

**BEFORE THE  
NATURAL RESOURCES COMMISSION  
OF THE  
STATE OF INDIANA**

**IN THE MATTER OF:**

<b>RAYMOND and KIMBERLY REHLANDER</b>	)	<b>Administrative Cause</b>
<b>Petitioner,</b>	)	<b>Number: 18-059W</b>
	)	
<b>vs.</b>	)	
	)	<i><b>[Pier Dispute]</b></i>
<b>ROBERT LENZEN, MARVIN TEMPLIN</b>	)	
<b>ROBERT DEMPSEY TRUST and</b>	)	
<b>WIESLAW KAMINSKI,</b>	)	
<b>Respondents,</b>	)	

**NICHOLAS AMELIO,**  
    **Intervenor.**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW  
WITH NONFINAL ORDER**

**Statement of the Proceeding and Jurisdiction**

1. Raymond Rehlander (“R. Rehlander”) filed correspondence on June 12, 2018, requesting a “ruling regarding a property/lake right dispute.” The request failed to name any opposing party and R. Rehlander was allowed the opportunity to amend his submission. On June 21, 2018, Robert Lenzen (“Lenzen”), Marvin Templin (“Templin”), Robert Dempsey Trust (“Dempsey Trust”) and Wieslaw Kaminski (“Kaminski”) were named as respondents by the Petitioner.
2. The Petition, along with the supplemental filing by R. Rehlander, initiated a proceeding governed by Ind. Code 4-21.5-3, sometimes referred to as the “Administrative Orders and Procedures Act” (“AOPA”) and the administrative rules adopted by the Commission at 312 IAC 3-1 to assist with the implementation of AOPA.
3. Administrative Law Judge (“ALJ”) Dawn Wilson was appointed under IC 14-10-2-2 to conduct this proceeding.
4. On July 5, 2018, Nicholas Amelio (“Amelio”) submitted a request to be identified as an intervening party. By ALJ order, Amelio was subsequently added as an intervening party.
5. On July 18, 2018, following the issuance of notice to all parties, ALJ Wilson conducted a Prehearing Conference, with R. Rehlander, Amelio and Lenzen attending. In addition, a Status Conference was held on August 15, 2018, with all parties present.

6. Thereafter, R. Rehlander and Kimberly Rehlander (the “Rehlanders”) requested the inclusion of Kimberly Rehlander as an additional Petitioner, due to her ownership in property relevant to this proceeding. The ALJ granted the request for Kimberly Rehlander to intervene as a party to this proceeding (“K. Rehlander”).
7. On July 30, 2018, the Department of Natural Resources (“Department”) by Counsel Elizabeth Gamboa and Ihor Boyko, filed its “Joint Appearance of Counsel for Department of Natural Resources for a Limited Purpose and Request for all Filings, Discovery Requests, Notices, Reports, and Orders”. For the reason that the Department is entrusted to hold and control public freshwater lakes for the benefit of the public pursuant to IC 14-26-2-5, the Department’s request was granted on August 2, 2018. On March 4, 2020, Attorney Gamboa filed a Notice of Withdrawal of Counsel. The Department did not seek to intervene.
8. On August 14, 2018, Arthur Johnson appeared as counsel for Lenzen, Templin, the Dempsey Trust and Kaminski. On October 3, 2019, George Ivancevich filed his substitution of appearance on behalf of Lenzen, the Dempsey Trust and Kaminski. On January 28, 2020, on behalf of Templin, George Ivancevich substituted his appearance.
9. On August 13, 2018, James Kaminski<sup>1</sup> filed his appearance as counsel for the Rehlanders.
10. On July 30, 2019, Gary Hancock filed his appearance as counsel for Amelio,
11. On July 24, 2018, motions to dismiss were filed by Amelio and Lenzen. On August 7, 2018 and August 31, 2018, the Rehlanders responded to the motions. Thereafter, party replies were filed by Amelio and Lenzen.
12. On August 2, 2018, the ALJ determined that the motions to dismiss would require treatment as motions for summary judgment under Indiana Trial Rule 56, as directed by Indiana Trial Rule 12(C). Pursuant to IC 4-21.5-3-23, AOPA requires an ALJ to consider motions for summary judgment as a court would consider a motion for summary judgment filed under Trial Rule 56.
13. On November 21, 2018, the ALJ issued an “Interlocutory Order on Motions for Summary Judgment” (“OSJ”) and granted summary judgment, in part. The OSJ is incorporated by reference as if stated herein and the matters established on summary judgment are affirmed.
14. Following issuance of the OSJ, upon party objection, Finding of Fact number 35 within the OSJ was amended to remove the phrase “that includes 77.5 feet of frontage”. The OSJ resolved some, but not all, of the pending disputed issues presented in the proceeding.

<sup>1</sup> Upon inquiry by the ALJ, Attorney Kaminski stated he has no relationship with the party to this case who shares the last name of Kaminski.

15. On March 5, 2019, a mediator was appointed in this proceeding. On June 25, 2019, the mediator reported mediation was unsuccessful.
16. Following multiple status conferences and the imposition of prehearing deadlines, an administrative hearing was heard on March 12, 2020. The administrative hearing was conducted in the hearing room of the Commission's Division of Hearings offices in Indianapolis, Indiana, with all parties present in person and by counsel.
17. Following the presentation of evidence, the ALJ allowed each party the opportunity to provide closing arguments in written form on or before April 17, 2020. On April 17, 2020, the Rehlanders, by counsel, filed "Petitioners' Memorandum of Law". On that same date, Amelio, by counsel filed a "Post Hearing Brief of Intervenors" and Respondents, by counsel, filed a "Brief of Respondents."
18. The Lake Preservation Act places full power over public freshwater lakes in the State of Indiana. The State, through the Department, is responsible to "hold and control all public freshwater lakes in trust for the use of all the citizens of Indiana for recreational purposes." IC 14-26-2-5(d), *Indiana Dept. of Nat. Res. v Lake George*, 889 N.E.2d 361 (Ind. App. 2008) and *Lake of the Woods v Ralston*, 748 N.E.2d 396, 401 (Ind. App. 2001).
19. The Commission has adopted rules at 312 IAC 11 to assist with administration of the Lake Preservation Act. *IC 4-21.5-1-15* and *312 IAC 3-1-2*.
20. Under IC 4-21.5, the Commission is responsible for resolving "a dispute among persons with competing riparian interests" associated with a public freshwater lake. *Id*
21. In addition, "A person may seek administrative review of the placement or maintenance of a structure under [312 IAC 11-3-1 or 1.2]...of this rule." *312 IAC 11-3-2*.
22. The Commission is the "ultimate authority" for determinations under the Lake Preservation Act. *IC 4-21.5-1-15* and *312 IAC 3-1-2*.
23. The Commission has jurisdiction over the subject matter and over the persons of the parties in this proceeding.

### **Findings of Fact<sup>2</sup>**

24. The following undisputed findings of fact were determined though summary judgment:
  - (a) Bass Lake is a public freshwater lake in Starke County, Indiana.
  - (b) Rehlander has an interest in real property on Bass Lake.
  - (c) Joseph Krivak was a prior owner of property now owned by Rehlander.

<sup>2</sup> Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.

- (d) Amelio has an interest in real property fronting on Bass Lake that is immediately adjacent to and north of the Rehlander property.
- (e) On March 20, 1992, a Declaratory Judgment was issued by the Fulton County Circuit Court in *Joseph Krivak and Emily Krivak v Robert Dempsey, et al*, cause number 25C01-9105-CP-0178 (the “Declaratory Judgment”). In the Declaratory Judgment, property owners of Lots 2 through 12 of Krivak Acres were determined to be the owners of a 20 foot easement (“Easement Holders”) across the north end of Krivak’s property, more specifically:

Beginning at a point on the meander line of Bass Lake (formerly Cedar Lake), 43 feet north of the northwest corner of Lot 16 in Shoup’s Addition to Shoup’s Cedar Lake Lots; thence north 90 feet along the meander line of said lake; thence east to the west line of public highway; thence south along said highway to a point where said highway intersects the north line of tract conveyed to Victor O. McDowell and wife as shown by deed recorded in Deed Record 90, page 475; thence west along the north line of McDowell tract to place of beginning.

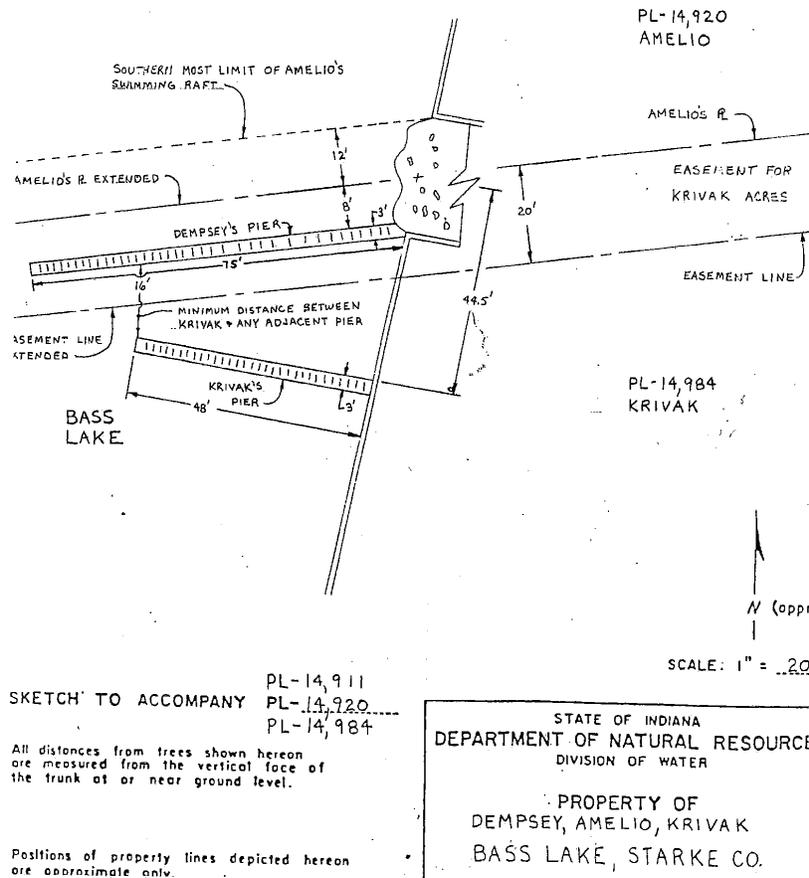
See “Response to Motion for Summary Judgment” (“Petitioners’ Response”), Ex.1.

- (f) Easement use, as described in the Declaratory Judgment, was limited to use by the property owners of Lots 2 through 12 of Krivak Acres, their guests of the day and tenants of the property owners. *Petitioners’ Response, Ex.2.*
- (g) In the Declaratory Judgment, the easement was determined by the court to “provide reasonable access to [Bass Lake] in a manner not unduly limiting usage by the other easement owners.” *Id.* at pg. 2.
- (h) The Fulton Circuit Court also determined that reasonable access included the “installation and maintenance of a pier by participating property owners; for installation and maintenance of shore stations or buoys for mooring boats. Selection of a location for the pier, for shore stations, or for buoys shall be as the property owners may from time to time agree based upon their need and reasonable usage for all. This in no way limits the property owners in the selection of a location for the placement of their pier other than to allow for reasonable usage of the lake by all users...Such other rights of access as may be reasonable under the circumstances or as a court of proper jurisdiction may from time to time determine.” *Id.* at pg. 2.
- (i) In the Declaratory Judgment, the Court’s order included the following instruction, “counsel for defendants shall make appropriate permanent record in Starke County of this Court’s ruling, either by filing of this ruling by *lis pendens*, by recording in the miscellaneous records of Starke County, or both.” *Id.* at page 3. The Court declared the dominant and servient estate ownership “shall be covenants running with the land.” *Id.*

- (j) On August 31, 1992, the Department issued Permit PL-14,911 to Robert Dempsey for the installation of a temporary pier. Permit PL-14,911, included the following conditions, “the temporary pier shall extend lakeward from the legal shoreline starting approximately 8 feet south of the north line of the 20-foot easement...the temporary pier shall remain parallel to the easement lines extended into the waters of Bass Lake...the maximum width of the pier shall be 3 feet...no pier segments shall extend in a perpendicular direction from the pier...all watercraft shall be moored parallel to the pier.” *Petitioners’ Response, Ex. 2, pgs. 6-7 and Ex. 4, pgs. 1-2.*
- (k) On September 11, 1992, Joseph Krivak filed a petition requesting administrative review of Condition 7<sup>3</sup> of his own permit for a temporary pier, Permit PL-14,984. The case was heard by the Commission as *Krivak v DNR, Dempsey, Lenzen and Amelio*, case number 92-338W (“*Krivak*”). See *Petitioners’ Response, Ex. 3.*
- (l) In *Krivak*, Permit #PL-14,984 was considered in conjunction with the permits issued to neighbors, PL-14,911 issued to Robert Dempsey, and PL-14,920, issued to Nick Amelio. Robert Lenzen was also included as a party to the proceeding. *Id.*
- (m) A sketch included within Exhibit 4 to the Petitioner’s Response, reflecting the locations of piers under Permits PL-14,911, PL-14,920 and PL-14,984, reveals an eight (8) foot area between the Dempsey pier and the southern boundary of Amelio’s riparian zone. The sketch reveals a 16 foot area between the Dempsey pier and the Krivak pier, marked as the “minimum distance between Krivak & any adjacent pier”. The Dempsey pier is marked as 75 feet in length and 3 foot in width. The Krivak pier is marked as 48 feet in length and 3 feet in width. *Petitioners’ Response, Ex. 4, pg. 11.* For the reader’s ease, a portion of the sketch is included below:<sup>4</sup>

<sup>3</sup> No party submitted the permit issued as PL-14,984 for consideration.

<sup>4</sup> The pier on the sketch that is labeled “Krivak” is now owned by Petitioner, Kimberly Rehlander. The pier labeled at “Dempsey” is the pier now placed by certain lot owners of Krivak Acres.



- (n) At the conclusion of the presentation of evidence in *Krivak*, the Commission issued its final decision and the decision was indexed as “*Krivak v DNR, Dempsey, Lenzen and Amelio*, 6 CADDNAR 176 (1994)”<sup>5</sup>. *Petitioners Response, Ex. 3, pg. 5*.
- (o) In *Krivak*, the Commission determined in its final order; “Where, as in this case, the onshore boundaries of the property owners are approximately parallel to one other, and nearly but not exactly perpendicular to the shoreline, the most direct and expedient manner for pier placement is at the same angle as the onshore boundaries of the neighbors.” *Id.*
- (p) In *Krivak*, the Commission affirmed Permit, PL-14,984, “[t]he subject permit as given initial determination by the Department is as the same angle as the onshore boundaries of the neighbors and meets the spirit and intent of *Nosek*<sup>6</sup>. The subject

<sup>5</sup> A final order of the Commission may be relied upon as precedent by the Commission to the detriment of any other person after the order has been indexed by name and subject and subject to public inspection and copying. IC 4-21.5-3-32(a). The Commission’s decision in *Krivak* was previously indexed by the Commission and is readily available through the Commission’s online searchable repository of decisions and may be used as precedent.

<sup>6</sup> *Nosek v Stryker*, 309 N.W.2d 868 (Wis. 1981).

permit should be affirmed as...conditioned by the Department in its initial determination.” *Id.*

- (q) In *Krivak*, Permits PL-14,911 and PL-14,920 were also affirmed in the form given initial determination by the Department. *Id. at pg. 4.*
  - (r) The Commission also previously issued a determination in *Robert Dempsey and Robert Lenzen v Department of Natural Resources*, case number 92-342W<sup>7</sup>. In the *Dempsey* case, the Commission issued its “Final Order of the Natural Resources Commission” on January 14, 1993, adopting an Agreed Order submitted to the Commission by the parties, Robert Dempsey, Robert Lenzen and the Department. The Agreed Order revised the name of the permit holder for Permit PL-14,911 from “Robert Dempsey” to the “Participating Property Owners of Krivak Acres”. See the Petitioners’ Petition, Exhibit 1 and Petitioners’ Response, Exhibit 2.
  - (s) Also, in the Agreed Order presented by the parties in *Dempsey*, the parties agreed to replace the condition limiting the permitted pier length to 75 feet as follows: “the pier can be extended to length no greater than the maximum length allowed by statute, rule or local ordinance so long as the extended pier does not interfere with the use of the lake by others.” *Id.*
  - (t) The Rehlanders installed a temporary pier under a general license in 2018 with a length of 140 feet. See Petitioners’ Response, Ex.1, pg. 1.
  - (u) Easement holders installed a temporary pier in 2018 with a length of 269 feet. Additions perpendicular to the pier resulted in a total pier width of 19 feet. *Petitioners’ Response, pg. 2.*
  - (v) The placement of piers by the easement holders and the Rehlanders has resulted in a navigational hazard.
25. At one time, K. Rehlander’s parents, Joseph and Emily Krivak, owned the off-lake property currently known as Krivak Acres and an additional lot having lake frontage. See the testimony of K. Rehlander.
26. K. Rehlander inherited the frontage property from her parents and she is the current owner of the property referenced hereafter as the “Rehlander Property” on Bass Lake. A deed from the Joseph Krivak Estate to K. Rehlander was recorded in Starke County records on February 22, 2016. See the testimony of K. Rehlander and Ex. B, Doc 1.
27. The Easement Holders possess a dominant easement over 20 feet across the north end of the Rehlander Property. Lots 2 through 12 of Krivak Acres are currently owned by the following persons:

<sup>7</sup> The Commission’s approval of the Agreed Order presented by the parties in *Dempsey* is not indexed by the Commission. Only pages two and three of the Agreed Order in *Dempsey* were included within Exhibit 2 of the Petitioners’ Response. While the Agreed Order is not indexed or available on the Commission’s website, the ALJ, under the authority of IC 4-21.5-3-26(f) took official notice of page one of the Agreed Order and determined that the Agreed Order attached to Exhibit 2 was the Agreed Order for case number 92-342W regarding PL-14,911.

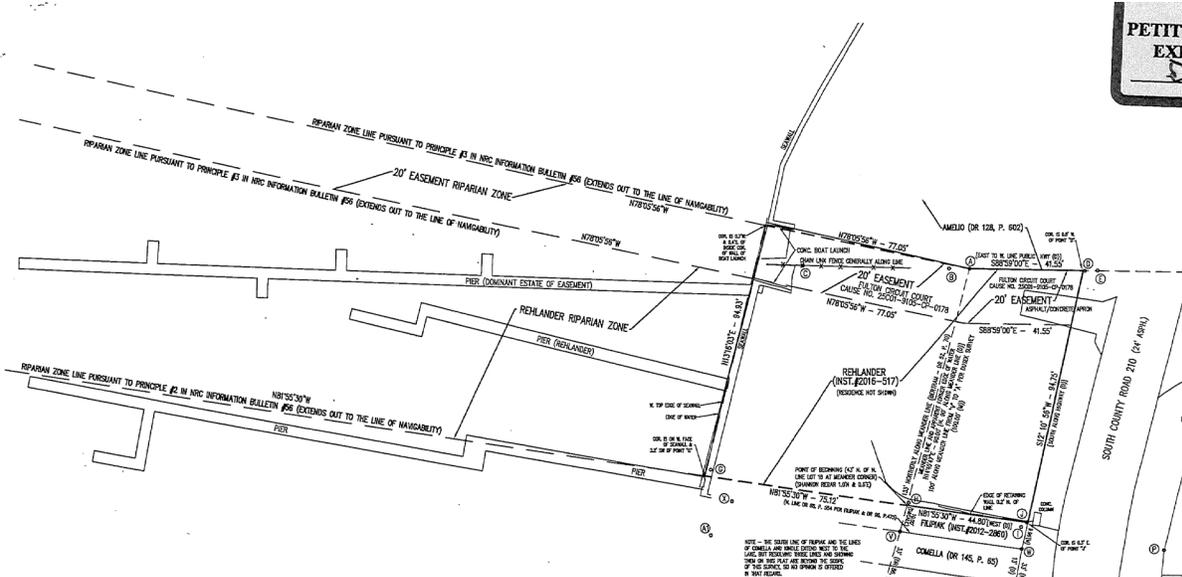
- (a) Dempsey owns Lots 2 and 3 in Krivak Acres. He inherited one lot and purchased the other from his brother. See testimony of Lenzen.
  - (b) Templin owns Lot 4. *Id.*
  - (c) Lenzen bought Lots 5 and 6 of Krivak Acres in 1980. *Id.*
  - (d) Amelio owns Lot 9 in Krivak Acres. Amelio purchased the lot so that he could use easement rights possessed by Krivak Acres lot owners, although he does not intend to use the Krivak Acres' pier. Amelio also has a pier from his own property that is adjacent to and north of the Rehlander Property. *Id.*
  - (e) Kaminski purchased Lots 7 and 8 in Krivak Acres in 2017. *Id.*
  - (f) Insufficient evidence was presented to determine the current ownership of lots 10, 11 and 12 of Krivak Acres. However, current ownership is not by Lenzen, Templin, Dempsey, Amelio or Kaminski.
28. During the administrative hearing held on March 12, 2020, the ALJ received testimony from the following witnesses:
- (a) Gary Kent ("Kent") is a Professional Surveyor. He obtained a Bachelor of Science degree in Land Surveying from Purdue in 1976. He became a licensed surveyor in Indiana in 1980 and Michigan in 1989. He has been employed by the Schneider Corporation since 1983. Kent has had experience with riparian rights for multiple lakes. He has also been a presenter on multiple occasions for programs that included topic that addressed easements, boundary law and riparian boundaries and rights. Kent asserted familiarity with the application of the principles addressed in Information Bulletin #56 ("IB #56"). See testimony of Kent and Exhibit A. See also *Riparian Zones within Public Freshwater Lakes and Navigable Waters, Information Bulletin #56 (Second Amendment)*, Indiana Register, 20100331-IR-312100175NRA (March 31, 2010).
  - (b) Terrance Lang ("Lang") is also a licensed surveyor. He obtained his Bachelor of Science degree in Surveying from Purdue in 1983. He participated in surveying since he was 14 years of age with his father. He is employed by Lang, Feeney and Associates, a firm originally owned by his grandfather. The firm provides surveys and the services of soil scientists and engineers. He obtained his knowledge of riparian interests by attending seminars presented by Kent and through his involvement with disputes along lakes and rivers. His primary riparian experience resulted from the location of his residence on the St. Joe River's lake caused by the Mishawaka Dam. Lang has reviewed IB #56. See testimony of Lang and Ex. I-2.
29. In addition, during the administrative hearing the ALJ received witness testimony from the following parties; Kim Rehlander, Ray Rehlander, Robert Lenzen and Nick Amelio.
30. Kent was engaged by the Rehlanders to prepare a boundary retracement survey, with the riparian zone identified. Kent performed chain of title research that included a review of an abstract of the Rehlander Property. Kent reviewed multiple documents, including public records and the Declaratory Judgment by the Fulton Circuit Court. He also reviewed IB #56. Kent prepared a Surveyor's Report to identify the documents he

reviewed and the relevance of the documents to his survey determinations. His Surveyor's Report is attached to his draft survey. See testimony of Kent and Exhibits B, C and D.

31. As a part of his survey, Kent conducted a site visit of the area relevant to this proceeding. During his field work, he sought out monuments above and below the ground. Kent also observed piers in the water at the time of his site visit. His draft survey reflects his observations of the location of monuments and existing piers at the time of his site visit. See testimony of Kent and Exs. C and D.
32. Rehlander's undisputed eastern property line boundary abuts County Road ("CR") 210 and is 94.75 feet in length.
33. The deed for the Rehlander Property identifies the western boundary of the property as follows; "Thence north 90 feet along the meander line of said lake..." See the testimony of Kent and Exhibit B, Document #1.
34. Kent and Lang agree that a "meander line" is randomly used to locate a body of water, with later surveys being laid off using survey system points. Kent described the original purpose of the establishment of meander lines was to create a straight line for an otherwise irregular shoreline.
35. Kent determined that the meander line of the Rehlander Property represented the general location of the shoreline in the 1880s. Real property between the meander line of the Rehlander Property and the shoreline of Bass Lake represents accretion of shoreline since the 1880s. See testimony of Kent.
36. The parties do not dispute that the western property line for the Rehlander Property would be the shoreline of Bass Lake.
37. The undisputed southern property line for the Rehlander Property is represented by a straight line extending between the southeastern corner of the property at CR 210 and Bass Lake.
38. The undisputed portion of Rehlander northern property line extends from CR 210 to the northern terminus of the meander line and it is 41.55 feet in length. See Exhibit C and D.
39. No contrary evidence was presented by any party to dispute Kent's factual determinations regarding the southern, eastern and western property line boundaries of the Rehlander Property. In addition, no party disputed the findings of Kent regarding the northern boundary of the Rehlander Property from CR 210 to the meander line.
40. The disputed portion of the Rehlander northern property line is the portion that extends from the meander line to the shoreline, the portion attributed to accretion. In order to establish the Rehlander's northern boundary line between the meander line and the shoreline, Kent acknowledged two potential alternatives.

- (a) Kent identified the first alternative as a straight out extension of the property line, similar to the southern property line boundary, from the meander line to the shoreline. Kent determined that this application would result in approximately a 78 degree angle at the point where the onshore boundary meets the shore. Under this alternative, Kent determined that the Rehlander Property would possess approximately 83.93 feet of shoreline, 11 feet less than the other alternative.
  - (b) Kent identified a second alternative that would result in the formation of an angle at the point where the meander line meets the northern boundary line. Kent determined that this application would result in approximately 86 degree angle, nearly perpendicular, at the point where the onshore boundary meets the shore. Under this alternative, Kent determined the Rehlander Property would possess 94.93 feet of shoreline.
41. Kent reviewed information concerning the southern property line boundary for the property owned by Amelio and discovered no additional guidance regarding the appropriate alternative.
42. Kent determined the second alternative would be more consistent with the placement of the monuments. Kent located a concrete boat ramp that would accommodate a pier perpendicular to the shore from the meander corner and he observed a notch in a seawall having a point that angled to the north. Kent observed a fence placed upon the Rehlander Property but placed no reliance on the location of the fence as a monument. See Ex. D.
43. Amelio obtained a permit from Starke County and installed a fence in 1988 or 1989 to denote the property line boundary between his property and the portion of the Rehlander Property that includes the Krivak Acres' easement. He did not obtain a survey but used surveyor stakes he located at the site. See testimony of Amelio.
44. Kent, in his effort to establish a fair apportionment for the riparian boundary lakeward of the shoreline, applied the Third Principle of IB #56 to establish the northern boundary line for the Rehlander Property onshore boundary. See Ex. D.
45. Kent's conclusions are reflected within his draft<sup>8</sup> "Rehlander Boundary Retracement and Riparian Zone Survey" survey completed on August 22, 2019. Kent's draft survey was corrected on September 18, 2019. See Exs. C and D. A portion of Exhibit D is included below to show the relationship of current pier placement for the relevant area and the onshore meander line and the property boundary line, as proposed by Kent.

<sup>8</sup> A survey that is not yet filed in the county records is a "draft" survey.



46. Kent has not yet recorded his survey because of this pending proceeding. See testimony of Kent.
47. Kent determined that the Fulton Circuit Court decision only addressed the easement from CR 210 to the meander line. Kent determined the easement extended to the shoreline because the court’s decision referenced the right of easement holders to access the water and to place a pier. *Id.*
48. Kent represented that a survey that includes dash lines represent “symbology” and solid lines represent what is being surveyed. *Id.*
49. Based on Kent’s survey conclusions, the Respondents’ pier would be beyond their easement.
50. Lang reviewed Kent’s survey and the documents cited by Kent in his Surveyor’s Report. Lang performed a site visit and observed property stakes. Lang disputes the determination by Kent regarding the Rehlander northern property line between the meander line and the shoreline. Lang determined that the more appropriate application would be for the property line to be extended in a straight line from CR 210 to the shoreline.
  - (a) Lang reviewed a 1907 plat for an area north of the properties at issue in this proceeding and determined that the plat referenced the property line as the road to the shoreline, not the road to the meander line. See testimony of Lang, Ex. I-3 and Ex. B, #13.
  - (b) Lang also reviewed a 1941 survey completed by the county surveyor for a property located south of the Rehlander Property. For that property, dotted lines represent extensions of the property lines to the lake in a straight line. *Ex. I-4 and Ex. B, #16.*

- (c) Lang reviewed a 1974 plat of the Johanson Estate<sup>9</sup> that revealed the meander line. The plat revealed a northern property line that extended in a straight line to the shoreline. The plat did not include an angle at the meander line. Lang noted that dotted lines between the meander line and the shoreline indicated the property owner has rights that extend to the shoreline. Ex. I-5. See also Ex. B, #18.
- (d) Lang reviewed a 1992 line survey, identified as a “line survey”. The Territorial Survey identified the northern property line between Amelio and Rehlander as a straight line extension. Ex. I-6.

Following his review, Lang determined that all four of the documents he reviewed presented as property line extensions in a straight line to the water’s edge.

51. Lang reported that his analysis was only designed to address the Rehlanders’ northern property line, not riparian rights associated with the line.
52. However, Lang also offered that an application of the Second Principle would be appropriate to determine the northern riparian boundary line because the angle at which the northern property line meets the shoreline is not perpendicular.
53. Lang offered his position that IB #56 principle application should be equally applied to both the north and south riparian boundary lines because the lines represent different sides of the same property. See testimony of Lang. The southern boundary of the Rehlander Property, including any associated riparian boundary line is not at issue in this proceeding. This decision is not intended to offer any determination concerning the Rehlander southern boundary line.
54. The shoreline associated with the Amelio property and the Rehlander Property is a straight line. See Ex. D.
55. In 1974, K. Rehlander’s parents built a house on the Rehlander Property. Her recollection is that piers were historically placed perpendicular to the shoreline. See testimony of K. Rehlander.
56. R. Rehlander and K. Rehlander have been married for more than 30 years. R. Rehlander has observed the historical placement of piers over many years. See testimony of R. Rehlander.
57. K. Rehlander is aware that Bass Lake is a shallow lake and at the shoreline may be no more than 12 inches in depth. It is not unusual for her to walk her boat out to deeper water. She is aware that children swim near the piers. See testimony of K. Rehlander.
58. Currently, the Rehlander pier is installed seasonally under a general license. See testimony of R. Rehlander.

<sup>9</sup> Parcel I is the Rehlander property at issue in this proceeding.

59. K. Rehlander has extended the Rehlander pier over time because she got a bigger boat. The Rehlander pier is currently 140 feet in length. See testimony of K. Rehlander and R. Rehlander.
60. The Easement Holders' pier over time, has changed in length and width. See testimony of K. Rehlander and R. Rehlander.
61. In 1993-1994, two "decks" measuring two feet six inches by eight and one half feet were added that extended the Easement Holders' pier width by eight and one half feet. See testimony of Lenzen.
62. In 2017, when Kaminski purchased his lots in Krivak Acres, he added four sections to the length of the Easement Holders' pier. At that time, seven watercraft were commonly moored to the pier. See testimony of Lenzen.
63. In 2017, the Easement Holders' pier was 225 feet in length. See testimony of R. Rehlander.
64. In 2019, the Easement Holders' pier was 269 feet in length. See testimony of Lenzen.
65. Commonly, one or more boats are placed on the south side of the Easement Holders' pier. See testimony of K. Rehlander and R. Rehlander.
66. Over the past two years, K. Rehlander has had difficulty navigating the area between the Rehlanders' pier and the Easement Holders' pier. See testimony of K. Rehlander.
67. The length of the pier to the south of the Rehlander Property and the length of the Easement Holders' pier creates a corridor that results in visibility issues for the Rehlanders. See testimony of R. Rehlander.
68. R. Rehlander notified Lenzen and Templin that he perceived a navigational safety issue and offered a solution that was not accepted. In 2017, R. Rehlander called the Department and complained prior to filing this proceeding.
69. The current distance between the Rehlander pier and the Easement Holders' pier, at the closest point, is eight and one half feet. See testimony of R. Rehlander.
70. Aerial photographs of the relevant area reveal the majority of the piers in the vicinity are placed in a manner that appear nearly parallel to one another, with the exception of the Rehlander pier. *Ex. E and F.*
71. No Krivak Acres' lot owner has requested Rehlander's permission to place a pier. See testimony of Lenzen.

### **Conclusions of Law**

Riparian ownership and use

72. The Indiana Court of Appeals has acknowledged the jurisdiction of the Commission to determine the scope of a landward property right, including an easement, “to the extent necessary to carry out the process of issuing permits for the placement of piers on public freshwater lakes.” *Kranz v Meyers Subdivision, et al*, 969 N.E.2d 1068, 1078 (Ind. App. 2012).
73. It is the practice of the Commission to exercise that authority with restraint. *Bowman v Walls*, 14 CADDNAR 85, 89 (2016).
74. “Accretion is the process of gradual and imperceptible increase in land caused by the deposit of earth, sand or sediment thereon by contiguous waters and is held to be a source of title. *Irvin v. Crammond*, 108 N.E. 539 (Ind. App. 1915), as cited in *Longabaugh v. Johnson*, 321 N.E. 2d 865, 867 (Ind. App. 1975).
75. “Accretion rights in public freshwater lakes are limited to land from which the waters have receded or may recede from natural causes only.” IC 14-26-2-8.
76. ““The question is well settled at common law that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold the same boundary, including the accumulated soil. No other rule can be applied on just principles.”” *Town of Freedom v. Norris*, 27 N.E. 869, 870 (Ind. 1891) citing *New Orleans v. U.S.*, 10 PET. 660. See also, *Longabaugh v. Johnson*, 321 N.E.2d 865 (Ind. App. 1975) and *Parkison v. McCue*, 831 N.E.2d 118 (Ind. App. 2005)<sup>10</sup>.
77. The metes and bounds description of the Rehlander Property identifies the meander line of Bass Lake but does not reference the current shoreline of Bass Lake.
78. Kent reasonably concluded that accretion has occurred since the time when the meander line was first identified in a deed.
79. There is no evidence that the land lying between the northern boundary of the Rehlander Property, as stated in the legal description, resulted from drainage of Bass Lake, or other non-natural occurrence.
80. Taking the evidence presented in this proceeding as a whole, it is reasonable to conclude that the land area existing between the Rehlander Property’s western boundary, as stated in the legal description, and the actual shoreline of Bass Lake is natural accretion to which Rehlander is entitled to benefit.
81. The Rehlander Property line, adjacent to Amelio, extends to the shoreline of Bass Lake.

<sup>10</sup>“Riparian rights have been traditionally associated with owners of land abutting a river or stream, while those with shoreline on a lake or pond acquired littoral rights. *Zapffe v. Srbeny*, 587 N.E.2d 177, 178 n. 1 (Ind.App.1992). *trans. denied*. However, the term “riparian” is now widely used to refer to both classes of ownership.” *Kranz v Meyers Subdivision*, 969 N.E. 2d 1068, Footnote 2. (Ind. App. 2012).

82. The northern property line boundary between Rehlander and Amelio from the meander line to the shoreline of Bass Lake by virtue of accretion is disputed.
83. Kent proposed to determine the property boundary line using the principles described in IB #56 in an effort to establish a fair apportionment for the riparian boundary lakeward of the shoreline. Kent's application of IB #56 is misplaced. The Commission has adopted a nonrule policy document under IC 4-22-7-7 to aid in determinations concerning riparian zones and the placement of structures within public freshwater lakes. *IB #56*. IB #56 is limited in its application and is not designed for appropriate delineation of onshore property boundary lines.
84. The proposed property line boundary proposed by Kent is unsupported by the weight of the evidence. The appropriate northern boundary line attributable to accretion extends in a straight line from CR 210 to the shoreline of Bass Lake.
85. Through accretion, the western shoreline of the Rehlander Property was extended, having the corresponding effect of the extension of the property boundary lines to the shoreline. The western boundary of the Rehlander Property extends from CR 210 beyond the meander line to its terminus at the Bass Lake shoreline.
86. While no deed was produced for the property of Amelio, the research conducted by Kent and his review of the deed for the Amelio property supports a conclusion that Amelio's property also extends to the shoreline.
87. The Commission has adopted a rule defining a "riparian owner" to mean "...the owner of land...bound by a lake..." *312 IAC 11-2-19*.
88. Amelio and Rehlander are riparian owners.
89. Dempsey<sup>11</sup>, Lenzen, Templin and Kaminski are the owners of off-lake lots within Krivak Acres and are not riparian owners.
90. The Fulton Circuit Court previously determined that the Rehlander Property is a servient estate over which a dominant easement is held by the owners of Lots 2-12 of Krivak Acres ("Krivak Acres"). The Krivak Acres' easement is located within the northern 20 feet of the Rehlander Property between the meander line and the eastern property line of the Rehlander property. In this case, the dominant easement holders are also entitled to benefit from the natural accretion of the actual shoreline of Bass Lake, in the same manner as the servient estate.

Riparian Boundary Line between Amelio and Rehlander

91. A riparian owner typically enjoys rights that include: "(1) access to navigable water; (2) the right to build a pier out to the line of navigability; (3) the right to accretions; and (4)

<sup>11</sup> Evidence is unclear if his ownership is as an individual or as a representative of the Dempsey Trust.

the right to a reasonable use of the water for general purposes such as boating, domestic use, etc.” *Parkison v McCue*, supra at 128.

92. Petitioners assert that a pier placed by the Respondents “infringes upon our riparian rights.” See the Petition.
93. In order to determine whether any temporary structure infringes or encroaches on the Rehlander riparian boundary zone, the common riparian boundary between Amelio and Rehlander must be determined.
94. The Lakes Preservation Act authorizes the Commission to resolve disputes among persons with competing interests. *IC 14-26-2-23(e)(3)(B)*.
95. Nonrule policies, such as IB #56, adopted by the Commission do not have the effect of law. Information bulletins are intended to be statements that interpret, supplement or implement a statute. Nonrule policies published in the *Indiana Register* are readily available through the Commission’s website and are frequently used by the Commission as guidance documents.
96. IB #56 is widely followed to provide guidance and principles for determining riparian boundaries. The overarching objective of the guidance document is that the “principles seek to accommodate the diverse characteristics of Indiana’s numerous public freshwater lakes. They are designed to provide riparian owners with equitable access to public waters....” *IB #56*, pg. 3.
97. The shoreline at issue in this proceeding represents as a straight line.
98. IB #56, as its “Second Principle”, states, “Where the shore approximates a straight line, and where the onshore property boundaries are approximately perpendicular to this line, the boundaries of riparian zones are determined by extending the onshore boundaries into the public waters. *Bath v. Courts*, 459 N.E.2d 72, 73 (Ind. App. 1984), and *IB #56*, pg. 3.
99. IB #56, as its “Third Principle”, states, “Where the shore approximates a straight line, and where the onshore boundaries approach the shore at obtuse or acute angles, the boundaries of riparian zones are generally determined by extending a straight line at a perpendicular to the shore. If the boundaries of two owners intersect at the shore, or in proximity to but landward of the shore, the boundaries of the riparian zones may be formed by a perpendicular to the shore from the point of intersection of the onshore boundaries. *Lukis v. Ray*, 888 N.E.2d 325 (Ind. App. 2008), citing *Nosek v. Stryker*, 103 Wis.2d 633, 309 N.W.2d 868 (Wis. 1981) and *IB #56*, pg. 4.
100. Application of the Third Principle is most compelling where land owners in the vicinity have historically used a perpendicular line to divide their riparian zones, but the principle should not be applied where a result is to deprive a riparian owner of reasonable access to public waters. *Pipp v. Spitler*, et al., 11 CADDNAR 39 (2007) and *IB #56*, pg. 4.

101. Historically, the Rehlander pier has been placed perpendicular to the shoreline. However, piers placed on either side of the Rehlander pier appear to have been placed to reflect a straight out extension of the onshore boundary lines.
102. The Indiana Court of Appeals has acknowledged the need to carefully review the facts and circumstances of each case and that the standards are “fluid and best applied on a case-by-case basis.” *Lukis v Ray*, 888 N.E. 2d 325, 332 (Ind App. 2008). The *Lukis* Court observed:
- ...the NRC acknowledged the wisdom of the *Nosek*<sup>12</sup> rule, merely concluding that the extension of boundary lines would accomplish an equally fair result. The NRC acknowledged that the shoreline ‘is generally irregular and the parties’ onshore property lines are not perpendicular to the shoreline’ and found that a ‘complete reliance’ on the extension of boundary lines lakeward was “misplaced.’... The NRC then concluded, however, that, ‘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.’.... Having carefully reviewed the facts and circumstances of the case, the NRC concluded that extending the property lines lakeward was equitable and resulted in a fair apportionment. That there may have been other results that would, likewise, have been equitable does not mean that the NRC arrived at a result that was erroneous or contrary to law.
- Id* at 332, emphasis in the original.
103. The Commission considered permits issued by the Department for the owners of properties at issue in this case in *Krivak*, supra. The Commission, in that case, for the purpose of individual pier permit review, found that “the onshore boundaries of the property owners approach the shoreline at other than a perpendicular” The Commission determined that “Where, as in this case, the onshore boundaries of the property owners are approximately parallel to one another, and nearly but not exactly perpendicular to the shoreline, the most direct and expedient manner for pier placement is at the same angle as the onshore boundaries of the neighbors”. *Id.* at 177. See also Exhibit I-1.
104. The issues determined by the Commission in *Krivak* were limited to review of individual pier permits. However, the conclusions of the Commission in that case are determined to present a reasonable application of facts that are also relevant to this proceeding regarding the same properties.
105. The appropriate application of IB #56 in this proceeding results in the determination of the riparian boundary between Amelio and Rehlander by extending onshore boundary lines into the public waters in a straight line.

<sup>12</sup> *Nosek v Striker*, 309 N.W.2d 868 (Wis. 1981)

106. This decision is not intended to address the Rehlander southern property line boundary in any manner.

Easement Holder Riparian Use Rights

107. The conclusion that Dempsey, Lenzen, Templin and Kaminski are not riparian owners is not determinative of their right to exercise riparian rights arising out of an easement.

108. It is well established that easements are limited to the purpose for which they are granted. The owner of an easement, known as the dominant estate, possesses all rights necessarily incident to the enjoyment of the easement. The owner of the property over which the easement passes, known as the servient estate, may use his property in any manner and for any purpose consistent with the enjoyment of the easement, and the dominant estate cannot interfere with the use. All rights necessarily incident to the enjoyment of the easement are possessed by the owner of the dominant estate, and it is the duty of the servient owner to permit the dominant owner to enjoy his easement without interference. The servient owner may not so use his land as to obstruct the easement or interfere with the enjoyment thereof by the owner of the dominant estate. *Xanders v. Nixon Trust*, 14 CADDNAR 33, 40 (2015) citing, *Rehl v. Billetz*, 963 N.E.2d 1 (Ind. App. 2012).

109. The Fulton Circuit Court, in case number 25C01-9105-CP-0178, as a court of competent jurisdiction, issued a Declaratory Judgment regarding easement rights and the right to place a pier by certain Krivak Acres property owners.

110. In determining the extent of easement ownership, the Fulton Circuit Court did not determine specific pier placement, length, width or any specific configuration for the easement holders' pier within the riparian zone available to the easement holders through ownership of the dominant estate.

111. The Declaratory Judgment established the Easement Holders' dominant estate over the northern 20 feet of Krivaks' property, now the Rehlander Property. The Krivak property is burdened as the servient estate for the easement. The easement was determined to provide a way of access to Bass Lake and the authority to place and maintain a pier. The right requires the selection of pier placement that allows for reasonable use of the lake by others.

112. In that the Fulton County Court determined that the rights run with the land, the determination by the Court is binding on current owners of the properties that form the dominant and servient estates.

113. The rights of the Easement Holders, as determined by the Fulton Circuit Court, are not in question. Rehlander is the current owner of the servient estate while the owners of Krivak Acres Lots 2 through 12 are the holders of the dominant estate.

114. The Easement Holders' dominant estate over the northern 20 feet of the Rehlander Property extends in a similar manner into Bass Lake to provide riparian use rights over the northern 20 feet of the Rehlanders' riparian zone.
115. The easement would include no rights north of the riparian boundary line between Amelio and Rehlander.
116. The easement would also not extend beyond 20 feet south of the Rehlanders' northern riparian boundary line for any purpose related to the easement.
117. After the determination by the Fulton Circuit Court, an individual permit was obtained by Dempsey. In *Krivak*, the Commission upheld the form of the pier within the approved permit. The Dempsey permit was subsequently modified in an unindexed decision to reflect a change in the permit holder from "Dempsey" to the "Participating Property Owners of Krivak Acres." *Dempsey*, supra.
118. Seasonal removal of an individual license for a temporary structure completed timely does not terminate a license if the temporary structure conforms to the terms of the license when the structure is replaced. *312 IAC 11-3.5-2*.
119. In this case, the configuration for the pier permitted to Dempsey and then to the Participating Property Owners of Krivak Acres has been modified over time in both length and width. The temporary structure no longer conforms to the original approved permit or the modification and has been abandoned. The individual permit is no longer valid.<sup>13</sup>
120. The Easement Holders' pier must be analyzed to determine if it qualifies under a general license.
121. A group pier does not qualify for a general license. A group pier requires a written individual license. *312 IAC 11-3-1(b)* and *312 IAC 11-3-3(f)(2)*.
122. A group pier is defined as a "pier that provides docking space for any of the following"  
 (1) At least five (5) separate property owners...(5) A subdivision or an addition. *312 IAC 11-2-11.5*.
123. The Fulton Circuit Court determined the easement is owned by the owners of Lots 2 through 12 of Krivak Acres. Lot owners of Lots 2 through 12 total at least five owners, including Lenzen, Templin, Dempsey, Amelio, Kaminski and one or more owners of Lots 10, 11 and 12.
124. Any pier placed on behalf of the Easement Holders presents as a pier with rights available to all Easement Holders. An Easement Holder pier must not restrict access or

<sup>13</sup> Contrary to the position taken in the "Brief of Respondents" filed on April 17, 2019, changes in the configuration of the pier would also disqualify the Easement Holders' current pier as a nonconforming use under *312 IAC 11-5-2*.

use by any single Easement Holder or any combination of Easement Holders fewer than the total of the lot owners possessing the easement.

125. The owners of Lots 2 through 12 of Krivak Acres include at least five owners who possess the authority to place a pier. In addition, while evidence was not presented on this point, it is a likely conclusion that Krivak Acres may be a subdivision or addition that would also require a group pier permit. Therefore, the Easement Holders must obtain a group pier permit in order to place a pier.

#### Safe Navigation-Clear Space

126. Any pier placed by the Easement Holders pursuant to its dominant easement must be placed in a way that would allow for reasonable usage of the lake by all users.
127. Consideration for navigational safety is critical in this regard. Current placement of piers by the parties in this case creates a navigational safety concern.
128. IB #56 states, “To assist with safe navigation, as well as to preserve the public trust and the rights of neighboring riparian owners, there ideally should be 10 feet of clearance on both sides (for a total of 20 feet) of the dividing line between riparian zones. At a minimum, a total of 10 feet is typically required that is clear of piers and moored boats, although the area may be used for loading and unloading boats and for active recreation.” See IB #56, pg. 2.
129. The Commission has routinely concluded that a buffer or clear space between piers and moored boats is necessary to provide for safe navigation. *IB #56, Roberts v Beachview Properties, LLC, et al., 10 CADDNAR 125, 166 (2005), Sims, et al. v Outlook Cove, LLC and Outlook Cove Homeowners Ass’n, 10 CADDNAR 258. 279, (2006), Havel & Stickelmeyer v Fisher, et al., 11 CADDNAR 110, 119 (2007), Rufenbarger & Rufenbarger v. Blue, et al., 11 CADDNAR 185 (2007), and Xanders v Nixon Trust, 14 CADDNAR 33 (2015).*
130. IB #56 recommends that a total of 20 feet of clear space and minimally 10 feet of clear space is customary. Ideally, each riparian owner would bear the responsibility to contribute one half of the total required buffer. However, the Commission recognizes the limitations of area available to some lake users.
131. Previously, the Commission approved permits for the area included within these riparian zones. In *Krivak*, the Commission determined that a distance of 20 feet was necessary between the Dempsey pier and Amelio’s swimming raft. The pier placement condition previously identified and approved in form by the Commission has not created a navigational concern between the Easement Holders and Amelio.
132. In *Krivak*, the Commission determined that a distance of 16 feet was necessary between Krivak’s pier, now the Rehlander Property pier, and any adjacent pier. The distance between piers that was previously designated has not served to preserve navigational safety

133. The decision in *Krivak* did not consider necessary “clear space” that would not constrict open water, clear of piers and moored boats that may be used only for loading and unloading boats and for active recreation.
134. In recognition of the limited space available to the Easement Holders, on the northern side of the riparian boundary line between Amelio and the Rehlander Property, ten feet of clear space is required to preserve navigational safety. On the southern side of the riparian boundary line between Amelio and the Rehlander Property, two feet of clear space is required.
135. On either side of the Easement Holders’ southern riparian easement boundary, located 20 feet south of the Amelio and Rehlander riparian boundary line, a clear space is required. Seven feet of clear space is required north of the line and seven feet of clear space required south of the line.
136. Riparian owners may build a pier within the extension of their onshore boundaries only so far out as not to interfere with the use of the lake by others. *Bath v Courts*, 459 N.E.2d 72, 76 (Ind. App. 1984).
137. Limitations to the authority of a riparian owner in placing a temporary structure include the limitation that the structure may not “infringe on the access of an adjacent landowner to the public freshwater lake.” *312 IAC 11-3-1(b)(2)* and *312 IAC 5-6-3*.
138. The resolution of a riparian dispute is also subject to the “reasonableness” test:
- ...Instead of a rigid application using a measure of depth or length to determine riparian boundaries, the better view would be to apply a “reasonableness” test to accommodate the diverse characteristics of Indiana’s numerous freshwater lakes.” The reasonableness determination “should be decided on the basis of the facts and circumstances of each particular case so that a court can treat each affected riparian owner equitably.” *Lukis v. Ray*, 888 N.E.2d 325, 332 (Ind. App. 2008) citing *Zapffe v. Srbeny*, 587 N.E.2d 177, 181 (Ind. App. 1992).
139. Citing *Zapffe v. Srbeny*, the Commission underlined applicability of the reasonableness test in IB #56:
- A “reasonableness” test is applied to how far a pier may extend from the shore. The installation of a pier by a riparian owner is unreasonable if the pier interferes with the use of a public freshwater lake by others. “One point is well-settled...the boundaries of riparian property do not extend to the middle of the lake....” Any extension of a pier beyond the point required for the mooring and launching of boats may be considered unreasonable.
- IB* at 2.
140. A reasonable length for the Easement Holders’ pier must be considered in obtaining a group pier permit. *312 IAC 11-4-8*.

**Nonfinal Order**

- 1) The onshore property line of Rehlander extends from CR 210 to Bass Lake in a straight line from the northeastern most point, through the northern terminus of the meander line identified in the deed for the property, to the shoreline of Bass Lake.
- 2) The common riparian zone boundary line between Rehlander and Amelio shall be determined by an extension of the onshore property boundary line into the waters of Bass Lake extended in a straight line. The northern 20 feet of the Rehlander riparian zone is subject to riparian rights of the Easement Holders.
- 3) The Easement Holders must not place a pier without obtaining group pier permit approval from the Department of Natural Resources. The permit may include conditions as deemed necessary by the Department but must include the restrictions ordered herein.
- 4) No portion of a temporary structure, including watercraft moored to the temporary structure, may be maintained within a zone designated herein as a “clear space” within which constriction of open water is prohibited. The clear space must be clear of piers, pier extensions and moored boats and may be used only for loading and unloading boats and for active recreation.
- 5) Clear space is required ten (10) feet north and two (2) feet south of the riparian boundary line between Amelio and Rehlander.
- 6) Clear space is required seven (7) feet north and seven (7) feet south of the Easement Holders’ southern riparian boundary.



Dated: June 30, 2020

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Dawn Wilson  
Administrative Law Judge  
Natural Resources Commission  
Indiana Government Center North  
100 North Senate Avenue, Room N103  
Indianapolis, Indiana 46204-2200  
(317) 232-4699

**Certificate of Service**

Served on the following as indicated this 1<sup>st</sup> day of July 2020.

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A copy of the foregoing will also be served upon the following in accordance with IC 4-21.5-3 or IC 5-14-3. *The parties need not serve pleadings, motions or other filings upon these persons.*

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Scott Allen  
Legal Analyst  
Natural Resources Commission



Krivak Acres. Respondent, Robert Lenzen, also testified that Nicholas Amelio was not a participating landowner and that the only participating owners were Robert Lenzen, Marvin Templin, Robert Dempsey Trust and Wieslaw Kaminski.

Additionally, the Findings of Fact and Conclusion of Law with Nonfinal Order states that despite the lack of evidence, it is a likely conclusion that Krivak Acres may be a subdivision. Respondents contend it would be improper for the Administrative Law Judge to arrive at conclusions without considering evidence to support the conclusion.

Based upon conclusions, not supported by the evidence, and a determination that Krivak Acres “may be a subdivision”, the ALJ finds that the Easement Holders (the Respondents herein) are required to obtain a group pier permit in order to place a pier.

Such findings are unsupported by the evidence and inconsistent with facts and therefore are objected to as is the Nonfinal Order paragraph three (3) wherein it is ordered “The Easement Holders must not place a pier without obtaining group pier permit approval from the Department of Natural Resources.

WHEREIN the Respondents request the language in paragraph 125, and the resultant order paragraph three (3) be stricken.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 13<sup>th</sup> day of July 2020 , I mailed the foregoing pleading or paper to the Administrative Law Judge, by depositing the same in the US Mail in an envelope properly addressed and with sufficient first-class postage affixed and/or served the aforementioned document via electronic mail service, as designated by this Commission:

AOPA Committee  
Natural Resources Commission  
Indiana Government Center North  
100 North Senate Avenue, Room N 103  
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By: /s/Edith Ferrell, Paralegal to  
George S. Ivancevich



Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on July 13, 2020, I filed the foregoing document using via electronic mail service-mail as follows:

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By: /s/Edith Ferrell, Paralegal to  
George S. Ivancevich

BEFORE THE  
NATURAL RESOURCES COMMISSION  
OF THE  
STATE OF INDIANA

IN THE MATTER OF:

RAYMOND REHLANDER and, )  
KIMBERLY REHLANDER, )  
Petitioners, )  
vs. )  
ROBERT LENZEN, MARVIN TEMPLIN )  
ROBERT DEMPSEY TRUST and )  
WEISLAW KAMINSKI, )  
Respondents. )  
NICHOLAS AMELIO, )  
Intervenor. )

Administrative Cause  
Number: 18-059W

[Pier Dispute]

**FILED**

**JUL 14 2020**

NATURAL RESOURCES COMMISSION  
DIVISION OF HEARINGS

**WRITTEN OBJECTIONS OF PETITIONERS' TO FINDINGS OF FACT AND  
CONCLUSIONS OF LAW WITH NONFINAL ORDER**

Come now the Petitioners, Raymond Rehlander and Kimberly Rehlander (“Rehlander”), by counsel, and file before the National Resources Commissions their Written Objections pursuant to I.C. 4-21.5-3-29(d) served upon the Petitioners by the Commission on July 1, 2020.

**INTRODUCTION**

Administrative Law Judge Dawn Wilson appropriately found in Finding 24(v) that the pier placement between Rehlander and Krivak Acres constituted a “navigational hazard.” Petitioners respectfully submit that the Findings herein do not correct the navigational hazard nor does it equitably apportion the riparian rights of the parties. ALJ

Wilson correctly ruled previously that the Rehlander pier is placed legally under a general license.

*Nosek v. Stryker*, 103 Wis.2d 633, 308 N.W.2d 868 (App. 1981), is recited repeatedly in Indiana supporting riparian boundaries and is cited as support throughout Information Bulletin #56. *Nosek* was also previously used by this Commission when reviewing permit applications by the parties to these proceedings and was cited as compelling by the Commission in *Krivak v. DNR, Dempsey, et al*, 6 CADDNAR 176 (1994), Vol. VI, page 177. *Nosek* confirmed three (3) general principles to determine extension of boundaries. As stated in *Nosek*, page 331 and *Krivak*, page 177, the “second” method of *Nosek* should be used in this case as it stated:

“Often, however, the boundary lines on land are not at right angles with the shore but approach the shore at obtuse or acute angles. In such cases, it is inappropriate to apportion the riparian tract by extending the onshore boundaries. *Jansky v. City of Two Rivers*, 227 Wis. 228, 240, 278, N.W. 527, 532 (1938), referring to *Hathaway v. City of Milwaukee*, 132 Wis. 249, 111 N.W. 570, 112 N.W. 455 (1907). Instead, the division lines should be drawn in a straight line at a right angle to the shoreline without respect to the onshore boundaries.”

This is the supporting logic for the third principle of Information Bulletin #56 and is also the logic determined to be persuasive in *Krivak*.

### OBJECTIONS

IB #56, Third Principle, states:

“Where the shore approximates a straight line and boundaries approach shore at acute angles, riparian zones may be formed by a perpendicular to the shore from the point of intersection.”

This guidance to the Commission stems from *Nosek v. Stryker* as indicated above. As repeatedly recited in Indiana, the basis of *Nosek* is that, “[t]he dominant rule is that each must have his due proportion of the line bounding navigability and a course of access to and from the shore exclusive of every other owner, and that all rules for apportionment or division are subject to such modification as may be necessary to accomplish substantially this result. (Emphasis added, *Nosek* at 640). Each riparian owner is, therefore, entitled to exclusive possession to the extent necessary to reach navigable water to have reasonable ingress and egress to reach navigable water, to have reasonable ingress and egress to navigable water and to have access for bathing and swimming.” *Nosek*, page 640.

Accordingly, Petitioners object to the Nonfinal Order in that IB #56, Third Principle and *Nosek* would be the appropriate rationale to support the riparian boundaries suggested by Mr. Kent in that:

(A) In Finding 97, ALJ Wilson found that the shoreline of Bass Lake approximates a straight line; and,

(B) In *Krivak v. DNR, Dempsey, et al*, 6 CADDNAR 176 (1994), Vol. VI, page 177, the Commission previously found that the boundaries of the property owners involved in this matter approached the shoreline at other than perpendicular meaning obtuse or acute angles. *Krivak*, page 177; Survey of Gary Kent, Exhibits C and D.

The Petitioners specifically object to Findings 83 and 84 of ALJ Wilson which states that Surveyor Gary Kent’s application of IB #56 applied the Third Principle of said Bulletin and the *Nosek* rationale supporting such principle was “misplaced” is not correct based upon the substantial facts brought before the hearing judge. As stated above in *Krivak*, Volume 6, page 177, the Commission previously found that the second method of

*Nosek* is, in fact, persuasive to the piers' placement of these parties and thus would be logical to use for setting riparian zones of the parties. *Nosek* states that a riparian owner shall place a pier in the most direct manner to the nearest water to navigate and shall place the pier at a right angle to the shoreline where the shoreline approximates a straight line. (*Nosek*, page 643). Following the *Nosek* logic which supports IB #56, Third Principle, the following are additional objections to the Findings and Nonfinal Order of ALJ Wilson:

1. In Finding No. 101, ALJ Wilson found that the "Rehlander pier" has been placed perpendicular to the shoreline and the piers placed on either side of the Rehlander pier appear to have been placed in a straight out extension of the "onshore boundaries." In Exhibits E and F, photos provided by Lenzen, the Rehlander pier is shown to be nearly straight and parallel to that of its neighbors to the south and in fact, it is the Krivak Acres pier which is at an acute angle to the nearby piers. See Exhibits E and F, photographs introduced by Respondent Lenzen in these proceedings and Kent survey Exhibits C and D; see also Amelio's "Rebuttal," Exhibit 2, filed herein depicting an aerial view extending property lines). These exhibits actually provide substantial evidence that the riparian zone established by Third Principle of Information Bulletin #56 and also by Surveyor Gary Kent in Exhibits C and D would be most appropriate and that Krivak Acres' pier should be rotated to fit within a riparian zone northerly from its current location.

2. In Finding No. 106, ALJ Wilson found, "This decision is not intended to address the Rehlanders' southern property line boundary in any manner." The

Petitioners object to this Finding in that the southern boundary is germane to these proceedings as that boundary must be compared to the northern boundary of the Rehlander property to develop an understanding of the appropriate riparian zone of Rehlander to the north as it relates the Krivak Acres' pier. (Exhibits C and D and testimony of Kent). As noted by Surveyor Kent, although the southern property line approaches Bass Lake at nearly a perpendicular angle, the northern boundary line from the meander point does not approach the lake at a right angle, and when the northern and southern lines are viewed together, they are not parallel to each other. See, Kent's survey, Exhibits C and D. Accordingly, the Third Principle of IB #56 and the laws of *Nosek* and *Lukis v. Ray*, 388 N.E.2d 325, 329 (Ind.App. 2008) cited by ALJ Wilson, would dictate that the "[a]pportionment method" should be used to determine the navigable waterfront proportionate to Rehlander, Krivak Estates and Amelio. By ignoring the relationship of the southern line to the northern boundary of the Rehlander property description, the Findings and Nonfinal Order of ALJ Wilson issued herein leads to Rehlander receiving less than equitable navigable water rights under *Nosek* and does not give Rehlander equitable apportionment of riparian rights as encouraged in *Lukis*.

3. It is important to note that the Fulton Circuit Court decision establishing the easement rights of the Krivak Acres subdivision used the legal description for such easement from the meander line to establish the boundaries of such easement (Finding 24(e)). The Rehlander property line, as noted by ALJ Wilson, also starts at the meander line for its northern boundary which includes the Krivak Acres' easement. (Finding 33). In Findings 78, 79 and 80, ALJ Wilson correctly noted that accretion has occurred which

would grant Rehlander the benefits of ownership to the shores of Bass Lake. In testimony before the ALJ, it is notable that Surveyor Kent also stated that Amelio's boundary at its southern point where it met with Rehlander property also is established at the meander line and such a finding is not included in the Findings of Fact before this Commission. The legal description of all parties to the proceeding is agreed upon by both Surveyors Kent and Lang to start at the meander points. (Testimony of Kent and Lang). The legal descriptions define a meander corner which is the common intersection of the Amelio/Rehlander onshore property boundaries with the original shoreline of Bass Lake. (See Kent survey, Exhibits C and D, and testimony of Kent). Accordingly, since it is clear the property boundaries of the parties to this proceeding start at the meander lines, if the ALJ's Nonfinal Order is issued by the Commission, the property rights of Rehlander, when considering accretions, is significantly reduced, and thus the riparian rights of Rehlander is reduced by fifteen percent (15%) from the meander line to the shores of Bass Lake and continues to diminish by fifteen percent (15%) as the line projects into Bass Lake's open waters from the Rehlanders' property while the rights and interests of the Respondents was not reduced. (Testimony of Kent, Exhibits C and D). Instead, an equitable finding based on *Nosek*, and one which would be reasonable for the Commission to apply, would be to run the riparian zones perpendicular from the meander corner to the shoreline and continuing into the lake so as accretions occurred, the parties' riparian zones would remain equitable. (IB #56, *Nosek* and testimony of Kent).

4. In Finding 128, ALJ Wilson noted that IB #56 states that ideally, to preserve the public trust and the results of neighboring riparian owners, there should

ideally be ten (10) feet of clearance on both sides for a twenty (20) foot dividing line between the riparian zone. Yet, in her final Findings and Nonfinal Order entered herein (Nonfinal Orders 5 and 6), the required space between the Petitioners' pier and the easement holders' pier is not required to meet those standards. This also contradicts 312 IAC 11-4-8(c)(1)(B) and 312 IAC 11-4-8(6). Surveyor Kent proposed that the Krivak Acres easement pier within the navigable waters of Bass Lake should be rotated approximately twelve degrees (12°) to the north which he concluded would be consistent with the riparian zone for the easement holder and would also result in upholding the intention of the Third Principle of Bulletin #56. (Testimony of Kent, Exhibits C and D). This conclusion of Mr. Kent would result in compliance with the Third Principle of IB #56 as cited by ALJ Wilson. Accordingly, the Petitioners object to the Findings of the ALJ as it does not provide for an equitable riparian zone delineation and it is feared the current Nonfinal Order will lead to continued navigational hazard given the abundant testimony that the easement holders have continuously lengthened the pier in the twenty-five (25) year period prior to the Petitioners' filing its Petition before the Commission. See also, *Wallace v. Stone*, 14 CADDNAR 140 (2017), under which ALJ Wilson previously noted the Commission has the authority to create clear space between piers and moored boats as necessary to provide for safe navigation.

5. Petitioners object to Findings 50 through 53 of the Nonfinal Order issued by ALJ Wilson in that the testimony of Surveyor Lang should not be considered by the Commission as he admitted in testimony that (a) he had not conducted "field work" to identify boundary points and property lines of the parties in this dispute, and (b) he had

no opinion or expertise to opine on riparian zones of the parties. (Testimony of Terrance Lang).<sup>1</sup>

6. Petitioners object to Finding #50 in that Mr. Lang testified that the northern Rehlander/southern Amelio property line should be extended straight into the waters of Bass Lake. This in fact contradicts the court rulings in *Nosek* and *Krivak* as previously cited by Petitioners. (See Permit 14-911, page 2, Rehlanders' Petition, page 9 and Item 13 in *Krivak*, page 177). As stated previously, *Bath* is based on *Nosek* "method one." In *Nosek*, it is stated that the straight property extension (*Bath*) is only applicable where the shore boundaries approach the shoreline at a right angle to the shore. In *Krivak*, the Commission ruled that the onshore boundaries between the parties to this proceeding approached the shoreline at other than a perpendicular and concluded that *Bath* and "method one" of *Nosek* was not applicable.

7. Petitioners object to Finding #51 in that Mr. Lang stated that he gave no opinion as to riparian rights associated with this line when in fact all of the property lakeward of the meander line or original shoreline is accretions attributed to the property rights of the upland owner.

8. Petitioners object to Finding #52 in that Mr. Lang attempted to utilize the second principle (*Bath* and *Nosek* method one) while he admitted that the property line approached the shoreline at other than a perpendicular. (Testimony of Lang, Finding #52).

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<sup>1</sup> Surveyor Lang was identified as a witness after the List of Witnesses and Exhibits deadline was due and identified as a witness one week before the hearing, but was allowed to testify.

9. Petitioners object to Findings #53 and 54 as such findings are contrary to a similar decision of the Commission in *H.G. Hatton Trust v. Young & Pfeiffer Trust*, 14 CADDNAR 176 (2017), where the Commission ruled that “use of two different principles of IB #56 in this instance results from the fact that the onshore boundary line between the Trust and Pfeiffer properties if extended to the shore would meet the shoreline at an acute angle (use of the third principle extending to the onshore boundaries applied for an equitable result) whereas the onshore boundary between the Trust and Young properties, if extended, would meet with shoreline at a near perpendicular angle (use of the second principle applied to achieve an equitable result).

10. Finally, the proposed Nonfinal Order of ALJ Wilson does not address the pier length of the Respondents’ group pier. Previously, in PL 14-911, the length of the Respondents’ pier was to be limited to 75 feet and it has lengthened over time to 269 feet (Finding 24(u)). Should the Respondents’ pier continue to lengthen, in order for the Rehlanders’ pier to maintain a distance between the Respondents’ pier to the north, it will be necessary to breach the riparian rights of the pier of the Rehlanders’ neighbor to the south.

### CONCLUSION

Accordingly, when one views the Nonfinal Order of ALJ Wilson and specifically the Findings 50, 51, 52, 53, 83, 84, 96, 99, 101, 102, 103 and 105 which led to the proposed Order in this matter, and when compared to the Information Bulletin #56 and the case law cited herein, the Nonfinal Order should be remanded for findings consistent with IB #56 and cases cited therein. Therefore, the southern riparian zone of Rehlander

should be apportioned by utilizing the Second Principle of IB #56 and the northern riparian zone should be determined utilizing the third principle of IB #56 by extending the northern Rehlander riparian line from point "A" on the Kent survey through point "G" on the Kent survey and into the open waters of Bass Lake.

No evidence was presented by the easement holders or Amelio which stated that a navigational hazard would be created if the Krivak Acres' pier was rotated to the north as suggested by Gary Kent.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 14th day of July, 2020, a copy of the foregoing was served by email upon the following persons:

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Word, Drafts\Petitioners' Objections to Findings of Fact & Conclusions of Law With  
Nonfinal Order.rtf



4. Administrative Law Judge (“ALJ”) Dawn Wilson was appointed under IC 14-10-2-2 to conduct this proceeding.
5. On July 5, 2018, Nicholas Amelio (“Amelio”) requested to be added as an intervening party. By ALJ order, Amelio was subsequently added as an intervening party.
6. On July 18, 2018, following the issuance of notice to all parties, ALJ Wilson conducted a Prehearing Conference, with R. Rehlander, Amelio and Lenzen attending. In addition, a Status Conference was held on August 15, 2018, with all parties present.
7. On July 30, 2018, the Department of Natural Resources (“Department”) filed its “Joint Appearance of Counsel for Department of Natural Resources for a Limited Purpose and Request for all Filings, Discovery Requests, Notices, Reports, and Orders”. For the reason that the Department is entrusted to hold and control public freshwater lakes for the benefit of the public pursuant to IC 14-26-2-5, the Department’s request was granted on August 2, 2018.
8. On July 24, 2018, motions to dismiss were filed by Amelio and Lenzen. By order dated August 2, 2018, the motions were determined to require treatment as motions for summary judgment under Indiana Trial Rule 56, as directed by Indiana Trial Rule 12(C). All parties were allowed until September 4, 2018, to file any appropriate response. The ALJ allowed an opportunity for Amelio and Lenzen to file any reply on or before September 18, 2018.
9. On August 7, 2018, the Rehlanders, as self-represented persons, filed a single response to the motions.
10. On August 13, 2018, James Kaminski<sup>1</sup> filed his appearance as counsel for the Rehlanders.
11. On August 14, 2018, Arthur Johnson appeared as counsel for Lenzen, Templin, The Dempsey Trust and Kaminski.
12. On August 31, 2018, the Rehlanders, by counsel, filed an additional response.

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<sup>1</sup> Upon inquiry by the ALJ, Attorney Kaminski stated he has no relationship with the party to this case who shares the last name of Kaminski.

13. On September 17, 2018, Amelio, self-represented, filed a reply identified as a “Rebuttal to Rehlander”.
14. On September 18, 2018, Lenzen, by counsel, filed “Respondents’ Reply to Petitioner’s Response to Motion for Summary Judgment” (“Respondents’ Reply”).
15. Respondents’ Reply states that it is a reply filed on behalf of Lenzen, Templin, the Dempsey Trust and Kaminski. Templin, the Dempsey Trust and Kaminski did not file a motion to dismiss and those parties were not authorized to file a reply. Respondents’ Reply is considered as a reply by Lenzen not Templin, the Dempsey Trust and Kaminski. In addition, Respondents’ Reply is not considered as a timely response by Templin, the Dempsey Trust and Kaminski in that it was filed beyond the deadline to file a response.
16. The Lake Preservation Act places full power over public freshwater lakes in the State of Indiana. The State, through the Department, is responsible to “hold and control all public freshwater lakes in trust for the use of all the citizens of Indiana for recreational purposes.” IC 14-26-2-5(d), *Indiana Dept. of Nat. Res. v Lake George*, 889 N.E.2d 361 (Ind. App. 2008) and *Lake of the Woods v Ralston*, 748 N.E.2d 396, 401 (Ind. App. 2001).
17. The Commission has adopted rules at 312 IAC 11 to assist with administration of the Lake Preservation Act. See IC 4-21.5-1-15 and 312 IAC 3-1-2.
18. Under IC 4-21.5, the Commission is responsible for resolving “a dispute among persons with competing riparian interests” associated with a public freshwater lake. *Id*
19. “A person may seek administrative review of the placement or maintenance of a structure under [312 IAC 11-3-1 or 1.2]...of this rule.” See 312 IAC 11-3-2.
20. The Commission is the “ultimate authority” for determinations under the Lake Preservation Act. See IC 4-21.5-1-15 and 312 IAC 3-1-2.
21. The Commission has jurisdiction over the subject matter of this proceeding and over the persons of the parties and this matter is ripe for consideration for potential disposition on the motions to dismiss filed by Amelio and Lenzen, herein considered as motions for summary judgment.

**B. Summary Judgment under AOPA as applied through Trial Rule 56**

22. IC 4-21.5-3-23 governs summary judgment under AOPA:

- (a) A party may, at any time after a matter is assigned to an administrative law judge, move for a summary judgment in the party's favor as to all or any part of the issues in a proceeding.
- (b) Except as otherwise provided in this section, an administrative law judge shall consider a motion filed under subsection (a) as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure.
- (c) Service of the motion and any response to the motion, including supporting affidavits, shall be performed as provided in this article.
- (d) [IC 4-21.5-3-28 and IC 4-21.5-3-29] apply to an order granting summary judgment that disposes of all issues in a proceeding.

23. As applied under AOPA, Trial Rule 56 of the Indiana Rules of Trial Procedure provides:

Rule 56. Summary judgment

(A) For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of twenty [20] days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

...

(C) Motion and proceedings thereon... The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered upon less than all the issues or claims.... A summary judgment upon less than all the issues involved in a claim or with respect to less than all the claims or parties shall be interlocutory....Summary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence, but the [Administrative Law Judge] shall make its determination from the evidentiary matter designated to the [Administrative Law Judge].

(D) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the [Administrative Law Judge] at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy...and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

24. “The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law.” *Wells v. Hickman*, 657 N.E.2d 172, 175 (Ind. App. 1995).
25. Summary judgment should be granted if the evidentiary material shows there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Auto-Owners Insurance Co. v. United Farm Bureau Insurance Co.*, 560 N.E.2d 459 (Ind. App. 1990).
26. “A fact is material if its resolution would affect the outcome of the case, and an issue is genuine if a trier of fact is required to resolve the parties' differing accounts of the truth ..., or if the undisputed facts support conflicting reasonable inferences.” *Hoosier Mountain Bike Assn., Inc. v. Kaler*, 73 N.E.3d 712, 716 (Ind. App. 2017), quoting *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009).
27. In determining if a genuine issue of material fact exists to preclude summary judgment, all doubts must be resolved against the moving party. Facts set forth by a party opposing the motion must be taken as true. *Terry v. Indiana State University*, 666 N.E.2d 87 (Ind. App. 1996).
28. A party moving for summary judgment has the burden of proof with respect to summary judgment, regardless of whether the party would have the burden in an evidentiary hearing. *Regina Bieda v. B & R Development and DNR*, 9 CADDNAR 1 (2001). See, also, *Jarboe v. Landmark Community Newspapers*, 644 N.E.2d 118, 123 (Ind. 1994).
29. Once the party moving for summary judgment establishes a lack of material fact, the party responding to the motion must disgorge sufficient facts to show the existence of a genuine triable issue. *Cowe by Cowe v. Forum Groups, Inc.* 575 N.E.2d 630, 633 (Ind. 1991).
30. Summary judgment is a lethal weapon. In considering whether to grant summary judgment, the adjudicator must consider its aims and targets and must avoid overkill. *Hutchens v. MP Realty Group-Sheffield Square Apartments*, 654 N.E.2d 35 (Ind. App. 1995), *trans. denied*. Caution must be exercised to ensure a party the right to a

fair determination of genuine issues. *E.Z. Gas, Inc. v. Hydrocarbon Transp., Inc.*, 471 N.E.2d 316 (Ind. App. 1984).

### **C. Issues on Summary Judgment**

31. Amelio, in his Motion to Dismiss, asserts that the issues in this proceeding are barred by “res judicata” due to the Commission’s decision in 6 CADDNAR 176 (1994). Amelio claims that the “property at issue is the exact same, as is the relief requested.” See Amelio’s Motion to Dismiss, page 1. Amelio also asserts that the “Petitioner’s name has changed due to a change in ownership of the Petitioner’s property.” *Id.* at page 2.
32. Lenzen claims that “res judicata”, or “collateral estoppel” bars litigation of the outstanding disputed issues because of the prior decision issued in 6 CADDNAR 176 (1994). Because both motions rest, in part, on issues of res judicata related to a specific Commission decision, the issues raised by both Amelio and Lenzen forming this legal basis for summary judgment will be analyzed but once.
33. In addition to res judicata based on 6 CADDNAR 176 (1994), Lenzen claims that the Declaratory Judgment in the Fulton Circuit Court, case number 25C01-9105-CP-0178, bars subsequent litigation of the outstanding disputed issues in this case. Finally, Lenzen claims that the Commission’s approval of an Agreed Order in case number 92-342W completed by the Petitioners, Robert Dempsey, Robert Lenzen and the Department, bars consideration of the issues presented in this proceeding.

### **D. Undisputed Findings of Fact<sup>2</sup>**

34. Bass Lake is a public freshwater lake in Starke County, Indiana.
35. The Rehlanders have an interest in real property on Bass Lake that includes 77.5 feet of frontage.

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<sup>2</sup> Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.

36. It is undisputed that Joseph Krivak was a prior owner of the property now owned by the Rehlanders.
37. Amelio has an interest in real property fronting on Bass Lake that is immediately adjacent and north of the Rehlanders' property.
38. On March 20, 1992, a Declaratory Judgment was issued by the Fulton County Circuit Court in *Joseph Krivak and Emily Krivak v Robert Dempsey, et al*, cause number 25C01-9105-CP-0178.
39. In the Declaratory Judgment, property owners of Lots 2 through 12 of Krivak Acres were determined to be the owners of a 20 foot easement across the north end of Krivak's property, more specifically:

Beginning at a point on the meander line of Bass Lake (formerly Cedar Lake), 43 feet north of the northwest corner of Lot 16 in Shoup's Addition to Shoup's Cedar Lake Lots; thence north 90 feet along the meander line of said lake; thence east to the west line of public highway; thence south along said highway to a point where said highway intersects the north line of tract conveyed to Victor O. McDowell and wife as shown by deed recorded in Deed Record 90, page 475; thence west along the north line of McDowell tract to place of beginning.

See "Response to Motion for Summary Judgment" ("Petitioners' Response"), Exhibit 1.

40. Easement use, as described in the Declaratory Judgment, was limited to use by property owners, their guests of the day and tenants of the property owners. Petitioners' Response, Exhibit 2.
41. In the Declaratory Judgment, the easement was determined by the court to "provide reasonable access to [Bass Lake] in a manner not unduly limiting usage by the other easement owners." *Id.* at page 2.
42. The Fulton Circuit Court determined that reasonable access included the "installation and maintenance of a pier by participating property owners; for installation and maintenance of shore stations or buoys for mooring boats. Selection of a location for the pier, for shore stations, or for buoys shall be as the property owners may from time to time agree based upon their need and reasonable usage for all. This in no way limits the property owners in the selection of a location for the placement of their pier other than to allow for

reasonable usage of the lake by all users...Such other rights of access as may be reasonable under the circumstances or as a court of proper jurisdiction may from time to time determine.” *Id.* at page. 2.

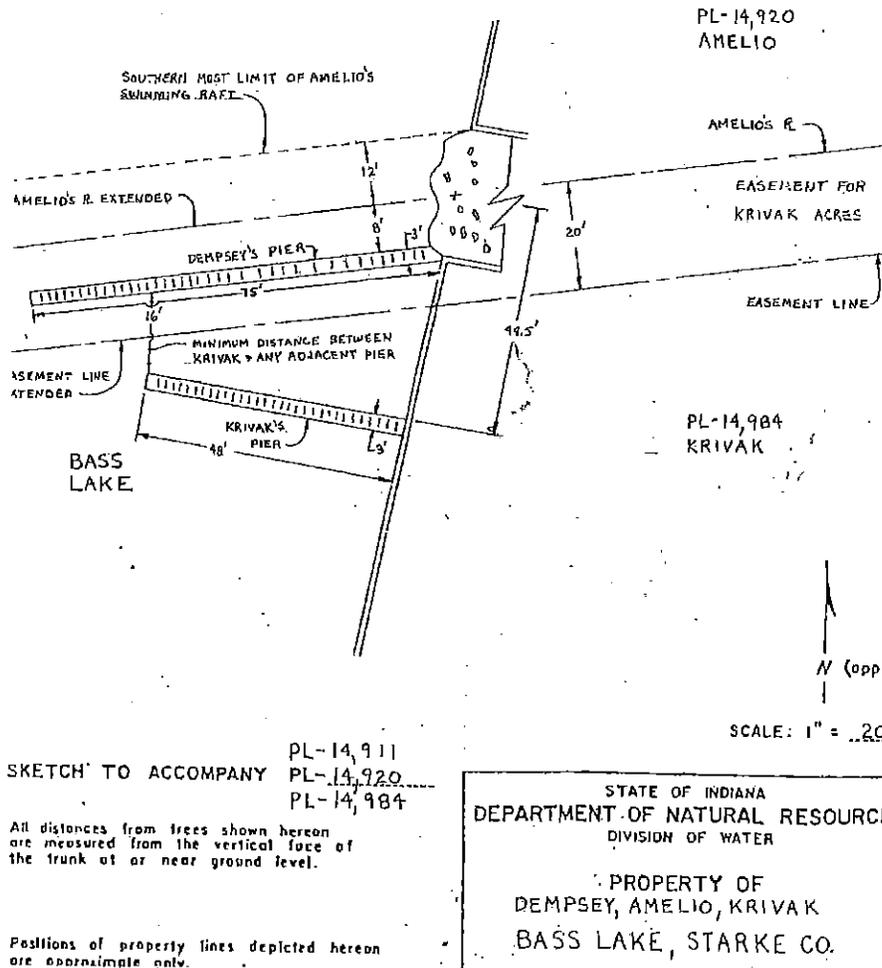
43. In the Declaratory Judgment, the Court ordered the following instruction, “counsel for defendants shall make appropriate permanent record in Starke County of this Court’s ruling, either by filing of this ruling by *lis pendens*, by recording in the miscellaneous records of Starke County, or both.” *Id.* at page 3. The Court declared the dominant and servient estate ownership “shall be covenants running with the land.” *Id.*
44. On August 31, 1992, the Department issued Permit PL-14,911 to Robert Dempsey for the installation of a temporary pier. Permit PL-14,911, included the following conditions, “the temporary pier shall extend lakeward from the legal shoreline starting approximately 8 feet south of the north line of the 20-foot easement...the temporary pier shall remain parallel to the easement lines extended into the waters of Bass Lake...the maximum width of the pier shall be 3 feet...no pier segments shall extend in a perpendicular direction from the pier...all watercraft shall be moored parallel to the pier.” The permit approval was “valid for one year from the date of approval.” Petitioners’ Response, Exhibit 2, pages 6-7 and Exhibit 4, pages 1-2.
45. On September 11, 1992, Joseph Krivak filed a petition requesting administrative review of Condition 7<sup>3</sup> of Permit PL-14,984 for a temporary pier in *Krivak v DNR, Dempsey, Lenzen and Amelio*, case number 92-338W. See Petitioners’ Response, Exhibit 3.
46. In *Krivak*, case number 92-338W, Permit #PL-14,984 was considered in conjunction with the permits issued to neighbors, Robert Dempsey, Robert Lenzen and Nick Amelio, who joined in the proceeding. Amelio’s permit was issued under Permit PL-14,920. Dempsey’s permit for a temporary pier was issued under Permit PL-14,911. *Id.*
47. A sketch included within Exhibit 4 to the Petitioner’s Response reflecting the locations for permits issued as PL-14,911, PL-14,920 and PL-14,984 reveals an eight (8) foot buffer area between the Dempsey pier and the southern boundary of Amelio’s riparian zone. The sketch reveals a 16 foot buffer area between the Dempsey pier and the Krivak

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<sup>3</sup> No party submitted the permit issued as PL-14,984 for consideration.

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pier, marked as the "minimum distance between Krivak & any adjacent pier". The Dempsey pier is marked as 75 feet in length and 3 foot in width. The Krivak pier is marked as 48 feet in length and 3 feet in width. Petitioners' Response, Exhibit 4, page 11. For the reader's ease, a portion of the sketch is included below:



48. At the conclusion of the presentation of evidence in *Krivak*, case number 92-338W, the ALJ issued his "Report, Findings of Fact, and Nonfinal Order of the Administrative Law Judge". After the issuance of the ALJ's nonfinal order, Amelio objected and the objections were considered by the Commission. Thereafter, the proceeding was remanded to the ALJ for further consideration. After both Amelio and Krivak, by counsel, presented written documentation, the case was resubmitted for disposition by the Commission at its regularly scheduled meeting on March 30, 1994. Following presentation of additional

argument by the parties, the Commission directed the Division Director of the Division of Hearings to reduce the Commission's substituted findings and order into a final disposition of the proceeding. On April 25, 1994, the Commission issued its final decision in case number 92-338W, thereafter indexed as "*Krivak v DNR, Dempsey, Lenzen and Amelio*, 6 CADDNAR 176 (1994)". After issuance of the final order of the Commission in *Krivak*, Joseph Krivak filed a petition requesting judicial review of the Commission's decision in Starke County, which was subsequently dismissed due to a failure to file the record timely. Petitioners Response, Exhibit 3, page 5.

49. In *Krivak*, the Commission determined in its final order; "Where, as in this case, the onshore boundaries of the property owners are approximately parallel to one other, and nearly but not exactly perpendicular to the shoreline, the most direct and expedient manner for pier placement is at the same angle as the onshore boundaries of the neighbors." *Id.*
50. In *Krivak*, the Commission affirmed Permit, PL-14,984, "[t]he subject permit as given initial determination by the Department is as the same angle as the onshore boundaries of the neighbors and meets the spirit and intent of Nosek<sup>4</sup>. The subject permit should be affirmed as...conditioned by the Department in its initial determination." *Id.*
51. In *Krivak*, Permits PL-14,911 and PL-14,920 were also affirmed in the form given initial determination by the Department. *Id. at page 4.*
52. The Commission also issued a determination in *Robert Dempsey and Robert Lenzen v Department of Natural Resources*, case number 92-342W. In the *Dempsey/Lenzen* case, the Commission issued its "Final Order of the Natural Resources Commission" on January 14, 1993, adopting an Agreed Order submitted to the Commission by the parties, Robert Dempsey, Robert Lenzen and the Department. The Agreed Order revised the name of the permit holder for Permit #PL14,911 from "Robert Dempsey" to the "Participating Property Owners of Krivak Acres". See Petitioners' Petition, Exhibit 1 and Petitioners' Response, Exhibit 2.

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<sup>4</sup> *Nosek v Stryker*, 309 NW2d 868 (Wis. 1981).

53. Also, in the Agreed Order presented by the parties in *Dempsey/Lenzen*, the parties agreed to replace the condition limiting the permitted pier length to 75 feet as follows: “the pier can be extended to length no greater than the maximum length allowed by statute, rule or local ordinance so long as the extended pier does not interfere with the use of the lake by others.” *Id.*
54. Only pages two and three of the Agreed Order in *Dempsey/Lenzen* are included within Exhibit 2 of the Petitioners’ Response. While the Agreed Order is not indexed or available on the Commission’s website, the ALJ, under the authority of IC 4-21.5-3-26(f) has taken official notice of page one of the Agreed Order and determined that the Agreed Order attached to Exhibit 2 was the Agreed Order for case number 92-342W regarding PL-14,911.
55. The Rehlanders installed a temporary pier under a general license in 2018 with a length of 140 feet. See Petitioners’ Response, Exhibit 1, page 1.
56. Easement holders installed a temporary pier in 2018 with a length of 269 feet. Additions perpendicular to the pier resulted in a total pier width of 19 feet. Petitioners’ Response, page 2.
57. The placement of piers by the easement holders and the Rehlanders has resulted in a navigational hazard.

## **E Conclusions of Law**

### Res Judicata and Collateral Estoppel-General Requirements and Application

58. Res judicata, also commonly referred to as claim preclusion, serves to prevent repetitious litigation of disputes that are essentially the same. *Hilliard v. Jacobs*, 957 N.E.2d 1043, 1046 (Ind. App. 2011), *trans. denied*.
59. A claim is precluded under res judicata if these four requirements are met: (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the prior action must have been between the same parties to the present suit or their

privies. *Cavallo v. Allied Physicians of Michiana, LLC*, 42 N.E.3d 995, 1002 (Ind. App. 2015), quoting *Evergreen Shipping Agency Corp. v. Djuric Trucking, Inc.*, 996 N.E.2d 337, 340 (Ind. App. 2013) (quoting *Hilliard v. Jacobs* at 1047). See also *Richter v. Asbestos Insulating & Roofing*, 790 N.E.2d 1000, 1002 (Ind. App. 2003), *trans. denied*.

60. The doctrine of res judicata consists of two distinct components: claim preclusion and issue preclusion. *Dawson v. Estate of Ott*, 796 N.E.2d 1190, 1195 (Ind. App. 2003).
61. “Issue preclusion” is also known as collateral estoppel. Subsequent litigation of a fact or issue, is prohibited by collateral estoppel where the act or issue was necessarily adjudicated in a former suit and the same fact is presented in a subsequent action. *In re L.B.*, 889 N.E.2d 326, 333 (Ind. App. 2008). See also *Crosson v Berry*, 829 N.E.2d 184, 192 (Ind. App. 2005).
62. The doctrine of “res judicata” and “collateral estoppel” are applicable in administrative proceedings. *Galbreath v. Griffith*, 11 CADDNAR 224 (2007), *Dean and Marilyn Ray v. Lukis, et al.*, 12 CADDNAR 69 (2009). See also, *Day and Schramm v. McCulloch & DNR*, 13 CADDNAR 184 (2013).

#### Res Judicata--Fulton Circuit Court

63. The case before the Fulton Circuit Court in case number 25C01-9105-CP-0178, a court of competent jurisdiction, was heard on the merits and a Declaratory Judgment was ultimately issued in the case regarding easement rights and the right to place a pier by certain Krivak Acres property owners.
64. In determining the extent of easement ownership, the Fulton Circuit Court did not determine specific pier placement, length, width or any specific configuration for the easement holders’ pier within the riparian zone available to the easement holders through ownership of the dominant estate.
65. The Declaratory Judgment identifies Joseph and Emily Krivak as the Plaintiffs in the matter. The Defendants are identified as “Robert Dempsey, *et al*”. The identities for all parties to that case is undisclosed.

66. The Declaratory Judgment established the easement holders' dominant estate ownership in an easement located within the northern 20 feet of Krivaks' property and lakeward extension into the waters of Bass Lake. The Krivak property is burdened as the servient estate for the easement. The easement was determined to include the authority for the placement of a pier.
67. In that the Fulton County Court determined that the rights run with the land, the determination by the Court is binding on current owners of the properties that form the dominant and servient estates.
68. The Petitioners in this case are the current owners of the servient estate.
69. The current property owners of Lots 2 through 12 of Krivak Acres are the current owners of the dominant easement.
70. In this proceeding, the Petitioners are disputing the appropriate placement of a pier by one or more of the easement holders within the riparian area associated with the easement. Neither the easement nor the authority to place a pier is being challenged by the Petitioners in this proceeding. The Declaratory Judgment does not bar litigation of the issues presented in this proceeding by res judicata.

Res Judicata—Commission Proceedings<sup>5</sup>

71. The claim of res judicata by Lenzen as a result of the Commission's final determination in *Krivak*, must be analyzed using the four part test.
72. The first consideration is if the Commission's decision in *Krivak* is a former judgment rendered by a court of competent jurisdiction.
73. Generally, an Indiana state administrative agency has only those powers conferred on it by the Indiana General Assembly. Powers not within the legislative grant may not be assumed by the agency nor implied to exist in its powers. *Bell v. State Board of Tax Commissioners*, 651 N.E.2d 816, 819 (Ind. Tax Ct. 1995).

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<sup>5</sup> *Krivak v DNR, Dempsey, Lenzen & Amelio*, 6 CADDNAR 176 (1994); *Dempsey & Lenzen v DNR*, #92-342.

74. The Commission has been granted to authority by the Indiana General Assembly to make determinations regarding riparian rights, including the placement of piers in the waters of a public freshwater lake. IC 14-26-2-23(f).
75. Unless consistent with a Department permit, a person may not place modify or maintain a permanent or temporary structure “over, along, or lakeward of the shoreline or water line of a public freshwater lake”, including the placement and maintenance of temporary piers. The Commission has adopted administrative rules to provide for the exemption of licensing activities that the Commission finds unlikely to pose more than a minimal potential for harm to public rights. See IC 14-26-2-23.
76. Temporary structures may now qualify for placement without a written license from the Department under a general license. A temporary structure, including a pier, qualifies for a general license that meets each of the following criteria:
1. Be easily removable.
  2. Not infringe on the access of an adjacent landowner to the public freshwater lake.
  3. Not unduly restrict navigation.
  4. Not be unusually wide or long relative to similar structures within the vicinity on the same public freshwater lake.
  5. Not extend more than one hundred fifty (150) feet from the shoreline or water line.
  6. If a pier, not extend over water that is continuously more than six (6) feet deep to a distance of one hundred fifty (150) feet from the shoreline or water line.
  7. Not be a marina.
  8. Not be a group pier.
  9. Be placed by a riparian owner or with the written approval of a riparian owner.

*312 IAC 11-3-1(b)*

77. Notwithstanding 312 IAC 11-3-1(b)(5), a group pier does not qualify for a general license and requires a written individual license. See 312 IAC 11-3-3(f)(2).
78. Bass Lake is a “public freshwater lake” as defined under IC 14-26-2-3 and is subject to regulation under the Lakes Preservation Act. *Zapffe v. Srbeny* 587 N.E.2d 177 (Ind. App. 1992).

79. Bass Lake temporary piers may extend further from shore than those described by 312 IAC 11-3-1(b)(5) and may qualify for a general license if other aspects of 312 IAC 11-3-1 are satisfied. Bass Lake piers may extend no more than 300 feet in length if the pier extends over water that is continuously more than a depth of three feet. 312 IAC 5-6-3.
80. Under the Lakes Preservation Act, the Commission possessed competent jurisdiction to issue a decision on the Department's determination regarding a permit for a temporary pier, PL-14-984, issued to Joseph Krivak in 1992.
81. To determine if the current claim is precluded by res judicata, the second consideration is if the Commission's decision in *Krivak* was rendered on the merits.
82. The decision by the Commission in *Krivak* following the presentation of evidence by the parties and thorough consideration by the Commission. The Commission's decision was rendered on the merits.
83. To determine if the current claim is precluded by res judicata, the third consideration is if the matter now in issue was determined, or could have been determined, in the prior action.
84. Amelio states in his Motion to Dismiss that "The property at issue is the exact same, as is the relief requested." See Amelio's Motion to Dismiss.
85. The primary issue in *Krivak* was a disputed issue concerning Condition 7 of Permit PL-14-984 issued to Joseph Krivak. The Krivak permit was granted in conjunction with the following permits that were issued to Krivak's neighbors, Permit PL-14,911 issued to Robert Dempsey and Robert Lenzen and Permit PL-14,920 issued to Nick Amelio. See *Krivak* at 176.
86. In *Krivak*, Permit PL-14,984, including the disputed condition, was affirmed.
87. The pier placement of the pier placed by Krivak's neighbors, Permit PL-14,911 issued to Robert Dempsey and Robert Lenzen and Permit PL-14,920 issued to Nick Amelio were considered in the Commission's decision in *Krivak*.
88. The riparian boundaries considered by the Commission in its affirmation of the Department's permit in *Krivak*, are the same landward property interests and riparian boundaries at issue in this proceeding.

89. The permit issued as PL-14,911 states the expiration of the permit was one year from the date of approval. The term of validity for the Department's Permit approval of Krivak's temporary pier under PL-14,984 is unstated.
90. "A license under IC 14-26-2 and 312 IAC 11 currently expires two (2) years after issuance unless: (1) otherwise provided in this rule; or (2) issued under [emergency rules which expired in 2012 and 2013]." 312 IAC 11-3.5-1.
91. Seasonal removal of an individual license for a temporary structure completed timely does not terminate a license if the temporary structure conforms to the terms of the license when the structure is replaced. 312 IAC 11-3.5-2.<sup>6</sup>
92. When the individual permits were originally issued for PL-14,984, PL-14,911 and PL-14,920, there was no availability for a general license for a temporary pier. Res judicata would be inapplicable to any determination regarding the validity of a general license by any party to this proceeding.
93. Unless an individual license is deemed to be currently valid, the matter now at issue regarding the current placement of a temporary pier by the easement holders was not and could not have been determined in *Krivak*. Insufficient evidence was submitted to determine current validity for the pier permit previously issued to Dempsey and subsequently the "Participating Property Owners of Krivak Acres."
94. To determine if the current claim is precluded by res judicata, the final consideration is if the controversy adjudicated in the prior action between the same parties to the present suit or their privies?
95. The parties in *Krivak* were Joseph Krivak, Robert Dempsey, Robert Lenzen and Nick Amelio. To those parties the decision of the Commission is binding for the issues determined in that proceeding.
96. Amelio asserts, "Petitioner's name has changed due to a change in ownership of the Petitioner's property." See Amelio's Motion to Dismiss.

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<sup>6</sup> While the response filed by Lenzen notes the potential application of the lawful nonconforming use affirmative defense, there was no showing of an unlawful use for the placement after a date certain. In addition, the availability of the defense is unclear in light of the requirements of 312 IAC 3-1-4.

97. The Petitioner in *Krivak* was Joseph Krivak, not the Petitioners in this proceeding.
98. The Petitioners in the instant proceeding were not parties to *Krivak*.
99. Despite prior ownership by Krivak for the property currently owned by the Rehlanders, evidence presented to show privity between Krivak and the Petitioners in this case is insufficient to support the application of res judicata for this proceeding based on *Krivak*.
100. Based on a void in the evidence presented to show that the matter now in issue was, or could have been, determined in *Krivak*; and that the controversy adjudicated in the prior action was between the same parties to this proceeding or their privies, Amelio failed to show that res judicata would bar litigation in order to dispose of the case through Amelio's Motion to Dismiss or Amelio's Rebuttal to Relander (*sic*).
101. The Commission approved an Agreed Order presented by the parties in Dempsey/Lenzen. The Agreed Order altered the identity of the permit holder and altered the previously authorized pier length. The Agreed Order is binding upon the signatories to the Agreed Order and the parties to that case. Insufficient evidence was provided to show that the matters currently at issue in this proceeding could have been adjudicated in Dempsey/Lenzen. In addition, insufficient evidence was presented to show that the controversy in that case was between the parties to this proceeding or their privies.
102. Based on a void in the evidence presented to show that the matter now in issue was, or could have been, determined in the prior actions and the controversy adjudicated in the prior actions were between the same parties to this proceeding or their privies, Lenzen failed to show that res judicata would bar litigation in order to dispose of the case through Lenzen's Motion to Dismiss and Lenzen's Reply.

#### Collateral Estoppel

103. The Indiana Court of Appeals has recently addressed the components of collateral estoppel and found the following:

Collateral estoppel bars the subsequent litigation of a fact or issue that was necessarily adjudicated in a former lawsuit if the same fact or issue is presented in the subsequent lawsuit. *Indianapolis Downs, LLC v. Herr*, 834 N.E.2d 699, 704 (Ind. Ct. App. 2005), *trans. denied*.

Where collateral estoppel is applicable, the former adjudication will be conclusive in the subsequent action even if the two actions are on different claims. *Id.* However, the former adjudication will only be conclusive as to those issues that were actually litigated and determined therein. *Id.* Collateral estoppel does not extend to matters that were not expressly adjudicated and can be inferred only by argument. *Id.*

In determining whether to allow the use of collateral estoppel, the trial court must engage in a two-part analysis: (1) whether the party in the prior action had a full and fair opportunity to litigate the issue, and (2) whether it is otherwise unfair to apply collateral estoppel given the facts of the particular case. *Id.* at 705. The factors to be considered by the trial court in deciding whether to apply collateral estoppel include privity, the defendant's incentive to litigate the prior action, and the ability of the plaintiff to have joined the prior action. *Id.* These factors are not exhaustive but provide a framework for the trial court. *Id.* A trial court is afforded great deference to disallow the offensive use of collateral estoppel because it is the trial court that will devote the time to try the case. *Id.*

*Acquisitions LLC v Fish*, 84 N.E.3d 1211, 1216 (Ind. App. 2017).

104. All findings made by the Fulton County Circuit Court in its Declaratory Judgment in cause number 25C01-9105-CP-0178 are binding on the parties to the action and to the owners of the dominant and servient estates.
105. Findings of the Commission in *Krivak*, 6 CADDNAR 176 (1994), would bar any subsequent relitigation of the same fact or issue in this proceeding for parties to those proceedings or those in privity with the parties.
106. Any term of the Agreed Order approved by the Commission in case number 92-342W is binding on the signatories to the agreement and the parties to that case.
107. The Indiana Court of Appeals previously addressed the issues of privity and determined the following:

The term privity describes the relationship between persons who are parties to an action and those who are not parties to an action but whose interests in the action are such that they may nevertheless be bound by the judgment in that action. *MicroVote Gen. Corp. v. Ind. Election Comm'n*, 924 N.E.2d 184, 196 (Ind.Ct.App.2010). Whereas a "party" is one who is directly interested in the subject matter and has a right to make a defense or control the proceedings, a "privity" is one who after rendition of the judgment has acquired an interest in the subject matter affected by the judgment. *Id.* The

term includes those who control an action, though not a party to it, and those whose interests are represented by a party to the action. *Id.* As such, an entity does not have to control a prior action, or be a party to a prior action, for privity to exist. *Id.* Therefore, in determining the parties for *res judicata* purposes, this court looks beyond the nominal parties and treats those whose interest are involved as the real parties. *Id.*

Thrasher, Buschmann, & Voelkel, P.C. v. Adpoint Inc., 24 N.E.3d 487, 495 (Ind. App. 2015).

108. Collateral estoppel is only binding on the parties to the action and the persons in privity with them. “In determining the parties for *res judicata* purposes, this court looks beyond the nominal parties and treats those whose interests are involved as the real parties.” *Indiana State Highway Commission v Speidel*, 392 NE 2d 1172, 1176, citing *Tobin v. McClellan*, 73 N.E.2d 679 (Ind 1947); *Smith v. Midwest Mutual Ins. Co.*, 289 N.E.2d 788 (1973) and *Mayhew v. Deister*, 244 N.E.2d 448 (Ind App. 1969).
109. Insufficient evidence is submitted to establish privity in this proceeding so that collateral estoppel would bar the litigation of issues already determined by the Fulton Circuit Court in *Joseph and Emily Krivak v. Dempsey, et al*, case number 25C01-9105-CP-0178, *Krivak v the Department, Dempsey, Lenzen and Amelio* in 6 CADDNAR 176 (1994) and *Dempsey and Lenzen v. the Department* in case number 92-342W by nonparties to those proceedings, except as otherwise designated by the decision maker.
110. A Commission decision that may not be binding upon a person may be used as precedent in some situations. A final order of the Commission may be relied upon as precedent by the Commission to the detriment of any other person after the order has been indexed by name and subject and subject to public inspection and copying. IC 4-21.5-3-32(a).
111. The Commission’s decision in *Krivak* was previously indexed by the Commission and is readily available through the Commission’s online searchable repository of decisions and may be used as precedent.
112. The Commission’s approval of the Agreed Order presented by the parties in *Dempsey/Lenzen* is not indexed by the Commission.

113. While the Commission may not rely on a previously issued Commission decision to the detriment of a person if the order has not been indexed, this prohibition does not apply if the person had actual timely knowledge of the order. IC 4-21.5-3-32(b).
114. For the parties to that case and nonparties who had actual timely knowledge of the order, the Agreed Order may be utilized as precedent.
115. The Agreed Order may provide relevant evidence for one or more of the outstanding disputed issues in this proceeding. However, the terms of the Agreed Order provide insufficient evidence to support summary judgment in this proceeding.
116. The Commission has adopted a nonrule policy document under IC 4-22-7-7 to aid in determinations concerning riparian zones and the placement of structures within public freshwater lakes. See *Public Freshwater Lakes and Navigable Waters, Information Bulletin #56 (Second Amendment)*, Indiana Register, 20100331-IR-312100175NRA (March 31, 2010) (“*Information Bulletin #56*”).
117. Nonrule policies, such as Information Bulletin #56, adopted by the Commission do not have the effect of law. Information bulletins are intended to be statements that interpret, supplement or implement a statute. Nonrule policies published in the *Indiana Register* are readily available through the Commission’s website and are frequently used by the Commission as guidance documents.
118. The effective date for the initial version of Information Bulletin #56 was January 1, 2009. Commission decisions referenced in the evidence presented predate the nonrule policy. While Information Bulletin #56 may now provide assistance in determining riparian rights, the document’s application would not support summary judgment in this proceeding on the basis of res judicata or collateral estoppel.

#### **G. Order on Motions to Dismiss Treated as Motions for Summary Judgment**

1. For matters in this proceeding within the jurisdiction of the Natural Resources Commission, the motions to dismiss filed by Amelio and Lenzen, treated as motions for summary judgment herein under IC 4-21.5-3-23, are denied.

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- 2. Relevant facts stated as Undisputed Findings of Fact herein within paragraphs 34-46 and 48-51 of this decision are deemed established.
- 3. A hearing of the facts is required for matters upon which there is insufficient evidence in the record. There is insufficient evidence in the record to determine:
  - a. Are PL-14,911, PL-14,984 and PL-14,920 current valid permits?
  - b. Is the pier placed by the current easement holders a group pier as defined in 312 IAC 11-2-11.5?
  - c. Is the length of the pier installed by the current easement holders authorized?
  - d. To assist with safe navigation, would alteration of the placement of any party pier be required?
  - e. Are the parties to this proceeding privies to the parties to the Commission’s cases in 6 CADDNAR 176 (1994) or 92-342W or otherwise bound by the conclusions in those proceedings?
- 4. Additional proceedings are required. A status conference will be scheduled by separate order.

Dated: November 21, 2018



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