

STATE OF INDIANA)
) SS:
COUNTY OF STEUBEN)

IN THE STEUBEN CIRCUIT COURT
CAUSE NO. 76C01-0701-PL-033

DEAN RAY, JOHN BLACKBURN,)
and THOMAS BLACKBURN,)

Petitioners,)

vs.)

MICHAEL LUKIS, HOLLY)
WEHRENBURG OLIVER, JAMES)
WEHRENBURG, KIM)
WEHRENBURG, PETER)
WEHRENBURG, GRETCHEN)
WEHRENBURG STEWART, and)
THOMAS SCHEELE,)

Respondents.)

ORDER

Petitioner Dean Ray ("Ray") appears in person, and by counsel, George G. Martin, Jr. Petitioners John Blackburn and Thomas Blackburn ("Blackburn") appear in person, and by counsel, George G. Martin, Jr. Respondent Michael Lukis ("Lukis") fails to appear in person, but does appear by counsel, Steven R. Snyder. Respondents Holly Wehrenberg Oliver, James A. Wehrenberg, Kim Wehrenberg, Peter Wehrenberg and Gretchen Wehrenberg Stewart ("Wehrenberg") fail to appear in person, but do appear by counsel, Kim Wehrenberg. Respondent Thomas Scheele ("Scheele") fails to appear in person or by counsel.. On September 14, 2007 this Court conducted hearing on a Verified Petition for Judicial Review filed on January 16, 2007 by Ray and Blackburn. At the conclusion of the hearing the Court took all matters under advisement. The Court at this time being duly advised in the premises finds and orders as follows:

1. This case involves a dispute among contiguous property owners regarding their respective riparian rights.
2. Lukis, Blackburn and Ray own contiguous lakefront real estate on Lake James, Steuben County, Indiana.
3. Lukis purchased his lakefront real estate during 2004. Lukis' neighbor to the east is Blackburn; Blackburn's neighbor to the east is Ray; and, Ray's neighbor to the east is Wehrenberg.
4. Lukis constructed a dock and boatlift. The dock was approximately 89 feet long and was 27 ½ feet wide at the lake end.
5. Historically, the dock of Lukis' predecessors in title was 40 feet long.
6. The difference in water depth from the lake end of a dock extending 40 feet to the lake end of the same dock extending 89 feet is approximately 6 inches.
7. Lukis constructed his dock and boatlift approximately 10 feet closer to the Blackburn property than had been done historically.
8. Historically, Blackburn had erected his dock in such a manner that it did cross Lukis' property line extended.
9. Lukis advised Blackburn that this must stop.
10. Blackburn complied with Lukis' admonition and extended his dock from the shoreline in such a manner that the dock and associated lift would be located entirely within his property lines as extended.
11. Ray, reduced the length of his dock from 60 feet to 40 feet and moved it to the eastside of his property line as extended.

12. Even with this action being taken, Ray could not moor his pontoon boat on the westside of his dock as had been his custom without transgressing the eastern most property line of Blackburn as extended.

13. Ray, therefore, with the permission of Wehrenberg (his neighbor to the east) started mooring his pontoon boat on the eastside of his dock thereby transgressing the western most extended property line of Wehrenberg.

14. Ray and Blackburn sought relief from the DNR.

15. Lukis brought Wehrenberg into the litigation.

16. On December 16, 2006 the Natural Resources Commission Committee handed down it's two-one decision affirming the non-Final Order of the Administrative Law Judge.

17. Judicial Review was sought by Ray and Blackburn on January 16, 2007.

18. No Petition for Judicial Review was filed by Wehrenberg.

19. On February 12, 2007 Wehrenberg filed with this Court a pleading captioned "Response to Petition for Judicial Review Under the Administrative Orders and Procedures Act."

20. Lukis filed his Motion to Dismiss on February 22, 2007.

21. This Court denied Lukis' Motion to Dismiss on April 9, 2007.

22. Lukis, at this time, asks the Court to reconsider its ruling of April 9, 2007.

23. The ALJ found, among other things, the following:

"49. While the survey depicting the parties' respective riparian zones was stipulated into evidence, Ray, the Blackburns and the Wehrenbergs

dispute the reasonableness of determining riparian zones by the extension of property lines into Lake James.

50. That the parties are riparian owners says little about the riparian zones under their respective control.

51. Riparian owners' use of public freshwater lakes is restricted by 'lateral limitation for the enjoyment of other riparians and to perpendicular limitations for the enjoyment of the public'. Rufenbarger v. Lowe, CADDNAR 150, 152 (2004).

52. While there is 'no set rule in Indiana for establishing the extension of boundaries into a lake', Id. citing Bath v. Courts, 459 N.E.2d 72 (Ind.App. 1984), two general premises for such determination have emerged. Id.

53. 'Where a shoreline approximates a straight line and where the onshore property boundaries are perpendicular to the shore, the boundaries are determined by extending the onshore property boundaries' lakeward. Id.

54. However, 'when the shoreline is irregular, and drawing lines at right angles to the shoreline would not accomplish a just apportionment, the boundary lines should divide the available navigable waterfront in proportion to the amount of shoreline of each owner . . .' Id. Relying on Bath, supra, and Nosek v. Stryker, 309 N.W.2d 868, (1981).

55. Based upon the evidence presented in the instant proceeding, the shoreline is generally irregular and the parties' onshore property lines are not perpendicular to the shoreline.

57. However, the riparian zones determined by extending onshore property lines lakeward appear to accomplish a just apportionment between the respective parties based upon the 'amount of shoreline of each owner'. *Rufenbarger, supra*.

61. In this particular case, the result of establishing the parties' riparian zones by extending onshore property lines lakeward, equivocates the apportionment of riparian zones consistent with the amount of shoreline owned by each respective owner. *See Rufenbarger*.

62. It is hereby determined that establishing Ray's, Lukis', the Blackburns', the Wehrenbergs' and Scheele's riparian zones by extending their onshore property lines lakeward is appropriate. *Bath, Nosek, Rufenbarger, supra.*"

24. As a court reviewing agency action it is mindful that it is without power to try this case de novo or to substitute its judgment for that of the Administrative Agency.

25. As set forth at Ind. Code 4-21.5-5-14(d):

"The court shall grant relief under Section 15 of this chapter only if it determines that a person seeking judicial relief has been prejudiced by an agency action that is:

(1) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . ."

26. The case of *Bath v. Courts*, 459 N.E.2d 72 (Ind.App. 1984) teaches us that when contiguous lakefront property owners have a dispute regarding their respective

riparian rights, if their property boundaries are perpendicular to the shoreline, then it is appropriate in establishing riparian rights to simply extend their respective property boundaries into the lake. The *Bath* court relied upon the opinion of *Nosek v. Stryker*, 309 N.W.2d 868 (Wis. 1981). In the case at bar the respective boundary lines of Lukis, Ray and Blackburn do not touch upon Lake James at right angles. Rather, their respective properties sit in a cove.

27. This Court has been unable to find any Indiana case which deals directly with the factual scenario with which it has been presented.

28. The *Nosek* court, however, did set forth a formula for dealing with the factual situation before this Court which the ALJ cited with approval.

29. When presented with irregular property lines such as in the case at bar the *Nosek* court adopted what it called the "apportionment method" of adjusting disputed riparian rights. At page 871 it set forth the following formula:

"The whole cove is to be treated as a unit of the shoreline by drawing such perpendicular lines from its two boundary points or headlands to the line of navigability, and then apportioning the whole intervening boundary line of navigable water to the whole shore line of the cove between the headlands, and by drawing straight lines from the two termini of each so apportioned share of navigable water line to the respective termini of the corresponding shore line pertaining to each owner."

30. By application of the apportionment method when establishing riparian rights in settling disputes among lakefront property owners each lakefront property owner receives a navigable waterfront proportionate to the width of that property owner's shore line.

31. In the case at bar the ALJ did not apply the apportionment method in developing riparian zones for Lukis, Ray and Blackburn. Rather, the ALJ extended

existing property lines into Lake James. By so doing, Ray finds himself in the precarious position of having to rely upon the largesse of Wehrenberg in order to moor his pontoon boat.

32. This Court concludes that the ALJ did not establish riparian zones among Lukis, Ray and Blackburn in accordance with the apportionment method as set forth in *Nosek, supra* and, therefore, the decision of the ALJ is contrary to law.

33. When this Court handed down its Order of April 9 2007 denying the Motion to Dismiss filed by Lukis, it was unclear to the Court whether Wehrenberg was simply responding to the Verified Petition for Judicial Review filed by Ray and Blackburn, or whether they were in fact seeking judicial review on their own behalf.

34. At this time, it is clear to the Court that the Wehrenberg's were seeking affirmative relief in their own behalf.

35. Ind. Code 4-21.5-5-5 provides that a Petition for Review is timely filed only if it is filed within thirty (30) days after the date that notice of the agency action that is the subject of the Petition for Judicial Review was served.

36. Wehrenberg was served with notice of final agency action on December 22, 2006. The "Response" which requested affirmative relief from the Order of the Natural Resources Commission was not filed by Wehrenberg until February 13, 2007.

37. Wehrenberg, therefore, cannot at this time seek affirmative relief from this Court.

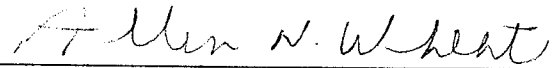
38. The Motion to Reconsider requested by Lukis should be granted.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. This case is remanded to the Natural Resources Commission for further proceedings not inconsistent with the Order of the Court entered this date.

2. Motion to Reconsider granted.

Dated this 24th day of September, 2007.



Allen N. Wheat, Judge
Steuben Circuit Court

Notice to:

RJO
Martin
Snyder
Wehrenberg
National Resources Commission

O.D.