

**AOPA COMMITTEE OF THE
NATURAL RESOURCES COMMISSION**

Meeting Minutes of July 21, 2010

MEMBERS PRESENT

Jane Ann Stautz, Chair
Doug Grant
Robert Wright
Mary Ann Habeeb
Mark Ahearn

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Jennifer Kane

GUESTS PRESENT

Patricia Martin Patrick Murphy
Jason Kuchmay Eric Wyndham
Jim Hebenstreit

Call to order and introductions

The Chair, Jane Ann Stautz, called the meeting to order at 1:33 p.m., EDT, at the Fort Harrison State Park Inn, Roosevelt Ballroom, 5830 North Post Road, Indianapolis, Indiana. With the presence of five members, the Chair observed a quorum.

Consideration and approval of minutes for meeting held on May 18, 2010

Mark Ahearn moved to approve the minutes of May 18, 2010 as presented. Mary Ann Habeeb seconded the motion. Upon a voice vote, the motion carried.

Consideration of Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Spaw, et al. v. Ashley, et al., and DNR (Third Party Respondent)*, Administrative Cause No. 09-070W

On July 14, 2010, Respondents, by Counsel, filed Request for A Record for the oral argument in *Spaw, et al. v. Ashley, et al., and DNR (Third Party Respondent)*. A transcription of the oral argument is the minutes for this item. See attached transcript.

Announcements

The Chair announced that Mary Ann Habeeb would be retiring from employment with the Indiana Department of Environmental Management effective July 22, 2010. “We need to thank Mary Ann for her service to the AOPA Committee and the Natural Resources Commission, because it is a labor of love.”

Mark Ahearn suggested that an announcement be made at the next meeting of the full Natural Resources Commission to officially acknowledge Mary Ann Habeeb’s service and commitment to the Commission and the AOPA Committee.

The Chair said, “We will respectfully do that. It has been a pleasure. It really has been a pleasure.”

Mary Ann Habeeb said, “Thank you. I’ve really enjoyed being here. This is one of the few times I get to really, really practice law, at least civil law.”

Adjournment

Mary Ann Habeeb moved to adjourn the meeting. Doug Grant seconded the motion. Upon a voice vote, the meeting adjourned at approximately 3:01 p.m., EDT.

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

IN THE MATTER OF:

JEFFREY SPAW and HOLLY SPAW, DAVID)	
JENNINGS, DIANA JENNINGS, MARK A.)	
LORNTZ, PATRICIA A. LORNTZ, DAVID A.)	
REMENSCHNEIDER, MARY J.)	
REMENSCHNEIDER, CAROL J. ENSLEY,)	
JENNIFER H. MILLER, ZACHARY A. MILLER,)	Administrative Cause
SUZANNE L. WOLPERT, GARY WARD, NADINE)	Number: 09-070W
WARD, STEVEN G. YBARRA, KAREN S.)	
YBARRA, THOMAS STUCK, JENNIFER STUCK,)	
KAREN S. NORDEN, SCOTT ENSLEY as)	
REPRESENTATIVE of the VELMA M. ENSLEY)	
ESTATE, RYAN BURTCH, SARAH BURTCH,)	
ROGER W. SELKING, MELISSA F. SELKING,)	
PAUL ZAWADZKE and MARY A. ZAWADZKE,)	
Claimants,)	
vs.)	
)	
MICHAEL M. ASHLEY, LANA S. ASHLEY,)	
LLOYD A. BICKEL, KAREN A. BICKEL, CARL)	
MOSSER, MARGARET MOSSER, PHILLIP E.)	
LAKE, KAREN M. LAKE, DEBRA ANN COZMAS)	
PARKISON, KATHLEEN R. SMITH as TRUSTEE)	
for the KATHLEEN R. SMITH TRUST, BRIAN)	
SMITH, ROGER N. MEYER, BEVERLY A.)	
MEYER, PAGE LIGGETT as TRUSTEES of the)	
PAGE AND CAROL LIGGETT 2005 TRUST,)	
L. DEAN RODENBECK, EDITH RODENBECK,)	
JOHN D. GROSS, SYLVIA S. GROSS, LYNN E.)	
FISHER AND BETTY J. FISHER as TRUSTEES)	
for BETTY J. FISHER REVOCABLE TRUST,)	
DENNIS R. ALLIS, KARA D. ALLIS, PAMELA)	(Riparian Rights
ANN MEEKS, KAREN S. POTTS, ALAN L.)	Dispute)
MACKLIN, and GREGORY O. KING,)	
Respondents.)	
)	
DEPARTMENT OF NATURAL RESOURCES,)	
Third Party Respondent.)	

TRANSCRIPT

The transcript of ORAL ARGUMENT held in the above-captioned matter, before the Administrative Orders and Procedures Act (AOPA) Committee of the Natural Resources Commission held on July 20, 2010, at the Fort Harrison State Park Inn, Roosevelt Ballroom, 5830 North Post Road, Indianapolis, Indiana.

A P P E A R A N C E S

FOR THE CLAIMANTS:

**Spaws, Ensleys, Jenningses, Lorntzes, Remenschneiders, Wards, Wolpert,
and Ybarras**

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Fort Wayne IN 46814

FOR THE RESPONDENTS:

**Ashleys, the Bickels, the Mossers, the Lakes, the Parkinsons, the Smiths, the
Smith Trust, the Meyers, the Liggetts, and the Liggett Trust**

Michael H. Michmerhuizen
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THIRD PARTY RESPONDENT

Department of Natural Resources

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ORAL ARGUMENT INDEX

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1 **CHAIRWOMAN JANE ANN STUATZ:** This afternoon we have a
2 matter before us that I would like for Judge Lucas, if you wouldn't mind,
3 introducing the matter before us.

4
5 **ADMINISTRATIVE LAW JUDGE STEPHEN L. LUCAS:** Thank
6 you, Madam Chairwoman. For considering in *Spaw, et al. v. Ashley, et al. and*
7 *DNR*, Administrative Cause Number 09-070W, are the Findings of Fact and
8 Conclusions of Law with Nonfinal Order of Administrative Law Judge, and two
9 sets of objections filed on behalf of several of the Respondents. Today's oral
10 argument before the AOPA Committee of the Natural Resources Commission is
11 governed by 312 IAC 3-1-12.

12 Representing the two sets of Respondents are attorneys Patrick Murphy
13 with offices in Fort Wayne, and Patricia Martin with offices in Angola. Attorney
14 Jason Kuchmay, with offices in Fort Wayne, represents the Claimants. Attorney
15 Eric Wyndham, with offices in Indianapolis, represents the Third Party
16 Respondent, the Department of Natural Resources.

17 Pursuant to 312 IAC 3-1-12, each of these attorneys would have ten
18 minutes to present oral arguments, including two minutes reserved for rebuttal.
19 Ann Zimmerman, one of the Respondent's law firms, requested on July 14 that a
20 record be made of the oral arguments as anticipated by 312 IAC 3-1-12(f).
21 Jennifer Kane of the Commission's Division of Hearings is today's court
22 reporter. She will also assist with timing of arguments. Mrs. Kane will need

1 everyone's assistance and efforts to prepare a recording that is both complete and
2 coherent. And, please be sensitive to this need.

3

4 **COMMITTEE MEMBER, MARK AHEARN:** A point of
5 clarification, Madam Chairwoman?

6

7 **CHAIRWOMAN STAUTZ:** Yes.

8

9 **COMMITTEE MEMBER AHEARN:** Is it each attorney has ten
10 minutes or each side has ten minutes?

11

12 **CHAIRWOMAN STAUTZ:** Each attorney here representing either the
13 Claimants or Respondents before us.

14

15 **COMMITTEE MEMBER AHEARN:** Okay.

16

17 **CHAIRWOMAN STUATZ:** So, with that we would like to go ahead.
18 You should have before you the Findings of Fact and Conclusions of Law with a
19 Nonfinal Order from the ALJ, as well as the two sets of objections that have been
20 filed by the respective Respondents. So, with that let's go ahead and I think we
21 will hear from one of the sets of Respondents represented, I believe, by Patrick
22 Murphy, representing one of the sets there. If you could just introduce yourself
23 again for the record?

1 **ORAL ARGUMENT**

2 **PATRICK G. MURPHY:** Sure. Good afternoon. I am Patrick Murphy.
3 I represent the Respondents in the front lake view homes in Block 7 and 8. I will
4 go through quickly, that’s the Ashleys, the Bickels, the Mossers, the Lakes, the
5 Parkinsons, the Smiths, the Smith Trust, the Meyers, the Liggetts, and the Liggett
6 Trust. With that said, good afternoon, and thank you for listening to me for at
7 least ten minutes. I appreciate it.

8 I do want to go over quickly the restriction that’s at issue, at least the
9 pertinent part. I will try not to bore you and go as quickly as I can. The
10 restriction, which was established in June of 1923 says, in pertinent part, each lot
11 owner is entitled to an easement on the lakeshore six feet in width, which I think
12 is an important part, for a boat landing, which is another important part, which
13 easement shall be in front of the block in which the lot is located—so in front of
14 the block which the lot is located. I brought with me one type of demonstrative
15 exhibit. Can everyone see that?

16

17 **CHAIRWOMAN STAUTZ:** And that has been before the
18 Administrative Law Judge?

19

20 **ORAL ARGUMENT CONTINUED**

21

22 **MR. MURPHY:** Yes. This was introduced during the hearing, both in
23 this size and a smaller version. But I think it’s easier just to explain what we are

1 doing. I know we are recording so I will try to make sure you hear me okay.
2 This is Long Lake Park, or at least the pertinent portions. This is the lake, Big
3 Long Lake; this is the public roadway behind the homes; these are the private
4 drives; this is Block 6 up top; this is Block 7; and this is Block 8. So, I
5 represent—you notice there's these little stickers in here—these are the names of
6 the current homeowners and lot owners. So, I represent the front lot owners in
7 Blocks 7 and 8. You also see there's a strip here that has been referred to as the
8 "Indian Trail;" that area separates the lots, for example, Lots 74 and 75 from the
9 water. Also, you will see here the Claimants are the back lot owners in Blocks 6,
10 7, and 8, and then the Respondents, the front lot owners in Blocks 6, 7, and 8.
11 So, we have Miami Drive is a private drive, Sioux Drive, and Shawnee Drive.

12

13 **COMMITTEE MEMBER, DOUG GRANT:** Do we have a picture of
14 that?

15

16 **CHAIRWOMAN STAUTZ:** No. This is different. We do not have a
17 copy of that.

18

19 **MR. MURPHY:** It is my understanding that you do not have our post-
20 hearing briefs, is that right?

21

22 **CHAIRWOMAN STAUTZ:** That's correct.

1 **MR. MURPHY:** If that were appropriate, I would like to submit those if
2 the Commission would accept those. If not, I will just continue and tell you
3 about some of them.

4
5 **CHAIRWOMAN STAUTZ:** I think maybe just highlight that since we
6 won't have an opportunity to read that at this point. So, if you want to include
7 that.

8
9 **MR. MURPHY:** No problem. I will put the— — just the top important
10 parts.

11
12 **CHAIRWOMAN STAUTZ:** Okay.

13
14 **ORAL ARGUMENT CONTINUED**

15 **MR. MURPHY:** What you will hear, or at least what was presented, the
16 evidence presented in the hearing is that all of these front lot owners in Blocks 6,
17 7, and 8 for going back to 1923, when that restriction was established, when this
18 whole Big Long Lake was established back in 1923, these folks have always
19 treated the Indian Trail as their own. This is not an adverse possession case.
20 There's a separate claim for adverse possession; it's not in the jurisdiction. But
21 what these folks have always done is they've built sidewalks out and put piers in
22 front of their lots—the folks that live along the lake. And, the back lot owners,
23 who are the Claimants, have always put their piers out in front of the private

1 drives, so they have stayed entirely from the private drives. So, these folks here,
2 the Respondents—or excuse me—the Claimants here and the Claimants on this
3 side have always put piers out in front of this area here, in front of the private
4 drive. The front lot owners have always put piers out in their area. And, that’s
5 been how it’s been since the beginning of the establishment of Long Lake Park,
6 so we are talking about 1923.

7 You had Claimants testify during the hearing specifically—and I am
8 going to point out to Mr. Spaw. I don’t know if you can read the writing, but
9 owns lot 92, so he is a back lot owner. He testified that when he bought his
10 home he had a sister who was a realtor. He knew about where the pier was
11 supposed to go, but he never put it out there, not until 2009. He also testified that
12 he has boats that are at least seven to eight-foot in width and other toys and such,
13 so he knew there’s no way he could comply with the restriction, which was a six-
14 foot boat landing easement. So, if you’ve got a seven-foot or eight-foot wide
15 boat obviously you can’t use that to put a boat out.

16 We also had testify Respondent, Mr. Ybarra, who is here in Lots 84 and
17 85. Excuse me. I keep calling him a Respondent; he is a Claimant. He testified
18 that he purchased this property in 1988, so over 20 years ago. When he bought
19 it, he knew that his piers were supposed to—according to restrictions—go in
20 front of the blocks not in the private drives, but he never put it there. He always
21 put it out in front of the private drives. Not until 2009, did a group of these
22 Claimants, the back lot owners, get together and start putting piers out in front of

1 the blocks instead of in the private drives. And that testimony was un-
2 contradicted.

3 In fact, we, as the Respondents, put forth evidence that was even stronger.
4 We had Margarite Hinsey testify, who did very well. She's an 80 year old
5 woman and has lived on the lake her entire life. Margarite testified that her
6 grandparents owned this area right here—excuse me—Lots 90 and 91, which is a
7 lakefront or all the way up to the Indian Trail property. And, that she had been
8 going there since she— for forever, since she was born. And, she remembers
9 back in the mid '30s. And, her father— she is uniquely situated, because her
10 father owned the Ybarra property, which is Lots 85 and 86, which is a back lot
11 property not lake view property. And, she stated that every year she was up at
12 the lake. And, she preferred to stay at her grandparents place, because their pier
13 was directly in front of the property, in front of the block as was as all the lake
14 front homeowners especially in Blocks 7 and 8. She said that “I have been going
15 there—that I can at least remember—75 years. No one, no back lot owner had
16 ever put a pier out in front of the block. Never”. And, she said all the back lot
17 owners always put their piers, including her father, in front of the private drives.

18 We also had Jim Hebenstreit, who I think is here and you may know, the
19 Deputy Director of the DNR for 36 years. He testified there were no complaints,
20 to his knowledge, of any back lot owner ever in the past 36 years of this
21 configuration. And, not one piece of testimony was elicited to say that the back
22 lot owners ever put a pier in front of the block until 2009.

1 We also had some damage testimony. We had an expert, Stuckey, she is
2 a realtor and appraiser, and testified clearly there would be damage to the value
3 of the homes if you let it go for 75 years and then all of a sudden the back lot
4 owners were allowed to put piers in front of the front lot homes.

5 Specifically, I want to talk about two objections, Paragraph 110 allows
6 for back lot owners to combine their lots. So, if you own— if all of these folks
7 want to get together pursuant to Judge Lucas’s order, they could get together and
8 put a group pier out in front of the block; that’s Paragraph 110. And, I would
9 respectfully submit that we strongly disagree with that. One, in the restriction
10 nowhere does it allow for group piers, for people to get together and combine
11 their lots and combine their riparian zones. I think it’s against public policy. I
12 don’t think we want to start establishing funneling of back lots to front lots,
13 especially with no— no reason. There’s no— in the restrictions there’s nothing
14 about a group pier or being able to aggregate your riparian zones. It also
15 contradicts—with all due respect to Judge Lucas—it contradicts his findings. In
16 Paragraph 51, he says this right is unique to each lot owner, and then later in
17 Paragraph 110, he says that the lot owners can now combine this together into
18 some kind of group pier.

19 Also, specifically our strong objection to this ruling is the ignoring of the
20 defense of abandonment and laches. Abandonment is the nonuse plus an act
21 indicating intent to abandon. And, here what we’ve got is the back lot owners
22 who have never put piers out in front of the block for the restriction says “in front
23 of the block”. It doesn’t say “in the private drives or off the block”— “in front

1 of the block". So, they have never used it. And, not only did they not use
2 their—let's say for Block 7—the back lot owners not only they or their
3 predecessors never put a pier out in front of the block, but they actually took
4 another step. They actually put out a pier in the private drive. So, if you are
5 looking at that, for 75 years that's happened, you would have no indication if
6 you, a front lot owner, that these folks were ever going to put piers out in front of
7 you. The indication would be they are always going to put them outside of the
8 blocks in the private drives.

9 I know that I don't want to bore you with too much law, but I think the
10 restatement, the FIRST RESTATEMENT OF PROPERTY, 504, Comment E, is
11 important. It says there must be an intent to abandon and for not only from a
12 failure to use but also an act inconsistent with the intent to make future use. I
13 think clearly for 75 years the back lot owners putting piers out in front of private
14 drives shows that they never intended to put out in front of the block, which is
15 where the restriction calls for. So, they never intended to use the restriction.

16 Even more importantly is the laches argument. We asserted the defense
17 of laches, and that was shot down in this order. Laches is an inexcusable delay in
18 asserting a right, which clearly we have, over 75 years. Our own Indiana
19 Supreme Court in numerous cases has cited that 17 years is plenty of time to find
20 laches. Two, an implied waiver from acquiescing in the existing condition: 75
21 years they certainly kept putting in the private drives; they never objected; they
22 never filed suit; never tried to put out a pier in front of the blocks. And then
23 prejudice due to the delay in asserting their rights. Clearly there's prejudice. I

1 mean, these people have all put out—and there was testimony on this—
2 sidewalks, piers. They had seawalls installed, the slots for their pier right in front
3 of their properties. They have a right to peaceful, quiet enjoyment of that
4 property.

5 Specifically, in Paragraphs 126 and 127 of the order, Judge Lucas asks
6 the right question. Is there an inexcusable delay in going through the laches
7 analysis? But then he fails to answer it. He instead claims that the entire lake,
8 those folks in Big Long Lake, needed to be named as parties. Well, that's not
9 true. You've got Indian Trail, but the only folks that have a right, arguably, a
10 right to put any type of pier out are those in front of the blocks. Remember, we
11 read that restriction before. You only have a right to put a pier out or a boat
12 landing in front of the block in which the lot resides. So, no one in Block 2 has a
13 right to put out piers in Block 7. So, there would be no reason to name those
14 folks. Laches is a defense that only goes these folks have the right to waive their
15 rights. Also, he goes through the implied waiver analysis, but never answers
16 instead talks about a survey. It was the Claimants' burden to prove that there
17 was an easement here, not the Respondents. The Respondents' burden was to
18 show laches, which we did. And, there is also prejudice obviously, which we've
19 already talked about.

20 So, I see my time is short. I would like to reserve a few minutes and
21 answer questions. We just ask that you modify the order and show the Claimants
22 are not allowed to place piers in front of the blocks due to the defense of
23 abandonment and laches.

1 **CHAIRWOMAN STAUTZ:** Thank you. Do you want to hear from the
2 other parties first and then open it for questions? Or does anybody have
3 questions?

4

5 **COMMITTEE MEMBER AHEARN:** Sure

6

7 **CHAIRWOMAN STAUTZ:** Let's go ahead. Mrs. Martin, I believe you
8 are representing the Respondents, and if you can explain which block so we can
9 understand who's who?

10

11 **ORAL ARGUMENT**

12 **PATRICIA MARTIN:** My name is Pat Martin. You have two Pats with
13 you today. I'm the attorney for the Respondents in Block 6. And, as Mr.
14 Murphy has indicated we are owners of the front lots along Block 6. And, my
15 arguments are very consistent with Mr. Murphy. I'm not going to bore you with
16 rehashing this. One of the things I would like to emphasize to you is in
17 reviewing this material if the Commission accepts that the restrictions as stated in
18 the 1923 plat are unambiguous and should be accepted on their face, then we
19 need to talk about how that is applied. And, certainly one of the things that you
20 will hear me emphasizing in my discussion with you today is specific and
21 geographically defined six-foot access to the lake. Now, we are not talking about
22 random access; we're talking about a specifically defined geographic location.
23 So, the Respondents' position has been throughout this argument that that

1 specifically defined geographic location has been abandoned by the Claimants.
2 So, as you review this, please keep that in mind.

3 We, in Block 6, very much concur with the filings of Mr. Murphy in
4 regards to the specific objections that they have listed for you to consider. We
5 also would concur with the argument that we object to reframing the terms of the
6 restrictions to allow for group piers. Judge Lucas, in his findings, indicated that
7 if Lee Hartzell wanted to have a wharf or a specific type of landing, he would
8 have said so. He did specifically say “he does not want a boat house in his
9 addition”. Now, if we consider what’s going to happen with group piers, there
10 will be boat lifts with awnings; there will be large pontoon boats. Did Lee
11 Hartzell intend for that to be part of the access to the lake? The Respondents in
12 Block 6, and I believe Blocks 7 and 8, would say, “Absolutely not.” It would
13 obstruct the view; it would obstruct access. We don’t believe that there was ever
14 any intent for the grouping of adjacent lots to form group piers. So, we would
15 ask that be stricken from the order.

16 Further, it is our position that the Commission should modify Judge
17 Lucas’s order to indicate that there has been abandonment of the specific
18 geographic six foot access as defined in the restrictions by Lee Hartzell. Both
19 abandonment and in terms of laches, we believe that we have strong arguments
20 and the weight of those arguments should be reconsidered. We appreciate your
21 opportunity— our opportunity to present this to you today. I will relinquish my
22 time if Mr. Murphy would like to add anything additional.

23

1 **CHAIRWOMAN STAUTZ:** Thank you. Mr. Murphy?

2

3 **MR. MURPHY:** I think I will reserve for the end if necessary.

4

5 **CHAIRWOMAN STAUTZ:** Okay. Great. And then, Mr. Kuchmay?

6

7 **JASON KUCHMAY:** Kuchmay. Thank you.

8

9 **CHAIRWOMAN STAUTZ:** On behalf of the Claimants?

10

11 **MR. KUCHMAY:** Certainly. Yeah.

12

13 **ORAL ARGUMENT**

14 **JASON M. KUCHMAY:** On behalf of the Claimants that are
15 represented by Counsel— — there are a number of pro se Claimants. I just wanted
16 to clarify that for the record. This case is obviously very important to my clients
17 and as reflected in the detailed decision that Judge Lucas rendered. He gave the
18 case the attention it deserves. There's a lot of parties to this case, and Judge
19 Lucas, he heard more than a full day's worth of evidence. Witnesses were
20 testifying well into the evening on the day that evidence was received. Judge
21 Lucas was there; he heard the evidence; he took notes; he observed the demeanor
22 of the witnesses; and ultimately he rendered his decision. With respect to, for
23 example, to that Margarite Hinsey, the elderly woman that Mr. Murphy had

1 referenced, and who has this great historical perspective. You know, what that
2 evidence revealed during the cross-examination, for example, while she may
3 have said, you know “I only saw piers here or there”. On cross-examination, if I
4 asked here, “Well, was that one of my clients’ piers or was that pier placed there
5 specifically by a predecessor in title to that lot?” She couldn’t answer the
6 question. She could not identify who put the piers where. And, the Judge was
7 there present to hear that testimony, and obviously that is not reflected in the
8 written objections before you today. Ms. Stuckey, for example, the appraiser that
9 he referenced, her testimony— the damage that she alleged occurred was based
10 upon the alleged taking away of the ownership to the lake. She appraised that
11 property as lakefront property. And, you heard Mr. Murphy concede and she
12 conceded on cross-examination nobody owns to the water’s edge. You have that
13 Indian Trail there. So, her appraisals were flawed from the get go, and they did
14 not offer any probative evidence.

15 With respect to the written objections that were filed—and that I’m sure
16 you have reviewed—I think a lot of the objections can be addressed with a few
17 general observations. I think you will find that many of them just noted
18 disagreement with Judge Lucas’s decision, but they don’t say why. When you
19 look at Objections 1, 3, 4, 5, and 6 in Mr. Murphy’s, the objections that he had
20 filed, you will see that and it’s repeated throughout the objections. And,
21 specifically, for example, number four. He indicates, “Respondents object to the
22 Finding in Paragraph 65 that the easement in question is ambiguous.” But
23 nowhere in the written objections does he say why. There’s no argument; there’s

1 no authority; there's nothing for you to act upon or to demonstrate that that
2 decision rendered by Judge Lucas was improper or should be set aside in some
3 fashion.

4 Others, like Objections 2, 8, and 10, they state that something is
5 inconsistent, but as you go through and read the objections you will note that
6 they don't say how they are inconsistent or why they are inconsistent; they just
7 make that statement. As well as another—and you will see throughout—they
8 indicate that a finding was contrary to law, but when you read the objections you
9 will note that there is no law; there's no argument or effort to support that
10 statement. I think a good example of that would be Objection 9, and that's where
11 the objection discusses Judge Lucas's determination that the lot owners can
12 combine their easements to effectively create a larger riparian zone than they
13 would have had individually. That objection simply states that what the Judge
14 ruled is contrary to the law of easements in Indiana. You will note in the
15 objection, there is no citation to any such law, what this contrary law might be.
16 And, there's just simply no further comments that are made. We would submit
17 that that would be an insufficient objection and should be overruled.

18 And, there was also some discussion in the opening remarks by Mr.
19 Murphy that the determination made by the Judge in that regard was
20 contradictory. In that finding, the Judge did, in fact, find that each easement is
21 unique to the owners of the lots. Respondents tried to hang onto that word
22 "unique" to try to show that there was a contradiction. But, frankly, whether it is
23 unique or not has nothing to do with whether the owners can rightfully choose to

1 work together in the manner in which those easements are used. The concept of
2 “uniqueness” is important because the Respondents— they are trying to
3 eradicate the easement rights—the recorded easement rights that my clients
4 purchased when they bought their property—under these theories of
5 abandonment, and laches, and so forth. In order to do that you need
6 individualized evidence as to each of my clients on those theories. You can’t just
7 lop them all in generally. If you are trying to eradicate Mr. Spaw’s easement,
8 you need evidence specifically as to Mr. Spaw. And, as I’ve indicated earlier
9 that Mrs.— the one woman at least was unable to do that, and there is certainly
10 no evidence located anywhere in the written objections.

11 Throughout the objections as well you will see that there is certain
12 characterization of the evidence suggesting that it might have been disregarded or
13 some contrary conclusion was improper. But, again, there was no transcript
14 provided. There was nothing to support the statements that are made and to
15 enable you to ascertain whether in fact what’s being said is accurate. It’s a
16 significant flaw, in my opinion. And frankly, I think it permeates both sets of the
17 objections. You know, Judge Lucas, he heard hours and hours of testimony in
18 order to reach his conclusions. You are now being asked to disregard those
19 conclusions without the benefit of the testimony that Judge Lucas heard.

20 On the issue of abandonment, I would like to talk about that just a little
21 bit here. My clients—and it is beyond dispute—that my clients always placed a
22 pier in the water of Big Long Lake; they did it every year. Their only right to
23 place a pier in the water, be it anywhere, is pursuant to that boat landing

1 easement. And, that is the same for the Respondents. They only right they have
2 to place a pier in the water is pursuant to the boat landing easement. Again,
3 nobody owns record title to the water's edge. So, the easement and the right to
4 place a boat only derives from boat landing easement. And, having exercised
5 that right every single year since they owned their property, there was no
6 abandonment. Obviously, there was no intent to abandon their rights under the
7 easement whether as a whole or with respect to a specific location.

8 I know Mr. Murphy cited a restatement to you in his argument here this
9 morning. And, I would also offer to you a citation from Am.Jur., which is
10 discussing easements. It's Am.Jur 2d *Easements and Licenses*, § 98; and that
11 was in our post-file brief. And, that indicates that use of another route does not
12 affect the interest in an easement unless there is an intentional abandonment of
13 the former way. Thus, an easement or a right-of-way whether acquired by grant
14 or prescription is not extinguished by the habitual use by its owner of another
15 equally convenient way unless there is an intentional abandonment of the former
16 way. And, every one of my clients have testified they never intended to give up
17 their right to put their pier where contemplated by the restrictions. The problem
18 was there was never a declaration. There was never a determination as to where
19 specifically piers should be placed. And, in fact, you know, again some of my
20 clients have owned their property for one year and some have owned for many
21 years. Every situation is different, but there was never a determination as to
22 where specifically piers go. When they tried their best in 2009 to approximate
23 the language of the restrictions—where do they go—they installed their piers; a

1 dispute arose; that's what caused this action to be initiated where we filed this
2 action asking Judge Lucas, "Please tell us where they go". You know, how can
3 we exercise our rights peacefully with our neighbors and in accordance with the
4 restrictions there?

5 And, also with respect to the abandonment, and I think the intent of my
6 clients, because again that's what this turns on, the testimony at the trial was that
7 their boat landing easement rights was an important consideration when they
8 bought their property. They wanted a place to enjoy the lake; they wanted to
9 have pier rights. And, they testified that if they didn't have that they never would
10 have bought that property in the first place. It's our contention that Judge Lucas
11 correctly determined that there was no abandonment and each of his supporting
12 findings in that regard were proper.

13 The last thing I want to talk about would be the laches argument. That's
14 kind of an equitable doctrine that if you take too long to assert your rights, you
15 know, you inhibit your ability to later enforce them. And, some of the objections
16 address Judge Lucas's findings that the Respondents-- they claim that the Judge
17 improperly looked at the Respondents' actions and not the Claimants and that
18 was somehow improper. They also argue that the restrictions-- the finding that
19 the restrictions are a recorded document have no bearing on the issue of laches. I
20 think, frankly, these both tie into each other, and I would submit that they were
21 both wrong. As an equitable doctrine, you need to look at the actions of the
22 Respondents when you are deciding if they are entitled to the relief that they are
23 seeking. And, again, the fact is that because there was no determination that

1 nobody put their pier where they were supposed to historically. It just never
2 happened that the Respondents never did and we never did. So, it was absolutely
3 proper for the Judge to say that “Well, if there is any delay on the one hand; you
4 have the same delay on this hand.” And, there was nothing improper with his
5 findings in that regard.

6 And, second, they put their actions directly into play at the trial and here
7 today when they are talking about the issue of prejudice. They are trying to
8 suggest that we were prejudice by what you did, where you put your piers. Well,
9 we wouldn’t have done the seawalls where we did; we never would have fixed
10 our houses if you didn’t do this. Well, the testimony at trial was that they did
11 that because they assumed they owned to the water’s edge. Most of the people
12 who testified, the Respondents, when they purchased their property they didn’t
13 have a lawyer; they didn’t have a real estate agent; they didn’t go to the
14 recorder’s office; they never bothered to look to see what these restrictions were,
15 what they said, and if they existed. They made improper assumptions. And, any
16 actions that they took the Judge properly found were based upon those improper
17 assumptions not based upon where my client did or did not place a pier.

18 With that, I would like to reserve whatever time I have remaining as well
19 for rebuttal and/or questions that anybody may have.

20

21 **CHAIRWOMAN STAUTZ:** Do we have a representative from the
22 Department of Natural Resources? Eric. You are there.

23

1 **ORAL ARGUMENT**

2 **ERIC WYNDHAM:** Yes. The Department really doesn't have any
3 argument today. I think the basic issues that were tried involved the status of
4 land inward from the lake, which I don't think we're necessarily, you know, have
5 jurisdiction over or interest in. I guess the only thing I would say that the sad
6 part about this case is with the six foot easements even with people, three
7 easements, 18 feet, that's not going to be enough to have a pier and a boat. I
8 guess the real sad thing about the easement language and the situation in this case
9 that everybody could lose their right to a pier. But, other than that the
10 Department will stand on Judge Lucas's order. But, basically, I think that's out
11 of our jurisdiction regarding the interest in the land inward of the lake.

12

13 **CHAIRWOMAN STAUTZ:** Is there anyone else from pro se that would
14 like to comment? Then I will go back to any rebuttal. Five minutes for that.

15

16 **REBUTTAL**

17 **MR. MURPHY:** Thank you. I want to talk briefly about Margery
18 Hinsey. She is the 80 year old woman that testified and said she has been at the
19 lake and remembers back 75 years. There's no finding by the ALJ that her
20 testimony wasn't credible. You will not find that in the order. So, that's not an
21 issue. So, to bring that up today I think I would ask that that be ignored. There
22 was no testimony at all from any Claimant that they ever put a pier out in front of
23 the blocks. I heard Mr. Kuchmay say that they always put piers out in the lake.

1 True, but the back lot owners always put piers in private drives, not in front of
2 the block. The restriction says it's within the block where the lot is located,
3 period. So, you know, I don't know how more clear that can be. And, I don't
4 think it's a matter of Judge Lucas looking at witnesses and deciding who's
5 credible and who's not, because I didn't see that in his order.

6 I think what we are asking is for the Commission to look at and decide
7 more as a matter of law; that, look, laches, abandonment apply here. You can't
8 recreate, redraft the restrictions and now allow group piers. That was never
9 contemplated in 1923. In fact, we object and find it questionable whether Mr.
10 Hartzell, who wrote these restrictions, ever intended for a pier to be used. He
11 said a six foot boat landing easement. When you go back to 1923 what do you
12 think that was? We had Ms. Hinsey testify that she doesn't remember motorized
13 boats back then; it was probably a canoe. So, we don't even think the intent was
14 to use piers, but that's how the Judge has ruled.

15 We also feel that the restriction is ambiguous, because it doesn't
16 specifically list where each pier, if you have a pier right, or where each boat
17 landing is supposed to go. It's certainly not ambiguous as to the group pier issue.
18 It doesn't say anything allowing group piers.

19 Briefly on the abandonment issue, you know, here you can't just have intent by
20 self-serving testimony—that I intended to do something. Because, if it was so
21 important to these back lot owners when they bought their property that they had
22 a pier, why didn't they ever put a pier out? None of them ever put piers out until
23 2009. If it was so important— you have to look at their actions not just what

1 they said. I think that's very self-serving to get up and say, "I never intended to
2 waive my right." But, you never acted on it, and that is abandonment. Not only
3 did they not act on it, but they did an affirmative act of relocating not where their
4 pier should go according to the restrictions, but in front of the private drives.

5 You know, if you look at laches-- I've never been, in all honesty, a big
6 fan of laches. I don't know how many of you have looked at those before, those
7 of you that are attorneys or have been on here, but, you know what, it is the law.
8 If this is not a laches case, what is? I mean, you've got 75 years of someone not
9 using their right. If this is not laches, what is? And, we assert this is laches.
10 With 75 years, there is no testimony that any back lot owner ever put a pier out in
11 front of the block. So, for over 75 years they have not asserted that right. And,
12 then all of a sudden in 2009 they start putting out piers and want you to believe
13 that it was never their intent to waive that right.

14 Well, actions speak louder than words, and we ask that you go back and
15 modify this ruling to find that abandonment and/or laches applies, and that the
16 back lot owners simply are not allowed to put piers in front of the blocks and
17 certainly not allowed to put group piers and funnel from the back lots to the front
18 when they have never done so ever. If there are any questions, I would be more
19 than happy to answer any of those.

20

21 **CHAIRWOMAN STAUTZ:** Let's go ahead and open up for questions,
22 and then we will have time for the other parties for rebuttal as well. But, I think
23 while were---

1 **COMMITTEE MEMBER MARY ANN HABEEB:** I have one
2 question. I guess my question is: Who has a right to build a pier on the private
3 drive? What are the rights with regard to building piers on the private drive?
4

5 **MR. MURPHY:** Well, that's a good question. I don't think there is an
6 answer to that right now. But, what was asked-- the Claimants were asking is
7 what were their rights to put their piers, and they started looking at the
8 restrictions. There is nothing that would allow them to put it on the private drive.
9 They may have another separate action, an adverse possession or some other
10 claim, but in terms of regarding the restrictions they don't have any rights to put
11 piers there because the restriction calls for just piers in front of the block where
12 the lot resides. I don't know if that answers your question.
13

14 **COMMITTEE MEMBER HABEEB:** I just didn't see anything here,
15 and I wanted to make sure everybody was on-- we were on the same page here.
16

17 **CHAIRWOMAN STAUTZ:** And, just for my frame of reference here,
18 how wide are the drives themselves, the private drives, whether it be Miami
19 Drive, or Sioux Drive? I'm just trying-- --
20

21 **COMMITTEE MEMBER HABEEB:** Perspective.
22

1 **CHAIRWOMAN STAUTZ:** -- --get a perspective on this versus the
2 width for the lots.

3

4 **MR. MURPHY:** About 50 feet.

5

6 **COMMITTEE MEMBER AHEARN:** I would suggest page 29 of the
7 Judge's order.

8

9 **CHAIRWOMAN STAUTZ:** Yes.

10

11 **MR. MURPHY:** That's right. Give or take 50 feet each of them within
12 a few feet.

13

14 **CHAIRWOMAN STAUTZ:** Okay. I mean, I thought that's what that--
15 trying to read it with the photo copying.

16

17 **COMMITTEE MEMBER HABEEB:** How many lot owners then
18 would be sharing that 50-foot easement, that 50-foot-- --

19

20 **MR. MURPHY:** For Block 7?

21

22 **COMMITTEE MEMBER HABEEB:** -- --that 50-foot private drive
23 area for which no one seems to have any legal claim?

1 **COMMITTEE MEMBER AHEARN:** Well, let me—and I’m sorry—
2 let me interrupt before you answer. Isn’t every single lot owner in Block 6, 7,
3 and 8 entitled to use the end of Sioux Lane or the end of Miami Lane?

4
5 **MR. MURPHY:** Yes, in fact— —

6
7 **COMMITTEE MEMBER HABEEB:** Including the back lot.

8
9 **COMMITTEE MEMBER AHEARN:** So, it’s not just the ones that we
10 are denying access to, but it’s the other four that have lots facing the property?

11
12 **COMMITTEE MEMBER HABEEB:** The front lot owners.

13
14 **COMMITTEE MEMBER AHEARN:** Is that correct?

15
16 **MR. MURPHY:** If I could clarify that though. The general answer is,
17 yes. In fact, everyone in Long Lake Park has a right to use the Indian Trail for
18 walking purposes, but the riparian rights from the restrictions only go to those
19 within the block, that owns lots within the block. So, if your question involves
20 can someone in Block 2 put up a pier in front of this area? The answer is, no.
21 The restrictions say you can only put a pier in front of the block. In fact, people
22 in Block 7 don’t have a right to put up a pier in front of the private drive
23 according to the restrictions. The only rights that we believe they’ve waived or

1 abandoned were in front of the block. The only thing the private drives were
2 ever allowed for was walking and access—swimming, walking down there. I
3 think people have even driven vehicles down there over time.

4

5 **COMMITTEE MEMBER AHEARN:** So— I’m sorry.

6

7 **COMMITTEE MEMBER HABEEB:** No, go ahead.

8

9 **COMMITTEE MEMBER AHEARN:** So, then, Mr. Murphy, and Ms.
10 Martin, if we determined— if we ruled the way that you are coaching us to will
11 we ultimately end up being in the situation where twelve landowners have some,
12 as yet undefined [word inaudible], access to the lake and 35 have none for a
13 purpose of a pier?

14

15 **MR. MURPHY:** No. I don’t think so. I think you would be saying or
16 what we would be asking you to do is say that these back lot owners abandoned
17 their rights to put a pier in front of the block. And then I think it is outside of the
18 scope of this Commission to determine what should be done with the private
19 drives, because the Claimants originally asked for where they could put their
20 piers pursuant to the restrictions. I think the answer is, well, pursuant to the
21 restrictions you can’t put them in front of the blocks. I think that’s clear based on
22 the abandonment, and laches, and how they’ve acted for at least the last 75 years.

23

1 **COMMITTEE MEMBER AHEARN:** Given the 1923 restrictions,
2 what riparian rights do your clients have? Do they have more than access of the
3 six-foot section?

4
5 **MR. MURPHY:** According to the restrictions, no. They have separate
6 actions by LaGrange Circuit Court to determine adverse possession. And, they
7 have separate action through the BZA to determine accessory use issue to that,
8 which the court, Judge Lucas, would not consider the BZA. And, we did make
9 an objection to that, but that's being handled in front of other areas. Just like the
10 back lot, I think have rights to have the BZA and/or the circuit courts determine
11 adverse possession, accessory use, and those types of issues.

12
13 **COMMITTEE MEMBER AHEARN:** In your analysis, would a back
14 lot owner have had to go out to the block, in front of the block, pace off six-foot
15 sections; find the exact one that was his six-foot section or be subject to an
16 abandonment argument?

17
18 **MR. MURPHY:** No, sir. In fact---

19
20 **COMMITTEE MEMBER AHEARN:** What if six, twelve, 18, what if
21 you used between twelve and 18 but he counted wrong and he was really
22 supposed to use between 24 and 30? Would he not be subject to your argument
23 of your abandonment, where you are supposed to be?

1 **MR. MURPHY:** I think as long as you are within the block I think you
2 have a good argument that, look, we never intended to abandon our rights. I
3 mean, that's a clear delineation between the two groups. And, I think if let's say
4 use Mr. Ybarrow who testified that he for the last 20 years instead of putting them
5 outside of the blocks and put them inside the blocks, I think he has an argument
6 that, look, I never intended to abandon. I always put it inside the block where the
7 restriction calls for. But once he, you know, stops using it and then relocates it
8 outside of the block, he has abandoned it. I think his intent at that point is not to
9 ever put it inside the block, he and his predecessors for over 75 years.

10 I think that is a good question, and one that we probably don't have to
11 decide because they never did that. But, I would argue, just like my clients
12 always put their piers right in front of the block and it was open and versed to
13 anyone who saw it. They made sidewalks right from their back door all the way
14 out to the lake. They had seawalls with slots that anyone could have objected to
15 and never did. They put their pier in the exact same location. And, maybe if you
16 counted the six feet, twelve feet, 18 feet, such as you are suggesting, that they did
17 not put it in the right spot, but what they did do was they always put it in front of
18 the block, which I think is a big difference between what the Respondents did by
19 sitting on their rights and never ever putting a pier out in front of the block until
20 2009 when all the legal explosion occurred.

21

1 **COMMITTEE MEMBER ROBERT WRIGHT:** This may not be
2 totally relevant, but it appears from the number system that there are additional
3 blocks probably on each side of the 6, 7, and 8. What do they do there?

4
5 **MR. MURPHY:** It's all over the place. There are some—maybe Ms.
6 Martin can be better to describe this—but there are some that have resolved it to
7 let the back lot owners put it out in front of the private drives, and the front lot
8 owners there are some that are waiting on this decision. And, it's kind of all over
9 the place.

10
11 **COMMITTEE MEMBER HABEEB:** Well, I guess that begs another
12 question then based on what you just said and what my question is. How can you
13 say that this decision would not affect people who are not parties because they
14 are part of the block, part of the other addition? I don't understand how this
15 decision would not affect them and they are not parties.

16
17 **MR. MURPHY:** Right. Well, I didn't file the action. I mean, it was the
18 Claimants and Mr. Kuchmay's group that filed the action. They did not name all
19 of the parties. I don't see how that can be used against us in terms of the laches.
20 Because remember what we are talking about is riparian rights only that are
21 unique to each block. So, someone in Block 7 doesn't have a right to put a pier
22 out in front of Block 2 and someone in Block 2 doesn't have a right to put a pier
23 in front of Block 7. So, in terms of a defense because the Claimants may or may

1 not have named everyone, I don't know how that can be used to say that they
2 haven't waived their rights by not putting piers out in front of their block.
3 Because everyone that has a laches argument is right here. It is the back lot
4 owners for Block 7, Block 8, and Block 6. So, there is no laches argument for
5 someone in Block 2. They are not waiving any rights by decision of laches
6 because it is unique to their block.

7

8 **COMMITTEE MEMBER WRIGHT:** Is Indian Drive—and this may
9 have been in the statement of facts—is Indian Trail a public street or was it
10 originally a public street?

11

12 **MR. MURPHY:** That as far as we can tell the whole purpose of it when
13 Mr. Hartzell—and Mr. Kuchmay can probably talk to this as well and so could
14 Ms. Martin—but as far as I understood it the private drives and the Indian Trail is
15 all part of Big Long Lake and it was established so the residences of Big Long
16 Lake can walk across there and use those to get down to their places. The only
17 riparian rights were in front of the blocks by the restrictions, but the Indian Trail
18 and the private drives were for use of Big Long Lake. I don't believe its public.

19

20 **COMMITTEE MEMBER WRIGHT:** And, they are still private?

21

22 **MR. MURPHY:** Yes. In fact, what you will see— kind of odd and we
23 haven't discussed it because it may be a small part of this is when Mr. Hartzell

1 passed away in his will he left everything that wasn't specifically given to the
2 Masons. The Masons-- everyone talked to the Masons and they decided they
3 waive any interest they have. That's a question about who would own the Indian
4 Trail. No one has paid taxes on it; no one has done anything with it; it has just
5 been part of Big Long Lake for years.

6

7 **COMMITTEE MEMBER HABEEB:** But are people walking-- is it
8 now a footpath for those within the subdivision?

9

10 **MR. MURPHY:** Yes. People have walked in the subdivision across the
11 Indian Trail and through the private grounds.

12

13 **COMMITTEE MEMBER AHEARN:** Tell me again how your clients
14 are entitled to any more than six feet of riparian rights where those would have--
15 assuming the back lot people started building their piers in 1940 or some time--
16 how is it that the lake-facing owners, the lake-facing properties are entitled to
17 any more than six feet?

18

19 **MR. MURPHY:** By "lake-facing" you are talking about these right here?

20

21 **CHAIRWOMAN STAUTZ:** Yes.

22

1 **COMMITTEE MEMBER AHEARN:** Yes, the twelve at the western
2 end of the block.

3

4 **MR. MURPHY:** Pursuant to the restrictions, I don't know that they are
5 entitled to any more than what the restrictions say, six feet per lot. Now again,
6 we have the adverse possession case and the BZA case separate, that are separate
7 issues to discuss whether or not they should or should not have more than six
8 feet. But, in terms of how the restrictions are applied for the purposes of today
9 and this Commission, I would agree that I don't think they are allowed any more,
10 pursuant to the restrictions, than six feet per lot in front of the block. And, they
11 have established instead of sitting on their rights and never putting piers out for
12 these 75 plus years, they always put piers out directly in front of their homes to
13 which no one objected. In fact, we had testimony that back lot owners helped
14 them put their pier out from time to time. So, not only did they not object, but
15 actually helped them. Not only acquiesced, but helped them put the pier in,
16 agreed to help them build the seawall with the one slot right in front of their
17 property where they always put there pier.

18

19 **COMMITTEE MEMBER AHEARN:** Is it not the case that if we start
20 counting off—I'm looking at Block 8, and I apologize for—if we counted the—
21 if we numbered the blocks from north to south and took the riparian rights in six-
22 foot strips, would it not be the case that lots 90, 89, and maybe 88 would not
23 have riparian rights in front of their lot?

1 **MR. MURPHY:** Right. And, that's how, in all honesty, I'm glad you
2 pointed it out. That's how I think ridiculous it is because what we have to do is
3 we have to look at the intent of Lee Hartzell when performing this restriction. I
4 can't believe that he intended-- and what you are saying is that you have six
5 feet, six feet, six feet, so that you have a bunch of piers in this area and no piers
6 in this area; and this guy's pier is down here somewhere. I can't believe that was
7 the intent of the restriction. And, that's in part of what I think we are here to
8 determine.

9

10 **COMMITTEE MEMBER AHEARN:** Well, let me ask this-- I'm
11 sorry for hogging this.

12

13 **CHAIRWOMAN STAUTZ:** No, go ahead.

14

15 **COMMITTEE MEMBER AHEARN:** We referenced-- it has been
16 referenced in the-- in the briefs what is ambiguous about the restriction
17 described in finding-- the 1923 restriction described in number 41? From the
18 four corners of the document, not from usage later, but from the day it was
19 written wherein lies the ambiguity?

20

21 **MR. MURPHY:** I think the first ambiguity is when it says "boat landing
22 easement". What does that term mean? Does that include a pier right? In 1923,
23 I think a boat landing easement did not include a pier. I think if he wanted piers

1 he could have put piers. He said "boat landing easement". I think it was for a
2 canoe or an oar boat. And, we have pictured established that in the '30s where
3 there were oar boats that people were using. We had those pictures and put them
4 in, in front of the hearing. So, I think that's the first part that's ambiguous. The
5 second part, I mean, we would argue that it's unambiguous; it doesn't include
6 piers, but obviously Judge Lucas found it does include piers so I think at least on
7 the face of it, that's ambiguous.

8 The second part is exactly where they go. And, you correctly stated how
9 it would go six-foot numbered north to south, but where does that start? How,
10 when it says "consecutively numbered" does that necessarily mean that this
11 person lives here can't have a pier in front of his place, and that there would be
12 no pier down in the lower half or two-thirds of each block.

13

14 **COMMITTEE MEMBER AHEARN:** But it is conceivable he meant
15 what he said?

16

17 **MR. MURPHY:** Yes.

18

19 **COMMITTEE MEMBER AHEARN:** So, I'm asking where the
20 ambiguity in the four corners?

21

22 **MR. MURPHY:** I think those are the two parts that I believe, the boat
23 landing easement and exactly where they go and whether or not that he really

1 intended for the folks here to have a pier way up here, and for no piers to be in
2 the lower half of two-thirds of the block.

3

4 **COMMITTEE MEMBER AHEARN:** Right. I'll say my thinking on
5 this. I'm distinguishing "difficult to interpret" from "ambiguous" here for maybe
6 even "difficult to apply" from "ambiguous".

7

8 **CHAIRWOMAN STAUTZ:** From being-- right. It may not make
9 sense, but it-- --

10

11 **COMMITTEE MEMBER HABEEB:** Right. Exactly.

12

13 **COMMITTEE MEMBER AHEARN:** Or "contradictory". Okay.

14

15 **COMMITTEE MEMBER HABEEB:** So, as I understand it, your
16 clients also have not then complied with the terms of the declaration?

17

18 **MR. MURPHY:** Well, it depends. I mean, my argument is that they
19 have and that they've always put piers in front of their blocks.

20

21 **COMMITTEE MEMBER HABEEB:** But they have exceeded six feet?

22

23 **MR. MURPHY:** They have exceeded six feet.

1 **COMMITTEE MEMBER HABEEB:** And, they have put a pier when
2 the term “boat landing” might not have meant “pier”.

3

4 **MR. MURPHY:** They have put a pier out every time, and they did not
5 put it as well. Just to be clear, if you were to count six feet, twelve feet, they just
6 put it right in front of their house where many of them, the people before them,
7 put it.

8

9 **CHAIRWOMAN STAUTZ:** Has there been any change in the width of
10 the private drives—the Sioux Drive, the Miami Drive, and that? I mean, was
11 there ever any type of marker or indication of here’s where you start and from the
12 public, you know, access drive area versus the start of each block? Has that ever
13 been surveyed and laid out?

14

15 **MR. MURPHY:** We did do a survey and put that in front of the hearing,
16 but the only thing the survey could tell is maybe the lake has moved a little but
17 nothing to say that, if I’m understanding you correctly, this area has decreased or
18 lengthened.

19

20 **CHAIRWOMAN STAUTZ:** Decreased or expanded. Okay.

21

22 **MR. MURPHY:** No. What there has been is back lot owners over time
23 have improved this area—put in steps, put in places to sit. They kept piers and

1 things there, taking care of it. There was testimony on that, but the front lot
2 owners always improved and took care of the area directly in front of the homes
3 on the Indian Trail.

4

5 **COMMITTEE MEMBER HABEEB:** I'm having a difficult time
6 understanding how your clients believe they own to the water if there was a trail
7 in front of their lot, where people were walking back and forth, had the right to
8 walk back and forth. There was no unimpeded ability for others within the
9 addition, including the back lot owners, to use that front area.

10

11 **MR. MURPHY:** Yes. And, I think that's a good question. I think there
12 is a two-part answer. The first part is I think the actual ownership of the trail is
13 not before the Commission; it wasn't before the Judge Lucas. The second part is
14 just a practical understanding of it is this area here looks different. If you were
15 out there, it looks exactly the same. As a practical matter, who mows this; who
16 fertilizes it and takes care of it; who has improved it; who has put fire pits and
17 flag poles and sidewalks? These people. And, when they bought their house, and
18 there was evidence of this put in, the realtor put in there that you have 75 feet of
19 lakefront. For whatever reason, that's what they were told. In fact, Mr. Ashley
20 testified that "I relied on an expert when I bought it. I wouldn't have bought the
21 place if I knew that there was this Indian Trail that other people have a right to
22 walk across". For all practical purposes, while they have a right to cross it, it's
23 my understanding—I think there was some testimony to this—that back in the

1 '30s this was a popular place to swim, and that people used to walk more. But
2 since then, it's overgrown so people don't walk over it all the time like they may
3 have used to.

4

5 **COMMITTEE MEMBER GRANT:** Moving on. If a lot, a back lot has
6 an exclusive easement, how can you combine two and you can let somebody else
7 use your exclusive easement? Is that the---?

8

9 **CHAIRWOMAN STAUTZ:** I think that is one of the objections before
10 us with the proposed order here, as indicated in Paragraph 5 on page 43. So, do
11 you have questions?

12

13 **COMMITTEE MEMBER GRANT:** Goes to the group pier issue?

14

15 **COMMITTEE MEMBER HABEEB:** Well, Judge Lucas's order, from
16 what I read, doesn't authorize a group pier. That would be a separate action, a
17 separate licensing decision, and a separate adjudication.

18

19 **COMMITTEE MEMBER AHEARN:** Right, a separate licensing issue.
20 I would agree.

21

22 **COMMITTEE MEMBER HABEEB:** All those issues could be raised,
23 if appropriate, at that time because there is nothing in this order that authorizes

1 any construction, and certainly not a group pier. So, I don't see that's relevant
2 here.

3

4 **COMMITTEE MEMBER AHEARN:** Right. We don't need to address
5 the issue.

6

7 **COMMITTEE MEMBER GRANT:** The fact that four of them could
8 combine their easements---

9

10 **CHAIRWOMAN STAUTZ:** And, the question is do you need even
11 suggest that?

12

13 **COMMITTEE MEMBER HABEEB:** Do you need to address that?

14

15 **COMMITTEE MEMBER AHEARN:** The question is do we need to
16 address it? I would offer us just to-- sorry for talking.

17

18 **MR. MURPHY:** No, that's all right. I didn't know if you wanted a
19 response. I would like to respond.

20

21 **COMMITTEE MEMBER AHEARN:** So, that we don't get to the idea
22 of even-- even if we-- even if we affirm the order, we don't have to address
23 the issue of the six-foot indivisible-- conceivably some-- we don't have to

1 address the issue that if someone buys every back lot, and then do they have a
2 70-foot-- well, you never get bigger than 70-foot-- you'll never get bigger than
3 30 or so feet because they have to be numbered consecutively. The front lots
4 will then intervene, and then the next ones would for those riparian rights.

5

6 **MR. MURPHY:** May I respond to that, sir? Or was that not a question?

7

8 **CHAIRWOMAN STAUTZ:** No.

9

10 **COMMITTEE MEMBER AHEARN:** No. I was just-- that was an
11 observation, but please do.

12

13 **CHAIRWOMAN STAUTZ:** And, we do want to respect time.

14

15 **MR. MURPHY:** Sure. Paragraph 110, I think of Judge Lucas's order,
16 does say they are allowed to combine riparian zones. The only purpose for that
17 would be to make group piers. He may not use that term. You know, that's the
18 scary part of this is to allow funneling when the restrictions don't call for a
19 combination of those riparian zones. The only person that can combine riparian
20 zones would be for a group pier.

21

22 **CHAIRWOMAN STAUTZ:** Well, I don't--

23

1 **COMMITTEE MEMBER AHEARN:** From my observations, I don't
2 think we have to make a group pier decision.

3

4 **CHAIRWOMAN STAUTZ:** No.

5

6 **COMMITTEE MEMBER HABEEB:** No.

7

8 **COMMITTEE MEMBER AHEARN:** That's a separate licensing
9 process.

10

11 **CHAIRWOMAN STAUTZ:** Correct. Any more questions for
12 Counselor Murphy? Thank you.

13

14 **MR. MURPHY:** Thank you.

15

16 **REBUTTAL**

17 **MS. MARTIN:** Do you want me to jump in and interact with you? At
18 this point, a couple of things I might assist in answering. I apologize if I didn't
19 get that on record. There was a comment, I believe by Mr. Kuchmay, that no one
20 owns to the water's edge; that's very true. That's why the front lot lake view
21 owners have asserted an action in LaGrange Circuit Court. I think we have to be
22 very careful that we are not mixing the adverse possession issue with the riparian
23 rights issue. And, I would assert maybe a little bit in contradiction with my

1 colleague, I believe that they have all abandoned their rights as they were defined
2 in 1923, and that's why we went to the adverse possession action because we
3 said nobody's doing it the way it was set up in 1923. It's not practical. Nobody
4 seems to want to do it that way. And, even Lee Hartzell himself, who was alive
5 until 1955, never made a declaration—as Mr. Kuchmay seemed to assert was
6 necessary—he never made a declaration, and said, “Hey wait a minute. You
7 guys are all supposed to be lined up here six-foot sections”. There was evidence
8 that was presented to Judge Lucas that indicated that piers were placed
9 historically out there even during the period of time when Lee Hartzell was still
10 alive. He never took steps to say, “Wait a minute. You guys aren't doing this
11 right, all right”. So, I think it's important that we look at this in terms of the
12 defined access that Lee Hartzell put in place was never used. Did everyone think
13 they had access to the lake? Absolutely. Absolutely, from the beginning, but no
14 one ever used the six-foot access.

15 There were a number of questions that came up with regard to the drives
16 as you were kind of evaluating how this looks. I wanted to explain also the
17 Indian Trail is very much a footpath. There is no— you don't see a distinction
18 of a sidewalk or even a worn down trail. It looks like grass all the way to the
19 water's edge or, in some cases, there's seawalls and pavement. In the
20 descriptions that I get from my clients and I believe even from, talking with Mr.
21 Murphy's clients, it's kind of a lake culture. They walk across the lakeshore.
22 Everyone just enjoys that right to go across. There is no specific distinction that

1 says, "Oops, wait a minute. You are on private property". They just all walk
2 across.

3 The drives themselves, these are not paved drives. And, in some cases
4 you can't even drive down them because of the steepness or because of the
5 terrain, and trees, and so forth. So, you know, what we are looking at here are
6 very specific places that the back lot owners have chosen along the lakeshore to
7 put their access point. And, they have chosen to do it at the points consistent
8 with the drives nearest to where their homes are located. Is that what Lee
9 Hartzell had in his restrictions? I say, no. I say what we have here is an
10 abandonment of the restrictions specifically and geographically set out by Lee
11 Hartzell.

12 The adverse possession case will define whether or not our clients in the
13 front can continue you to use it the way they have been. Do they have more than
14 six feet? Not by the definitions of Lee Hartzell's restrictions. Any questions?

15

16 **COMMITTEE MEMBER AHEARN:** If I could ask this: If your clients
17 prevail on their adverse possession case with respect to the land to the lake will
18 they not then be in the position of saying "Our riparian rights are essentially 90
19 degree lines that run at our lot lines out into the water?"

20

21 **MS. MARTIN:** Yes.

22

1 **COMMITTEE MEMBER AHEARN:** So, they will pick up another, in
2 some cases, 45 or 50 feet, above the six feet they might have had of riparian
3 rights? If the Hartzell restriction says you have six feet— —

4
5 **MS. MARTIN:** Depending on the width of the lot, yes.

6
7 **COMMITTEE MEMBER AHEARN:** Right. It would be the width of
8 the lot minus six feet is the essential, what I'm going to call it a "windfall",
9 because I'm not comfortable with it, just to tell you guys what I think. Okay.
10 Thank you.

11
12 **MS. MARTIN:** If I might suggest also adverse possession is always a
13 windfall, and that's not something that, again, is before this Court, or this
14 Commission. Adverse possession is a totally separate issue. What we are talking
15 about here is whether or not riparian rights have been abandoned. And, we
16 believe, the Respondents believe, that they have been. And, that this
17 Commission should modify Judge Lucas's order to reflect that.

18
19 **COMMITTEE MEMBER AHEARN:** Won't prevailing in the adverse
20 possession cause expunge of the riparian, in your theory, assuming they exist, the
21 riparian rights of the back lot owners?

22

1 **MS. MARTIN:** It certainly would unless they assert their own adverse
2 possession action.

3

4 **COMMITTEE MEMBER AHEARN:** Thank you.

5

6 **COMMITTEE MEMBER WRIGHT:** I have a question. You say that
7 there is an adverse possession action---

8

9 **CHAIRWOMAN STAUTZ:** Which is not before us. I just want to---

10

11 **COMMITTEE MEMBER WRIGHT:** Yeah, I know it's not before us.
12 ---by the front lot owners? And, if they prevail in that action, the back lot
13 owners no longer have riparian rights, do they?

14

15 **MS. MURPHY:** Yes. That would be true.

16

17 **COMMITTEE MEMBER WRIGHT:** They would still have them?

18

19 **MS. MARTIN:** No. No. You are correct that they would lose their
20 access at that point by the definition as set out by Lee Hartzell. Now, whether or
21 not they assert some sort of rights to have access through the drives is entirely up
22 to them. But we are asserting in our adverse possession action that, historically

1 and without getting into the adverse possession argument, that the front lot
2 owners have a right to own all the way to the water.

3

4 **COMMITTEE MEMBER WRIGHT:** Adverse possession is an
5 equitable remedy, isn't it? I've done them, but I can't remember if it's a legal
6 remedy or an equitable remedy. I would think it would be equitable.

7

8 **MS. MARTIN:** I don't know of any statute that provides any additional
9 so it's my understanding that we are talking about an equitable argument as well.

10

11 **COMMITTEE MEMBER WRIGHT:** Which certainly would play into
12 the laches argument?

13

14 **MS. MARTIN:** Yes. I mean, there are elements, crossover elements, in
15 all of these arguments—the abandonment, the laches, and the adverse possession.
16 Is that what you are thinking?

17

18 **COMMITTEE MEMBER WRIGHT:** Okay. I don't have any more
19 questions.

20

21 **CHAIRWOMAN STAUTZ:** Okay.

22

23 **MS. MARTIN:** Any more questions?

1 **CHAIRWOMAN STAUTZ:** Thank you, Ms. Martin. Great. Thank
2 you. Mr. Kuchmay?

3

4 **REBUTTAL**

5 **MR. KUCHMAY:** Thank you. The issue when you are determining
6 whether or not there was abandonment is an issue of intent. And, the testimony,
7 frankly, on that issue we believe was clear. That was the testimony that the
8 Judge heard. The right was always exercised and the authorities that we cited
9 within our memoranda to Judge Lucas-- and I read that one paragraph here this
10 afternoon. The use of another more convenient way in and of itself is not
11 abandonment unless you intentionally intend to give up this other right as well.
12 And, the testimony was-- you know, my clients did testify they never intended
13 to give that up. They always intended to exercise, but they couldn't do precisely,
14 because again there was never a determination that was made. And, frankly, the
15 testimony was not self-serving as Mr. Murphy suggested.

16 You know, my clients-- certainly you try to get along with your
17 neighbors, and I think that was reflected in Judge Lucas's decision. You know,
18 they did stick them in instances off the drives there, but frankly, the testimony
19 also indicated that that became unworkable. You know, the more people
20 obviously that are trying to do that under the drives, that doesn't work. Now we
21 have to go back and let's exercise the rights that we do in fact have. When they
22 attempted to exercise those rights that is when the dispute arose. And, we
23 promptly, my clients promptly initiated this action to determine what their rights

1 were; there was no delay. So, it has to be an inexcusable delay. And, I think that
2 the fact that it was never before delineated, and when we attempted to exercise it
3 and it was opposed, we instantly filed this action. So, one, on the laches there
4 was no inexcusable delay.

5 We have already talked about the fact that, I think, the third element on
6 laches is that they have to show that they were prejudice by my clients' actions.
7 And, we have the finding that Judge Lucas entered that, to the extent that they
8 put in seawalls, to the extent that they made improvements to their homes, that
9 was done not because of something that we did; that was done on their own
10 misguided assumption that they owned to the water's edge. I'm sorry if their
11 realtor told them they owned to the water's edge; sue your realtor. My clients
12 didn't make that representation, and laches requires that they are relying on
13 something that my clients did. There was no evidence of that. And, as a
14 practical matter, you know, they say that we didn't object to putting in the
15 seawalls and things of that nature. Putting in a seawall does not prohibit us from
16 exercising our rights. We can still walk on it; we can still put a pier there. Why
17 are we going to object? They have a right to improve the easement just as we do.
18 That's a legal right that they have. There is no reason for us to object, and
19 certainly it shouldn't receive any consideration on a laches or abandonment
20 argument.

21 On the issue of whether the provision is unambiguous, is probably
22 flushed out during the question and answering. But it is certainly our position
23 that it is unambiguous. When you want to know what a boat landing is, what did

1 the Judge do, he looked at the dictionary definition. That was addressed on
2 summary judgment. Where does it start? As this indicates, it's in front of each
3 respective block; it's goes north to south; they're numbered consecutively.
4 Whether or not there is a practical problem in the use and how you are going to
5 actually use the easement, that's not what's at issue here. What's at issue here is
6 the declaration as to what the parties have; and that's exactly what the Judge has
7 done. I would be happy to address any questions.

8

9 **CHAIRWOMAN STAUTZ:** Any additional questions?

10

11 **COMMITTEE MEMBER AHEARN:** None.

12

13 **CHAIRWOMAN STAUTZ:** Questions? Counsel?

14

15 **COMMITTEE MEMBER WRIGHT:** No.

16

17 **COMMITTEE MEMBER GRANT:** Well, yeah. You may have
18 answered this, but I'm back on this zone again on Paragraph 5 of the Judge's--
19 the identification of riparian zones attributable to particular lots does not preclude
20 a person who owns adjacent lots are treating them as a single riparian zone.

21

22 **CHAIRWOMAN STAUTZ:** Well, I don't know if-- --

23

1 **COMMITTEE MEMBER GRANT:** Tell me again what you told me?

2

3 **CHAIRWOMAN STAUTZ:** Do you have a question or do want
4 discussion among us?

5

6 **COMMITTEE MEMBER GRANT:** Among us.

7

8 **CHAIRWOMAN STAUTZ:** Okay. So, I am— —

9

10 **COMMITTEE MEMBER GRANT:** I thought you were there. I'm
11 sorry.

12

13 **CHAIRWOMAN STAUTZ:** No. I'm sorry. I was wondering if you
14 had any more questions for Counselor Kuchmay? No?

15

16 **COMMITTEE MEMBER GRANT:** No.

17

18 **CHAIRWOMAN STAUTZ:** Okay. Thank you. So, with regard to open
19 discussion amongst the committee members here then, in Paragraph 5— — and I
20 will open it up for discussion. I am comfortable with the proposed nonfinal order
21 as I go through the first four paragraphs, but Paragraph 5, I was wondering
22 whether we actually need to have that as documented there on the third sentence
23 where it starts with, "Also, two persons...". I would move that we would strike

1 that from the nonfinal order in the respect that I'm not sure we need to make that
2 determination if folks are in agreement that according to the original intent was
3 to have each lot owner have their six-foot wide easement for a boat landing. And,
4 that would continue over on page 44 as you look at Paragraph 6, is that really
5 before us with regard to spelling that out or could be stop short of that to
6 basically address the six-foot easement issue? Because, I think where you're
7 going is concern around are you establishing that potential there and do we need
8 to do that versus on the face of the original ---?

9

10 **COMMITTEE MEMBER HABEEB:** Well, I guess my question is I'm
11 not sure what's before us. I don't know what was in the original complaint. If
12 that issue was in the original complaint, then I would submit that maybe we
13 should address it. I guess I'm not sure about that.

14

15 **COMMITTEE MEMBER AHEARN:** I would say, at least what's in
16 front of us, I think the issue-- I agree with the Chair. To say it this way, the
17 Paragraph 5 and Paragraph 6 issues are not ripe for our determination.

18

19 **CHAIRWOMAN STAUTZ:** Right. Much better put. Yes.

20

21 **COMMITTEE MEMBER AHEARN:** Assuming we we're going to
22 accept Judge Lucas's order, my observation for the fellow Committee Members
23 is this—and then we can do the discussions—I think the Respondents are asking

1 for a lot in the—I'll say a great deal—in the sense that there is a— I appreciate
2 there's an adverse possession claim, which is not before us, but will ultimately
3 significantly alter the riparian rights based on some of the Commission's own
4 documentation for determining riparian rights. So, in one sense, it's a windfall
5 by adverse possession. Also, an argument of laches and abandonment to the
6 detriment of 35 lot owners, or 35 lots, the restriction runs with the land; it's gone
7 forever, I assume, to the benefit of twelve, none of whom used the property, I
8 think—by the admission of all Counsel in here—none of whom come with clean
9 hands.

10

11 **CHAIRWOMAN STAUTZ:** Right.

12

13 **COMMITTEE MEMBER HABEEB:** Right. Yes.

14

15 **COMMITTEE MEMBER AHEARN:** None of whom used or
16 understood them as per the language of the 1923 grant or restrictions. And, then
17 to the Respondents' argument of -- of their-- their clients or their clients'
18 predecessors interests either didn't have access to counsel or relied on erroneous
19 description from realtors. It strikes me that it ought not be the case that the back
20 lot owners are accountable for a compilation of professional mistakes from
21 agents of the front lot owners. If that were true, the more mistakes you made, the
22 more the equity is would tip, I think, in favor of the lake facing owners. So, I'm
23 leaning in the direction—and I'm not phrasing it as a motion yet, I want to know

1 what we think—of accepting, of adopting Judge Lucas’s order as a final order,
2 but striking number five and number six as we described earlier. So, to get us
3 into a discussion, I will tell you that is what I’m thinking.

4 My other observation, as I said, I think the language of the 1923
5 restriction described in 41 is potentially difficult, maybe hard to work, but it may
6 be, and we don’t know, it may be exactly what Hartzell intended. It may be that
7 he didn’t want anyone putting anything on the lake, that he had a great deal of
8 property in front of other than a canoe.

9

10 **COMMITTEE MEMBER HABEEB:** Absolutely.

11

12 **COMMITTEE MEMBER AHEARN:** Or a small motorboat. And, we
13 just don’t know what that is. And, if we may never have anticipated “group
14 pier”, and that— as we say, “group pier” is not in front of us. If the group pier
15 issue comes up somehow among the property owners, that’s a second
16 Commission decision somewhere else.

17

18 **COMMITTEE MEMBER GRANT:** Well, we’ll never know what
19 went on in 1923, but you can almost— one possible solution, answer was six-
20 foot easements were wide enough base to pull up a fishing boat up on, onto the
21 shore, or to pull up a canoe up to. And, it seems to me at least reasonable that
22 people that lived on the lake put their piers out in front of them and the other
23 people, for convenience and as a courtesy, didn’t need much room and they

1 pulled their boat up at the end of these other streets, and progressed. So, where
2 does the convenience and the courtesy switch over to the law is probably why
3 we're here.

4

5 **CHAIRWOMAN STAUTZ:** Right. And, it's why we are here. One
6 point—and I don't want to stop the discussion there—but the point I don't want
7 to lose is in one of the objections was a correction on page— a clerical error on
8 page 29 with regard to Paragraph 109, line three that says "Lot 71" should be
9 "Lot 65". And, that line four where it says "Lot 87" should be "Lot 81". Are
10 there any objections to that? Is that correct as suggested in the objections that
11 have been filed to correct that clerical error? Anybody know?

12

13 **COMMITTEE MEMBER AHEARN:** It looked to me like it required
14 being corrected. Someone raised it. Was it in your brief?

15

16 **MR. MURPHY:** We object to it. Ms. Martin showed it as a clerical
17 error. We just objected to it because it didn't make sense with the explanation.
18 But, I think the way you just phrased as what was intended by Judge Lucas.

19

20 **CHAIRWOMAN STAUTZ:** Okay.

21

22 **MR. KUCHMAY:** Was it just referencing the wrong lot number?

23

1 **CHAIRWOMAN STAUTZ:** Yes.

2

3 **COMMITTEE MEMBER AHEARN:** The loss of sequence— — —

4

5 **MR. MURPHY:** Lot 71 instead of a back lot being first.

6

7 **MR. KUCHMAY:** We had obviously included portions of the plat into
8 the record, and that was even incorporated into the Judge's decision. So, I
9 would, obviously with the numbers, stand by whatever the plat says.

10

11 **CHAIRWOMAN STAUTZ:** Okay. So, I would like to note that, you
12 know, that if we move forward with that that we would note that correction, the
13 clerical error on page 29. I just didn't want to lose that, because I would like to
14 make sure we have as accurate of a record before us.

15

16 **COMMITTEE MEMBER HABEEB:** There is another clerical error
17 that's probably just to make sure. There are several typos, but I don't think any
18 of them are substantive, and you can pretty much figure out what happened. But,
19 on page three, Paragraph 11, there are references to two different legal mean sea
20 levels. I would suggest that whichever is the most accurate, whether it's 956.21
21 or 965.21, that we please make a correction to the correct— — because that may
22 become important at some point in the future, at some point down the road.

23

1 **CHAIRWOMAN STAUTZ:** Yes.

2

3 **COMMITTEE MEMBER HABEEB:** I don't think the other typos are
4 substantive, but that one may be at some point.

5

6 **CHAIRWOMAN STAUTZ:** I don't know if anybody has the---

7

8 **COMMITTEE MEMBER HABEEB:** Does anybody know what the
9 correct legal mean sea level of the lake is? 956 or 965?

10

11 **ADMINISTRATIVE LAW JUDGE LUCAS:** The parties stipulated to
12 that. Provided that that's my error, I will make sure to correct it.

13

14 **COMMITTEE MEMBER HABEEB:** Whichever it is, I want-- it
15 should be corrected.

16

17 **COMMITTEE MEMBER AHEARN:** Right. And, we can order it
18 modified.

19

20 **CHAIRWOMAN STAUTZ:** Modified to reflect the correct order.

21

22 **COMMITTEE MEMBER HABEEB:** Yeah. Exactly, whichever it is.

23

1 **CHAIRWOMAN STAUTZ:** Okay.

2

3 **COMMITTEE MEMBER HABEEB:** Just so that's clear.

4

5 **CHAIRWOMAN STAUTZ:** All right. So, back to the conversation.

6

7 **COMMITTEE MEMBER HABEEB:** So, we have a motion, but we
8 don't have a seconded.

9

10 **CHAIRWOMAN STAUTZ:** No. We don't have a motion yet.

11

12 **COMMITTEE MEMBER AHEARN:** We have a concept that we can
13 work on.

14

15 **COMMITTEE MEMBER HABEEB:** We have a concept, but we don't
16 have a motion.

17

18 **COMMITTEE MEMBER WRIGHT:** Mark, will you repeat your
19 motion? My hearing aid went out.

20

21 **COMMITTEE MEMBER AHEARN:** I'm sorry. The motion would be
22 we adopt Judge Lucas's nonfinal order as a final order making the corrections
23 that we referenced here and striking Paragraphs 5 and 6 in the order with respect

1 to the different— with respect to what they say, but it's the different groups—
2 different landowners being able to aggregate their six-foot rights. And, I do that
3 based on the idea that I think that's not ripe for us yet. That's a potential
4 consequence someday, but it's not a consequence that's before us today. So, if
5 you like, I can offer that as a motion, and then we can discuss?

6

7 **COMMITTEE MEMBER WRIGHT:** Before we seconded that, what
8 would we be losing by letting the adverse possession play out? I mean,
9 everybody has made all these investments in this property and it seems to me—
10 and I very much respect what Judge Lucas has done and has done a tremendous
11 job in doing it—but it seems to me all these people have made their investments
12 in these properties and at least, on its face, it would appear that they all acted
13 under some common belief until most recently. What would be the loss in this
14 process by allowing the adverse possession to play out? If it did, then we would
15 know who had the riparian rights and who didn't, and it would be, you know,
16 very simple for probably for the people to agree or for us to rule. I mean, if we
17 change this right now, I guess they are going to go in there and make changes?

18

19 **COMMITTEE MEMBER HABEEB:** Well, I would say that that's not
20 before us now, because there is no motion for stay. If one of the parties wanted
21 to have that happen they could have pled it; and they didn't. So, I think we need
22 to move forward. That's my position.

23

1 **CHAIRWOMAN STAUTZ:** Yes. We don't have that before us.

2

3 **COMMITTEE MEMBER HABEEB:** It's not before us. I don't think
4 it's before us to rule, so I don't think we can. That would have been the party's
5 right to have done that, and they didn't.

6

7 **CHAIRWOMAN STAUTZ:** Because they brought a matter before us
8 from a procedural standpoint.

9

10 **COMMITTEE MEMBER HABEEB:** It's here for adjudication, so I
11 would suggest we move forward.

12

13 **COMMITTEE MEMBER GRANT:** So, is that a motion?

14

15 **COMMITTEE MEMBER AHEARN:** I don't necessarily-- Yes, it is.
16 I'm not sure that I agree with your analysis, Bob. I have to think about why that
17 is, but I don't necessarily know that respect to the adverse possession-- --

18

19 **COMMITTEE MEMBER WRIGHT:** If ownership was-- if
20 ownership was determined, than riparian rights would also be determined, would
21 they not?

22

23 **COMMITTEE MEMBER HABEEB:** We don't know.

1 **COMMITTEE MEMBER AHEARN:** Yeah. I'm not sure we can make
2 that determination.

3

4 **COMMITTEE MEMBER WRIGHT:** No, I-- --

5

6 **COMMITTEE MEMBER AHEARN:** I think we can work backwards
7 where we say we think the riparian rights are, and then have the court-- --

8

9 **CHAIRWOMAN STAUTZ:** To determine whether or not subsequent
10 actions have evolved.

11

12 **COMMITTEE MEMBER AHEARN:** And, in the interest of judicial
13 economy that this is going to court, maybe that ought to be bundled up together
14 or something.

15

16 **COMMITTEE MEMBER HABEEB:** But it's not before us now.

17

18 **COMMITTEE MEMBER AHEARN:** I agree.

19

20 **CHAIRWOMAN STAUTZ:** So, what we have before us, and we
21 haven't officially-- -- and maybe you've put that in a form of a motion, and we do
22 not have a seconded.

23

1 **COMMITTEE MEMBER AHEARN:** Okay. So, it's just out there. So,
2 I will put that in the form of a motion.

3

4 **CHAIRWOMAN STAUTZ:** It has been moved that we amend the
5 nonfinal order by striking Paragraphs 5 and 6 as a motion to move forward with
6 the clerical errors corrected.

7

8 **COMMITTEE MEMBER GRANT:** Second.

9

10 **CHAIRWOMAN STAUTZ:** Great. Thank you. It has been moved and
11 seconded. Any further discussion with regard to the matter before us?

12

13 **COURT REPORTER:** Chairwoman Stautz, who seconded the motion?

14

15 **CHAIRWOMAN STAUTZ:** Mr. Grant. Why I am pausing is whether
16 or not there are any other modifications needed to the findings of fact, but I don't
17 believe there are by striking Paragraphs 5 and 6. That's why I was just glancing
18 back to make sure that it is consistent.

19

20 **COMMITTEE MEMBER AHEARN:** My question would be, and what
21 I don't know, while we're discussing are there any other findings that are--

22 from which five and six grew?

23

1 **CHAIRWOMAN STAUTZ:** Exactly.

2

3 **COMMITTEE MEMBER AHEARN:** We could then modify—and we
4 would need a second—the motion to then modify the findings— --

5

6 **CHAIRWOMAN STAUTZ:** The findings to reflect-- --

7

8 **COMMITTEE MEMBER AHEARN:** -- --consistent with striking
9 five and six. I don't know if those exist or not. I mean, we would have to read it
10 again. I hadn't planned on making a motion [word inaudible].

11

12 **CHAIRWOMAN STAUTZ:** Do you want to amend the motion or do we
13 need to vote on the motion that was before us and then you would put another
14 one before us.

15

16 **COMMITTEE MEMBER AHEARN:** I am offering an amendment to
17 my-- unless someone wants to offer an amendment to the motion that has been
18 offered and seconded, it says “and then we instruct Judge Lucas to modify the
19 findings consistent with having-- striking five and six. Does that make sense?

20

21 **CHAIRWOMAN STAUTZ:** Yes.

22

23 **COMMITTEE MEMBER HABEEB:** To the extent necessary.

1 **COMMITTEE MEMBER AHEARN:** To the extent necessary.

2

3 **COMMITTEE MEMBER HABEEB:** To the extent necessary.

4

5 **COMMITTEE MEMBER AHEARN:** So, can you read that back to us?

6 No.

7

8 **CHAIRWOMAN STAUTZ:** Okay. So, we have an amendment to the
9 motion before us. Is there a second for that amended motion? Mr. Grant?

10

11 **COMMITTEE MEMBER GRANT:** Yes.

12

13 **COMMITTEE MEMBER AHEARN:** I'm sorry. So, now the motion
14 says—which we haven't voted on—adopt Judge Lucas's findings and
15 conclusions and order as final with the following exceptions: technical
16 corrections that we described going through; strike Paragraphs 5 and 6; and
17 modify any findings inside the order that are inconsistent with striking five and
18 six. Does that make sense?

19

20 **CHAIRWOMAN STAUTZ:** Correct. Okay. So, we have a motion
21 before us. Any additional discussion? We have a motion on the table. If not, the
22 Chair will call for a vote on that. All of those in favor moving forward with the

1 motion before us to approve the findings of fact, and nonfinal order, as amended,
2 signify by saying “Aye”.

3

4 **COMMITTEE MEMBER AHEARN:** Aye.

5

6 **COMMITTEE MEMBER GRANT:** Aye.

7

8 **COMMITTEE MEMBER WRIGHT:** Aye.

9

10 **COMMITTEE MEMBER HABEEB:** Aye.

11

12 **CHAIRWOMAN STAUTZ:** Opposed? Motion carries. Thank you.

13 And, thank you Counselors for a challenging situation.

14

15 **[END OF TRANSCRIPT]**

CERTIFICATION

THE FOREGOING TRANSCRIPT OF ORAL ARGUMENT BEFORE THE AOPA COMMITTEE OF THE NATURAL RESOURCES COMMISSION, IN THE MATTER OF *SPAW, ET AL. v. ASHLEY, ET AL., AND DNR*, ADMINISTRATIVE CAUSE NUMBER 09-070W, HAS BEEN TYPED AS ACCURATELY AS POSSIBLE CONSIDERING THE QUALITY OF THE RECORDING AND SIMILARITY OF VOICES.

Dated: August 17, 2010

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