Minutes of the AOPA Committee of the
Natural Resources Commission
July 13, 2006

AOPA Committee Members Present

Jane Ann Stautz, Committee Chair
Mark Ahearn

NRC Staff Present

Sandra Jensen
Stephen Lucas

Call to Order

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 9:05 a.m., EDT, on July 13, 2006 in Conference Room 2, Indiana Government Center South, 402 West Washington Street, Indianapolis, Indiana. With two members of the Committee present, the Chair observed a quorum.

Mark Ahearn of the Indiana Department of Transportation introduced himself.

Approval of Minutes for Meeting Held on March 21, 2006.

The Committee discussed and approved by acclamation the minutes for the meeting held on March 21, 2006.

Consideration of Oral Argument with respect to Objections to Findings of Fact, Conclusions of Law, with Non-Final Order of Administrative Law Judge in *Hoosier Environmental Council v. Department of Natural Resources*; Administrative Cause No. 97-065R. AOPA Committee deliberations only. No oral argument or presentations by the parties or the public.

The Chair opened the Committee discussion and reflected that oral argument was received on the item during the March meeting. She expressed appreciation to the parties for offering their suggestions and recommendations for modification to the findings and nonfinal order of the Administrative Law Judge. "I think that they were very helpful for review."

Stautz said she believed "eligibility has been established. It's really to entitlement as I read and understand what's before us." She said the parties disagree as to the amount of entitlement to which the Hoosier Environmental Council is entitled based upon the factors of success in the different phases.

Mark Ahearn said he wished to address the concept of "substantially successful". From reading the statutes, rules and cases, he believes "the purpose of the law is to open doors to citizens as

against government" in the administration of the Surfacing Mining Control and Reclamation Act. He said the law seems to anticipate that citizen groups are inherently mismatched in dealing with government. "Our determination ought to be consistent with the concept that, if as a result of the citizen proceeding going forward, there was a substantial change," the citizens "ought to be entitled to reimbursement of their fees without subjecting" the fees to a percentage test. He suggested that, if "but for" the proceeding a substantial change would not have occurred, the citizens should be appropriately reimbursed. Applying a percentage to an award based upon the terms of a request for review is flawed because the pleading to initiate litigation often asks for more than is really expected to be achieved.

Jane Stautz said how to apply these concepts to the facts of the current case was at the core of the AOPA Committee's responsibilities. "There is a wide disparity between HEC and the DNR." She said she had concerns for "the potential for exposure" to the State and in determining "what is reasonable" in bringing forward petitions for litigation expenses. She asked how to apply the concept of "substantially successful" when viewed in the context of "reasonableness of the action and how do you encourage those parties at some point to stop the proceeding and how do you encourage settlement. That's the other philosophical issue that I have, as well, with this."

Ahearn said he wanted to subtract from the award a consideration of the retainer given to HEC's law firm. Let's address that "as its own issue." He suggested "there should be some independent constraints around that." Ahearn added, "Couple with those two the concept of what can the citizen group do, where it is now, if it has to incur further fees to achieve the recovery of the first set of fees."

The Chair asked Ahearn if he didn't believe the nonfinal order by the Administrative Law Judge was based upon a determination of whether HEC was "substantially successful"? He responded that he was uncertain of this reading. Stautz said she believed the concept of being "substantially successful" was incorporated in the Administrative Law Judge's analyses and findings. The ALJ, Sandra Jensen, said, "I will confirm that was the thought process." She added, "I don't know that I actually used the language 'substantially successful'" in "my nonfinal order. If that's not clear, I would be able to enhance that or correct that."

Mark Ahearn continued. "If hypothetically a citizens' group challenged a license or permit, and it said here are the three things we want: A, B and C. Over the course of the deliberations or the litigation, the parties got together and said here's what we'd like to do: D. There's an argument that you didn't get A, you didn't get B, you didn't get C, but you got a solution that all the parties like, which would not have occurred had not the process been brought forth." If the direction the State was going has been changed, the citizens' group should be eligible for an award.

Jane Ann Stautz said, "One of the things I did was to put all three orders side-by-side. There's a decision at this end of the spectrum and one at [the opposite] end of the spectrum. I would say the ALJ is probably ¾ of the way in between if you look at straight dollars figures. What I draw from the analyses here is that there is no formula and no guidance as to how to apply" the law. "It is largely personal reflection in terms of how you apply this."

Ahearn asked the ALJ, what "percentage of those fees" in the order "you would agree ought to be reimbursed?" Judge Jensen responded, "The way I did this [is] I split the actual underlying litigation into three phases. The administrative review phase was the only phase that I awarded fees on. The total relative to the administrative review segment of the litigation was $74,884.61. I think these are the fees sought. This is not what was actually awarded." The other two phases

were the "objections phase" before the whole Natural Resources Commission or its AOPA Committee and the "judicial review" phase.

The Chair said, "I am supportive of the ALJ's interpretations" particularly where we're looking at the determination of reimbursement for litigation expenses at the administrative review phase. "I know there are questions that you have with respect to the retainer, and the reasonableness and appropriateness of reimbursement." She suggested the discussion focus upon the retainer question. Stautz also indicated interest in reconsidering the phases other than the administrative review phase.

Ahearn suggested that being "substantially successful" should touch upon all phases. "It's kind of the reverse of the 'fruit of the poisonous tree'. If at the end you're successful, I don't see why that doesn't touch each phase of the costs that were incurred." He said he couldn't put together a dollar amount, however.

Jane Stautz asked if Ahearn was "suggesting offering additional guidance for a modification of the nonfinal order before us, or are you suggesting that we affirm the order before us as written?" He responded, "I'm not sure I'm ready to affirm because I don't know where the parties last came out on the issues." He said there were "a couple of them, when I did the math, I couldn't quite figure out how to make it work." Stautz said if there were to be some award for the other phases, there could be an additional award, but she suggested that the parties had provided extensive documentation as to how they applied their theories for compensation.

Mark Ahearn asked, "Where did the nonfinal order go on the retainer concept." The Chair responded that no award was approved because the ALJ found there was insufficient documentation. Ahearn suggested that an award of an attorney retainer was a determination that could properly "only be made at the end of the litigation looking back." There needed to be an analysis of "what was the extent and the complexity of the substance of the work? What was the actual amount of the work that was really done?" First, a reimbursement for a retainer needed to pass a threshold test of whether the client was "substantially successful" with the litigation. Secondly, the retainer "has to be consistent with state law and state legal ethics." For reimbursement under SMCRA, the amount of the retainer should not be excessive relative to the services rendered.

Stautz said she did not question the amount of the retainer or the reasonableness of the retainer provided by the Hoosier Environmental Council to Michael Mullett. "What I question is: was it for purposes of this case as a classic retainer", or did the retainer have a more general application?

The Administrative Law Judge said, "There was no question in my mind as to whether the $5,000 retainer was strictly for this litigation." There "was an affidavit" in the record to support that finding. "The concern that I had was the fact that all of the cases that I read relative to fee proceedings for the lodestar being a reasonable hourly rate times the number of hours. The way they cited it made it impossible for me to calculate the $5,000 amount."

Stautz and Ahearn proceeded to an overall view of the nonfinal order and how they might achieve a consensus opinion. They agreed the disqualification of the third member of the Committee complicated their challenge. Ahearn said, "As I read through all of the comments and objections, there are simply some things I agree with in HEC's objections." Stautz responded that if there were specific items where Ahearn would offer direction for review, she and he might be able to come closer together. "I'm struggling to hear what are those specific modifications."

In order to help the proceeding advance, Mark Ahearn presented a proposal for instructions to the Administrative Law Judge. "I am going to state it, not in the form of a motion, and then I'm going to say that's my motion." He continued, "The motion would be to refer this back to the ALJ, [one,] to provide additional clarity, specifically addressing the concept as to what extent and what dollar amounts does the nonfinal order recommend paying fees attributable to substantial success on the merits all the way through the case. Two, to provide the same clarification and guidance with respect to the issue of the retainer, addressing as appropriate the case law with respect to the retainer. Third, to address the concept of that if you're not substantially successful, then you're out." Ahearn asked if these elements could be read back to him for placement in the form of a motion.

Steve Lucas suggested if there was consensus on a concept, that the Committee might allow Judge Jensen to memorialize the concept in writing. She could bring a draft back for consideration later in the day.

The Chair then ordered the item deferred to allow the ALJ to prepare a draft and to return for its consideration following the review of other items on the agenda.

Later, Judge Sandra Jensen tendered a draft motion to the AOPA Committee that sought to comply with the oral statement by Mark Ahearn. Following review and modification of the draft, Ahearn made the following motion:

> I move to remand the Non-Final Order to the Administrative Law Judge for the inclusion of additional findings clarifying:
>
> (1) That the substantial success of HEC was considered with respect to the determination of the award for fees and expenses, or lack of an award, relating to each of the four identified phases of the litigation.
>
> (2) The determination association with HEC's claimed $5,000 retainer.
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> (3) The determination to award no fees associated with HEC's protection of its successes achieved in the Administrative Review Phase through its participation in the AOPA Objections Phase and the Judicial Review Phase.

Jane Ann Stautz seconded the motion, and it was approved.

The Chair said she understood the parties were anxious to achieve a final agency decision. She directed the Administrative Law Judge to respond to the motion as soon as practicable. When a response is prepared, a copy is to be served upon the members of the AOPA Committee and upon the attorneys for the parties. After a reasonable period for review of the ALJ's response, the Chair would schedule a meeting of the AOPA Committee to address the response.

Consideration of Oral Argument with respect to "Claimant's Objections to Findings of Fact, Conclusions of Law and Nonfinal Order of Administrative Summary Judgment" and "Findings of Fact and Conclusions of Law and Nonfinal Order of Administrative Summary Judgment" in *Daniel Ray Miller, Trustee for the Miller Family Real Estate Trust v. Doris G. Miller; Mark A. Morin Logging, Inc.; Mark A. Morin, Individually; Western Surety Company; and Bloomfield State Bank, Guardian for Luther K. Miller***; Administrative Cause No. 04-201F.**

The Chair called this item for consideration on the Claimant's objections. She noted that Cortney Rowe Givens, attorney for Bloomfield State Bank, had expressed her client's neutrality and would not participate in the oral argument. In addition, although an attorney had monitored the proceeding for the Department of Natural Resources, the agency was not a party and also would not participate in oral argument. The Chair then invited Daniel Mills to present his objections for the Daniel Ray Miller, Trustee for the Miller Family Real Estate Trust.

Daniel M. Mills stated, "We disagree with the nonfinal order, and we would ask that it be rejected by the Committee essentially for the following reasons. My client owns the subject property and manages the property as the trustee of a trust. The original grantors were his parents, and they reserved a life estate. The life estate was restricted with the terms of the deed of trust and the trust. The nature of the restriction is that the fee simple owner, my client, has sole power to deal with the real estate. He can sell it. He can manage it. He can mortgage it. He is the only person who can do anything with the real estate." Mills said his client's mother died, and in 2002 Luther Miller was declared incompetent and was placed in a guardianship. "In 2004, this timber transaction occurred." Mills said his client was not involved and did not know about the sale. Luther Miller and his new wife contracted to harvest the trees. He argued that his client qualified as a "timber grower" under the Timber Buyers Act and was exclusively entitled to proceeds from a timber sale. He said the Administrative Law Judge wrongfully applied the principles of the *Klann* case, finding Daniel Ray Miller did not qualify as a timber grower. "We think the decision is wrong" because it ignores the effect of the deed of trust. Mills said the deed of trust was a conveyance which gave to Daniel Ray Miller the sole power to sell timber and the sole power to receive proceeds from a sale. "We believe that you have to apply the terms of the deed of trust and the trust agreement in this case. You can't just stop with the fact there is a life estate involved. That's why we think the *Klann* decision does not apply." As a matter of law, Daniel Ray Miller should have prevailed, but at the very least summary judgment should not have been granted against him.

Marvin E. Coffee, attorney for Doris Miller, spoke next. "Daniel Miller doesn't own the property. He has a remainder interest in the property. He does not have a fee simple. Those powers run in the trust—all those powers [Daniel Mills] is talking about. None of those are applicable until Luther Miller dies." At the time of the timber harvest, Daniel Ray Miller could not come on the property or otherwise exert control without the permission of the life estate. "The fact is, according to the trust agreement," [Daniel Miller] had no powers because Luther Miller reserved a life estate for himself." Luther Miller had all the rights to the real estate "except for 'waste'. If they have a complaint against Luther Miller, it's because of 'waste'. Since they have settled with the [guardian for] Luther Miller, they don't even have that claim. You can't bring 'waste' against third parties. We asked that a decision be made with prejudice, but the Administrative Law Judge decided to do it without prejudice. There is a question whether the Trustee could have harvested the trees himself. He could not under the trust agreement. All the powers given to him are the same powers that are given under nearly every trust agreement like this. None of those powers take effect until such time as the life estate holder dies. The life holder is entitled to all the benefits of the property until that time as he dies, subject to not

committing 'waste'. 'Waste' is not the subject matter of this forum," and the Trustee has not been harmed in a way that the Natural Resources Commission can provide relief.

Mark Ahearn asked, "Does the Trustee have any rights with respect to the property? How would he know if there is 'waste' occurring if he is a trespasser?" Coffee answered that the Trustee lives across the street from the subject property and, "He might be able to walk on the property to see if there is 'waste' being committed. There is a big difference between this and planting crops and taking all the proceeds." He said all of Daniel Ray Miller's rights as Trustee were "subject to that life estate. When the deed was granted, in bold letters it stated that Luther Miller is reserving a life estate. Under Indiana law that only means one thing, he is the owner of the property until he dies. He has a right to everything that goes on at that property. He can harvest timber as long as it is not detrimental to the property. Now, there is some case law that says it is arguable you can thin out trees, and that would be better for the property."

The next person to provide oral argument was David A. Smith, attorney for Mark A. Morin Logging, Inc.; Mark A. Morin, individually; and, Western Surety Company. He said in the record that was before Judge Lucas, the crux of the dispute was the deed of trust. Luther Miller and his wife "created a land trust, and part of the land trust was 80 acres." The documentation established powers in the Trustee. The documentation retained a life estate in favor of Luther Miller and his wife. "There was no suggestion in the establishment of the life estate that it would be subject to the trust or the control of the trustee. Part of the record that Judge Lucas also had in front of him, to consider the summary judgment motions, was the settlement agreement between the [Daniel Ray Miller, Trustee] and Bloomfield State Bank as Guardian for Luther K. Miller. As part of the agreement, they redefined the powers that the Trustee would have over the land. The Judge made special note that before that settlement was reached, there was no statement of powers given to the Trustee. But as part of the settlement, [the Guardian for Luther K. Miller] gave away substantial powers. One would presume in looking at this record, apparently in settlement, if Daniel Miller had those powers before, why is there the need for the limiting terms and conditions that were placed in the settlement agreement? I think when you look at the deed, and the termination of the deed, and the settlement that was part of the record before the Administrative Law Judge, and apply the *Klann v. Wright Timber & Veneer* decision, Judge Lucas reached the right conclusion in that he didn't find that there was anything that prohibited Luther's ability to control the property. If there was a 'waste' issue or any other disagreement, the Claimant would have a right to go to state court and seek whatever state court remedies they could plead and prove. It wasn't that the dispute was fully resolved, only that it was in the wrong forum for improper jurisdiction. In fact, there are other ancillary proceedings going on."

Daniel Mills responded that "what Mr. Coffee is effectively saying is that the deed in trust and the trust are nil. If the terms don't take effect until Luther Miller dies, then why in the world would you put a life estate? It makes no sense whatsoever. If it were a will, it would say it's a will. It's not a will. It's a conveyance of real estate, and it's a conveyance in fee simple. The settlement with Bloomfield State Bank on behalf of Luther Miller, I don't think has any relevance to the issue." He said the Administrative Law Judge erred in finding the deed of trust did not restrict the life estate. "It wasn't clearly set out in the deed of trust what exactly the life tenant's rights were simply because it's a family situation. You wouldn't expect something like this to happen: [Luther Miller] being adjudicated an incompetent and he and his wife selling the timber off without any notice to the Trustee. What the Bank tried to do was make things a little more clear because they have to tell him what he can do and what he can't do."

Mark Ahearn asked if the nonfinal order is saying there is no ability to limit the terms of a life estate through a deed of trust? David Smith responded that he believed the deed of trust was

probably modified after-the-fact, "but at the time of the initial deed, there was no limitation." Marvin Coffee concurred with Smith saying the Trustee created a limitation in its settlement agreement with the Guardian, Bloomfield State Bank. "That actually did give them all the powers they wanted." Daniel Mills replied that "we cited case law in our response to summary judgment that the terms of the deed control the reservation."

Jane Ann Stautz moved to approve the findings of fact and conclusions of law with nonfinal order of summary judgment of the Administrative Law Judge as the findings of fact and conclusions of law with final order of summary judgment of the Natural Resources Commission. Entry of the summary judgment was specifically made without prejudice to all the parties to seek relief, in a civil court, based upon waste or another theory other than the relief accorded by the Timber Buyers Act. Mark Ahearn seconded the motion, and the motion passed.

Consideration of Objections to Findings of Fact, Conclusions of Law, with Nonfinal Order of Administrative Law Judge in *Wawasee Property Owners Association, Inc.; Wawasee Area Conservancy Foundation, Inc.; Robert A. Dumford; Sherman Goldenberg; and, Kanata Manayunk Johnson Bay Property Owners Association v. Wawasee Real Estate and Development, LLC and Department of Natural Resources* (Objections to Dismissal of the Claim by Kanata Manayunk Johnson's Bay Property Owners Association); Administrative Cause No. 06-020W.

The Administrative Law Judge, Stephen Lucas, explained the nonfinal order was issued in response to complaints by nonparty citizens. He said Larry Harkleroad purports to speak as President of Kanata Manayunk and for lot owners who, pursuant to covenants in deeds, are members of the Kanata Manayunk Property Owner's Association. The complaining nonparty citizens question whether Kanata Manayunk Property Owner's Association exists as a legal person and, even if it does, whether Harkleroad is authorized to speak for them or for the Association in this proceeding.

Judge Lucas reported that each of the other parties is represented by an attorney. The attorneys stated during a telephone status conference they did not intend to participate in today's oral argument, although Stanley Pequignot (an attorney for Wawasee Real Estate and Development, LLC) stated he believes Harkleroad was engaged in the unauthorized practice of law. Lucas reflected he alluded to the possibility of unauthorized practice of law in the nonfinal order, but this theory was not a basis for the decision. "Basically, the nonfinal order was based upon lack of clarity as to the existence of the Association, what the Association's name is, whether it is authorized to participate in this proceeding, whether the Association has conducted meetings with meaningful member participation, whether Harkleroad is its elected President, and that whole litany of similar things."

Larry Harkleroad said, "We have in the last couple of days retained a lawyer to represent our Association. We really don't know what more you're looking for." He said the Association's existence "went back for a long time and had been involved with building codes" and with other issues involving "hazards to safety". He said "we pay dues and assist the Association as far as cleaning the channel and erecting street signs. We do any kind of business a neighborhood association would encounter." He said he knew he did not represent all property owners, but he believed most of the neighborhood was against the proposal by Wawasee Real Estate and Development. Harkleroad indicated the Association had retained Stephen Snyder as its attorney.

Committee Member, Mark Ahearn, asked whether Kanata Manayunk Property Owner's Association owned any property. Harkleroad responded that the Association collects dues and has a bank account, as well as supplies, but does not otherwise own property. "We hire people to clean the channels and provide upkeep for things that need to be done." Ahearn asked about the ability of the Association to sue or be sued. Harkleroad responded "that it has never really happened."

Chairwoman Stautz reflected upon the apparent lack of documentation in the record to evidence the current status of the Association. Harkleroad responded, "This is probably the biggest thing we've ever done. Before it has been take care of the neighborhood, put up the street signs and make it a good neighborhood." He added, "Do we have a majority of people that is for this? I can't answer that. From talking to the neighborhood, yes. We're taking around a survey now." He added, "Do we have 51% at our annual meetings? Probably not. It's just hard to get people to a meeting."

Mark Ahearn added, "To the extent the State of Indiana is issuing an order, we need to know who the order is binding upon. Did the people in the order we bind have a fair opportunity to explain or exercise their rights?" He said that, in making a final disposition, the AOPA Committee needs to know who is responsible and who can rely upon the disposition. "By what authority are people bound?"

Lucas noted for the record that Stephen Snyder, who has been identified as the newly retained attorney for the Association, had just entered the room.

The Chair asked Snyder if he wished to provide any comments.

Snyder responded, "At a meeting of the Board of Directors of Kanata Manyunk," the decision was made to retain him as the Association's legal counsel for this proceeding. "As of yesterday, we will be representing them or individual persons as potential intervenors. We'll be in a position to address the formal requirements that may be placed on an association to participate."

The Administrative Law Judge reflected to the Committee that his concerns have been with the lack of specificity and clarity with respect to the Kanata Manayunk Property Owner's Association. If those matters are addressed under the guidance of Snyder as the Association's legal counsel, his concerns would be resolved. Lucas said that, if acceptable to the AOPA Committee, he would suggest a deferral of the item might allow time for this resolution.

Snyder added, "I could orally enter my appearance today, but if you wish for it to be in writing, it won't go out until tomorrow." He said he already had discussions with the Kanata Manayunk Board as to the need for appropriate documentation of its activities, and this documentation would be developed.

Ahearn said there were two stages that needed to be satisfied. First, documentation needed to establish the valid existence of the Kanata Manayunk Property Owner's Association. If that is accomplished, then the Association must demonstrate its authority and standing to participate in this proceeding. "I think we'll need to see some evidence of that."

Snyder said, "The appropriate evidence, I think, would be the original plat and the covenants, and, subsequently, the property owners' association development as the entity representing the owners. There certainly can be owners who may not agree with the action taken by the Board of Directors. That's sometimes just the way it is."

Ahearn asked whether "those plats and covenants were represented in the record of this proceeding." Snyder answered that presently they were not. The Chair said the written record is what should be augmented.

Mark Ahearn moved that the AOPA Committee defer consideration of this item to provide the Association with an opportunity to augment the record to provide clarity as to its existence, as well as to show standing and authority to represent the property owners in the area. The Chair joined in the motion, and it was approved.

Consideration of Objections to Findings of Fact, Conclusions of Law, with Nonfinal Order of Administrative Law Judge in *Thomas G. Sims and Rhoda A. Sims vs. Outlook Cove, LLC and Outlook Cove Homeowners Association and Department of Natural Resources*; Administrative Cause No. 04-202W

The Chair called this item for consideration on the objections by Outlook Cove, LLC and Outlook Cove Homeowners Association to findings of fact and conclusions of law with a nonfinal order by the Administrative Law Judge. She said Edward L. Volk was the attorney for Outlook Cove. Stephen R. Snyder was the attorney for Thomas and Rhoda Sims. Ann Z. Knotek was the attorney for the Department of Natural Resources.

Edward Volk presented argument on behalf of Outlook Cove, LLC and Outlook Cove Homeowners Association. He introduced his associate, Phillip A. Garrett, who he said has been assisting.

Volk indicated, "We are not objecting or appealing in any way the determination by Judge Lucas as to riparian area. We believe that follows the law in the State of Indiana." We raised a jurisdictional issue early in this proceeding that "this little body of water which is now appended to Pine Lake is, in fact, not a part of Pine Lake and is not subject to the jurisdiction of the Department" of Natural Resources. "This is a hard case because we all are inclined to see what we expect to see and to believe what we are conditioned to believe." He said his first impression was to view Outlook Cove as a "public freshwater lake", because it is a body of water that is attached to Pine Lake, and "Pine Lake is clearly a 'public freshwater lake'." He explained that based on "the research I've done and the objections that I've set forth in the record," I have concluded Outlook Cove is not part of Pine Lake. "I'm asking you to exercise willingness to suspend disbelief, as you look at this clearly and freshly."

Volk said his first objection went to the heart of the matter. "We've taken the position, and I believe this is correct, that Finding 41 of Judge Lucas that Pine Lake is a 'public freshwater lake' and Outlook Cove is an integral part of Pine Lake is erroneous." He said the 1949 order of the LaPorte Circuit Court established the legal elevation of Pine Lake at 796.2 feet, and the order includes a map. The map does not include the area of Outlook Cove. He said Judge Lucas found in Finding 34 that the legislature could have directed in the Lakes Preservation Act that a circuit court would identify the exact boundaries of a "public freshwater lake". The ALJ said it could have done several other things, too, but "It did not." Volk said Judge Lucas was correct in Finding 34, but in IC 14-26-4-9 pertaining to the establishment of legal lake levels, the legislature provided in subsection (c) that "Certified copies of the record of the judgment of the court as kept in the office of the clerk of the circuit court and the records recorded in the office of the county recorder shall be received in any court in Indiana as conclusive evidence of all matters contained in the records."

Edward Volk urged that Finding 31 by Judge Lucas was also in error. This finding asserted Outlook Cove provides "no factual or legal support for the proposition that a lake's bay is a body of water distinct from the lake for purposes of the Lakes Preservation Act. The proposition is inconsistent with the historic usage of Outlook Cove and Pine Lake and is inconsistent with the design of the Lakes Preservation Act." Volk said aerial photographs support his clients' position, as well as an affidavit from Greg Olyphant, an expert in hydrology, and calculations by surveyor, Charles Hendricks.

Volk said the ALJ erred in Finding 40 where he stated that the shoreline of 796.2 feet would form an uninterrupted close that includes Outlook Cove. He said the 1949 order by the LaPorte Circuit Court did not include Outlook Cove. Lucas erred in Finding 102 that Outlook Cove is a "public freshwater lake" because Volk's clients hold title to lands beneath Outlook Cove. In his brief, Volk cited *Sanders v. DeRose* as supporting this proposition. He said Lucas erred by including Outlook Cove as a "public freshwater lake" because 312 IAC 11-6-5 defines a "freshwater lake" as containing at least ten acres, and Outlook Cove contains only 7.3 acres. Finally, the ALJ erred in striking the Affidavit of Donald Porter because Porter's opinion was based upon personal knowledge and his extensive professional training and experience as a land title examiner.

Volk urged the AOPA Committee to reverse the Administrative Law Judge, to find that Outlook Cove is not subject to the jurisdiction of the Department of Natural Resources, and to enter findings consist with the objections of Outlook Cove, LLC and Outlook Cove Homeowners Association.

Stephen R. Snyder, attorney for Thomas and Rhoda Sims, responded on behalf of his clients. He said he would keep his comments brief and would attempt to track the issues raised by Volk in the same order as Volk. Snyder said that as to the Lakes Preservation Act, the significance of the 1949 order by the LaPorte Circuit Court was to establish the legal elevation of Pine Lake at 796.2 feet. The map was not part of the order. The boundaries of a "public freshwater lake" are governed by the Lakes Preservation Act, itself, and the delineation of those boundaries is provided by the shoreline as determined at the legal elevation. The shoreline is not static but rather changes over time with accretion, erosion and other factors. Snyder cited the AOPA Committee to *Parkison v. McCue,* decided last year, in which the Court of Appeals of Indiana found that private deeded land which erodes and is submerged becomes part of the "public freshwater lake" and is then titled to the State of Indiana.

Snyder urged that even if Outlook Cove were found to be a body of water distinct from Pine Lake, and the evidence does not support this proposition, the uncontested affidavit of Thomas Sims in Finding 28 demonstrated that Outlook Cove is itself a "public freshwater lake". As decided in the *Garling* case, the acquiescence of a single riparian owner in public use of a lake qualifies a lake as a "public freshwater lake". Thomas Sims is a riparian owner who acquiesced in the public usage of Outlook Cove. Finding 28 fully resolved the status of Outlook Cove as a "public freshwater lake".

Snyder stated that the usage of Outlook Cove is legally indistinguishable from Pine Lake. The usages to which Outlook Cove are placed are inconsistent with those of a private lake. If Outlook Cove were a private lake, individual landowners would have control over the waters within the boundaries of their individual deeds. Outlook Cove and other landowners have boat slips, and the boat operators routinely travel from Outlook Cove to the main body of Pine Lake. In fact, a marina is included within Outlook Cove. The routine usages of Outlook Cove are entirely inconsistent with the assertion Outlook Cove is a private lake.

Snyder urged that in striking the affidavit of Donald Porter, the Administrative Law Judge was correctly performing his "gatekeeping function" under Rule 702 to ensure an expert's testimony rests on a reliable foundation and is relevant to the issues. For consideration in this proceeding was application of the Lakes Preservation Act and the relationships between riparian owners. The affidavit did not provide a basis, either as to application of the Lakes Preservation Act or as to the relationships among riparian owners, to demonstrate Porter had a sufficient foundation to provide relevant testimony.

Ann Z. Knotek, attorney for the Department of Natural Resources, spoke for the agency. She said DNR joined in the argument presented by Stephen Snyder. The agency fully supported the findings of fact and conclusions of law, as well as the nonfinal order, of the Administrative Law Judge and asked for affirmation by the AOPA Committee. She said if Volk's arguments were adopted, the resulting character of Outlook Cove as a "private lake" would come as "quite a shock" to all of its riparian owners, not just those who are parties to this proceeding. That result is not supported by the facts or the law. Pine Lake is a "public freshwater lake", and it has a bay known as "Outlook Cove", but it's all one lake and all one community. The affidavit by George Bowman, referenced in Finding 25, demonstrated that the DNR has consistently considered Pine Lake to be a "public freshwater lake" and has included Outlook Cove as part of Pine Lake. Knotek said maps provided by the DNR, when legal elevations are established, were intended only to help identify which particular lake is being addressed. There are likely other lakes in Indiana known as "Pine Lake", but the map clarified that the lake for which the LaPorte Circuit Court determined a legal elevation of 796.2 feet was the particular Pine Lake in the city and county of LaPorte. The map wasn't intended to identify the shoreline of Pine Lake at its legal elevation. The DNR could have included a more precise map in 1949 but wished to provide a simple functional drawing.

Mark Ahearn moved to approve the findings of fact and conclusions of law with nonfinal order of the Administrative Law Judge as the findings of fact and conclusions of law with final order of the Natural Resources Commission. Jane Ann Stautz seconded the motion, and the motion passed.

Consideration of General Delegation of Authority to an Administrative Law Judge to Address, as a Nonfinal Order, Any Matter Appropriate to Application or Interpretation of a Final Order of the Natural Resources Commission where the Commission Retains Jurisdiction Over a Proceeding.

Steve Lucas presented this item as the Director of the Division of Hearings. He said there were a growing number of adjudicated proceedings where some authority is retained by the Natural Resources Commission to consider a dispute or interpretation of a final order, subsequent to issuance of the final order. This circumstance may arise in an agreed order or in a final order entered following contested proceedings. Lucas directed the attention of the AOPA Committee in its packet to *Department of Natural Resources and Indiana Michigan Power Co., Inc. v. Pheasant Ridge Development Co., Inc*., Administrative Cause No. 03-123W (10 Caddnar 187 (2006)). He said Finding 180 of the final order indicated, "The AOPA Committee may delegate to its administrative law judge the authority to enter a nonfinal order under the previous Finding or otherwise under this Order where the AOPA Committee retains jurisdiction. The AOPA Committee retains exclusive authority to enter a final order, however, and any final order is subject to judicial review under AOPA." To date, the need to have an administrative law judge

address a dispute as to a final agency order has not arisen, but with the growing number of decisions where this possibility exists, "it's just a matter of time before it happens."

The Committee Chair indicated this kind of limited delegation of authority was consistent with how adjudications before a final order are addressed by the Natural Resources Commission through its AOPA Committee. She suggested that delegating to the administrative law judge the authority to enter a nonfinal order, as a general proposition, would save time and potential expense for the parties, as opposed to requiring an agenda item to come before the AOPA Committee for an ALJ appointment for each case. Also, the participation of an ALJ might allow the parties to achieve a settlement on the dispute without ever coming before the AOPA Committee. Mark Ahearn said he was supportive of the concept but wished for it to be stated with specificity and included in the minutes for review.

With this background, the following resolution was drafted and is placed before the AOPA Committee for consideration:

> The AOPA Committee delegates authority to the administrative law judge, who conducted a proceeding, to provide administrative review and to issue a nonfinal order with respect to any contested matter where a final order provides that the Natural Resources Commission (or the AOPA Committee of the Natural Resources Commission) retains jurisdiction following entry of the final order. If the administrative law judge who conducted the proceeding is no longer an employee of the Commission or is otherwise disqualified, the director of the division of hearings shall assign an administrative law judge to perform the functions anticipated by the delegation. The AOPA Committee retains jurisdiction, in accordance with 312 IAC 3-1-12, to review any nonfinal order where a party files timely objections.

This resolution would be placed on the agenda of the next meeting of the AOPA Committee for its consideration and possible adoption.

Adjournment

Jane Ann Stautz called for adjournment at approximately 12:20 p.m.