AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION

August 28, 2014 Meeting Minutes

MEMBERS PRESENT

Jane Ann Stautz, Chair
Doug Grant
Bob Wright
Jennifer Jansen
R.T. Green

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Sandra Jensen
Jennifer Kane

PARTICIPANTS AND GUESTS PRESENT

Charles Parkinson	Paul Panther	Cameron Clark	Mark O'Hara
Chris Smith	Dan East	Joe Hoage	Eric Wyndham
Steve Hunter	Terry Hyndman	Ihor Boyko	Dave Moss
Michael DiRienzo	John Davis	Kent Brasseale, II	Jason Kuchmay
William Illingworth	Jonathan Cress	Herschel McDivitt	Stephen Snyder

Call to order and introductions

The Chair, Jane Ann Stautz, called the meeting to order at 10:05 a.m., EDT, on August 28, 2014 in the Fort Harrison State Park Inn, 6002 North Post Road, Indianapolis, Indiana. With the presence of all five members, the Chair observed a quorum. She, Doug Grant, Bob Wright, R. T. Green, and Jennifer Jansen introduced themselves.

Consideration and approval of minutes for meeting held on April 23, 2014

Doug Grant moved to approve, as presented, the minutes of the meeting held on April 23, 2014. Bob Wright seconded the motion. Upon a unanimous voice vote, the motion carried.

Consideration of objections and other pleadings with respect to "Nonfinal Order of Partial Summary Judgment on Remand" by the Administrative Law Judge in *Lee E. Gross Revocable Trust, et al., v. Department of Natural Resources and Howard*, Administrative Cause No. 13-100W

Stephen Lucas, Administrative Law Judge, provided a summary. He explained the proceeding arose on remand from a Final Order of Partial Summary Judgment by the Natural Resources Commission in *Howard v. DNR and Smith*, Administrative Cause Number 10-206W, 13 Caddnar 36 (2012). *Howard v. DNR and Smith* ("*Howard*") involved proprietary issues as to who had proprietary rights. The decision in *Howard* was included in the nonfinal order for this proceeding, *Lee E. Gross Revocable Trust, et al., v. Department of Natural Resources and Howard*, Administrative Cause No. 13-100W, ("*Lee E. Gross*

Revocable Trust")**.** *Howard* was remanded to the Department for a determination as to the exercise of proprietary rights.

Robert W. Eherenman, attorney for the Respondents, Larry and Bernadean Howard, stated the basis of their objections is administrative res judicata. On March 29, 2012, the AOPA Committee modified the ALJ's nonfinal order in *Howard*. "Our entire argument is that the AOPA Committee has already ruled on the respective riparian rights between the Howards, who have the dominant easement and the landowner, who are the Larshes, and they were a part of the original proceeding." Eherenman distributed a three-page hand-out illustrating those modifications. On the left side of each of the handouts are the modifications to the Nonfinal Order shown in "redlined" format. The changes that were made by the AOPA Committee are highlighted in yellow, the old language in red font double underlined, and the language to be deleted in strikethrough font. On the right side of each page is the Final Order with modifications applied. The changes made to Paragraph 62 of the Nonfinal Order is the language that was added with regard to the 1960 warranty deed found to give the Howards the rights. The language added by the AOPA Committee reads "Any riparian rights associated with Outlot 4 are subject to the dominant rights conveyed by the 1960 Warranty Deed and now enjoyed by the Howards." Reviewing what was struck out in the original 2012 Nonfinal Order, the ALJ determined that, in fact, the owners of Outlot 4 had certain riparian rights. Those were in Paragraphs 63 and 64, and those were struck out by this Committee. In fact, if you look at what was highlighted in the struck-out portion it says, 'as such, the Smiths, (and, to the extent passed by the land contract, Larsh) generally have the rights enumerated in *Parkison.*'"

Eherenman, referencing page two of the handout, Paragraph 65 of the 2012 Nonfinal Order (language highlighted in yellow), addressed the dominant rights. The ALJ found in the instant Nonfinal Order of *Lee E. Gross Revocable Trust* that a remand is necessary in order for DNR to determine the respective proprietary rights between the Larshes and the Howards. In the original 2012 Nonfinal Order, Paragraph 67, "that is exactly what [the ALJ] determined in 2012. And, that is that the DNR must consider the property rights of the Howards and the Smiths, including the Larshes, in addressing the application of the subject permit. That language was replaced, [shown in red font]: The riparian rights of the owners of Outlot 4 are subject to the vested and dominant riparian rights of the Howards as the owners of Lot 21. The riparian rights between the Larshes and Howards were addressed because the final determination by this Committee was that there was no genuine issue of material fact regards proprietary rights. So, what is happening here is that, we are here today to argue over the exact same thing we argued about two years ago, and won". He noted that the 2012 Nonfinal Order found that the DNR did not look at the respective proprietary rights. "Even if [DNR] did, the NRC is the one [who] really reviews that *de novo*. That has already happened. How is the DNR, on remand, going to make a decision that's different than what you already determined in 2012? And that is, the riparian rights of the Larshes, as the owners of Lot 21, are subject to the riparian rights of the Howards".

Eherenman said the Larshes' Response to Respondents' Objection to Nonfinal Order included quoted language from the 2012 Nonfinal Order: "'The DNR had not determined and could not reasonably have determined the interest of persons claiming riparian ownership or an easement.' That wasn't the entire quote. There was an introductory right before that [quote], which stated, 'Until the entry of this order, the DNR had not determined.' So, the DNR hadn't determined it in the original proceeding, because [DNR] couldn't have because one of the issues was that the Howards had not shown that they had exclusive use of Outlot 4. But it was determined when the AOPA Committee made the changes to the 2012 Nonfinal Order" for the *Howard* Final Order."

Eherenman stated that on Remand the DNR investigated and determined the Howards have the dominant rights, the rights to use Outlot 4, and the Howards are entitled to a pier permit. He said the Larshes appealed the permit and challenged how the DNR reviewed the permit application, and the ALJ found that the DNR correctly reviewed the permit application. There was no objection to the ALJ's finding.

"To go back to a hearing to the DNR, it's really unclear to us what are we going to be doing? We've submitted all the deeds, all the plats. The AOPA Committee determined in 2012 that the Howards have the dominant right, and, in fact, the Larshes riparian rights are subject to the Howards. There are no facts to determine, because that is a legal determination that has already been made."

Eherenman noted the original 2012 Nonfinal Order found the "Larshes have some rights, the Howards have some rights, and we are going to remand back to the DNR to figure that out." The Final Order in *Howard* found the Howards have the dominant rights. The Larshes rights are subject to the Howards…. We think this is a clear case of administrative res judicata. It has already been determined. The same parties are involved." Eherenman requested the AOPA Committee amend the [*Lee E. Gross Revocable Trust*] Nonfinal Order, and Findings 23 through 27 in particular, to be consistent with the Final Order in *Howard*, so "the owners of Outlot 4 are subject to vested and dominant riparian rights of the Howards as the owners of Outlot 21".

Stephen R. Snyder, attorney for the Lee E. Gross Revocable Trust, Chad D. Larsh, Michelle M. Larsh, and Marvin D. Larsh, said he understood Eherenman's argument. But the *Howard* Final Order, which remanded the matter to the DNR for DNR to conduct its proper evaluation, was issued before the DNR could have conducted that evaluation. "Because at the initial evaluation of the permit, which was denied by the DNR, there would not yet have been a determination of the riparian rights of the Howards *vis a vis* the Larshes. As a result, even though the hearing was final here, it was remanded to the DNR to conduct its evaluation as required by the Lakes Preservation Act. That apparently took place in some form, although there was never any notice given to anyone else to submit additional information." DNR's review on remand was based on the information that had previously been submitted to the DNR. Snyder said the key is if the DNR "could not have properly conducted the investigation at the first permit determination, and it was then remanded, then that is when [the DNR's] proper evaluation, if it took place, took place. Therefore, we have something new at this point that we didn't have before, and that is an evaluation by the DNR made after the original order of the AOPA Committee determining the riparian rights of the parties…. Two things at that point happened. Either there's no evidence that an appropriate evaluation was made by the DNR the second time around after the riparian rights had been determined, or there was an evaluation made, that we are now in the position to contest, because it is the first time a proper evaluation of the permit application has been made. I think that is exactly what Judge Lucas was saying in Paragraph 25 and 26" of the nonfinal summary judgment.

Snyder noted that the last sentence in Paragraph 25 states the Hebenstreit Affidavit does not reference DNR consideration of the riparian interests of the Claimants, and the Howards offer no material facts upon which to conclude the DNR considered proprietary interests. "Those aren't just riparian interests. Those may be navigational interests. They may be the interests of the Larshes of owners of Outlot 4 to which the Howards' pier attaches or other factors that are required to be considered by DNR." Paragraph 26 states: Even if the DNR had considered the proprietary interests of the Howards and the Claimants, an administrative law judge for the Commission is obliged to conduct a de novo hearing on administrative review. "There are two things that potentially could have happened. First of all, Judge Lucas has indicated he sees nothing in the summary judgment submission that says the DNR properly considered or evaluated the various interests of the parties, be they riparian interests or other interests of lakefront owners adjacent to the Howards riparian area. And, even if there was, Gross and Larsh still have a right to appeal that evaluation as being improper, ineffective, or defective in some fashion. So, we are not doing something new. This is the first time that we have had a proper evaluation of the Howards permit application, because it could not have been properly considered until the decision of this body determining riparian rights."

Snyder said the DNR's initial evaluation was not an evaluation proprietary interests which the AOPA Committee confirmed. The second DNR evaluation is the only proper evaluation and either it was

inadequately conducted, or if it was adequately conducted, the Claimants still have a right to appeal to an administrative law judge. "We are not dealing with res judicata because there was never a proper evaluation made by the DNR at the first application evaluation."

Eherenman responded. He urged that Judge Lucas remanded for a fact hearing on the respective proprietary interests between the Howards and Larshes. He noted the language in bold font on page three provided that with respect to this assertion, there is no material issue of fact in dispute as to proprietary interests. The original Nonfinal Order in *Howard* contained language (shown stricken and highlighted in yellow on page three of the handout) that concludes the Larshes enjoy the fee simple, hold the servient estate, and are the riparian owners of Outlot 4. The general rights of the Smiths (and Larshes through their land contract with him) include access to navigable water and the right to build a pier to the line of navigability. "That language was crossed out. We are going to go back under the Nonfinal Order in [*Howard*] and have a hearing as to proprietary interests." DNR did not make a determination of proprietary interests because the determination had already been made in the 2012 Final Order in *Howard*. "What is happening is the Larshes are looking for a second bite at the apple. They didn't prevail in the first proceeding…, and now they are using the DNR's issuance of a permit to go back and have another chance to argue the respective proprietary interests that were already determined in [*Howard*]. The DNR, on remand, respected that determination, looked at the application, conducted the investigation under the Lakes Preservation Act, and found that the pier met the requirements." The only outstanding issue is the respective proprietary rights between the Larshes and the Howards, which were determined in *Howard*.

DNR attorney, Eric L. Wyndham, said the agency "pretty much agrees with Mr. Eherenman's position". James Hebenstreit, the Assistant Director of the DNR's Division of Water, submitted an affidavit, along with the Howards' Motion for Summary Judgment, in which he affirmed that on remand the Department conducted a thorough investigation regarding the permit. There were several general and specific conditions attached to the permit to which the Howards are subject. Judge Lucas ordered the DNR to provide notice of its determination to the Howards and the Respondent Intervenor or to their respective attorneys. "That was done. So, DNR's position is that a thorough investigation on remand was made to the application for the permit, and proper notice was given to all parties…. The matter has been pretty well decided, and [the DNR] would stick by" the Nonfinal Order of Partial Summary Judgment.

Stephen Snyder urged Paragraph 24 of Judge Lucas's Nonfinal Order is significant. The proceeding was sent back to the DNR after the AOPA Committee's decision "because prior to that time, nobody knew the respective rights of the parties. [The AOPA Committee] determined those rights, but [the AOPA Committee] didn't determine how they played against each other, and that is one of the factors the DNR has to consider in the evaluation of a permit application."

R.T. Green stated his understanding of the Nonfinal Order in *Lee E. Gross Revocable Trust* in that "given our previous order, there needs to be a process that should be honored. To a certain extent the process has not been honored, that is, the particular need for a hearing." Green asked Judge Lucas whether his understanding was correct.

Judge Lucas answered, "I think it is pretty close to that. If the Hebenstreit Affidavit said, 'We looked at who had the dominant estate and who had the servient estate, and we made this calculation…,' it might be proper for disposition on summary judgment…. I didn't read it as saying that. It said [DNR] did its job, but it didn't speak to this specific aspect of the case that was remanded…. The Commission has determined who has the dominant estate and who has the servient estate. That is not the same as saying that the entity that has the dominant estate preempts all rights of the servient estate…. That's not the same thing as saying who gets to put their pier exactly where."

Green asked whether Counsel had any response to Judge Lucas's explanation.

Eherenman responded the easement is 15 feet wide, and the pier is in the center and meets the setback. "The whole point of this proceeding is an attempt by the Larshes to stop the Howards from putting a pier out. That's really what the endgame here is…. It's not like you have 100 feet of shoreline here, and we can move the pier. It's a narrow area where [the Howards] have the riparian rights…. Is the hearing going to result in that we move [the pier] one foot to the left, one foot to the right?" The navigability issue was already addressed by the DNR in *Howard* and was affirmed.

Snyder responded, "What we have at this point with the denial of a portion of the request for summary judgment is a statement that the interests of the parties, from a standpoint of real estate law, were determined. The Howards own the dominant easement, which includes the right to place a pier. The Larshes own the servient tract, which also carries with it certain rights. The DNR did not appropriately, on remand, determine the relationship between those under the provision of the Lakes Preservation Act, and that is essential before the permit can be approved. We are simply saying that even if [DNR] did consider it, we still have a right to appeal that determination that the Howards right to put a pier out supersedes everything Larsh has as owner of Outlot 4, because that was a determination that was not made until the remand, which is now a new matter ripe for appeal."

Wyndham responded that all parties were notified regarding the ability to submit additional information. He did not think any of the parties submitted additional information to the DNR during the remand regarding proprietary interests. "We feel we met our burden".

The Chair stated, "Without having the record before us, I can't really attribute whether that is a factual statement."

Lucas said the instant Nonfinal Order was a "narrow disposition". The "administrative law judge and the Commission are supposed to do a de novo review. I don't think there is any estoppel argument" arising from failing to provide information to the DNR. If a party makes a timely request for administrative review, and had a whole lot of things it could have presented to the Department but didn't, that would be sad. But it wouldn't preclude the party from raising issues on administrative review because it is a de novo hearing."

Green said, "So, in the end the Nonfinal Order, as I understand it, is to honor the process?"

Lucas responded, "Yes".

Doug Grant observed, "The easement says 'the right to put a pier out'. That's much stronger than just having an easement where you have to stay within your riparian rights. Do I understand that right? The easement is six feet, right?"

The Chair agreed the easement is six feet but added, "That's really not the challenge before us."

Grant said, "Yes, I know, but it's just out of curiosity question."

The Chair reflected the issue was whether, following the prior AOPA Committee decision in *Howard*, "there was a right for further review and a de novo hearing on the additional information …besides the fact that we had…determined that the Howards enjoyed the dominant easement." She said she appreciated the discussion and the challenges before the AOPA Committee. "I am not one to encourage unnecessary or additional proceedings; however, given the nature of the process and the role that the AOPA Committee and the ALJ plays on behalf of the Commission, I would entertain a motion."

R.T. Green stated, "In so moving, it may be—and this is not to telegraph what we would decide—that what's brought before us today, it may be our decision, but we have to honor the process." He then moved to adopt the Nonfinal Order of Partial Summary Judgment on Remand, as written, as the Final Order of the Natural Resources Commission. Jennifer Jansen seconded the motion. Upon a unanimous voice vote, the motion carried.

Consideration of:

- **Claimants' Motion to Index Agreed Order**
- **Respondent Department of Natural Resources' Objection to and Response to Claimants' Motion to Index Agreed Order**
- **Claimants' Response to Department of Natural Resource's Objection to and Response to Claimant's Motion to Index Agreed Order**
- **Division Director's Recommendation Regarding Inclusion of Agreed Order in CADDNAR**

with respect to *Anchor Holdings, LLC, et al., v. Department of Natural Resources and Howard*, Administrative Cause No. 14-049W

Stephen Snyder stated, "This really involves the DNR not wanting to publish [the Agreed Order in the matter of *Anchor Holdings, LLC, et al., v. Department of Natural Resources*, Administrative Cause No. 14-049W] to know what it did, because that's the end result if this Agreed Order is not indexed." Snyder said that he reviewed the Natural Resources Commission's website and searched for "final orders. I can find all of the orders in CADDNAR. That's easy. But there is no place to find an index of agreed orders, at least not that I could find on the website. Maybe you have to make a phone call, but for John Doe, I'm not sure that there is any way to know that there is anything such as an 'agreed order' because they do not appear to be accessible."

Snyder said the underlying substantive issue is that what are commonly called the "Lilly properties" on Lake Wawasee are adjacent to about a quarter of a mile of "pristine lakefront, no seawall, wonderful beach, great swimming area. I have been around there since 1957, and, at least since then, that has been an attraction similar in fashion to the sandbar, which is out in the middle of the lake. Everybody with a cruiser or a pontoon boat, or whatever would be inclined to pull up very close to shore, swim, spend an entire day or sometimes an entire weekend in that, 25 to 50 feet offshore, and actually trespass from the standpoint of getting on the pier, or the shore, or walking their dog, or throwing trash on the beach." For at least 35 years, the property owners have asked the DNR to enforce a statute. Snyder urged the statute requires if a person is operating a motorboat, the person cannot go within 200 feet of shore except to troll or approach or leave the shoreline or dock. In most instances a shoreline is private, including piers. "The DNR has always refused, and… simply won't enforce it." On behalf of the current property owners, he filed a permit application with the DNR requesting to place twelve posts in Lake Wawasee with a sign attached that would read, "Anchoring within 200 feet of shore is illegal" and citing IC 14-15-3-17. The DNR denied the permit application, and "I appealed that denial. In negotiations with the DNR, we came to an agreement that said, 'Yes that particular statute that limits the activities of boats within 200 feet of shore, overrides the general provision that the public has the right to use public freshwater lakes for recreational purposes as stated in IC 14-26-2-5.' We entered into an Agreed Order which has specific findings to that effect."

Snyder said following the final signing of the Agreed Order, there was publicity that came with the Agreed Order. The local conservation officer was concerned about the Agreed Order, because "he didn't want to enforce it so it ultimately ended up back in front of the DNR from a policy decision standpoint. I received a couple different letters saying 'We're not going to enforce that, because we don't believe that is the law.' Well, it is the law. It's kind of hard to avoid reading that statute, which limits the activities of

motorboats within 200 feet of shore, but there was still the determination that it wasn't going to be enforced." Snyder said this issue does not just affect the Lilly properties. It impacts properties all over the northern part of the state.

Snyder said that he just learned there are two indexes of final orders maintained by the Commission, one for contested hearings and one for agreed orders. "There is a problem with that though, and the problem comes from the Administrative Orders and Procedures Act. IC 4-21.5-3-32(a) requires that all written final orders shall be indexed." The subject Agreed Order is written. "Even though it is an agreed order, it is a final order." Snyder urged AOPA does not distinguish between agreed orders and contested orders. He also noted that one of DNR's arguments is that "CADDNAR" stands for "Contested Administrative Decisions of the Department of Natural Resources." He said, "I don't think the acronym overrides the provisions in the statute, which simply requires all written final orders to be indexed."

Snyder continued by saying Commission's Information Bulletin #1 has been amended three times. The third amendment references a database of agreed orders maintained by the Commission's Division of Hearings. Snyder said the Information Bulletin #1 states that IC 4-21.5-3-32 requires the indexing of orders but "makes this distinction between contested and agreed orders. I think that's a distinction without a difference because that doesn't comply with the statute. But that's not really the real issue here." Finding 16(a) of the Agreed Order states IC 14-26-2-5 is limited by the provisions of IC 14-15-3-17. Finding 16(b) states IC 14-15-3-17 limits the operation of a motorboat within 200 feet of the shoreline of a public freshwater lake to those activities stated in the statute. "Those are agreed findings. The DNR and the Claimants agreed to those findings in the appeal action. Now the DNR is saying, 'We don't want the world to know about those.' I'm not sure why. Well, I do know why. [DNR] does not want to enforce" the statute. The communications he received from DNR "make it very clear. 'We don't think that's the law.' Yet the DNR agreed that was the law, and the Findings of Fact confirm that."

Snyder requested that the Agreed Order be indexed. "In my opinion, it was a contested action. We contested the determination made by the DNR, and that contest resulted in an administrative review, which resulted in, rather than a full-blown hearing, an agreed order but an agreed order with considerable significance that needs to be affected. If the DNR does not want this law on the books, then it is time to go to the legislature."

Snyder noted that Information Bulletin #1 specifically states that at the "request of the parties, agreed orders that have significance be included in CADDNAR. It doesn't say that 'both parties' or 'all parties' have to agree. It says 'parties can request it.'" The Agreed Order is of such significance to lakefront owners that it needs to be addressed. "It's not just about protecting lakefront owners. There is a reason there is a 200-foot boundary around a lake. The same statute involved here is the one that gives the DNR the right to require an idle zone within 200 feet of shore, and [DNR] certainly [does not] have any problem enforcing that provision of the statute". He noted three of the parties, not including the DNR, requested the Agreed Order be indexed.

DNR attorney Eric Wyndham noted that Information Bulletin #1 does not state that "a" or "any party may request". All of the parties must request an ALJ to include an agreed order in CADDNAR before inclusion may be considered.

Wyndham related that Andrew Wells, who was DNR's attorney in the proceeding, was involved in the negotiation of the Agreed Order. "I talked with Mr. Wells and [he said] there was no discussion between Mr. Snyder and Mr. Wells regarding having this Agreed Order indexed and made a part of CADDNAR.". The Agreed Order is an agreement between two parties. "If one party wanted this matter…indexed in CADDNAR, then that should have been negotiated during the process of trying to reach an agreement."

Wyndham said he did not agree that the provisions in the Agreed Order were novel or of precedential value. The Agreed Order does not change the current statutory language.

Wyndham said IC 4-21.5-3-32 requires all final orders be made available for public inspection and copying, and the Commission has complied with the statute. "CADDNAR" is an acronym. "'Contested' orders, that's what is to be placed in CADDNAR." IC 4-21.5-3-27(c) requires that "conclusions of law must consider prior final orders, other than negotiated orders, of the ultimate authority under the same or similar circumstances if those prior orders are raised on the record in writing by a party and must state the reasons for deviations from those prior orders." It is clear that the Commission may decide how its final orders are to be indexed, categorized, and made available to the public. "The Commission has not violated [its] responsibility for indexing." Wyndham stated he agreed with Division of Hearings Director Lucas's interpretation that IC 4-21.5-3-32 and IC 4-21.5-3-27(c) must be construed together. Wyndham stated he and Andrew Wells agreed the DNR "probably wouldn't have entered into this Agreed Order if [the DNR] had known it was going to be indexed as precedent in CADDNAR."

Wyndham emphasized that the Agreed Order was an agreement between the parties to resolve a matter pending before the Commission. Snyder could have made the argument for indexing the final order during the negotiation process. "It's almost like Mr. Tobias and Anchor Holdings want to appeal [their] Agreed Order and arrive at different terms, different provisions or a different agreement. That puts a chilling effect on a party's right to enter into agreements to resolve such matters." Including any agreed order in CADDNAR without the agreement of all parties would "put a chilling effect on the settlement of all future cases. It may not put a chilling effect on the Department's position, but it could put a chilling effect on the other party's position, too." If the AOPA Committee orders the Agreed Order be indexed in CADDNAR, it "would be opening the door to basically destroying the mutuality of these agreements." He requested the AOPA Committee not grant the petition to index the Agreed Order in CADDNAR.

Snyder responded that the Department's argument regarding a "chilling effect" is probably more affective from the Claimants' standpoint than it is from the Department's standpoint. "Had I known—and I think it was virtually impossible to know that there are two separate indexes maintained by the Natural Resources Commission—I would never have entered into a settlement. It simply wouldn't have happened. If this isn't going to be something that I can rely on, why bother. I would just take it to a hearing and probably end up in a courtroom somewhere, if that's the case. The other thing I don't understand is, if, in fact, the Department has agreed this is the law—and [it has] agreed to that—why [is DNR] so reluctant to agree that it is the law for everybody, not just Randy Tobias, Sargent House Partners, LLC, and Anchor Holdings, LLC? Where does the Department get off saying 'We're going to limit the application of the state law to three properties, and we are never going to allow any cite to this case.'" A court's consent judgment has the same effect as a judgment tendered by a court after trial. "There is no difference, and there is no difference here. This is an administrative proceeding as opposed to a judicial proceeding, but the effect of the termination of those proceedings by either an agreement or by a judgment entered after the trial is the same."

Wyndham responded that Information Bulletin #1 and all other Commission information bulletins are posted on the Commission's website. If the Claimants wanted the final order to be indexed in CADDNAR, the request should have been brought up during the negotiation process. "I don't think DNR is trying to hide anything from the public. The statute says what the statute says…. I picture this as a round-about to appeal the agreement, which they reached, entered into, and executed."

Stephen Lucas, Director of the Commission's Division of Hearings, explained that this item is not before the AOPA Committee in the more common status of a contested stage of adjudication. But he believed the Motion to Index Agreed Order "deserved to be brought before the AOPA Committee. I think it is a serious request—as Mr. Snyder presented it—and a serious policy question." As a general principle, the

Commission's Division of Hearings "tries to follow what the Commission gives us as nonrule policy documents. If a nonrule policy document is incomplete or off-track in some regard, I would hope that the solution would be to modify the nonrule policy document."

Lucas said when AOPA was first written, IC 4-21.5-3-32 was included regarding agency decisions having precedential consequence. "I remember [the discussions by the Commission that drafted AOPA] well. It was, by many, considered to be a pretty radical idea that you could have an administrative precedent that had consequence…, although the most junior of precedents." He said he wasn't then sure the Indiana Supreme Court or the Court of Appeals of Indiana would be receptive to the concept of agency decisions as precedents. But the decisions from CADDNAR have since been cited in high court decisions.

Lucas also explained that a few years following the effective date of AOPA, "there was a push to have it said that an ALJ had to apply precedent or distinguish a precedent" such as those included in CADDNAR. Part of the discussion "was about agreed orders…being precedents that would bind the agency and bind the ALJ." IC 4-21.5-3-27(c) became an amendment to AOPA. For decisions applying IC 13, IC 14, and IC 25, the new requirements were added, but negotiated orders were exempted and would not become binding on ALJs or the agencies. This proceeding construes a section of IC 14 so IC 4-21.5-3-27(c) would apply.

Lucas said the Division of Hearings does not receive much interest with respect to agreed orders. But the Division of Hearings has assembled agreed orders, and the collection is open to the public. "Maybe it's a 'chicken and egg' situation, that because we don't show [agreed orders] in a high profile, they don't get a lot of interest. Maybe if we showed [agreed orders] at a higher profile on the Commission's website, they would get more interest". Lucas said he believed Information Bulletin #1 would not need to be amended if the AOPA Committee wished to have agreed orders more visible. IC 4-21.5-3-27(c) does not seem to anticipate agreed orders should have the same presidential stature as orders resulting from an adjudicated process, "but that isn't to say that [an agreed order] has no meaning".

Lucas agreed that CADDNAR has a higher profile on the Commission's website than the index of agreed orders, and he suggested one approach could be to have the Commission's website increase attention to the opportunity to access agreed orders. The Division of Hearings has received record search requests regarding agreed orders. We've concluded that even if a party "doesn't want us to share them, we have to share them, and we do".

Lucas added that he believed to modify Information Bulletin #1 would require Commission action. "I was hoping that this Committee…could be the backbone of having the conversation with the Commission if an adjustment is needed to the nonrule policy document or the website." Lucas said he would be uncomfortable with the Division of Hearings acting in a way that would be inconsistent with Information Bulletin #1.

The Chair stated she sympathized with the Claimants with regard to their property, and the nature of the activities that occur in the adjacent lake. But "I believe that is an enforcement issue…. With regard to the request to index [the Agreed Order] in CADDNAR, to me there is still going to be the enforcement issue. The statute to me is fairly clear and straight forward. I'm struggling a little bit why open up this from a need and request to index in CADDNAR because it does…open up a lot of other considerations when you look at the precedential value that it could have. In my mind, I am trying to separate those two things. I think there is a difference as well between whether or not it was contested. There wasn't a hearing. There wasn't that opportunity. It was an agreed order between the parties to resolve a situation there."

Jennifer Jansen asked Snyder and Wyndham whether they agreed a "negotiated order" under Section 27 included an agreed order under AOPA. Both Snyder and Wyndham answered in the affirmative.

Robert Wright asked, "It's basically private property, a shoreline that people are picnicking on, that they want the DNR to enforce people coming to and from the water?"

The Chair stated it is a potential trespass issue.

Snyder said, "That's part of it, but also anchoring within 200 feet of the shoreline, because that is not one of the permitted uses." IC 4-21.5-3-32(b) states that an agency may not rely on a written final order as precedent to the detriment of any persons until the order has been made available for public inspection and indexed in a manner described in IC 4-21.5-3-32(a). "That just means it's not precedent for the agency. If that's the case, is it your interpretation that an individual can rely on a non-indexed order as precedent because there is no restriction to that effect here. That makes those 'non-indexed' orders much more significant to the general public…in a database that can't be accessed."

The Chair stated, "I want to clarify the comment that [agreed orders] can't be accessed. The agreed orders are available to the public."

Lucas reiterated that persons have requested to use the agreed order index. The Division of Hearings has honored the requests and provided copies of the agreed orders. "I agree that [the index of agreed orders] can have a higher profile on the website, but it is not an index that cannot be accessed." Only rarely, and by consent of all parties explained to the ALJ before approval of an agreed order, has an agreed order been included in CADDNAR.

Snyder said he could not find the index of agreed orders on the Commission's website.

Lucas clarified that the agreed orders index has not been posted on the Commission's website, but the index is accessible. "There is no place in the statute…that this must be on a website. That is something we have done for CADDNAR. That is something that we can add [on the Commission's website for agreed orders], and I'm suggesting I think that might make sense."

Snyder said there is a caveat to IC 4-21.5-3-32(b) that reads, "However, this subsection does not apply to any person who has actual timely knowledge of the order." If the DNR and "John Smith know of this order, then it can be relied on as precedent. I guess what I'm looking for is guidance. If we are going to get better access to the non-indexed orders, the non-CADDNAR orders, then fine. I am going to go through and read every one I can find, because if I have knowledge of it, the DNR certainly would have knowledge of it because it would have been a party, and then it becomes precedent." Snyder said that in this instance, the DNR has knowledge of this order, and with enough press everyone else will have knowledge.

The Chair stated, "Your definition of 'precedent' may be a little different from mine. It may be of interest to you as a counselor as you look at future settlements or future action in potential negotiations and settlements."

Snyder responded, "Or as being binding on an ALJ who is making a decision who either has to rely on it or distinguish it."

The Chair disagreed.

Lucas also disagreed with Snyder's response. IC 4-21.5-3-27(c) states that "other than negotiated orders" can be relied on as precedents, or they must be distinguished by the ALJ. IC 4-21.5-3-27(c) and IC 4-21.5-3-32 must properly be construed together.

The Chair summarized that the AOPA Committee has before it a motion to index the Agreed Order. Division Director Lucas presented a suggestion to the AOPA Committee to establish a special committee to evaluate and make recommendations to the Natural Resources Commission. "I would encourage us to consider looking at how we dispose of the current request before us, as well as opportunities going forward, including…the option of improving the access or visibility on the website" of the agreed orders index. The Chair asked whether a decision by the special committee would need to be presented to the full Commission.

Lucas explained that it would be the Commission's prerogative to modify Information Bulletin #1. But even without modifying Information Bulletin #1, it did not seem to him unreasonable for the AOPA Committee to request the Division of Hearings to make the agreed orders index more visible.

Grant stated, "I don't know how we can resist something that encourages more transparency. That's the way the world is moving to have things transparent."

The Chair commented a clarification is needed between including the Agreed Order in CADDNAR and including the Agreed Order in a separate index of agreed or negotiated orders, orders that have not been through the adjudication process.

Green voiced his agreement with the Chair. "This is a process that we have to honor, and there is perhaps some precedential value we may stumble upon inadvertently by doing as the Claimants are asking us to do. That's my fear."

The Chair then asked for a motion.

Green asked whether two motions would be appropriate for this matter: (1) a motion to adopt the recommendation of the Director of the Division of Hearings; and (2) a motion to request the Commission's Division of Hearings to make access of these agreed orders more transparent, visible to the public, on the Commission's website.

Jennifer Jansen asked, "Are we ready at this point to go forward to convene a special committee to examine in more detail? Are we ready to ask the Division of Hearings to start moving toward making agreed orders available online? Or is that something that we would like to consider after the special committee has had time to look at the issue?"

Green asked whether a motion is required today to form the special committee.

The Chair said that part of the value of establishing a special committee of the Commission is the review of the mechanisms. Information Bulletin #1 may be amended to include additional language to further explain the accessibility of agreed orders or an Excel spreadsheet of the agreed orders posted on the Commission's website.

Jansen stated, "Just to avoid any unnecessary duplication of work and avoid any unintended consequences, I would say we ought to look at the issue before we ask the Division of Hearings to take a particular action." Green agreed.

Wright stated that Chair Stautz could confer with the Chair of the Commission, Bryan Poynter, and Patrick Early, Chair of the Advisory Council, to see if this issue would be appropriate for review by the Advisory Council.

The Chair said, "We need to have a motion of how we want to move forward and what that would look like. And, then that would become a recommendation that we take to the full Commission, correct?" She asked whether the AOPA Committee could make a recommendation to establish a special committee to develop a recommendation going forward. Lucas answered in the affirmative.

Green commented that his understanding was there was a recommendation by Judge Lucas to deny Claimants request to index the Agreed Order on CADDNAR.

Lucas stated, "I am speaking here only as the Division Director. I think my jurisdiction as administrative law judge ended the moment this Agreed Order was signed by the Secretary of the Commission." Before the AOPA Committee is a request to include an agreed order in CADDNAR rather than adjudication.

The Chair noted another component is that if the AOPA Committee recommends or goes forward with a workgroup to evaluate this matter, "do we wait pending the outcome of that and any potential changes that may come before the…Commission for review and approval, which would be potentially several months? One approach is that we put this request for indexing this Agreed Order on hold." She asked if instead the Committee was comfortable with denying the request but going "forward with a study workgroup to evaluate?"

Green asked, "By doing such that would not preclude the Claimant to come back and…resubmit a petition in a manner consistent with what the Commission has recommended? In other words, it's not administrative res judicata?"

Wyndham said that considering the Agreed Order "down the road, it kind of takes the Department out of the mix. We entered into an agreement without any knowledge whatsoever that there was going to be a proposal to have it indexed into CADDNAR…. I think that this…AOPA Committee, the Commission, ought to honor that agreement…. I think the decision needs to be made today on this agreement. If you want to study for future reference, then that is fine."

Green said, "My amendment addresses that. The only thing it doesn't do is this won't have any precedential value. In other words, just by denying this does not preclude the Claimant to ask that the [petition] be reconsidered. That's what I think would only be fair, because we are obviously making a policy decision whether you knew about it or not. That policy statement is based upon the arguments that you made today…. You do have some input on how we proceed forward with these types of orders."

The Chair noted discussion would be required regarding including other negotiated orders retroactively. She noted that the Division of Hearings currently has an index of agreed orders that is accessible, but the index may not be as readily accessible and searchable as CADDNAR.

R.T. Green moved to deny the Claimants request to index in CADDNAR the Agreed Order in the matter of *Randall L. Tobias and Sargent H P LLC, v. DNR*, Administrative Cause Number 14-050W. Robert Wright seconded the motion.

Grant reflected that Division Director Lucas indicated that on occasion there have been agreed orders added to CADDNAR.

Lucas recalled that roughly 20 years ago there was an integration order from the DNR's Division of Oil and Gas with multiple parties. He said there were new technological and statutory developments, and the parties came to consensus. The parties requested the integration order be included in CADDNAR. Lucas noted the parties asked whether he, as administrative law judge, had issues with the integration order as written. A couple of the findings were amended to address his concerns. He thought the agreed order was added to CADDNAR. "But it has been so long. [The parties] believed it would be really important, but then the subject never came up again" as an adjudication. The decision might have predated IC 4-21.5-3-27(c), and following a recent cursory search of CADDNAR, he was unable to locate it.

Grant asked, "Is there just one issue here, or are we talking about a whole general policy?"

Green explained that his motion addresses the Claimants' request to add the Agreed Order in CADDNAR. "I would move to deny that request based upon DNR's argument that it's not part of the deal. If it was to be part of CADDNAR, it needs to be part of the deal. What I hear [Division Director Lucas] say is that the only time [he recalls an agreed order] was ever put in CADDNAR, it was the deal." Green said that consideration of whether to constitute a study committee to make recommendations that these types of orders be part of CADDNAR, with perhaps some precedential value, would be a second motion.

Green restated his motion in two parts. Green moved to deny the Claimants' request to index the Agreed Order in CADDNAR. Secondly, Green moved that if the "issues raised are significant enough," going forward "it should automatically be part of the negotiation of [agreed orders]; and therefore, published in CADDNAR. But that is a policy decision" which should be made by the agency.

The Chair asked for a vote with regard to the denial of the request to index the Agreed Order in CADDNAR.

Grant asked, "So, if it goes into CADDNAR, then it has more of a precedent?" The Chair answered in the affirmative.

Wright stated an agreed order can be considered as an unpublished opinion. "One is advisory, and one is precedent." The Chair and Green agreed.

Green said that if the AOPA Committee granted the Claimants' request, the AOPA Committee would be making a policy shift.

The Chair called for a vote. Upon a voice vote, the motion carried. Doug Grant abstained.

The Chair noted that the AOPA Committee discussed establishing a workgroup to evaluate the issue of adding negotiated orders in CADDNAR. She noted that Division Director Lucas recommended the special committee could be made up of members of the AOPA Committee, Division of Hearings staff, and other interested persons.

Wright stated that the DNR should be involved in the review.

Stephen Snyder suggested that if it is an agreed order, it "stays in your lower level index, unless the agreed order specifically states it shall be published in CADDNAR."

The Chair commented that Snyder's suggestion may be appropriate for review by the special committee, as well as evaluating the language in Information Bulletin #1. The Chair noted the AOPA Committee could develop a workgroup.

R.T. Green moved to establish a workgroup to study Information Bulletin #1 (3rd Amendment) with the respect to agreed orders. Constituency of the workgroup would be considered by the Committee at a future meeting. Jennifer Jansen seconded the motion. Upon a unanimous voice vote, the motion carried.

Consideration of objections and other pleadings with respect to "Findings of Fact and Conclusions of Law with Nonfinal Order" by the Administrative Law Judge in *Lucy V. Cress, et al., v. Byrer, et al.*, Administrative Cause No. 12-192W

Jonathan O. Cress, representing Lucy V. Cress, stated that objections to the Findings of Fact and Conclusions of Law with Nonfinal Order were based on five principles:

- Principle 1: The Nonfinal Order did not comply with the substantial evidence introduced at hearing.
- Principle 2: Any finding that the Byrers are entitled to, 15 feet, to exercise their docking privileges was inconsistent with the terms of the easement and the evidence.
- Principle 3: Any finding that the Byrers are entitled to maintain a boatlift is contrary to the terms of the easement and the evidence.
- Principle 4: Any finding that the Byrers may exceed a six-foot wide riparian zone exercising their docking privileges is in consistent with the grantor's intent as it does not adequately consider the docking privileges that were granted for two separate properties in this matter.
- Principle 5: Any finding being that a 10-foot buffer zone is necessary between the Byrers docking privileges and the Cress riparian rights is contrary to the easement and evidence.

Cress provided an eight-tabbed exhibit binder to AOPA Committee members and respective Counsel. He said the administrative law judge was originally called upon to answer three questions concerning the easement: (1) is the six-foot pathway a separate and distinct right from the docking privileges granted to the Byrers; (2) can the Byrers exceed a six-foot wide riparian zone when exercising docking privileges; and (3) can the Byrers maintain a boatlift as part of their docking privileges in the riparian zone? He stated that based on the language of the easement and the evidence introduced at hearing the answers to these three questions are "No." Cress noted that Alline Bender created the easement and docking privileges in 1942, at which time Bender owned Lot 23 (Cress property) and Lot 38 (Byrer property). At the same time, Bender also split Lot 23 into two separate properties, the East Lot and the West Lot (Tab 1).

Cress explained that Bender sold all three properties at auction with a new easement survey (Tab 3). He agreed with the administrative law judge that the easement unambiguously created a six-foot pathway on Lot 23 for the benefit of the East Lot and Lot 38 to access Lake George; unambiguously granted the East Lot docking privileges for two boats and Lot 38 for two boats off the northwest part of Lot 23; and is ambiguous as to the specific geographical boundaries of the docking privileges within Lake George due to lack of definition. When parts of an easement are ambiguous Indiana courts look to ascertain the intent of the parties who created the easement through parole evidence. Indiana law requires that the intention of the riparian owners who originally granted the easement to be implemented in construing that easement. He said the six-foot pathway was not a separate and distinct right from the docking privileges granted to the Byrers. "The only logical way for the east part of the lot and Lot 38 to access Lake George was through that pathway…. There could be no question that the docking privileges were reliant on and should be read in conjunction with the docking privileges provided in the easement…. There could be no question that the six-foot pathway was located at the northwest part of Lot 23, which was consistent with the terms of the easement. There is a legal presumption that the parties intended for every part of the easement to have some meaning, and construction is favored in reconciliation and harmonized throughout the entire document."

Cress said the deed creating the original easement on the East Lot was located under Tab 4. The easement recital and the docking privileges as contained in the deed are contained in the same paragraph and "only separated by a semicolon. This is certainly evidence that the docking privileges are not separate and distinct." Referring to Tab 5, Cress identified the document as the deed that created the original easement on the West Lot, specifically noting the phrase "also reserving docking privileges. It is our assertion that the deed language refers to the reserving dock privileges within the easement area. It is Cress's contention that the six-foot pathway was not a separate or distinct right of the docking privileges and granted to the Byrers, and should be read in harmony".

Cress said the Byrers cannot exceed a six-foot wide riparian zone when exercising docking privileges. Indiana courts have held that the width of an easement is indicative of the grantor's intent. Cress said that despite a six-foot easement, Judge Lucas found that the Byrers are entitled to 15 feet in which to exercise their docking privileges. His finding was based on Paragraph 32, which is contrary to evidence presented during the hearing. Bender's grandchild, Connie Carroll, testified at hearing. She was "particularly persuasive because her grandmother was the individual who created the easement and docking privileges…and familiar with the Cress property and the Byrer property from her early childhood." Carroll testified with "clarity and specificity as to the historical development" of Lot 32 and Lot 38, the use of the easement, and the placement of their pier from its inception. Her testimony was the only testimony given as to the grantor's intention. Carroll testified that in the 1940s the most common boat found on Lake George was called a "double boat" with average width of less than four feet (photograph under Tab 7), and a common rowboat, three feet in width. She testified further that it was possible to maintain four average boats on the same side of the pier within a six-foot riparian zone, and from 1942 up to 1985 no boat was parked or a pier placed on the northwest portion of Lot 23. Because the deed could lawfully and reasonably moor two boats on the same side of the pier within a six-foot easement, the width of the easement is indicative of the grantor's intent. "Alternatively, even if the intent of Ms. Bender was that the lot owners maintain boats outside the easement, each lot owner would only be entitled to a six-foot riparian zone." Referring to the diagram under Tab 8, Cress stated the alternative supports maximizing the riparian zone for the lot owners docking two boats off the Schultz side of the pier. The pier would have to be placed on the southwest portion of the easement allowing both owners of the lots to access the pier from the easement. Assuming the pier was approximately two feet wide, the riparian zone for the lot owner on the Schultz side would be approximately four feet.

Cress stated that if Lot 23 had not been recombined, the ALJ's determination would have granted the East Lot also a 15-foot riparian width to exercise docking rights. "This would have resulted in over 30 feet of frontage being taken up and approximately 50% of the Cress shoreline taken up. This certainly was not the grantor's intent…. This also would not be consistent with the easement being located off the northwest part of the property."

Cress said the Byrers cannot maintain a boatlift in their riparian zone. "Nowhere in the deeded language does it provide that a boatlift…or any structure, other than just the simple mooring of a boat to a pier, was authorized." There was no evidence presented and no boatlift should be maintained pursuant of the terms of the easement. Boatlifts are greater in width than a boat, and there was no evidence presented that a boatlift was necessary for the Byrers to exercise their riparian rights. "A boatlift is a luxury, not a necessity. The right to maintain a boatlift is not reasonably necessary to carry out the original intent of the grantor and places a greater burden on the servient estate, that being the Cress property, than which is needed".

Cress said that the ten-foot buffer zone between the Byrers' docking privileges and the Cress riparian right is not necessary. Jim Hebenstreit, Assistant Director of the DNR's Division of Water, testified that the facts would not warrant the implementation of any buffer zone in the Cress or Byrer riparian zones

"even considering the opportunity of safe navigation. Moreover, Mr. Byrer testified that he could exercise his boating rights under the easement within a 13 or 14 feet width". Byrer did not request any buffer zone. A ten-foot buffer zone is not reasonable or necessary to carry out the grantor's original intent. "It is our position that the evidence and the terms of the easement weighs heavily in our favor." The diagram under Tab 8 "illustrates clearly that the intent of Ms. Bender was to have each lot owner maintain a boat within a six-foot area. Otherwise, each lot owner would not have had access to their docking privileges." Cress asked the AOPA Committee to reverse the Nonfinal Order and enter appropriate findings.

Jason Kuchmay, attorney for the Byrers, observed that Jonathan Cress frequently referenced testimony before Judge Lucas. "But as far as I can tell, he has not ordered a transcript or supplied the Committee with a transcript so [Cress] is relying on whatever summary he has provided to you, and whether or not that's accurate, I certainly submit that on a few points it was not."

Kuchmay said the Byrers have a deeded easement that gives docking privileges for two boats, and the easement specifies "exactly where that's located. It's at the northwest part of Lot 23. What the easement does not do is specify the width of the riparian zone that's available to the Byrers", which was determined by Judge Lucas. Judge Lucas heard testimony regarding the historical uses of the easement presented by both the Byrers and the predecessor's in title, and he heard evidence regarding the present easement use and the needs of the Byrers." After he reviewed the evidence and "weighed the credibility of the different witnesses that he was experiencing firsthand, the Judge entered an appropriate ruling…. In the end, he gave my clients 14 feet to work within for their pier and for their docking privilege for two boats. That is their property right." He also ensured there was an appropriate buffer zone "both by limiting the proximity of the Byrers use to the north, making sure there is at least one foot between that common riparian line to the property owner to the north, and then…also provided for the ten-foot buffer zone between the Byrers and the Cress uses. That allows, frankly, just for some safe ingress and egress for everybody involved."

Kuchmay said he prepared and introduced into evidence Exhibit D as shown under Tab 1. The property shaded in blue is Lot 38, the Byrers' property and to the east is the Cress property, Lot 23 adjacent to Lake George. Lot 38 and Lot 23 were originally under common ownership "so obviously, there was no need at that time to have an easement creating a docking privilege, because the owner was touching the water's edge and they had their own riparian rights." In 1942, the owner divided Lot 23, and first created was the East Parcel (shaded in pink), which was deeded to a third party, and the remainder of Lot 23 was deeded to another person. "The result of that transaction was to land-lock the rest of Lot 23 and prohibit that lot from having access to the road. Now you have the new East Parcel that's blocking the lake access for Lot 38. Again, you have these two parcels that…one is land-locked and one cannot access the lake." To resolve the access issue, a six-foot pass way was created, which is shaded in green and orange on Exhibit D, and "again, that does settle things. It allows the Byrer property to access the water, and it allows Lot 23 to access the road". The 1942 deed created the docking privileges. "They were reserved at the northwest part of Lot 23 for the owners of that new East Parcel, and [the deed] says for two boats for the owners or the tenants of the Byrers property." The East Parcel and the rest of Lot 23 came back under common ownership "so that easement disappears. It is no longer necessary. You can't have an easement over your own property." But the easement for the Byrers property remained. "We are talking about two different things. We have the pass way, one that allows you to walk across Lot 23 to and from the water and…the road. Then you have the docking privilege, [which] is on the northwest corner of Lot 23 for an unspecified width, but we do know it is for a pier and for two boats." In his response to objections, under Tab C, he said he provided more historical detail.

Kuchmay said Cress filed written objections to Paragraph 19 but did not address them in today's oral argument. "I assume that [Cress] withdraws the objections in light" of the Entry with Respect to Cress

Motion for More Definite Statement, which proposed amendments to Paragraph 36 of the Findings of Fact and Conclusions of Law, and Part (A) of the Nonfinal Order. Judge Lucas modified Paragraph 36 by "just quoting the language of the deed, omitting some language [of the deed], and put in the ellipses. I think that is a moot point."

Kuchmay stated that Paragraph 32 of the Nonfinal Order "seems to be the meat of the Cress objections." Judge Lucas held the Byrers and their predecessors of interest have "commonly used more than six feet of the lake waters that are immediately adjacent to the six-foot wide easement. That finding is important because…Cress is trying to limit the Byrers to six feet in which to have a pier and two boats. It has never been the case; it can't be done. Frankly, that renders the easement useless." The evidence supports the ALJ's finding. Byrers' predecessor had a straight pier with a boat moored on each side using "more than six feet always." "Every time [the Byrers] moored a boat to their pier they used more than six feet." The Byrers once moored a five-foot wide boat to a double-wide section of the pier, and they have moored an eight-foot wide pontoon on the Cress side of the pier. The historical pier use by both the predecessors and the Byrers was more than 30 years, which was not disputed at hearing.

Kuchmay said Cress objected as hearsay to the Affidavit of Nancy Vinson, the Byrers predecessor, which was submitted into evidence at hearing. IC 4-21.5-3-26 provides that hearsay can be admitted in an administrative hearing, but the order cannot be based solely on the hearsay evidence. The Nonfinal Order contains detailed findings and was not solely based on Vinson's Affidavit. "Everything [Vinson] testified to was reinforced by other non-hearsay evidence."

Kuchmay urged that the Claimant's objections were "cherry picking" and limited to evidence considered "favorable evidence to support their position". Judge Lucas heard all the testimony and "should be entitled to make whatever credibility determinations he sees fit to weigh the evidence. "There was ample evidence to contradict the Cress's opinion." John Byrer researched the types of boats used in the 1940s, and Byrer testified they included "canoes and outboards that were at least four feet wide. Obviously, you can't moor that to a pier and still be in less than six feet." The "double boats" depicted under Tab 7 are "all different sizes… Essentially what that double boat is, is two canoes that are put together…. You cannot have this double boat moored to a pier and be within six feet." Carroll testified a double boat was wider than a standard row boat. Lucy Cress testified that a standard row boat was four feet.

Kuchmay urged the case law confirms the width of an ambiguous easement is what is reasonably convenient and necessary for purposes for which the way was created. A judge need not limit the right-of-way to the means of transportation in common use at the time the easement was created. The 14 feet that was afforded to the Byrers by Judge Lucas is reasonably convenient and necessary for the Byrers to enjoy the right to have a pier and moor two boats. "It is certainly less than what we asked for, and certainly less than what [the Byrers] have used in the decades that [the Byrers] owned the property, but we accept that. We acknowledge it is reasonably convenient and necessary." The Byrers pier is "not excessive" and is "not an extravagant pier. We are talking about a simple, straight pier, three-foot wide pier." Judge Lucas instructed the Byrers to moor their two boats on the same side. "It's reasonable, and it's within the easement."

Kuchmay said Cress argues Paragraph 33 of the Findings makes it unequivocally clear the grantor's intent was the Byrer property and the East Parcel were each to have a six-foot riparian zone, which somehow would include a shared pier and the use of a ten-foot riparian zone. "To be honest, I find it difficult to follow the reasoning. I think it is clear that there was no such intent." The deed language is "dead silent as to the width of the riparian zone. As the judge acknowledged, the grantor could have specified a width but did not…. It's not limited to the six-foot passage way. The pathway and the docking privilege were created in different parts of the deed, and they were created for different purposes. The pass way has nothing to do with riparian rights… The deed as well says absolutely nothing about a shared pier. What

the deed does do, however, in the sentence after creating the pass way, it also conveys a parking space for two vehicles." Lucy Cress acknowledged during hearing that two vehicles cannot be parked in six feet of space. She "acknowledged that the pass way and the parking are two separate things. I don't think one can make that concession and then rightfully argue that the docking privilege is somehow limited to six feet when that is created in an entirely separate part of the deed itself."

With respect to the Byrers' boat lift, Cress filed a Motion for Clarification. Kuchmay said Judge Lucas clarified the Nonfinal Order and found the Byrers are allowed a boat lift. "We were given 14 feet within which to exercise our docking privileges. The deed does not dictate how two boats will be docked, and as long as the Byrers remain within the 14 feet, the Byrers are not interfering with Cress's use of her riparian rights or ability to navigate.

Kuchmay noted the Byrers' initial position was they were entitled to one boat on either side of their pier. The currents in Lake George "make it difficult to stack the boats, and that's why [the Byrers] wanted to have a boat on either side of the pier. [The Byrers] have been told [they] can't do that. We will accept that…. The buffer zone does allow for safe navigation not only for" the Byrers but also for Lucy Cress.

Kuchmay also noted that Cress's Objections reference the issue of "unclean hands, whether on [the Byrers'] part or their predecessor's, because for a period of years part of the riparian zone to the north, the Schultz's property had been used. The evidence was that both [the Byrers] and the predecessors always thought they were exercising their rights properly. They weren't trying to do anything wrong there. Frankly, this is only an action to determine the dimensions of a property right…. I submit that there is nothing in the deed that limits the available riparian space to six feet—that the historical use has always exceeded six feet. The measure is what is reasonably convenient and necessary to the exercise of the docking privilege for two boats. And, the Judge's ruling on that regard was supported by the evidence and should be affirmed in all respects."

DNR attorney, Eric Wyndham, said during the oral argument a stipulation was made that the riparian lines "were to be property lines extended based on the Second Principle of Information Bulletin #56. The Department wants to respect riparian zones. The over-the-land easement to the lakeshore was six feet. I kind of agree with Mr. Cress that the six-foot easement on the land, shortly followed by the docking privileges off the northwest corner of Lot 23…would include the six-foot easement for the riparian zone in that six-foot easement. I don't know where Judge Lucas got his 14 feet, other than to make it accommodating, which I understand because this basically was ambiguous…. It's the Department's position that we like to honor riparian zones and the use of the public freshwater lake for docking privileges." By not specifying the width of docking privileges, an "interpretation could also be made that the grantor was limiting the docking space to six feet". The easement is specified at six feet, and for the Byrers to "allege and argue their docking privileges were more than that…violates the sanctity of riparian zones".

Wyndham said the Department disagrees with the finding in Paragraph 33 that parole evidence supports the finding that use of a space wider than six feet was anticipated. "I don't know if whether that is the case or not." Carroll testified and had more knowledge of history of that location on the lake "than anybody…. She testified that there was no pier back in the 40s at the northwest corner of Lot 23." The Schultzes were also Claimants in this action because the Byrer pier "encroached upon [the Schultz's] riparian zone…so basically the Byrers were not obeying anybody's riparian zones…. For the fact that the Department wants to respect riparian zones and the fact that the easement was six feet…, we accept whatever the Committee chooses. We are not saying that Judge Lucas didn't have some justification for his findings, but by the same token, I think there is equal justification…for the Cress argument that the docking privileges were on the northwest corner of Lot 23, which includes the six-foot easement…. It's

the Department's position, for the sole purpose of respecting riparian zones that we would have to possibly support Mr. Cress and his client."

Jonathan Cress provided his rebuttal. He said there are two issues with Kuchmay's remarks. He agreed with the Department's position that the historic use may be irrelevant or not as important to this case as may have been given credence. The findings were clear that for the first 40 plus years, there was no use of the easement whether by passage to the lake, placing a pier, or docking a boat off that pier. Nancy Vinson purchased Lot 38 in 1985, and she placed a pier right on the shared boundary line of the Shultz-Cress properties and moored boats on either side, encroaching on the Shultz riparian zone. "There is argument that they exceeded a six-foot width, but in essence they exceeded the six-foot width towards the Shultz side. I understand that there was evidence that they may have exceeded the six-foot on the Cress side for periods of time, but it certainly wasn't over the course of 30 years." John Byrer testified that from 1992 to 1998 he did not place a boat on either side of the pier.

Cress asked the Committee to consider that "The easement granted more than the Byrers docking privileges. In taking into consideration the grantor's intent…, and if the properties were not recombined, would that mean that the East Lot would also be entitled to 15 feet for docking privileges for a total of 30 feet? How would one get down to the lake on a six-foot easement and get over 'x' amount of feet to access their docking privileges? That idea just does not match up."

With respect to the diagram under Tab 8, Cress said, "I understand it may be difficult conceptually, but it is one of those things where we have to look…and say that there is no guarantee that Lot 23 was going to be recombined. Applying that principle would certainly say that it was not the grantor's intent to award one of the lot owners 15 feet for docking privileges if that amounted to awarding both over 30. I think that is the crux of our argument…. You can't access your docking privileges from a six-foot passageway, which was the grantor's intent."

Jason Kuchmay replied to the Cress rebuttal. He acknowledged the Byrers' encroachment on the Schultz side was also at issue in the proceeding. The Byrers placed their pier in the same location as did their predecessors. The Byrers "were told that's where [the pier] goes, and there was no ill will intended." The Nonfinal Order would resolve any encroachment with respect to the Schultzes.

Kuchmay said the deed provides that a lot owner has a docking privilege for two boats. The deed "doesn't say six feet anywhere. That's one of the reasons I walked you through the history of how this easement was created…. There are reasons for that passageway which are 100% independent of riparian rights." Carroll's testimony that there were no piers or boats docked for a period of 40 years is irrelevant. Cress did not argue abandonment or laches. "All we are doing is trying to define" the portion of the Cress riparian zone within which the Byrers have the dominant estate for an easement "to have a pier and two boats."

Wyndham added, "I don't think there was a whole lot of respect by the Byrers regarding where they put their boats." Alline Bender created the easement "put six feet for the easement and then the docking privileges statement was right after that. Another possible interpretation was that [Bender] didn't need to specify the docking privilege area, because she specified the six-foot easement." Wyndham said Cress was a riparian owner and the Byrers were not. He reiterated the DNR's emphasis was to respect riparian rights.

The Chair asked Kuchmay for clarification regarding the stake shown in Exhibit D contained in Kuchmay's Response to Objections. Kuchmay responded that the survey stake shows the property line. She then asked if the stake depicts existing property lines. Kuchmay said the Byrers had a survey taken,

which was submitted into evidence. He said that the photograph shows that part of Byrers' pier encroaches on the Schultz's property.

The Chair noted that the AOPA Committee has heard many pier cases. "There is a difference in size and width of piers. Historically, [the piers] were two-foot, and some cases three-foot. … So the other piece to this is things change over time as do sizes of boats. Where do you stop? At some point of saying how big of boats are we going to continue, which gets back to respecting the riparian zones."

Kuchmay reflected that the Nonfinal Order prohibits the Byrers' pier from being more than three feet wide and limits their usage to what is needed for two boats.

The Chair thanked the attorneys for their presentations. She then opened the floor for discussion among the AOPA Committee members.

R. T. Green asked whether the debate is over whether the original description of the riparian rights is either ambiguous or unambiguous.

Kuchmay answered, "I guess you can argue both sides of the coin. In some ways, I would say it is unambiguous, because it unambiguously doesn't say what it is. In my opinion, it is dead silent as to the width" of the riparian zone.

Cress answered that the deed provided for docking privileges off the northwest part of Lot 23. "The northwest part would be the corner of Lot 23 with a shared boundary line with the Schultzes at the water's edge, which would have been consistent where the easement was coming down to the lake."

Robert Wright asked whether the Nonfinal Order required the pier not interfere with the riparian rights of the Schultzes. "I assume that was the reason for the one-foot when set out?"

Cress agreed, and stated, "Yes, because the survey indicated that when the pier was placed out, depending on how you placed it out, [the pier] could gradually go in there so there was a one-foot kind of barrier there."

Kuchmay added that the Nonfinal Order also prohibits boat mooring on the north side of the Byrer pier.

Green said, "Let's assume for the purpose of argument that the granting of riparian rights, docking, if you will, is ambiguous, did Judge Lucas apply the rules of construction correctly?"

Wyndham answered, "I think that is the whole issue. I think there are various ways that that could be constructed. I think definitely the language is ambiguous."

Kuchmay noted that he cited in his Response to Motion for More Definite Statement, *Rehl v. Billetz*, 963 N.E.2d 1, 7 (Ind. App. 2012), which says, "In fact, any doubt or uncertainty as to the construction of the easement language is ordinarily construed in favor of the grantees" being the Byrers.

Green asked whether Kuchmay believed that Judge Lucas applied the rules of construction, in an ambiguous situation as this instant case, was correct and appropriate. Kuchmay answered in the affirmative.

Green then asked Cress, "My understanding is that you don't concede that it is ambiguous, and I understand that, but assuming that the series of deeds be considered ambiguous, do you take issue with Judge Lucas's rendering of the rules of construction? If so, particularly which ones?"

Cress answered, "I do respectfully disagree, because…if the terms of the easement [are] ambiguous, we are supposed to look to the grantor's intent as opposed to the predecessors' use of the property, to look at the construction of the easement, interpreting it, and applying it." Referring to Paragraph 34 of the Nonfinal Order, he said "whether Mr. Byer needs 13 or 14 feet, or 30 feet, or six feet is immaterial as to ascertain and construct what the terms of the easements are when they are ambiguous." In determining "what the grantor would have done, we look at what types of boats were there in 1942. … What was the size of the boats at that time? That would be indicative of the grantor's intent versus any prior usage or how they used those riparian rights."

Wyndham stated that *Rehl* "might be the law, but something has to be factored by this Committee, in this case, that principle may be restricted by the riparian zones."

Bob Wright asked whether the AOPA Committee is considering the modified Nonfinal Order. The Chair answered in the affirmative.

Wright noted that there may be a typographical error in the modified Nonfinal Order, Paragraph (A), second page, last sentence, which states "…between Lot 23 and Lot 23". He asked whether the sentence should read "…between Lot 23 and Lot 24"? That Chair answered in the affirmative.

Wright moved to amend the last sentence of Paragraph (A) of the modified Nonfinal Order to read "…Lot 23 and Lot 24." He also moved to adopt Judge Lucas's modified Nonfinal Order as the Natural Resources Commission's Final Order.

Grant said he was "a little sympathetic to the Department. Just thinking about these six-foot zones that have been around the lake, so many of those were originally nothing more than to pull a rowboat up on the shore to start with. Then they turned into a pier and then they turned into something more. I guess the question is how much do we move to accommodate the person who has the zone as opposed to the rights of the other person that has lakefront?"

The Chair suggested a refinement to Grant's question. "Who has the easement versus the others that have the lakefront and the riparian zone?" Grant agreed.

Green asked whether the rules of construction have to consider the grantor's intent and accommodate both the dominant estate and the servient estate. "All those interests are competing…, and eventually there is supposed to be a decision that weighs those…. Of those three interests, is one greater than the other two?"

Kuchmay urged that based on *Rehl* the grantee's interest would receive greater consideration on an ambiguous situation.

Cress said if there was disagreement as to the grantor's intent based on the evidence, "I would tend to agree with Mr. Kuchmay…, but the evidence was presented about current use versus use when the easement was created. There is no disagreement with regards to the use of the property when the easement was created….. If there was an issue with regards to the intent of the grantor at the time the easement was created, then, yes, it would go to the grantee. In this case, I don't believe the evidence is contrary to that, because again we are talking about current use versus use when it was originally established and what types of boats were common on Lake George."

Kuchmay said the grantor's intent was to create a docking privilege for two boats, and the grantor did not limit the size of the boats.

Cress said the grantor did not specify the owners could expand beyond the six-foot easement.

Green seconded Wright's motion to amend the last sentence of Paragraph (A) of the modified Nonfinal Order, to read "…Lot 23 and Lot 24", and moved to adopt Judge Lucas's modified Nonfinal Order as the Natural Resources Commission's Final Order.

The Chair opened discussion by the Committee on the motion. She suggested the modified Nonfinal Order allowing the Byrers up to 15 feet for docking privileges, and a ten-foot buffer from the docking privileges for access to "not only their pier, but…it is any boat. So, if you have a pier and you want boats on it, the edge of that boat has to be ten feet from 15 feet. I will be very open with my concern as I map it out of that fact that what was a six-foot easement from the property line if you extend it out into the water for the riparian [zone] you not only have now 15 feet, but another ten feet. So you've taken 25 feet of frontage and limited the use of [the Cress's] riparian zone and rights in that zone…. You have shifted [the Cresses] much farther down. I'm siding with concern around the riparian zone. My next question is where do you stop with this, as well as a boat lift…, because you start changing the dynamics when you start putting boatlifts and other structures in addition to just mooring or docking…boats".

Jansen said she understood the Chair's concerns. But I'm not sure that reversal wouldn't be a matter of "reweighing the evidence that Judge Lucas heard in the hearing," She said she was inclined to affirm.

The Chair called for a vote. Wright, Green, and Jansen voted to adopt the Findings of Fact and Nonfinal Order (with the clerical correction to the identification of lot numbers) as the Commission's Final Order. Stautz and Grant voted against the motion.

Consideration of objections and other pleadings with respect to "Findings of Fact and Conclusions of Law with Nonfinal Order" by the Administrative Law Judge in *Locust Street Company, Inc., v. Citation Oil & Gas Corp. and Department of Natural Resources*, Administrative Cause Nos. 13-101G and 13-104G

Sandra Jensen, Administrative Law Judge, provided an overview. For consideration are oil and gas permits approved by the Department to Citation Oil & Gas Corp. At issue is ownership of the mineral rights associated with the location of the oil wells to be drilled. The permitted site lies along the Wabash River, and the Wabash River in this area has changed such that on the Indiana side the surface has expanded due to accretion while the Illinois side has eroded. "There is the position that the surface is controlled by the accretion and erosion, but the subsurface mineral rights stay with the original grantors, which meant that the mineral rights, the oil, would have been still in the possession and property of the owners, Locust Street, on the Illinois side." Judge Jensen said the issue remaining, based on the objections, is whether the Nonfinal Order adequately addressed the "line of acquiescence" as it relates to those mineral rights.

Michael E. DiRienzo, attorney for Locust Street Company, Inc. ("Locust Street"), provided a copy of Locust Street's six-tabbed Appendix of Exhibits. He said although Locust Street filed the petitions for administrative review, the mineral interests are owned by the manager for several Gray Family entities. Locust Street objected to the Nonfinal Order on Summary Judgment, because the findings and conclusions did not consider appropriately (1) a 1984 Unit Agreement that was entered into between the Department of Natural Resources and Citation's predecessor, Danson Oil; and (2) the payment of nearly three decades of royalties paid to the State of Indiana consistent with that Unit Agreement. Citation's Exhibit D (Tab 1) provides a good illustration, which shows the oil and gas wells on the Indiana side of the Wabash River in red and the oil and gas wells on the Illinois side in white. "It is our contention that there is a line that is designated as what we call the 'prescriptive line' or the 'line of acquiescence' that is the historic line between the two States as it concerns oil and gas mineral interests."

DiRienzo said in her proposed revision of the Nonfinal Order, Judge Jensen correctly quoted the portion of the Unit Agreement, which provides that royalty payments were to be determined by the ratio that the surface area of the tract bears to the entire surface area of the Unit Area involved and noted Judge Jensen correctly cites Paragraph 5.1 of the Unit Agreement, which states that those "Tract Participations shall remain constant notwithstanding any subsequent shifts or changes in the course of the Wabash River." DiRienzo expressed that Judge Jensen incorrectly found Paragraph 2.2 of Unit Agreement provides that title to the property is unaffected by its terms noting that the Unit Agreement states "there is nothing in the Unit Agreement shall be construed to result in the transfer of any title by state or by lessees to each other or to any other person whatsoever", but noting "it does not otherwise state that it has no effect on title. This paragraph deals with the transfer of title, and that makes sense when you think about the purpose of the Unit Agreement—it's to combine the properties of two different owners in order for there to be sufficient area for a well unit to be formed. The Unit Agreement is clear that the combing of those properties for the purpose of unitization does not transfer those interests between those entities. We would agree with that, that the Unit Agreement does not do that. But claiming that Unit Agreement has no effect on title or other property rights of the parties thereto, or any third parties, the ALJ ignored other provisions of the Unit Agreement."

DiRienzo noted that Paragraph 6.1 of the Unit Agreement (Tab 2) specifically provides that the Unit Agreement is a "covenant running with land interests covered hereby. It's binding on successors and assigns of the parties to the agreement and to any other party that acquires an interest in one of the tracts." He explained that a "covenant running with the land" effects title. "So the argument that the Unit Agreement has no effect on title can't be squared with Paragraph 6.1…. It is the general rule of law in Indiana that 'all words, phrases, sentences, paragraphs, and sections of a contract cannot be read alone,' and the true meaning of a contract is to be ascertained from the consideration of all of its provisions, not just one isolated clause, and much less the title of one isolated clause."

DiRienzo said Judge Jensen's conclusions that the Unit Agreement bears no relevance to the dominion or control of active property is inaccurate based on the language of the Unit Agreement itself and other facts presented by Locust Street regarding almost three decades of continuous payment of royalties to the State of Indiana. There were several maps of the individual units that were attached as exhibits to the Unit Agreement and those exhibits show the units included property, which borders the then existing thalweg of the Wabash River and also touched upon property owned by the mineral interest owners on the Illinois side of the Wabash River, including some of the Gray Family entities represented by Locust Street. DiRienzo explained that Tab 3, Exhibit A, Unit 31X-14 illustrates the unit that existed at the time; Indiana's land under the surface of the Wabash River as it existed at the time; and what was then the current thalweg between Illinois and Indiana. Locust Street presented evidence that Indiana has continued to receive royalty payments for oil and gas produced from Unit 31X-14 based on the Unit Agreement's designation of ownership interests. "Indiana's portion of this unit that existed at the time of the Unit Agreement for nearly 30 years Indiana has continued to receive royalty payments based on that percentage…despite [now referring to Tab 4, Exhibit C, purple line marked "2013"] …despite the fact that the Wabash River has shifted in this particular area in such a way that the thalweg is much closer to the Indiana side than it was at the time the Unit Agreement was entered into". Exhibit C shows Indiana has been receiving royalties for Unit 31X-14 and others that have since included portions of the bed of the Wabash River under the lands of Illinois. The exhibit under Tab 5 shows Unit 31X-14 in relation to the current thalweg of the Wabash River as opposed to where it was located at the time of the Unit Agreement.

DiRienzo stated, "Unlike Indiana, Illinois makes no claim of ownership of minerals under its portion of the bed of the Wabash River. Without an exception to the application to the doctrine of accretion, evidence appears to show that the State of Indiana has been receiving royalty payments that now belong to the Gray Family entities and other individual owners in Illinois." The DNR claims the Unit Agreement

has no impact on the mineral interests of the parties along the Wabash River but "has acted for three decades as if the Unit Agreement continues to control royalty rights of the parties." Locust Street argues the continuous payment and acceptance of royalties for the production of oil and gas is not an exercise of property rights and is not consistent with the law or the Unit Agreement. "The actions of the Department of Natural Resources and Citation and its predecessor has established by prescription and acquiescence an exception to the doctrine of accretion regarding mineral interest boundary in this Section."

DiRienzo said that prior to the issuance of the permits at issue the Department acted as if the movement of the Wabash River did not impact mineral interest ownership in Section 14 and elsewhere. The Department's oil and gas records, GIS map (Tab 6), shows the prescriptive line is the State Line despite subsequent shifts and changes of location of the Wabash River. "It is our argument that to the extent there's any dispute or there's insufficient evidence to establish the exact location of this line, based on the evidence presented…. Summary judgment should not have been granted." He requested the AOPA Committee remand the matter to the administrative law judge to hold a full evidentiary hearing and to determine if the prescriptive line impacts the well permit units at issue.

Kent A. Brasseale, II, also representing Locust Street, stated the issues are complex and said Judge Jensen "actually did a very good job of distilling it down." Referring to Exhibit D (Tab 1), he explained that "if you look at all of the red wells—and this is over decades of drilling—on the Indiana side and all the white wells on the Illinois side…, you see a line as we called it a 'prescription' or a 'line of acquiescence' that has defined itself very well over time. The wells have been drilled over a period of time when the Wabash River has been moving, but the locations of the wells have played out in the same manner to recognize this line…. Coincidentally, if you compare this line to the lines of the Section boundaries of both States, and…this line to the line that the USGS maps, even as recently as 2012, recognized as the boundary between the States, they match up uncannily well". To apply Judge Jensen's Nonfinal Order is "different than what has been happening in the past. The reason we spent time on this Unit 31X-14 is to point out that if this is the way it is supposed to be. This is certainly not the way it has been applied in the past. If the river has moved one way or the other, and if we are going to apply this, it cuts to the benefit of Indiana side. Sometimes it cuts to the detriment of the Indiana side." There are more examples of wells along the Wabash River with unit agreements. Brasseale explained that a "unit agreement" is an understanding between the parties that are relevant to that acreage as to how the mineral interests or royalties are to be split between the parties. The apportioning of interest or royalties is not a title issue.

Brasseale concluded and stated that applying the Nonfinal Order "though as the river has moved, those numbers should have adjusted particularly in instances where the river has moved to the detriment of Indiana. Under this theory, Indiana has become a part of an owner. In the case of Unit 31X-14, that's what we have going on here, but there has never been a revised or updated Division [of Oil and Gas] order to say that [Locust Street] is to receive any of that money. We obviously not just focusing on Unit 31X-14, but it illustrates the point that the application of this [Nonfinal Order] has not been the way things have been carried all up and down the Wabash River boundary between" Indiana and Illinois.

William C. Illingworth, representing Citation Oil & Gas Corp. ("Citation"), stated there is "more or less agreement as to what the lines are." Locust Street's objection is that Judge Jensen did not address in her Nonfinal Order the theory of acquiescence, and Locust Street requested that the theory be addressed and that the AOPA Committee remand the matter back to Judge Jensen. "But that's kind of already what happened. Locust Street has submitted acquiescence in its response to our Motion for Summary Judgment. There was a reply to that. The Judge didn't specifically say the word 'acquiescence' in her" Nonfinal Order. In response to Locust Street's objection, Judge Jensen revised her Nonfinal Order to include additional findings and conclusions of law. In her revised Nonfinal Order, she addressed the acquiescence, and there is no need for remand. "Basically, [a response to Locust Street's request for] relief has already taken place."

Illingworth said over time the Wabash River moves. Referring to an enlargement of Hearing Exhibit C (Tab 4), he pointed out lines for 1807, 1902, 1958, and 2013 show the Wabash River, at this point, is moving west. The doctrine of accretion "says that whenever the river moves west, [property located in Indiana] gets bigger and [property in Illinois] gets smaller. This rule makes sense." If a farmer owns property in Indiana, the farmer "wouldn't want to have half of [the property] to be on one side of the river and half of the land on the other side. You've got to drive over and around to find a bridge somewhere…. In the oil and gas sense, it makes sense, too." Wells will have flow lines, but those flow lines go into a single tank battery. The refinery is going to pick up the oil stored in the tank battery. "It doesn't make sense if you are going to have some of the oil over here is owned by this guy, because then you would have put a tank battery here and a tank because you can't put flow lines across the Wabash River. It makes sense on the surface, and it makes sense with the oil and gas industries, too."

Illingworth stated that Indiana case law provides that property moves with the river. "It doesn't say 'surface'; it doesn't say 'subsurface'. It just says 'property'; property moves." Case law does not specifically address minerals. Judge Jensen found that accretion applies to minerals, and oil and gas ownership moves with the river. But Locust Street objections cite the existence of a Unit Agreement. The Unit Agreement provides the process to allocate the royalties from wells, which is "different than what the river rules". When the Unit Agreement was prepared and entered, the parties took into consideration the location of the Wabash River. A unit agreement is between landowners that wish to drill for oil and gas, but individually do not own sufficient land to satisfy state law setting acreage amount for a drilling unit permit. "In order for [the landowners] to drill a well, they have to agree how [they] are going to do this. So, they enter into a unit agreement that says…[one landowner] gets a third of the revenue and [the other landowner] gets two-thirds…. [The landowners] don't want to pay for a surveyor…so [the landowners] do a unit agreement…and say 'we don't really care what the property line is. You get a third and I get two-thirds.' That's what happened here." The State of Indiana owned a portion of the property, because that portion was under the Wabash River, to which the parties agreed. The parties to the Unit Agreement were aware that the Wabash River would move, but entered into the Unit Agreement, not to set property lines but to set allocation of royalties. ¶2.2 of the Unit Agreement provides: "Nothing herein shall be construed to result in the transfer of any title by the State or by lessees to each other or to any other person whomever; the intention of this agreement being to provide for the cooperative development and operation of the several tracts and for the sharing of the unitized substances produced and saved as herein." ¶5.1 provides: "The allocation of the minerals and royalties shall remain constant throughout the entire period in which this agreement remains in force and effect, notwithstanding any subsequent changes in the course of the river."

Illingworth stated that the Unit Agreement did "fix a boundary line. Even more so, they are fixing the royalties between the state [of Indiana] and the property owner. They are not talking about Illinois." Illinois was not a party to the agreement, but the Unit Agreement dictates the property line at this location not the State line between Indiana and Illinois. The boundary line between Indiana and Illinois is the subject matter of the U.S. Supreme Court. "I don't think an ALJ…can make [a state boundary] determination…. I can't imagine you can make that determination through a unit agreement which says how we are going to split up royalties."

Referring to Hearing Exhibit C, Illingworth said the DNR's Division of Oil and Gas is asking, "'Where is the river? Okay, we can permit a well, here, here, here, and here.' That's what all the red spots are. Illinois [asks], 'Where is the river? Well, it's here. Here, here, here [Illinois] can permit wells.'" Both Indiana and Illinois are permitting oil and gas wells based on the location of the Wabash River, not the location of the Wabash River at the time of the Unit Agreement was created. Indiana and Illinois continue to permit oil and gas wells and unit agreements are also being entered. Locust Street "is going to say that the boundary of Indiana is according to all these private unit agreements. The state boundary is

going to jumping all over the place." Illingworth concluded, and stated that Citation filed a permit to drill a well with the Department, and the permit was issued. "The question is, does Indiana have the authority to do that…? Indiana has authority to issue anything in its State boundary. The State boundary is the Wabash River."

DNR attorney, Ihor Boyko, stated, "We are kind of drifting far afield from what the real issue was in this case." Locust Street filed two petitions for administrative review in June 2013. Locust Street provided in its petitions that the meandering of the Wabash River impacted surface rights. But Locust Street also noted that it obtained a land patent from the federal government in 1839, and the "mineral rights stayed as they were in 1839 even though the surface moved." He noted Judge Jensen found that both the surface and subsurface rights move, which in effect, rejected Locust Street's argument. Locust Street did not object to that determination. "That's the whole issue in this case. The issue about state royalties and unit agreements from 1984, that's really not relevant to the issue. I don't think this Commission has jurisdiction even to address those issues."

Boyko said Judge Jensen found in Finding 48 that Locust Street does not have standing and is not aggrieved by the Unit Agreement. There may be other forums where Locust Street may raise royalty issues that it perceives with Indiana, but the Commission is not the appropriate forum. Disputes regarding State boundary lines are under the jurisdiction of the U.S. Supreme Court. "I don't know how you can have a private unit agreement with the State of Indiana and then argue that it impacts State boundary lines." Judge Jensen found that she does not have the authority to determine State boundary lines. The plain purpose of the Unit Agreement is to allocate mineral royalty payments, not to establish the boundary between Indiana and Illinois. Judge Jensen correctly made the determination, and the objections raised by Locust Street "go far afield" and do not apply "the original basis for [its] petitions for review, which [Judge Jensen] ruled against." He asked the AOPA Committee to affirm Judge Jensen's modified Nonfinal Order as well as the permits issued to Citation.

Kent Brasseale urged, "There is a selective application of the legal concepts that we've got here. On the one hand, we can be told that we're not arguing right, we're not objecting correctly." A permit can be issued when the interest that is needed to make the drilling unit is in agreement, is under lease, and the rights are there to develop that drilling unit. Locust Street is arguing that the portion of the acreage of the mineral interests for the well unit that was permitted was not under lease with Citation that were needed to be leased. "We are told that the [State] line moves, and we've got this Unit Agreement but it doesn't affect title. But what we've pointed out is that when you apply this accretion concept and how that changes and how that supposedly can move the minerals, the point being when you've got a unit where the river has cut into it, [Citation and DNR says] the Unit Agreement doesn't affect title…. Over time you have a third party, and like it or not, it is a State line matter. It is an Illinois property issue at that point, but the unit didn't change. I'm not saying the unit changes the ownership, but what I am saying is that some of the acreage under that unit is no longer owned by the people in that Unit Agreement." There is an argument being made that Citation has "'squatter's rights' and that's illogical. If we are going to apply that, what we are essentially saying it's acquiescence. You were there first. Well, we are dealing with wells here that were drilled by Gray heirs in the '30s and '40s," but with the movement of the Wabash River, the Gray heirs have "lost it".

Brasseale said Indiana could permit wells up to the Wabash River, the boundary line, but "actually there are plenty of instances along that river where that is the case. The line does not bear out to match up with the river. The line doesn't always bear out to match up to where the river has moved. This line of acquiescence matches the realty." Reviewing Unit 31X-14 illustrates that the "application of the concepts here is already not being followed in many instances along the way. It's not an appropriate application in this instance either."

DiRienzo added, "One point that may have been lost is this matter before you is on the Respondents' Motion for Summary Judgment not the Claimant's Motion for Summary Judgment. Procedurally, that is a little bit different." The DNR argued Locust Street raised new issues not addressed in its petition. Locust Street was responding to a specific argument made in the Motion. Locust Street's argument about acquiescence may not have been its original argument about line location, "but it is still an argument about [Locust Street's] mineral interests being part of the units at issue in this case. Whenever…a petitioner is responding to a defendant's motion for summary judgment, there is a lot less of a burden on that [petitioner] and the facts should be construed against the moving party in favor of the nonmoving party".

Illingworth responded the Indiana rule provides the issuance of a permit does not determine title. The Department "is not saying what title is when [it] issues a permit." The DNR "is just saying the applicant has…a right to drill a well." Some of the existing wells do not line up with the Wabash River, but "they did at one time…. This area has been drilled for…a long time."

The Chair opened the floor to discussion and questions from the AOPA Committee.

R. T. Green asked for clarification regarding the material facts at issue that could make summary judgment inappropriate.

DiRienzo responded that the fact in material dispute is the exact location of the line of acquiescence or the prescriptive line in relation to the two well units. In its response to the Motion for Summary Judgment, Locust Street presented the Unit Agreement and Exhibit 6, which showed three decades of royalty payments to Indiana based on the Unit Agreement.

Green asked, "Assuming there are material facts at issue, and the matter is remanded for further proceedings, what would you hope to accomplish then at that hearing?"

DiRienzo answered that Locust Street would seek to present sufficient evidence to show the line impacts one or both of these units.

Green asked whether the contracts for the two units had expired and are now being renegotiated.

Brasseale responded the Department has issued permits allowing Citation to drill wells on the specific unit. The Department does not confirm the ownership, but the permit gives the right to develop all the acreage in the unit. "The factual issue is we believe by the line of division of ownership a portion of that acreage is actually owned by [Locust Street]. If that is the case, [Citation does] not have all of the ownership leased up; and therefore, the permit shouldn't have been issued because [Citation] didn't have rights to all of the acreage that was necessary."

Illingworth responded the "Unit Agreement and the line in the unit don't matter…. It's just an agreement on royalties, not State line determination."

DiRienzo replied, "The argument isn't just the fact that they entered into the agreement alone changed the ownership. It's they entered into an agreement in 1984 based on where the line was, and they have acted for 30 years as if the line has remained the same by paying and receiving royalty. The argument that this is a private party agreement, the State of Indiana is a party to that agreement. An agreement by the State is not a private agreement; the public is obviously a party."

Green noted that if the issue is regarding State boundary issue, the Commission is not the appropriate forum. "If it's a deal issue, then I guess we are okay. But if it's a boundary issue, if that's what you are saying, we can't get this done".

DiRienzo responded if the ownership of the property where the two well units are located is in dispute, then the permits should be denied.

Green said that if oil is pumped from underneath Indiana, "you pay Indiana tax for pumping that out. But you are telling me that there can be an agreement that can change some of those things. But if you are telling me that agreement is dependent upon who owns it," the Commission is not the appropriate venue. "I would suspect you would need to go to Federal Court."

Brasseale said the matter falls on a question of ownership, and he agreed the Commission is not the venue to decide ownership. "We're not asking that." A permit applicant makes a statement on the application representing it has the proprietary rights to develop the minerals within the unit area. If Locust Street owns a portion of the acreage, the application statement may be incorrect. "We think it is incorrect. If that's incorrect, then the basis for the permit being issued was improper…. Until [Citation] has clear right to develop all of the acreage…, the permit shouldn't properly be issued. The answer to that may not be before [Commission's] sphere, but to have that question" and allow Citation to drill "doesn't make sense".

Illingworth urged the Department should not determine mineral ownership.

DiRienzo responded there is an ownership contest, which is a precursor for permit issuance.

Jennifer Jansen asked whether the rules governing the Department's issuing these permits provide any standards regarding ownership.

Boyko responded there is a provision in a permit application that requires an applicant to confirm the interests that are owned or controlled to drill a particular well. But the Department does not verify ownership.

Jansen then asked whether the applicant is required to produce documents to demonstrate ownership.

Herschel McDivitt, Director of the Division of Oil and Gas, stated that the applicants are not required to produce evidence to demonstrate ownership or control of the acreage within a unit.

The Chair said, "That's the issue."

Boyko said the ownership issue is "far beyond" what can be resolved by the Commission.

Brasseale stated the Department has taken an application statement without proof, "but until the issue is resolved, this permit" cannot be issued appropriately.

Green asked what would be the implication if the Committee moved to accept Judge Jensen's modified Nonfinal Order and stayed the effect of the permit for 60 days.

Brasseale answered that the implications would be the same for all parties. The ownership issue would still need to be resolved, but the permit should not be approved.

Jansen asked, "What if we were to stay the effectiveness of the permit until the title issue is settled?"

Illingworth said staying the permit would, in effect, take from Citation's property rights. If the title issue is resolved in favor of Locust Street, Locust Street would be compensated for any royalty owed.

Brasseale said Locust Street has "created a colorable issue of law and fact that there is at least an argument based on acquiescence that all of the property within that unit is not owned by Citation's leasehold."

The Chair stated, "I think we all understand the issue and the complexity of it. I'm not sure it is all within our purview as the AOPA Committee."

Jennifer Jansen moved to accept the Nonfinal Order with the revision submitted for Paragraphs 45 through 48 as the Commission's Final Order. R. T. Green seconded the motion. Upon a unanimous voice vote, the motion carried.

***Information Item*: Inspector General's Office Survey for Code of Judicial Conduct**

Stephen Lucas explained that because of a quick deadline provided to respond to a survey from the Inspector General, which was directed to State agencies with administrative law judges, the Division of Hearings provided a conditional response. The survey was to help comply with a statutory directive to the Inspector General to draft a Code of Judicial Conduct applicable to ALJs and their ultimate authorities. In Paragraph 5 of the Division of Hearings survey response, the Inspector General was informed the response would be tendered to the AOPA Committee for review. Depending upon the wishes of the AOPA Committee, the response might be amended. He said Judge Jensen would communicate any amendments to the Inspector General.

The Chair opened the floor for discussion.

Bob Wright and R. T. Green indicated they believed the survey answers were appropriate and complete.

Hearing no further revisions or additions, the Chair expressed her appreciation for the preparation and submission of the survey answers on behalf of the AOPA Committee.

Adjournment

Robert Wright moved to adjourn the meeting. Doug Grant seconded the motion. The motion was approved and the meeting adjourned at approximately 3:20 pm., EDT.