; Administrative Cause No. 04-080W.

Sandra Jensen, Administrative Law Judge, introduced this item. For consideration is the disposition of intervention petitions by three persons: the Hoosier Environmental Council, Elizabeth Mahoney, and Janyce Frank. She said Ihor Boyko was attorney for the Department of Natural Resources. Joel Wieneke was a legal intern for the

Intervention Petitioners. Donna Marron and Daniel McInerny were the attorneys for Centre Properties.

Joel Wieneke presented the objections for the Hoosier Environmental Council and Mahoney. He also responded to Centre Properties' Objections relating to the Administrative Law Judge's granting of Frank's petition to intervene. He said Centre Properties brought the appeal to the Natural Resources Commission in response to the denial by the Department of Natural Resources of a license application under the Flood Control Act. HEC as well as Mahoney and Frank, who are individual members of HEC, sought to intervene in the proceeding.

Wieneke directed the AOPA Committee's attention to IC 4-21.5-3-21 that governs intervention. He said the section provides that those with special statutory rights, as well as those who show they are adversely affected, have the right to intervene. "It is our contention that IC 13-30-1-5, part of the civil suit statute, creates that statutory right." This law empowers citizens to intervene in an administrative proceeding where the matter under consideration has the potential for significantly impairing the environment. He said the Intervention Petitioners filed a verified pleading contending that the license sought by Centre Properties had the potential for significantly impairing the environment, and intervention should have been approved on this basis.

Wieneke said the ALJ pointed to IC 13-30-1-3 in determining that applying the civil suit statute to grant standing would be improper. He said IC 13-30-1-3 explicitly stated, however, that it applied only to IC 13-3-1-1 and that Section 3 does not apply to the operative provision here: IC 13-30-1-5. "We are intervenors trying to go into an already ongoing suit." He said the ALJ's interpretation would also seem "an illogical result" when IC 4-21.5-3-24 is considered.

Wieneke said Frank and Mahoney had presented a sufficient basis to demonstrate they would be aggrieved by the licensure. He cited *Huffman* in which the Indiana Supreme Court defines what it means to be "aggrieved or adversely affected" under AOPA. An intervention petitioner must show a property interest, pecuniary interest, or personal interest in the proceeding. Looking at prior NRC precedents, the facts here support this standard. If approved, the consequence of the license would be to threaten life or property or to cause unreasonable detrimental effects upon fish, wildlife, or botanical resources. Both individuals own property in the vicinity of the Centre Properties application.

Wieneke said *Huffman* also clarified that the denial of standing was comparable to a Trial Rule 12(B)(6) motion. An Administrative Law Judge may dismiss only if, on the face of the complaint, the person seeking relief would not be entitled to relief under any set of facts admissible under the allegations of the complaint. He cited *Save the Valley* in which the Court of Appeals of Indiana relied upon the allegations of the members of the group to withstand dismissal.

As a final point with respect to the objections, Wieneke said HEC has standing because two of its members, Frank and Mahoney, have standing. Based upon the doctrine of associational standing, as approved in *Save the Valley*, an aggrieved or adversely affected individual would establish a basis for intervention by an organization representing the same interests. The interests at stake are directed to the kinds of interests supported by HEC since the Flood Control Act is largely concerned with environmental protection.

Wieneke addressed a motion to strike objections filed by Centre Properties directed to granting Frank's intervention petition. He said the ALJ entered a nonfinal order with respect to intervention, at which time HEC referenced AOPA to determine the timeframes for filing objections. He said IC 4-21.5-3-29 provided those objections must be filed within 15 days, so HEC then filed timely objections. Centre Properties did not file timely objections, and the ALJ did not have statutory authority to expand the time for filing objections. As a result, Centre Properties' objections should be stricken.

Donna Marron spoke as attorney for Centre Properties and said Daniel McInerny would subsequently speak for Centre Properties as well. She said she wished to place the dispute in context and stress the importance of the "standing" issue. She said, "'Standing' is a critical issue because allowing unlimited intervention by basically any party with a professed interest in proceeding, it does gum-up the works." She said for consideration here was merely one of three or four proceedings relating to the same project. In this case, a floodway construction license was denied "on the grounds that not enough information had been submitted. We're not talking about an agency order granting a floodway construction permit. We're not talking about an agency order even denying a floodway construction permit because of a violation of the Flood Control Act. We're talking about an agency order denying a flood construction application because the agency felt like it didn't have enough information. So, I just want to keep that in context."

Marron said the crux of her client's argument was "that no one but Centre Properties has been aggrieved and has proved it's adversely affected by this decision." Because HEC, Mahoney, and Frank opposed the project, "they're benefited by this decision that the permit shouldn't be issued."

Marron said she wanted to give the AOPA Committee "a little bit of background on this project. The floodway development project extended back to about 1996. Back in 1996, Centre Properties, Inc. obtained zoning for a shopping center development at the corner of 96th and Allisonville." In 1998, Centre Properties submitted a floodway application to the DNR, but the DNR denied the application "citing concerns about unreasonably adverse detrimental affects upon fish, wildlife, or botanical resources." Instead of proceeding with administrative review regarding that permit, Centre Properties "went in and redid their entire project. They addressed the agency's concerns about floodway effects by creating this incredible mitigation project. Centre Properties would place fill on less than 15 acres of ground and will be creating a 119-acre park to be donated to the Town of Fishers, will be preserving an additional approximately 60 acres of riparian ground from farmland to aquatic habitat, and over 6,000 or maybe 6,000 plants and trees

will be planted by this project. I just want to stress that this is a very unusual project that has tremendous potential assets to the citizens of Indiana, including members of HEC that have a professed interest in recreation and the environment."

Marron said in 2001 the DNR approved the revised project and "said the project looked good." HEC appealed the permit "and started doing some discovery." In a deposition, one of DNR's engineers tweaked a flood-stage model, and surcharges were generated that appeared problematic. "He testified in the deposition that he didn't trust the numbers because they were generating surcharges where there should be no surcharges." The DNR sought the assistance of an outside consultant who said the model "over-predicted." In 2002, DNR took the unprecedented step of withdrawing the permit. Centre Properties then sought administrative review of the Department's withdrawal of that permit. Once again, however, Centre Properties has not pushed forwarded with that administrative proceeding but has instead submitted a third license application to the Department.

Marron said Centre Properties submitted its third license application in 2002. In 2004, the DNR denied the application "not because it thought the project was going to violate the Flood Control Act but because it claimed not to have enough information even to evaluate the project." She said Centre Properties appealed, and the denial of the third application "is the particular proceeding we're concerned with today."

Marron said *Huffman* stands for the proposition that to be aggrieved or adversely affected, there must be a showing that a person has suffered or be likely to suffer, in the immediate future, harm to a legal interest be it a pecuniary, property, or personal interest. "It's a demanding standard. That doesn't mean you just have to be generally interested in the well-being of the Indiana environment." She said *Huffman* specifically held that the generalized interest of the public was not sufficient to establish standing. Marron said IC 13-30-1-5 was also cited in *Huffman*, and the Indiana Supreme Court there rejected the view that this section provided broad environmental standing to any citizen in Indiana.

Marron said *Save the Valley* was a controversial decision pertaining to associational standing for which transfer to the Indiana Supreme Court was being pursued. Even if the case were upheld, however, *Hunt v. Washington State* makes it clear there are three requirements: (1) Members must have standing to sue in their own right. (2) The interests that the organization seeks to protect must be germane to the organization's purpose. (3) Neither the claim asserted nor the relief requested requires the participation of individual members. She said HEC asserted in its brief that Centre Properties is responsible for showing the HEC does not meet the three requirements, but AOPA requires that the person petitioning for intervention must demonstrate all the needed facts. "Germaness is not a rubber stamp," and HEC's general concern for the environment does not carry the purpose for addressing the mainly local concerns for flood prevention. Marron also noted that much of the area is privately owned. With the exception of activities such as canoeing that take might place in the water channel, recreational activities are presently limited. As revised, the project would increase the opportunities for public recreational activities within the area, including HEC and its members. HEC's concerns for supporting recreational interests would be substantially served by "the

creation of this impressive 119-acre park and the preservation of additional ground and the planting of all these native trees and shrubs."

Daniel McInerny also spoke as attorney for Centre Properties. He said HEC failed to make any demonstration that it was "aggrieved or adversely affected" so as to establish a basis for intervention under IC 4-21.5-3-21. HEC had not proven, nor could HEC prove, that it was adversely affected. Under AOPA, a person seeking relief must show some level of personalized harm in order to achieve standing. To achieve standing here, HEC must show that it is directly affected by the DNR decision. As a matter of both fact and law, HEC did not make such a showing.

Similarly, neither Mahoney nor Frank showed they have been directly affected. The status of the proceeding is that Centre Properties has taken administrative review of a DNR determination that it was not provided sufficient data upon which the agency could determine whether to grant a floodway permit.

McInerny directed the Commission's attention to Finding 69 concerning Mahoney and to Finding 70 concerning Frank. He said the ALJ correctly found Mahoney's claim related to property located two miles downstream from the site, and this claim was purely speculative.

McInerny said Judge Jensen found in Finding 70 that Frank could arguably have been harmed by an increase in surcharge based upon the model developed during the administrative review of Centre Properties' license application that was approved and later withdrawn by the Department. Although he believed the model used for making the determination was flawed, and the evidence would not have ultimately supported the argument, the key is that the other license application was not now under review. Frank offered no evidence in support of the proposition there would be an increase in surcharge if the most recent license application were granted.

McInerny urged that HEC's motion to strike, filed on behalf of Frank, be denied. He said the ALJ did issue an interlocutory order that spoke to standing, but the order did not specify it was ripe for objections nor did it specify timing for filing objections. Both AOPA and standard practice before the Commission required such a notice. When subsequently the ALJ issued a nonfinal order directed to intervention, and she advised the parties of their right to file objections, Centre Properties did so in a timely fashion.

McInerny closed by asking that denial of the intervention petitions of HEC and Mahoney be affirmed. As to Frank, he urged the AOPA Committee to modify the findings and issue a final order also denying Frank's intervention petition.

Michael Kiley said he agreed with the contentions by Daniel McInerny that Judge Jensen's Finding 69 and Finding 70 were key to adjudication of the intervention petition. "As far as Mahoney is concerned, and as far as HEC is concerned, and also taking into consideration the last sentence of Finding 68, HEC has not established any interest in this proceeding, beyond those interests of the general public, which are based purely upon

speculation. On these grounds, HEC's and Mahoney's petition for intervention, as aggrieved or adversely affected entity must fail."

On the other hand, Kiley said he "was a little bit of a loss as to the findings on Frank." He added, "We have to take at face value the findings that are made by the Administrative Law Judge in respect to that on Frank." He said it was his judgment the AOPA Committee was compelled to affirm the ALJ. "We can't go behind that by taking into consideration issues in the record we don't have available to us." He then moved to affirm in all parts the nonfinal order of Judge Jensen with respect to the intervention petition.

Daniel McInerny interjected that he understood Michael Kiley's concern for "constraining yourself to the record. In our objections we did note that the DNR denial…states specifically the reason for the denial was a determination that there was not enough information to properly review the application. A point we wanted to stress with respect to that is that, if that is your stated basis, how could they have made an affirmative determination that the project would have an adverse effect and not comply with the Flood Control Act." McInerny also clarified that the modeling, cited by Frank as the basis for her position that the project would adversely affect her property, had been made a matter of record through the parties briefs in preparation for the oral argument before the Committee.

Linda Runkle indicated she agreed that neither Mahoney nor HEC had "standing" to support their intervention petition. On the other hand, she said she was "very persuaded" by McInerny's argument concerning the meaning of "aggrieved" and "adversely affected." She emphasized that administrative review to the Natural Resources Commission "was based upon denial due to lack of information. I really buy the argument that Centre Properties is the only one aggrieved and adversely affected." She asked whether the AOPA Committee had the power to disagree with the Administrative Law Judge.

Kiley answered, "I think we do." The Chair expressed her concurrence with this perspective. Kiley continued by noting the AOPA Committee's authority for considering objections to a nonfinal order of an ALJ was the totality of the NRC's authority. Jane Stautz said the AOPA Committee could affirm, remand, or modify the ALJ's nonfinal order and findings.

Kiley said, "I agree with the contention that the petition for intervention is probably premature." He added, "Obviously, there hasn't been a determination by the Department that the project has adversely affected fish, wildlife, and botanical resources." He continued, "I guess maybe I'm a little ambivalent about it. The issue you see in these associational cases is that we have Ms. Frank, who maybe appears to be aggrieved and adversely affected pecuniarily because she has property that abuts the subject real estate. Is she aggrieved for that reason, or is she in there because she's a member of HEC?" He concluded by saying he was "not wed to the motion irretrievably with respect to Frank."

Runkle asked Kiley if he would withdraw his motion. Kiley responded, "I will withdraw my motion."

Linda Runkle then moved to affirm the findings of fact, conclusions of law, and nonfinal order by the ALJ with respect to her determination that Mahoney and HEC did not establish standing sufficient to support intervention. Michael Kiley seconded the motion. The motion was approved unanimously.

Runkle moved to modify the ALJ's findings of fact and conclusions of law with respect to Janyce Frank "to find that Frank is not sufficiently aggrieved and adversely affected as to qualify for intervention in this proceeding." Runkle then paused and asked whether the AOPA Committee was required to remand to Judge Jensen or whether the AOPA Committee could make the modifications.

Chairwoman Stautz responded that either option was available. Kiley added, "That's exactly right. Normally, we send them back for additional information or for supplemental hearings of some kind. That's not necessary in this case."

Linda Runkle began again. She moved to modify the nonfinal order of the Administrative Law Judge to conclude that Frank is not sufficiently aggrieved and adversely affected to qualify for intervention.

Joel Wieneke interjected to ask whether there was a ruling on his motion to strike Centre Properties' objections. Michael Kiley responded there was not, and this ruling was needed before determining whether to uphold Frank's petition to intervene. "Thank you, for your consideration."

Kiley then moved to deny the motion to strike. Linda Runkle seconded the motion. The motion was approved on voice vote.

The Chair then returned to Runkle's motion to modify the ALJ's nonfinal order to conclude, instead, that Frank was not entitled to intervene, with the Chair to memorialize the motion in writing. Kiley seconded the motion. The motion was approved unanimously.

Daniel McInerny asked, for purposes of the record, that the AOPA Committee specifically find that, "in reality, only Centre Properties is aggrieved by this order because on judicial review someone is going to want to know why that finding was changed." Wieneke questioned whether McInerny's request was "appropriate parliamentary procedure."

McInerny said he understood Committee Member Runkle "was persuaded by the argument that, in reality based on the procedural status of the appeal, we are appealing the denial of a permit not the issuance of a permit. That really Centre Properties is the only party who could even be adversely affected at this point in the proceeding. It's premature for anyone else to be concerned about it because no permit has been issued."

Michael Kiley suggested that McInerny's analysis was itself premature to a final disposition of the proceeding. "I don't want that to be utilized somewhere on down the line as some sort of precedent, that Centre Properties is aggrieved. We don't know that they are."

Linda Runkle reflected that she expected the reasons for her motion would be set forth in the minutes. McInerny said he observed no court reporter was present, but if the reasoning would be set forth in the minutes, "I take it back."

Consideration of Oral Argument with respect to Objections by Indiana Coal Council, et al. to Denial of Intervention Petition and Objections by DNR to Non-Final Order on Summary Judgment in *F. D. McCrary v. Department of Natural Resources*; Administrative Cause Number 03-156G.

At the joint request of the parties and the intervention petitioners, the Administrative Law Judge continued consideration of this item on March 3, 2005. The Chair reported the item withdrawn.

Consideration of Oral Argument with respect to Objections to Findings of Fact Conclusions of Law and Non-Final Order on Motion for Summary Judgment in *Hazelett, et al. v. Walbridge, et al. and DNR*; Administrative Cause No. 04-026W.

Sandra Jensen, Administrative Law Judge, introduced this item. She said for consideration were objections by G. Charles Walbridge and other Respondents to her Findings of Fact and Conclusions of Law and Non-Final Order on Summary Judgment. She stated that two issues had originally been presented on summary judgment, but ultimately summary judgment was granted solely upon a determination that the piers in question were unusually wide and long in comparison to other piers within the vicinity. Patrick G. Murphy was the attorney for Thomas E. Hazelett and other individual claimants. R. David Boyer, II was the attorney for the Lake James Association, Inc. Stephen R. Snyder was the attorney for G. Charles Walbridge and other Respondents. Michael Reeder was the attorney for the Department of Natural Resources.

Stephen Snyder argued in support of the objections of the Respondents, including G. Charles Walbridge. He observed that until recently disputes before the Natural Resources Commission concerning piers were rare. In the last couple of years, they have become much more frequent.

Snyder said the proceeding involved the placement of two temporary piers, serving multiple users, at Eli's Point on Lake James, Steuben County. At the request of the predecessor to the current titleholder, the DNR's Division of Water sent correspondence indicating the configuration described in the request would qualify for a general license. The Claimants took issue with approval of the temporary piers under a general license

and sought administrative review. The ALJ determined the piers did not conform to 312 IAC 11-3-1(b)(4). This subdivision provides that to qualify a pier must "not be unusually wide or long relative to similar structures within the vicinity on the same public freshwater lake." Under the ALJ's order of summary judgment, Walbridge would be required to complete a licensure process through the DNR before placing the piers.

Snyder urged that the piers for which the Respondents received approval were multi-user piers providing dock space for 38 separate boats. The rule references the use of a "similar structure" for determining whether a pier is unusually wide or long. He said the comparison of a multi-user pier to a single pier would not be the comparison of similar structures. The comparison of a multi-user pier to a multi-user pier is needed. He said the ALJ erred in comparing the Respondents' multi-user piers to single user piers at Eli's Point and in failing to compare them to a marina on an adjacent property that provides dock space for 58 boats. A basic principle of construction is that words placed in statutes and rules are not considered mere surplusage. When the NRC adopted 312 IAC 11-3-1(b)(4), it carefully chose the words "similar structures," and those words must not be ignored in performing the requisite comparison.

Snyder also urged that the ALJ also construed "the vicinity" too narrowly when she rejected out of hand photographs of piers from elsewhere on Lake James merely because they were not located at Eli's Point. He said the Commission gave some insight on its intent by following the term "vicinity" with the phrase "on the same public freshwater lake." This qualifier means that, for example, the comparison would not extend from Lake James to Snow Lake. Even though a person might reasonably interpret piers on these two lakes are in the same vicinity, the piers would be located on different public freshwater lakes and would be disqualified from comparison. He said it was impossible to determine, as a matter of law under summary judgment, the piers were unusually wide or long unless other piers on Lake James were also considered.

Snyder further argued that the comparison of the piers in question to other similar structures must be made on a relative basis including consideration the amount of lake-frontage owned. In support of this position, Snyder stated that the Respondents' real estate consists of 250 feet of lake-frontage in comparison to most residential lots, which contain between 40 and 60 feet of lake-frontage. He provided an example. By dividing the parcel containing 250 feet of lake frontage into five lots, each containing only fifty feet of frontage, the Respondents would be enabled to increase the number of piers thereby allowing for an increased number of boats than what is, under the present interpretation, being authorized.

Snyder requested to reserve a few minutes for rebuttal following the oral arguments presented by the Claimants.

Patrick Murphy began by providing history regarding the piers in question and the relationship of the piers to the condominium development planned for an adjacent, non-lakefront, parcel. He displayed an enlarged photograph of a portion of Eli's Point that depicted the piers at issue as well as other piers in the area. Michael Kiley asked where

the marina that Snyder had referenced was located in the photograph. Murphy responded that the marina was not included in the photograph.

Murphy responded to Snyder's argument that the Administrative Law Judge had ignored a letter from the Department's Division of Water indicating the subject piers would qualify for a general license. He said the letter was not ignored. Finding 75 indicated the letter was based solely upon information submitted by the previous property owner, and it did not consider other piers in the area. In contrast, Finding 75 observed First Sgt. William Snyder's report specifically addressed the unusual length and width of the piers as compared to others in the area.

Murphy also stated the Division of Water letter included a contingency that fees could not be charged for slips. He said the Respondents now indicated that fees would be charged.

Murphy pointed out that the Administrative Law Judge did not rely solely upon Sgt. Snyder's report. She also considered multiple photographs submitted by both parties in determining that the piers were unusually wide and long. Additionally, he produced an enlarged excerpt of Finding 77 containing a portion of Respondent G. Charles Walbridge's deposition testimony, in which Walbridge responded affirmatively when asked if the piers in question were larger than other piers in the area.

Murphy said that contrary to the Respondents' position, the Administrative Law Judge correctly determined that the piers in question were properly compared only to piers in the vicinity of Eli's Point. The word "vicinity" in 312 IAC 11-3-1(b) served to limit the scope of any comparison to not only the same lake, but also to a particular area on that same lake. Contrary to Snyder's argument, the rule did not contemplate that an entire lake was properly considered a "vicinity." If the entirety of a lake qualified for comparison, there would be no need in the rule for the term "vicinity".

David Boyer provided a demonstrative exhibit containing the language of 312 IAC 11-3-1(b). He highlighted the requirement that, for a temporary structure to qualify for placement under the general license, the structure must meet each of the specified criteria. These multiple criteria included the prohibition against unusually wide and long piers. He produced a second enlarged photograph depicting portions of Eli's Point (taken from the opposite direction as the photograph produced by Murphy) and identified the piers Snyder referred to that constituted the adjacent marina. He pointed out that the piers in the marina are significantly smaller than the piers at issue.

Boyer noted that Respondents sought to have the piers at issue qualify for placement under the general licensing authority of 312 IAC 11-3-1(b) while also contending that the proper comparison involved other multi-user piers located on Lake James. Boyer further pointed out that other multi-user piers, particular the marina on the adjacent property, to which the Respondents urged the Committee to compare the piers at issue, were not temporary structures but instead were marinas in place pursuant to individual permits.

Boyer reiterated Murphy's argument regarding the appropriateness of comparing the piers at issue only to those within the vicinity of Eli's Point. He said that while Snyder portrayed the comparison made by the Administrative Law Judge as restricted solely to the immediate area of Eli's Point, the actual comparison as indicated at Finding 78 included consideration of piers located on the opposite side of Lake James from Eli's Point.

Boyer addressed what Snyder urged were different factual positions by the Department's Division of Water and its Division of Law Enforcement. He urged that the Administrative Law Judge had properly granted summary judgment upon an interpretation of the plain meaning of 312 IAC 11-3-1(b)(4). Boyer directed the AOPA Committee to Finding 76 as supporting this proposition.

Michael Reeder addressed the Respondents' argument that 312 IAC 11-3-1(b)(4) must properly be interpreted as requiring consideration of the relative lengths of lakefront. He said nothing in the rule language required or supported this proposition. Neither had the Department ever applied this interpretation. The rule section merely determines whether a person qualifies for a general license and not whether a person could qualify for a license following a completed review. Reeder pointed out the word "relative" as used in 312 IAC 11-3-1(b)(4) referred to similar structures and not to lake frontage. The rule did not contemplate consideration of varying lengths of lakefront relative to the length and width of a temporary structure qualified for placement under a general license.

In rebuttal, Snyder reminded the AOPA Committee that whether the piers at issue were being provided for a fee, or whether the piers constituted a marina, was not currently for consideration. The Administrative Law Judge did not render summary judgment on the basis the piers constituted a marina.

Snyder directed the Committee to the Administrative Law Judge's finding that six piers, similar to the piers at issue, were located on Lake James. He urged that the piers at issue should properly have been compared to all piers located on Lake James and not simply those on or near Eli's Point.

Michael Kiley said he was "very familiar with the proliferation of pier cases that began about a decade ago. Mr. Snyder's representation is correct that there essentially was no pier problem until the frontage values, and strong desire for access to the lakes, made it an issue."

Kiley indicated it was "hard to determine what the Commission intended," when it adopted the language now codified at 312 IAC 11-3-1(b)(4). "If you had the intention of the Commission in connection with this rule, it would be 45 pages long, and it still wouldn't meet the criteria to satisfy everybody." He said when the Commission originally embarked on rule standards pertaining to the placement of temporary piers, "it was done on the basis that it would create an atmosphere that was reasonable, right, and just as to the use of the lakefront with piers by property owners. I have to say that the discussions that were had back then did not agree with Mr. Snyder's connotation of what

constituted ‘the vicinity.’ In talking about the ‘vicinity’ in discussions we were having in the Commission at that time, we were talking about the immediate environs.”

Kiley added, “Until the courts define what that might be, or more specifically define, we have to work with what we have.” He said, “I’m convinced, at this juncture, that the job that was done by Judge Jensen, in connection with the preparation of her findings of fact and conclusions of law, is on point with what the law is currently in Indiana until an Appellate Court in Indiana might redefine (not redefine but define because it hasn’t been defined) what we mean by unusually wide or long relative to similar structures.”

Kiley concluded, “In light of that, and in order to bring this to a head, …I am going to make a motion that we affirm the findings of fact and conclusions of law of Judge Jensen and that we deny the objections that were filed by the Respondents.” Linda Runkle seconded the motion. The motion was approved unanimously.

Adjournment

At approximately 12:48 p.m., EST, the meeting was adjourned.