**AOPA COMMITTEE**
**OF THE**
**NATURAL RESOURCES COMMISSION**
**December 7, 2012 Meeting Minutes**

## MEMBERS PRESENT

Jane Ann Stautz, Chair
Doug Grant
R.T. Green

## NATURAL RESOURCES COMMISSION STAFF PRESENT

Sandra Jensen
Jennifer Kane
Stephen Lucas

## DEPARMENT OF NATURAL RESOURCES STAFF PRESENT

| | |
|---|---|
| Ron McAhron | Executive Office |
| Cameron Clark | Executive Office |
| Eric Wyndham | Legal |
| Jim Hebenstreit | Division of Water |
| Alysson Oliger | Division of Water |

## GUESTS PRESENT

| | |
|---|---|
| Carl Mosser | Deb Parkison |
| Sam Parkison | Lloyd Bickel |
| Margaret Mosser | Michael Ashley |
| Lana Ashley | Tom Niezer |
| Pat Murphy | Jason Kuchmay |
| Karen Ybarra | Steve Ybarra |
| David Jennings | |

## Call to order and introductions

Jane Ann Stautz called the meeting to order at 9:18 a.m., EST on December 7, 2012 in the Lawrence Room of The Garrison, Fort Harrison State Park, 6002 North Post Road, Indianapolis, Indiana. With the presence of three members, the Chair observed a quorum. The AOPA Committee members introduced themselves.

## Consideration and approval of minutes for meeting held on May 15, 2012

Doug Grant moved to approve the minutes of the meeting held on May 15, 2012 as presented. R.T. Green seconded the motion. Upon a voice vote, the motion carried.

**Consideration of "Findings of Fact and Conclusions of Law with Nonfinal Order along with Order Denying Petitioners' Motion for Stay of Effectiveness" in the Matters of:**

**A. *Skilbred, et al. v. Spaw, et al.*, Administrative Cause No. 11-160W;**
**B. *Skilbred, et al. v. Lorntz, et al.*, Administrative Cause No. 11-161W; and**
**C. *Skilbred, et al. v. Macklin, et al.*, Administrative Cause No. 11-162W**

The Chair noted that, on agreement of all parties, oral argument would be heard on Item 3 (*Skilbred, et al. v. Spaw, et al.* (Administrative Cause No. 11-160W), *Skilbred, et al. v. Lorntz, et al.* (Administrative Cause No. 11-161W), *Skilbred, et al. v. Macklin, et al.* (Administrative Cause No. 11-162W)), and Item 4 (*Skilbred, et al. v. Ward, et al.* (Administrative Cause No. 12-014W)) simultaneously. The Chair then asked Administrative Law Judge Sandra Jensen to provide brief background of the cases and discussion of the order of presentation.

Sandra Jensen explained that in regards to *Skilbred, et al. v. Spaw* and *Skilbred, et al. v. Lorntz* there is at least one Respondent represented by Counsel, Jason Kuchmay, and Kuchmay represents both Respondents in *Skilbred, et al. v. Ward*. The Petitioners in all cases are represented by Patrick Murphy and Thomas Niezer. Jensen noted that the Respondents in the matter of *Skilbred, et al. v. Macklin* are not represented by counsel; however, there are two applicants, Steve Ybarra and David Jennings, present "who may or may not have additions Mr. Kuchmay's arguments but they would probably be—according to what I understand—relatively minor". Counsel of record for the Department of Natural Resources is Eric Wyndham. "As I understand it, Cameron Clark, who is General Counsel for the Department, will be here momentarily and does intend to present some argument for the Department".

Eric Wyndham stated, "I originally was not supposed to be here today. I was supposed to be in North Judson for a prehearing conference, but it was continued first of the week. So, Mr. McAhron and Chief Counsel are going to present the position for the DNR".

Thomas Niezer, Barrett & McNagny, Fort Wayne, Indiana, said that he and Patrick Murphy represent the Petitioners. Niezer provided, for illustrative purposes, enlargements of exhibits admitted into evidence during the administrative hearing process. "The last time we were in front of this Committee was to review Judge Lucas's order a couple of years ago, the original order". He said this order "established the present day validity of the Hartzell boat landing easements created in 1923, but valid yet today pursuant to the ruling." The ruling identified the boat landing easements as being six feet wide for each lot in each block of Long Lake Park running north to south. "Judge Lucas also found that the boat landing easements created for the benefit of each lot owner in each block existed upon the lakeshore of each block consistent with the clear and concise language of the 1923 covenants. That lakeshore has always been known as the Indian Trail." Referring to an enlargement of the original 1923 plat for Long Lake Park, Niezer pointed out that when Hartzell, "laid the plat out, [he] set aside a swath of land known and marked on the plat as the 'Indian Trail.'" Judge Lucas determined that the boat landing easements were appurtenant to each individual lot that benefitted from its own 6-foot wide easement. "This part of Judge Lucas's decision has never been appealed. It has never been challenged by the Petitioners, the Respondents, or by the DNR itself. That decision is the law of the land with respect to Long Lake Park." Where the Petitioners took issue with Judge Lucas's

ruling was his determination that the appurtenant easements, the 6-foot wide easements, could be combined, aggregated. "It was this Committee that, in reviewing Judge Lucas's decision, struck that portion of his decision."

Niezer said, "Today, we now focus on two rulings by ALJ Jensen that go directly to the heart of whether these boat landing easements created by Lee Hartzell over, across, and upon Indian Trail can be combined. That's the issue; thereby, allowing the riparian rights, the flow from these lakeshore-based easements to be combined as well." He said it is the Petitioners' contention that Judge Jensen misapplied rules of the Lakes Preservation Act to well-established common law principles in Indiana that govern easements appurtenant over land. "We must first look at the land, mainly the lakeshore, which is the Indian Trail of Long Lake Park, and how those easements are affected before the riparian rights over and across Big Long Lake can be established and adjudicated. We believe that middle step has been missed in a clear reading of the two rulings in front of you today."

Niezer said the Petitioners offer one "simple premise. The riparian rights sought by the Respondents are based solely on the establishment of boat landing easements six feet in width over and across the Indian Trail, the lakeshore. The Indian Trail is land. It is not water. The Indian Trail is not part of the waters of Big Long Lake as determined by your DNR in establishing the mean water level of the lake." Niezer said Indian Trail is the same land that Judge Jensen acknowledges in her decisions the lot owners have rights to walk upon. "Indian Trail, the lakeshore, is governed by Indiana common law and not by the Lakes Preservation Act. The Petitioners are simply at a loss to understand how riparian right upon Big Long Lake can be combined if the land-based easements from which these very riparian rights flow and are established; they cannot be combined pursuant to well-established Indiana common law. Nowhere in any of the decisions in front of you today is there any analysis on this basic fundamental point, which has been raised by the Petitioners. That is the issue, which is at the core of the Petitioners' objections brought to you today".

Niezer said that Judge Jensen in her rulings (Administrative Cause Numbers 11-160W, 11-161W, and 11-162W) found in Finding 47 that the Petitioners are not aggrieved or adversely affected parties as they are not owners of the servient estate over, across, and upon the Indian Trail. "But please review Finding 50, which rules that all lot owners within Long Lake Park are co-tenants of the dominant estate in the Indian Trail." He said the findings are classifying Indian Trail first as the servient estate, and then as the dominant estate. "If the Petitioners are not aggrieved parties, then we merely ask a simple question, and that is, how can the Respondents then claim any rights from the same Hartzell-based easements if we are not aggrieved under these same easements themselves?"

Niezer stated that the Petitioners also believe that Finding 48 is incorrect. "Application of Indiana common law was not and has not been abrogated by the Lakes Preservation Act as to the boat landing easements consisting over, across, and upon the Indian Trail. An analysis must first be made of Indiana common law as to these land-based easements, which are appurtenant to the lots that benefit from them before an analysis can be made of the riparian rights, which Judge Jensen has singularly focused on."

Niezer stated that Finding 49 is incorrect. He said Indiana common law does apply to the analysis of whether the Respondents may combine appurtenant easements. The riparian rights that are authorized by the permits at issue flow solely from the six-foot wide boat landing easements originally created upon the Indian Trail by Lee Hartzell. "They do not flow from the general licensing provisions of state law. They flow solely from a series of covenants created in 1923 by a land developer. Overlooking such a fundamental principle we believe can only be explained by a lack of understanding of how the riparian rights at issue were created, or worse, just an overt attempt to justify the means to the ends in reaching the decisions in front of us today. But, either way, it's incorrect."

Niezer stated that Finding 52 is "patently incorrect. It states that the Petitioners, who are not owners of the real property associated with the Indian Trail, but evidently co-tenants pursuant to Finding 50, and who do not possess riparian rights associated with Indian Trail have not had their property rights violated. If nobody has riparian rights associated with the Indian Trail, how can the permits have been issued in the first place? This finding is completely incorrect and inconsistent with Judge Lucas's prior decision". He said the riparian rights at issue in these proceedings can only be associated with the Indian Trail, because Hartzell created the 6-foot wide boat landing easements over the Indian Trail. Niezer stated that Lee Hartzell did not have the authority in 1923 to create easements over the water of Big Long Lake, because "it is well-founded basic Real Estate 101 law that a property owner cannot grant an easement over land that he does not own. Lee Hartzell did not own Big Long Lake in 1923, nor do any of the property owners own it today. It is governed by the State of Indiana. What Lee Hartzell did own was this piece of land known as the 'Indian Trail', and it is only upon that Indian Trail in which these easements could have been created."

Niezer noted that the Petitioners believe the same deficiencies are also found in the other decisions. "Even Judge Jensen, in her rulings, does not counter Indiana common law on this point, and in fact, agrees with the Petitioners that the law recited is correct. Rather the rulings just summarily sweeps away the common law analysis in favor of the Lakes Preservation Act. One only needs to look at a present-day drawing of Blocks 7 and 8 to realize why this ruling is inconsistent with today what Lee Hartzell intended." Hartzell intended for equal access to the lake through a series of 6-foot wide boat landing easements, but "as those boat landing easements are combined upon the lakeshore, the Indian Trail, look at the result upon Big Long Lake. The Petitioners, who are in the middle of each block are summarily squeezed between the piers at both the north end and the south of end of the block from the Respondents permits resulting in untenable situations from which they cannot enjoy and have the same level of enjoyment of the lake. And, clearly, they cannot enjoy the lake on an individual basis." Niezer said Hartzell intended everyone to have individual property rights onto the lake. "He did not intend nor did the 1923 covenants intend to have these shared-type boat landing easements that are now in front of us. … If anyone needs further proof of how damaging the decisions are, you only need look at Block 6 where there is no longer any Indian Trail in front of Lot 57. The Hartzell mandate cannot be implemented. And, if it cannot be implemented and Judge Jensen's decisions are not modified, then the property owners, all of the property owners within Block 6 will no longer be able to have the same access rights to the lake as contemplated by Lee Hartzell in 1923, when, in fact, Indian Trail did exist then."

Niezer said the boating landing easements under Judge Jensen's decisions appear to be "on some mythical razor-thin line separating the lakeshore from the waters of Big Long Lake." He noted that the 1923 covenants use the term "lakeshore" not "shoreline." He said that it is the lakeshore upon which the boat landing easements are created. Niezer reiterated that it must first be determined as to how Indiana common law treats these boat landing easements, but noted that this analysis has not been done.

Niezer stated that the Petitioners request the AOPA Committee to: (1) "Go back to your initial determination, which struck Judge Lucas's finding that the appurtenant boat landing easements can be combined, and then reform, modify Judge Jensen's decisions by establishing that the riparian rights sought by the permits flow from and exist only due to the boat landing easements created by Lee Hartzell created over the Indian Trail." (2) Find that the boat landing easements upon the Indian Trail are appurtenant to each individual lot that they serve in each block consistent with Judge Lucas's initial decision. (3) Find that the boat landing easements upon the Indian Trail are governed by Indiana common law as to the issue of combining those easements those easements and not the Lakes Preservation Act. (4) Find that Indiana common law does not allow the combining of boat landing easements over the Indian Trail without the consent of all property owners within the block where the combination is sought. (5) Find that the combination of riparian rights, which flow from the boat landing easements, cannot be combined unless and until the boat landing easements over the Indian Trail are first combined pursuant to Indiana common law." (6) Find that the permit should be revoked and rescinded until the Department makes a determination that all lot owners within Block 7 and 8, where the permits have been issued, consent to the combination of boat landing easements over the Indian Trail in those respective blocks.

Niezer stated, "I understand that what we are asking of you requires 100% consent within these two blocks. And, yet…if you look at the rest of Long Lake Park, that's exactly what has happened. In each and every other block that is not being horseshoed into the strictures of the 1923 covenants, the property owners, all of the lot owners collectively, in each and every block have agreed upon their use of the lake using, by and large, individual piers stretching across the entirety of the shoreline. That's what happens when 100% consent of the property owners work together. And that's what Lee Hartzell intended in 1923 that everybody work together, be treated equally in using the boat landing easements across this lakeshore known as the Indian Trail."

Judge Jensen commented to briefly clarify statements made by the Petitioners regarding Indian Trail. "There was some argument about the nonexistence of the Indian Trail in certain locations. That was not in evidence in any of these four proceedings."

The Chair said, "As my reading of it was, the Indian Trail still existed, and you could traverse or use it."

Judge Jensen said, "It just simply was not evidence, and everything that related to that was based upon Judge Lucas's previous order."

Niezer stated, "We agree, Commissioner Stautz. I believe I stated for the record that it has been subsequent to Judge Lucas's determination that that surveying has disclosed that there is no Indian Trail. In fact, that matter is now pending."

Jason Kuchmay noted, "This matter is Blocks 7 and 8 only. Block six is not at issue here. It's completely irrelevant. There is no evidence."

Patrick Murphy continued on behalf of the Petitioners with respect to the navigability issues and how the *Ward* ruling was made especially on summary judgment. "We have a situation where we filed a Motion for Summary Judgment. We presented evidence and affidavits and exhibits. The other side didn't file a response, didn't put forth any exhibits, and didn't put forth any evidence. And, not only did we lose on summary judgment on that pier, but summary judgment was granted to the Respondents when they didn't even file for a motion. Also, as you can tell this is an illustrative exhibit looking at [Block] 7 and 8. What you've got cramming all of the piers into one small area leaving the open shoreline for no good reason. The results of these orders just don't make any sense when the other blocks use the entire shoreline including the areas in front of the private drives. Clearly, without going through it…this creates all kinds of navigability issues for no reason when these piers could be spaced out, moved out, and have more room. We are violating even the tenets of [Information Bulletin] #56 for no reason when every other block has used the entire shoreline. So, I know we don't have much time. I don't want you to think that we are waving any of those issues."

The Chair then recognized Jason Kuchmay, Counsel representing Ensley, the Wards, Spaws, and the Lorntzes.

Jason Kuchmay provided AOPA Committee members a binder containing documents admitted during the evidentiary proceeding containing Tabs A through F.

Kuchmay noted that Block 6 is not at issue in these proceedings and is not among the evidence, "as well as the comments about agreements in other blocks. What is at issue here are Blocks 7 and 8, nothing more and nothing less." He said that there have been trials and arguments before this Committee, and rulings and appeals. "The parties' property rights have been defined. They have been defined in Blocks 7 and 8 for the purposes of this proceeding. Anything in the other blocks is completely irrelevant." Kuchmay said that his clients, once the property rights were confirmed, applied for pier permits consistent with those rights. He said the lake view owners objected, but the permits were granted over their objections.

Kuchmay said it was very important to have an understanding of the property rights. Referring to Tab A, he said it has been determined that "nobody in Long Lake Park—when I say that I'm limiting that to Blocks 7 and 8—owns title to the water's edge. All they have are platted lots; that's what they bought. Those platted lots are separated from the water by a strip of land called 'Indian Trail'…. None of these people own property to the water's edge. They don't have riparian rights simply by owning that lot." Everyone in Long Lake Park has the right to walk upon and to use Indian Trail. Long Lake Park is divided into blocks, and the blocks are separated from one another by drives. Kuchmay noted there are recorded restrictions, and those restrictions are "what give each owner of a lot a six-foot boat landing easement at the shoreline.

Those easements on the shoreline, it says right in the restrictions, they start at the north end of the block and they go from north to south. You just tick them off six feet. So, when they say 'well we can spread them out.' No, you can't. The restrictions tell you where they are. You bought what you bought…. They do not span the entire block and there are no boat landing easements at the end of the drives. Again, this has been litigated and has been decided. This is what we have to work with. The easements are concentrated as a result of the six feet, north to south, at the northern half of the blocks…. So, we cannot, in the confines of what has been decided in this case, spread out and use that."

Kuchmay said if a person owns one lot that person has a six-foot easement, and if a person owns two lots, that person has a 12-foot easement. "Now, if you've got a three-foot pier and an 8-foot boat, a 6-foot easement doesn't do you a whole lot of good. It's insufficient space, but that's what people bought." Judge Lucas initially ruled that the different lot owners could combine their riparian zones and install a shared pier inside that larger zone. "Now, this committee struck that language from the initial order. We can't gloss over that. Why was that struck? That was struck, if you look at the transcript…not because Judge Lucas was wrong in saying people could do that. It wasn't ripe. It wasn't properly before Judge Lucas. The AOPA Committee determined that was a licensing issue. Well, here we are, on a licensing issue. The fact that it was struck is completely irrelevant."

Kuchmay said that earlier this year the Department's Division of Water forwarded a letter to every lot owner within Long Lake Park, which stated that the six-foot riparian zones could be combined. "That's what my clients did. We cooperated. We got together with our neighbors, we agreed to share a pier, and we made use of our combined riparian zones…. My clients also left some buffer space of open water on both sides of their riparian zones to allow for safe navigation in the event in the future other piers are going to be placed in the water nearby them."

Kuchmay said he could not respond point by point to the all the objections in the limited time. The Petitioners' objections frequently state a "general disagreement with Judge Jensen's ruling, but they give you nothing to work with, and that's, frankly, insufficient to have those findings overturned." The Petitioners' objections to particular findings are not supported by contrary evidence. "They just make a statement, and that's insufficient." Judge Jensen heard a lot of evidence and put a lot of time into these decisions. "She has been involved with these parties and this dispute for years. Her rulings were thoughtful and the rulings were proper."

Kuchmay said the Petitioners' objection in the case involving the Wards and Ms. Ensley can be summarized into three complaints: that summary judgment should not have been granted because no written response was filed; they object to the combining of the riparian zones; and they object to the characterization of the servient estate being the shoreline as opposed to covering the entire Indian Trail. He noted that the last two objections were also raised in the case involving the Spaws and Lorntzes.

Kuchmay explained that the Wards and Ms. Ensley were not represented by counsel when the Motion for Summary Judgment was filed. Kuchmay was hired just before oral argument on those motions. He did participate in oral argument, and "there is no denying that a written response was not filed; however, it does not affect propriety of Judge Jensen's ruling."

Kuchmay said, "If you look at the evidence that was designated, we already had Judge Lucas's decision. That was designated as evidence. The pier permit was already designated as evidence." The issues such as the existence and the combining of the riparian zones, are legal issues, which can properly be decided on summary judgment. The factual issues such as safety and navigation were reserved for trial. "Notably, the Petitioners refused to appear for trial. They didn't show up. Mr. Ward appeared, and he testified. We presented testimony from five different DNR employees…, and the uncontradicted testimony at that trial confirms the propriety of the permit and it supports Judge Jensen's decision."

Kuchmay said that Judge Jensen followed the applicable summary judgment standards when ruling on the summary judge motion in the case involving the Wards and Ms. Ensley. The facts "have to be construed in favor of the Wards and Ms. Ensley as the non-movant. Indiana law is clear, if the Petitioners do not meet their initial burden on summary judgment, the burden never shifts to the Wards and Ms. Ensley to respond." Trial Rule 56 provides that once a party moves for summary judgment, the court can grant summary judgment for any other party on the issues raised even if they do not file a motion for summary judgment. "That is what has happened here. There was nothing wrong with Judge Jensen entering summary judgment in favor of my clients on certain issues."

Kuchmay said the Petitioners object to the characterization of the servient estate being the two-dimensional strip, the shoreline. "Literally we are talking about that point where the edge of the land meets the beginning of the water. That is where the easement is." The Petitioners argue that Judge Lucas held the easement spans the entire Indian Trail, and that Judge Jensen's ruling is inconsistent, "but that is just flat wrong." He said that Paragraph 1 of Judge Lucas's Order, included under Tab B in the exhibit, "does not say that the servient estate spans the entire Indian Trail. It says that each lot owner in Block 6, Block 7, and Block 8 has a geographic unique easement on the shoreline or the water line of Big Long Lake that is six feet wide. Those words are straight forward and those words speak for themselves. That decision is final. It has been appealed, and it cannot be challenged. Judge Lucas held that it is on the shoreline. It does not span the entire Indian Trail, and Judge Jensen's ruling was 100% consistent with that ruling as well as the language of the restrictions."

Kuchmay addressed the Petitioners' objections with respect to the joining of riparian zones. He noted the Petitioners arguement that an appurtenant easement can only be used for the benefit of the specific lot to which it is appurtenant and to no other lot. "That's frankly wrong, and an over simplification, and it completely ignores the Lakes Preservation Act, which modifies common law." Kuchmay said that 312 IAC 11-3-4 makes it clear that the DNR can condition licensure on common use and maintenance of a structure by neighboring riparian owners. "In fact, if the owners refused to engage in a process of common usage they can be denied their license. And, that is all that has taken place here." The Department notified every lot owner in Long Lake Park that an option for pier placement would be for "multiple owners to apply for a permit as a group for a shared pier across several easements. That's all we've done…. Now, ignoring that, [the Petitioners] are trying to focus on the common law for easements, and they argue that you cannot unilaterally increase the burden on the servient estate by allowing other lands to use it." A pier would be installed in the water, not on the land. "The only activity on the land that is taking place is walking to the pier. People have a right to walk across Indian Trail regardless of

the boat landing easement. That's not what gives them that right…. There is no additional burden." The easement is not located across Indian Trail, but is on the shoreline, the line where the water meets the land. "Honestly, where is the burden? And, we are not inviting 100 strangers to be parties of this pier application. These are neighboring riparian owners, and the easements are being used by those riparian owners for the exact purpose of the easement. There is no overburden. And, even if there were, Judge Jensen very clearly noted in her ruling that that could be easily overcome by simply constructing a walkway parallel to the shoreline for the full width of the combined easements. If you do that, she says, the burden is going to be the same for each easement, not overburdening one. She recognizes the absurdity of that result…. She also correctly noted, again, the Petitioners, they are not the owners of the servient estate. They don't own it so they can't be the ones to come in here and complain about any burden on that property."

Kuchmay addressed the objections with respect to safety and navigation. He noted that the Petitioners did not appear for trial in the Wards/Ensley trial, "presumably that's why they didn't focus too much on the safety and navigation issues in their objections." Referring to Tab D of the exhibit, a drawing of the Ward/Ensley approved pier, Kuchmay described the pier as a "straight pier with a pontoon boat on either end. That's it." He noted the buffer zone on each side and said the testimony at trial was "consistent and confirmed the obvious. You can go straight in and go straight out without interfering with the neighboring riparian owner." A diagram of the Spaw pier, under Tab E, shows the pier as being straight with "wings on one side. On the straight side the testimony at trial was that "well maybe a rowboat or a jet ski could be moored there. If you look at it, you've got eight feet of space plus a 10-foot buffer zone. There is more than enough room for a rowboat or a jet ski. On the wing side, you can see that those wings are facing open water. That open water is in front one of those drives…there are no boat landings easements in front of the drive. There can be no pier where that open water is". Kuchmay said the testimony at trial "supports the conclusion that there are no safety issues there. There's just wide open water. The drives are roughly 50 feet, so that is more than enough room for a boat to pull in and pull out safely."

Kuchmay said the diagram of the Lorntz pier, which is similar to the Ward/Ensley pier, is located under Tab F of the exhibit. The Lorntz pier is straight with "a boat on each end. In addition, you'll see on the north side you have twelve feet of space and then you have wide open water. Again, that wide open water is in front of a drive. So, you can have a boat going straight in and straight out very safely, and that was what the testimony at the trial was. On the south side, you've the ten-foot boatlift. You can have the boat park straight in and straight out, and you've got the five-foot setback here and five on the other side. You can do that without ever entering the buffer zone, yet the buffer zone is there anyways to enhance the safety". He said the testimony received at hearing confirmed that there were no safety issues with the pier configuration. Kuchmay said testimony was also given that the pier configuration would allow for the safe mooring of small watercraft landward.

Kuchmay said that most of the objections and arguments at the hearing were that the permits do not contain a restriction of the size of the boats that can be moored. He said the Petitioners "speculated about all kinds of crazy things that may happen in the future, but that ignores the conditions on every permit that the boats moored to the pier have to be entirely within their

zones and not encroach on the buffer zone. It ignores testimony at trial about the size of the watercraft that is going to be used, and frankly, those are use and enforcement issues. It has nothing to do with the propriety of the pier. We have conservation officers that enforce that."

Kuchmay stated that there are only two ways to acquire ownership in property—through a deed or adverse possession. He said the Long Lake Park lot owners do not have a deed giving them ownership of Indian Trail or the shoreline. Kuchmay noted that the Petitioners filed a separate lawsuit seeking adverse possession of the Indian Trail, but the Court of Appeals "made it clear that [the Petitioners] don't have ownership and it was never decided that anyone had ownership as co-tenants. They have an easement to use the trail. It was just an acknowledgment that they have the right, just like everyone else does, to use the trail". Kuchmay concluded, "All the owners here have practical limitations. We bought what we bought. Nobody owns to the water's edge, and each lot has a six-foot easement. As much as they would like to spread out and use everything, you can't create a property right where one doesn't exist. Nobody has that authority. Everyone needs to get together and cooperate and combine their zones, and that is the case for everybody, including the Petitioners. It's unfortunate that they are arguing against themselves on that issue, but that's what's happening. My clients just want to exercise their rights that they bought and that they fought very hard for over these years. And, that's all Judge Jensen's ruling does, and should be affirmed."

The Chair recognized Steve Ybarra and Dave Jennings.

Steve Ybarra said, "Basically, we agree with everything that Mr. Kuchmay said on all points. We have followed all the protocol that was set forward to us. We worked with the DNR; we applied for our permits. We did everything that was required of us. We went to court. We did not violate any safety violations. There are no safety concerns or navigable concerns. Our pier goes straight out to the water with access to the north to open water."

The Chair then recognized Department of Natural Resources staff.

Ron McAhron, Deputy Director for the Bureau of Water and Resource Regulation, said the Department is seeking guidance of how to administer the permitting program for the "entirety of this subdivision. We didn't believe that everyone could gain access to the lake with the 6-foot easements…We sent a letter subsequently that said 'If everyone in the subdivision agrees to the use of the entire lakefront, we will issue a permit for the entire lakefront.' We have had some people attempt to partake of that and we actually issued a permit, but not at issue today, based on that premise". McAhron said the rulings at issue today clarified the prohibition of using the area in front of the drives. "The permit that we had approved had included the use of one of the drives, which we have since revoked that. My point is in this, we need to figure out from just an administrative standpoint whether we can provide access for everyone using the entirety of the lakefront. …Somebody must have interest in that common area, that trail, and so we then subsequently…I sent a letter out that said 'most of the piers that go in the State of Indiana, individual piers, go in under a general license. If you think, because I can't tell, you have adequate right, riparian right, put one in'…thinking that ultimately we would get here and get clarification on the underlying rights that people do have." McAhron then deferred to the Department's Chief Counsel, Cameron Clark.

The Chair then recognized Cameron Clark.

Cameron Clark stated that the Department is seeking guidance. "In my opinion, [Blocks] 7 and 8 are merely a microcosm of the entire regulatory issue we are faced with." He noted that are a number of appeals not before this Committee; however, "from our standpoint, we are hopeful that today's ruling may be dispositive of all those and give us the direction we need as a permitting authority to go forward". Clark said that the "rest and residue" of Hartzell's estate, the drives and Indian Trail in Long Lake Park, went to the Masonic Lodge located in Franklin, Indiana. The record does not reflect that there was a conveyance document, and there were no general or specific reference to any interest that Hartzell may have had remaining in the Long Lake Park plat. "In a typical plat, a developer will put in his declaration that at some point in time the common area gets turned over to an association that is formed by the owners…but that was not done. The record does reflect that the Masonic Lodge has disclaimed its interest."

Clark stated that the ownership of the Indian Trail needs to be determined. "In my view, from a permitting standpoint, we have to determine does somebody have riparian rights to put out a pier. We have, in my opinion, have determined that everybody in this subdivision has rights to the common area superior to anybody known to us. That, in our opinion, is sufficient to give them adequate riparian rights to make use of it. How they decide to make use of it is still up to them, but if that is not the case, if they do not have riparian rights then we really cannot allow piers to be placed anywhere other than within the Hartzell easements." Outside of Blocks 7 and 8, there are other blocks that have agreed to make use of the entire shoreline "essentially that we have allowed or looked the other way". He stated that the AOPA Committee has the authority to determine property rights, which has been established in law. "It would be great today if you gave some thought to who does have the superior interest in the common area and does that create a riparian right for the entirety of the ownership. "No one has the exclusive right or ownership of the common are other than their specific six-foot easements." Clark said the Department is struggling with how to administer the entire subdivision "when some people are allowed, if you will, to place piers where they may not have riparian rights. However you view that question, in my opinion, will go a long way from an administrative standpoint on how we deal with piers in the whole subdivision."

Grant asked, "When you say, 'put piers where they don't have any riparian rights,' are you talking again about the combining of riparian rights?"

Clark explained that his characterization was referring to placement of piers outside what has been described as the Hartzell easements.

R.T. Green asked, "Would I be correct in saying that there was no dedication or reversion back to a property ownership association, or anything like that?"

Clark answered that the record does not reflect evidence that an association was formed. "I may have gone outside the record in my discussion today, but the point is what do we do as an administrative agency?"

The Chair recognized Thomas Niezer to provide rebuttal.

Thomas Niezer said the Hartzell covenants for Long Lake Park entitle each lot owner to an easement on the lakeshore, six feet in width for a boat landing, which easement shall be in front of the block in which the lot is located. "It does not use the word 'shoreline'. It's the 'lakeshore'…What's a little ridiculous, after years of fighting about this, is to now believe that there is a mythical two-dimensional shoreline that is the boat landing easement upon which, in 1923, people were to pull their boats and land upon the Indian Trail. These easements were not on some very small stretch of land. The boat landing easements encompass the entirety of the Indian Trail. That's the clear language of the 1923 covenant when it uses the term 'lakeshore' and not 'shoreline'." Niezer said that it has not been adjudicated or "let alone does Lee Hartzell intend that the 1923 covenants are the only means by which a property owner can gain access to Big Long Lake." He stated that the Hartzell covenants do not foreclose the use of the general licensing laws of the State of Indiana, because the Hartzell easements only encompass approximately one-third of each block running from north to south. "The remaining southern portions of each block aren't encompassed by these easements. So what do we do with that portion of shoreline? I think that goes to the very heart of the question that Mr. Clark was just asking of you. It's silent; it's dead. And, yet, overtime the rest of Long Lake Park has done exactly what most homeowners will do, they will use as much shoreline as available to them, as much lakeshore. And, that's exactly what has happened. That's common sense application of what was intended in 1923." Niezer said that if Judge Jensen's ruling stand; that the boat landing easements and the riparian rights that flow from them can only be used right here and that the rest of the shoreline cannot be used. If that is your decision, then Mr. Clark is correct, there will be wide-ranging ramifications for the rest of the property owners in Long Lake Park…the likes of which I doubt the Department will have seen in a long time."

Niezer said that Judge Lucas's decision as to the boat landing easements clearly ruled that the easements are appurtenant and run with the land to which they are associated. "That is an important legal distinction. They run with the lot to which they are associated. And, for them to be modified, for them to be changed, for them to be combined, for them to be enlarged, requires the consent of all of the lot owners that are burdened by those easements on the servient estate."

The Chair recognized Jason Kuchmay to provide rebuttal.

Jason Kuchmay said, "In Mr. Niezer's first point, he was referring to the restrictions including the word 'lakeshore'. Judge Lucas has already ruled. It's the 'shoreline'. You cannot now argue well 'lakeshore' means something different. It has been ruled. It has been decided. We are stuck with that decision." Kuchmay said Niezer argued the Hartzell covenant restrictions are not the only means by which somebody can gain access to the lake and the restrictions do not foreclose the use of general license laws. "To put a pier in the water under a general license, you have to be a riparian owner or have permission from a riparian owner. You've got to have that right. [Niezer] has pointed to nothing that gives you that right. Again, ownership of property in Indiana, two ways: deed, adverse possession. That's it. There is no third category for 'I wish I owned it.'"

The Chair said, "Counselor Clark, this has been an ongoing matter. I know the Department has struggled with it from a licensing standpoint and permitting, and we have seen many matters before us here at the AOPA Committee on behalf of the Commission. Bound by what is in the deed, what has been stated, and the interpretation of the six-foot easement there, alternatives? Do you support the findings of the ALJ, which I believe the Department has?"

Clark answered, "The difficult position we've found ourselves in, particularly giving the…animosity that exists, appearing as if we are taking sides…. We are stewards of a particular natural resource. Is it better to use just the Hartzell easements for the placement of piers where clearly some people can't use them that may lessen the amount of piers and people have to combine? Or is it better to spread them out over the entire shoreline, which may result in more piers ultimately. That's an issue for perhaps our fish and wildlife people to say 'is this better for some of the weed beds and the wildlife that is there…. I don't want to necessarily side with one party or the other. We can live with whatever ruling you make. We are just sort of in a state of flux. I may have gone too far in creating a riparian right…. Are you creating a right where one doesn't exist? …[T]here is only one person with a known interest, and one group of people with a known interest in a portion of this common area. At some point there has to be a determination that somebody owns this." He said, "I don't know if I have a recommendation. That may be kicking the can down the road, but it really is a matter of we can live with what ruling you have, and frankly, we don't want to appear to be taking sides in this." Clark said the situation at Big Long Lake is unique, but disputes of riparian rights and pier placement are not unique to just Big Long Lake.

The Chair said, "It is matters like this that inform a person of the general public when buying lake property in plats, and really understanding the deed and what rights you are acquiring at the time of purchase. This is, as you said, we are focusing on these blocks today, but there are other freshwater lakes in Indiana that are faced with similar types of situations."

Green asked whether it was an appropriate time to address the Nunc Pro Tunc entries in Administrative Cause Numbers 11-160W, 11-161W, and 11-162W.

The Chair agreed that the AOPA Committee should address the Nunc Pro Tunc entries, and asked for a motion.

Green noted that there were no objections filed regarding the Nunc Pro Tunc Entry in *Skilbred, et al. v. Spaw, et al.* (Administrative Cause No. 11-160W), *Skilbred, et al. v. Lorntz, et al.* (Administrative Cause No. 11-161W), and *Skilbred, et al. v. Macklin, et al.* (Administrative Cause No. 11-162W). Green motioned to incorporate the Nunc Pro Tunc Entry correcting error in the proposed findings and order. Grant seconded the motion. Upon a voice vote, the motion carried.

The Chair asked Judge Jensen for clarification regarding any motions, and whether the cases would require separate motions.

Judge Jensen said the four cases remain under their respective administrative cause numbers. "We did that for the reason that each one involves a separate permit." She also noted that the

Department's Brief in Response to Petitioners' Objections brought to her attention that further amendments may be needed to further clarify certain findings in the respective cases.

Green moved to approve and incorporate the clarifying revisions as contained in the "Entry with Respect to 'Respondents Department of Natural Resources' Brief in Response to Petitioners' Objections to Administrative Law Judge's Findings of Fact and Conclusions of Law with Nonfinal Order,' dated September 4, 2012, within *Skilbred, et al. v. Spaw, et al.* (Administrative Cause No. 11-160W), *Skilbred, et al. v. Lorntz, et al.* (Administrative Cause No. 11-161W), and *Skilbred, et al. v. Macklin, et al.* (Administrative Cause No. 11-162W. Doug Grant seconded the motion. Upon a voice vote, the motion carried.

The Chair then opened the floor for discussion between AOPA members.

Green said, "I'd like to have a discussion with the three of us before I would be willing to make a decision. Would that be a violation of the Open Door? I do have some questions more from a legal standpoint with respect to where the lakeshore or shoreline, and where did it go as far as ownership is concerned."

The Chair invited the AOPA Committee members to pose questions to the respective party counsels.

Green said that the decisions today would have far-reaching affect on other property owners along Big Long Lake.

Kuchmay answered, "What we have in this case are just these specific permits. There are only four permits, and the propriety of those permits. What you are doing today doesn't impact [Block] 6 or [Block] 9. It's just these permits. Were they approved properly—yes or no?" He noted that in Judge Jensen's order, if a block came forward with 100% consent, "we are okay with that, but that has nothing to do with the wording of these permits. We need to be able to compartmentalize what it is we are doing here today".

Jensen stated that a portion of the suggested revisions was the "fact that maybe the plat applies across the board but this decision applies only to these permits".

Kuchmay said, "There is not 100% in [Blocks] 7 or 8. So, we have to address the propriety of the permits under the law as it exists. If other blocks want to do something separate, if it's ruled that they can do that by 100%, that's fine. We don't 100% here. All we are stuck with is our property rights and that's all we've exercised."

Grant asked, "When you say '100%' you're talking about every easement in front of that block?"

The Chair explained, "What has been litigated, and the result of that litigation, has been that these property owners, lot owners in each block, have a six-foot easement, and it starts from north to south. That is what we have been provided with as we look at these permits and the validity of the permits."

Clark said, "Admittedly, I am not as far up to speed on the various rulings that have come out on the particular appeals before you today…so I stand to be corrected. But I thought that in some or one of the rulings relative to today's proceedings there was a statement about not having any riparian rights in what I have described as the 'common areas'. If that is in one of the rulings pertinent to today's appeals, then I would suggest that while this is just about 7 and 8…, I think it is ripe for you to decide today, and I believe you have the authority under the law to determine property rights in the common area."

The Chair noted that there have been "so many documents before us on this matter to confirm that. When you say 'riparian rights'…are you including in that the drives, Shawnee Drive, Sioux Drive, and Miami Drive, which I know in earlier matters and the litigation that I believe went before the Court of Appeals, that was exempted out and the start for the easements for the property lot owners here started on the north boundary."

Clark answered, "For the purposes of the question that I raised, I don't know that it matters to me. It's all common area. But, if you look at the plat itself, I would argue if they wanted to distinguish the trail from the drive, you would see a line…and if we were going to say you can use everything but the drives, I mean, it seems to me if the drives were supposed to be distinct from the trail, there would be lines extending the drives to the water. There isn't. It's all open. There is nothing that separates the trail from the drives.... I view it as it is all one common area."

The Chair said, "Are you aware in addition to the…the plat itself of the written description that goes with the deeds and the lots?"

Clark said the administrative record shows that the written description is the start of the plat restrictions. "I think that is a general description of the entire property and not individual delineation of trails, roads, and lots. That's the only one I'm aware of. I seem to be doing a lot of talking for somebody that doesn't know that much."

The Chair reflected that before the AOPA Committee are the four permits. "That is what we are to rule on today. I think there is an opportunity that if we wanted to seek further information, direct the Department for further information on some of these other issues, we have that…, but we are given what has been presented before us as to the 6-foot easements that they have the riparian rights for."

Jensen noted that on page 23 of Judge Lucas's order at Finding 87 describes the previous usage of placing piers where a riparian easement was not associated with a lot or in front of a drive adjacent to the block "the usage was inconsistent in that the respondents, with relatively unimpeded views and which had only to cross Indian Trail to reach Big Long Lake, typically placed piers and boats in front of their lots". She added, "To the extent that that is included in my orders, it came out of the original order that Judge Lucas wrote…. I think probably my orders do state it very specifically, somewhere it seems to me that they do, that there are no riparian rights in the area outside the six-foot areas, but those zones were established in the previous *Spaw* case decided by Judge Lucas and has been through the appeals process."

Green asked, "Giving the six-foot easements, as you go from north to south within each block, there are not enough owners of property to take the full lakefront?" The Chair affirmed Green's understanding.

Green then said, "And, so thereafter you've got no man's land?"

Niezer answered, "More specifically, if you do the measurements, the entirety of the Hartzell boat landing easement say for Block 7, starts at the north end at Lot 71 and ends at roughly the middle of Lot 72, so that south end of Lots 72, 73, and 74 are no man's land. And where we had in 1923 6-foot wide boat landing easements for whatever type of watercraft existed back then, we now have in front of 1½ lots, in this case our clients, the Ashleys, a significant number of piers and watercraft hedged right into that area, basically one-third of the space of the block…. That's what has happened with the application of the 1923 Hartzell easement."

The Chair said, "Exactly, and that is the challenge presented us."

Niezer said he agreed that the matters before the AOPA Committee are "Blocks 7 and 8. But Members, please consider what why we're here in front of you to begin with. Two or three years ago a group of homeowners who found, rediscovered, these covenants, filed a petition to the DNR seeking guidance on their riparian rights. I don't know what stands between your ultimate decision, if these decisions are upheld, and any other property owner who now wants to, on any given day because they are unhappy…will decide to not only raise this, but now they will have the precedent setting decision of this Commission if the decisions of Judge Jensen are upheld…prompting them forward. So to say that we are in this vacuum of Block 7 and 8, and we are going to ignore the reality of everything else that's occurring along the exact same lakeshore, the exact same Indian Trail, under the exact same set of covenants is perhaps expedient for today's decision making, but we are not convinced it's in the best interest of administering the uses of Big Long Lake down the road and into the future."

Green asked whether the Petitioners' find Judge Lucas's and Judge Jensen's decisions consistent.

Niezer said the decisions cover two different issues. He said Judge Lucas determined the validity of the 1923 covenants determining that the covenants are currently in force and affect as of today. "We believe that his language in his ruling that the riparian rights within the Hartzell easement are the riparian rights to be governed by this document. We think it's a stretch to read into [the Lucas] decision that you can no longer use the rest of the shoreline outside of Hartzell." It was not a matter of inconsistency. Judge Jensen "went one step further. Judge Jensen has decided that the boat landing easements can be combined. It's not a matter of inconsistency. That was the decision that this Committee struck, that Judge Jensen has now furthered in her two decisions. In allowing that to happened, all that is happening is you are taking away the rights of the entire block to decide amongst themselves what's best for the use of Big Long Lake."

The Chair again reminded the AOPA Committee that what is currently at issue are the DNR permits to which the Petitioners objected. The AOPA Committee is bound by the Court of Appeals decision on six-foot easements. For the permits under consideration "they each have their six-feet. If they want to agree to combine those, and a permit is proposed to be issued for

that that can safely have a pier with safe navigation…. I'm not sure that we have enough information or authority to be able to rule on" the other parts of the subdivision. "I know this is going to be problematic going forward for the Department and other lake owners there, but I'm really questioning how we can determine that under this proceeding."

Niezer said, "It's very simple, because…Judge Lucas never decided, because this Commission never allowed him to decide, and what Judge Jensen has decided, which we believe is incorrect, is that Indiana common law applies to the determination of how appurtenant easements can be combined. If this Commission decides that Indiana common law applies, instead of the Lakes Preservation Act, as Judge Jensen has determined, then this matter changes it's complexion immediately, because Indiana common law as to easements appurtenant…require consent to modify those easements by all 100% of property owners that benefit from those easements. Judge Jensen's order does not dismiss that. Judge Jensen's order merely dismisses the notion. She agrees that common law is correct. Judge Jensen merely states that Indiana common law is not applicable to what we believe is a land-based easement on the lakeshore, namely the Indian Trail…. Once that happens then everybody in the block…not just a few property owners, have to work together."

The Chair asked Judge Jensen whether Niezer's characterization of her findings and nonfinal orders is correct.

Jensen said, "A lot of what is included in my decisions are based on Judge Lucas's decision. A lot of that had to do with…the determination that there are easements appurtenant as it relates to the individual boat landing easements, but that there was an easement-in-gross to all of the lot owners regardless of what block they live in to the Indian Trail throughout Long Lake Park. As a result of Judge Lucas making that distinction and the language that [Judge Lucas] included in his order that the riparian easements, as I call them in my orders, are on the 'shoreline'…. That the Indian Trail went from the shoreline landward left me with I have to distinguish between what is the Indian Trail and what is the riparian easement…one is an easement-in-gross and the other was an easement appurtenant." The orders also include "interpretation that there are no riparian rights associated with…'no man's land.'" She read Judge Lucas's order, Paragraph (2) of the Final Order section: "The boundaries of the riparian zones for Lot 51 through Lot 97 shall be delineated as set forth in Finding 94 through 98." Judge Jensen continued, "The same goes on for a variety of other lots in these blocks. That identifies the six feet going from north to south and leaving this 'no man's land area'. She also noted and read Paragraph (6) of Judge Lucas's final order: "No pier, boat station, platform, or similar structure shall be placed along Block 6, Block 7, or Block 8 that is inconsistent with this Final Order. A pier, boat, station, platform, or similar structure which does not conform to this Final order is unlawful." As a result of Paragraph (6), "my interpretation is there are no riparian rights to do anything otherwise."

Green asked Judge Jensen whether there was a distinction between "shoreline" and "lakeshore".

Judge Jensen said the question was not presented in her proceedings.

Grant asked, "Didn't Judge Lucas rule on that?"

Judge Jensen responded affirmatively. "Judge Lucas ruled…, and I took his previous decision."

Grant said, "Doesn't that seem logical back in 1923? They wanted to give these people six feet to pull up their fishing boat up on there."

Kuchmay answered, "Right. [Hartzell] is just giving them the right. You don't need the depth to come in Indian Trail to have that right."

Grant asked if the owner of the Indian Trail is unknown.

Kuchmay said he "would not use the term 'no man's land'. It's just an area where there are no boat landing easements. People can still walk there, and they can wade in the water…. They just haven't been given a riparian right to put a pier in that area. We know where riparian rights exist. Judge Lucas told us. We know where the boat landing easements are. It says here that we are to have a survey done, work with the DNR. We've done that…and we cannot reopen [Judge Lucas's] decision." Judge Lucas's decision "sets the stage. It has been appealed. We cannot ignore any judicial decision that limited people's rights. We can't ignore that. A decision that created our rights, we can't ignore that. We are bound by that. It sort of makes our bed for us here."

Kuchmay continued, "Mr. Niezer keeps saying that you struck the language about combining the riparian zones as if it was wrong. He keeps trying to make that connotation. That's not the case. The transcript was perfectly clear…. You did it because it wasn't ripe. That's what you said. It was a licensing issue…. Frankly, the easements, all those do is give somebody a riparian right. The exercise of that right takes place in the water. The NRC has the jurisdiction over that…, and the DNR has the authority to require neighboring riparian owners to join together and use a shared pier. It's not a land-based issue…. We didn't wait to be required. We tried to work together and do that together with our neighbors."

Green asked, "If you are a strict constructionist…, would it not be land-based controlled before we could throw it out to the DNR for licensure?"

Kuchmay answered, "The easement just creates the right. The exercise of that right is the jurisdiction of the DNR and the NRC to place a pier."

Green then said, "To say it's not a land-based issue, I do have a problem with it because if you look at what [Hartzell] attempted to do—not very artfully but in 1923 it may have been the thing to do—…obviously that's changed greatly since then. What we are trying to do is trying to adopt [Hartzell's] thinking to today's thinking. But the way I look at it…is [Hartzell] said you have six feet and to get to use that six feet, this is your six feet. It's nobody else's six feet. And, to get to that point, to build that joint pier, I think you…have to have everybody's permission in that block to get that done, and then go to the DNR…. That's why I don't really see any distinction between 'lakeshore' and 'shoreline'. I do think it's land-based, based on what I see if you are a strict constructionist. If you are saying we are trying to make adaptation to what's in front of us as we go along in society and the fact that [Hartzell] didn't make arrangements to throw it back into the lakeshore association, which probably would have ended this."

Kuchmay said, "Even if it is land-based, Judge Jensen had addressed that. She talked about the absurdity of that result, and how you can get around that result, and how it doesn't prohibit the permit. What you have to also recall is the Lakes Preservation Act modifies common law. We can't get around that…. The Lakes Preservation Act allows folks to do precisely what it is that we are doing." The Respondents are not strangers. "They are neighbors. I have a riparian right. The guy next to me has a riparian right. We are together exercising our riparian rights. We have agreed to do that. No one else has the right to be in our combined zone. That's our property right. That's ours."

Green then asked whether Kuchmay thought Judge Lucas's decision addressed the issue of the Lakes Preservation Act, in essence, superseding common law.

Kuchmay said that he would need to read Judge Lucas's entire order. "I know primarily what was litigated in that issue was what does the boat landing easement give us? Does it give a right to put in a pier? Where are they located? Did you lose it by virtue of laches, abandonment? Those are the things that were litigated. Whether that worked its way into the order, I would have to go back and read it…. Judge Jensen has ruled that it does, and I don't think there is any question that the Lakes Preservation Act modifies common law. It didn't exist in 1923. We are bound to consider it."

Green then asked Niezer regarding whether Judge Lucas's order found that the Lakes Preservation Act modifies common law.

Niezer answered, "No. That notion came up solely within the context of Judge Jensen's two decisions in front of you today. We are talking about a piece of ground, the lakeshore, the Indian Trail, which is some cases is over 15 to 20 feet in width. In some cases, it has completely disappeared. But in Block 7 and 8, it's in some cases 15 to 20 feet in width and above and outside of the mean water level of Big Long Lake as established by the DNR back in 1961, I believe. It has never been the subject of any jurisdictional issue involving the DNR until now. The notion that the Lakes Preservation Act has now gone beyond the boundaries to completely wipe away Indiana common law as to appurtenant easements that run with the land—they don't run with the lake. Judge Lucas…in his order clearly did say that these easements run with the land. They do not run with Big Long Lake. They are land-based easements from which riparian rights into the waters of Big Long Lake flow. But you first have to decide and determine what the common law is as to those land-based issues that run with the land before the Lakes Preservation Act kicks in. And we just simply don't believe that in this case the Lakes Preservation Act uniformly and with a stroke of a pen wipes away generations of land-based use by all the property owners of Long Lake Park of the Indian Trail."

The Chair said, "Again, that is not before us today. I keep going back to what are the permit matters that are before us. Though I would like to resolve some of the greater issues here, I'm not sure that we have all the information before us. This is where I am really struggling because I would go back to say it needs to be determined who owns the Indian Trail and for that 'no man's land' and then what are the riparian rights and others that would accrue to that portion of

the Indian Trail that actually abuts or has shoreline that isn't accounted for by the 6-foot easements that go with that."

Niezer said, "Regardless of who owns the Indian Trail, it is still land. In Blocks 7 and 8, these are land-based easements."

The Chair said, "I agree, but today we don't have a ruling. We have a ruling that has determined six-foot easements with the riparian rights for those land owners in that block starting on the north and going south."

Jensen noted that the Court of Appeals decision "even more clearly stated that the ownership of the Indian Trail is not even known."

Niezer said, "Regardless of who owns the Indian Trail, the fact still remains if the boat landing easements are to be combined as they have been by virtue of the permits then the consent is needed from the property owner."

The Chair asked, "From which property owner?"

Niezer said the consent of the owner of the Indian Trail would need to be given. He stated that the boat landing easements are on the Indian Trail.

The Chair said, "Well, that is what's at debate here, right?"

Niezer said in order for the boat landing easements to be combined in Blocks 7 and 8 the consent of Indian Trail would need to be obtained. He said there is no evidence before the Committee that there is consent from anyone who holds themselves forth as the property owner of the Indian Trail. Niezer said that under Indiana common law "we do not see of these land-based easements that run with the land and the lots in Blocks 7 and 8 can be combined because they are appurtenant easements running with the land and to each lot to which they are associated."

The Chair said, "I may or may not agree with that." Is there "any rebuttal to that? We are way beyond the permits that are before us. I know the Department would like greater guidance."

Kuchmay said, "I appreciate your comments and your desire to limit it to what is before you…. We are looking at the validity of these permits." The permits are for very specific piers, and these piers and the testimony are the focus. "Without sounding too redundant…, Indian Trail is not the shoreline. They are different. Judge Lucas held that the easement is on the shoreline. Like it or not, that is the decision, and that is final…. We need to be mindful of that. This is not broad reaching. This is four little piers."

The Chair said, "I am going to turn to the Department. You are hearing this discussion. We could have predicted we were going to be back here, because we did encourage them to come to the Department for licensing and permitting".

Clark said, "As I listen, I'm getting the feeling the Committee is not eager to rule on the ownership of what has been described as the common area."

Green responded, "I don't think we can. I wish we could."

The Chair asked the Department to provide comments on the Committee's authority, if any, to rule on the ownership issue.

Clark said, "Obviously, whether you are looking at Block 7 and 8, or the entire thing, I think it is going to be dispositive of a lot of issues. I refrain from getting in the middle of the discussion between Mr. Kuchmay and Mr. Niezer, but I can't get away from the ownership issue having some impact on the piers in question. So, if we cannot rule today on the ownership issue can you rule on the legality of the permits in question? It goes to the very discussion that these two gentlemen are having. Is the Lake Preservation Act governing in this instance or common law? If it is common law, then you have to determine the ownership issue. I do feel like it was maybe tangentially raised in the ruling when somebody said…nobody has riparian rights…. I am trying to make that part of the issue… But I do believe that you have the right in this committee or the authority to determine property rights. You may not like it in this instance, but I believe Judge Lucas has pointed that out in his rulings that the ALJs have that right as do you. Now, is that the ideal place for this determination to be made, probably not, but the law in this case allows you that authority."

Green said, "The issue that I am hung up on is what you've defined, or issues, one may tumble over into the other. I'm not convinced that the Lakes Preservation Act has superseded common law, but who am I? I know it happens all the time. Common law is superseded by statute. There are certain fundamental rights, and we go from there. Are we at that point where this Lakes Preservation Act actually has taken away property rights without some form of adequate compensation? I don't know…. I think this petition hinges on that issue—on the application of the Act; and then it may tangentially issue on determining ownership rights, the way I look at it. I would like these gentlemen to address those issues, one maybe tumbling over to the other. Perhaps the Department may have some responses as well or some thoughts on it before we make a decision. That's my preference, and I would move that we do that within a timeframe."

The Chair asked, "So you are suggesting that we defer the action today to allow the parties to brief on this issue before we make a determination?"

Green responded, "Yes, and there may be issues."

Clark asked for clarification from the AOPA Committee regarding defining the issues for briefing.

Green said that the primary issue is the application of the Lakes Preservation Act to these permits. "As you said, perhaps tangentially to make that decision, do we have to determine property rights to get to that point and how that may affect our decision on this issue."

Judge Jensen said, "The question that I would have is [do you] believe that my interpretation of Judge Lucas's order is incorrect, or [do] you believe Judge Lucas's order was incorrect?"

Green responded, "I don't think that was the primary issue before. That wasn't the ultimate judiciable issue on [Judge Lucas's] order. I don't think the Court of Appeals has really come down and said this is what it's all about."

The Chair noted that a suggestion is before the Committee for discussion.

Green moved to defer action by the AOPA Committee for 20 to 30 days to allow for briefing by the parties with respect to the applicability of the Lakes Preservation Act to these permits, which would give the Department the authority to issue the subject permits.

The Chair asked for a second to the motion. Not hearing one, the Chair invited further discussion.

Green said, "If Madame Chairwoman wants to refine my motion…, I am not confident on any decision I would make today without knowing a little more."

The Chair refined Green's motion for additional clarification "on how the findings and the nonfinal order before us would be modified or revised if they don't already address the issues with regard to the application of the Lakes Preservation Act versus common law. I think there is some of that in there. It may need to be further clarified through the course of their briefing."

Green approved the amendment, and seconded the motion

The Chair then called for a voice vote. Upon a voice vote, the motion carried. No members abstained.

**Consideration of Findings of "Findings of Fact and Conclusions of Law with Nonfinal Order along with Order Denying Petitioners' Motion for Stay of Effectiveness" in the Matter of *Skilbred, et al. v. Ward, et al.*, Administrative Cause No. 12-014W**

[See previous item for the oral argument and discussion.]

**Adjournment**

The meeting adjourned at approximately 11:16 a.m., EST.