AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION
April 20, 2017 Meeting Minutes

AOPA COMMITTEE MEMBERS PRESENT
Jane Ann Stautz, Chair
Jennifer Jansen
R. T. Green

NRC, DIVISION OF HEARINGS STAFF PRESENT
Sandra Jensen
Dawn Wilson
Jennifer Kane
Scott Allen

GUESTS PRESENT

Andrew Palmison	Brad Beerman
Mark Gorney	Doris Beerman
Rosemary Gorney	Craig Doyle
Steve Snyder	Ihor Boyko
Steve Lucas	Marilyn Dennis

Call to order and introductions

Jane Ann Stautz, Chair, called the meeting to order at 1:36 p.m., EDT, at the Fort Harrison State Park, Garrison, 6002 North Post Road, Lawrence Room, Indianapolis, Indiana. With the presence of three members, the Chair observed a quorum. The Chair, Jennifer Jansen, and R. T. Green introduced themselves.

Consideration and approval of minutes for meeting held on January 31, 2017

Jennifer Jansen made a motion to approve, as presented, the minutes of the meeting held on January 31, 2017. R.T. Green seconded the motion. Upon a voice vote, the motion carried.

Consideration of Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Dennis v. Sutton & Melendez* Administrative Cause No. 16-021W

The Chair recognized Craig Doyle, Counsel for Sutton and Melendez (Respondents) who filed objections to the Administrative Law Judge's (ALJ) Nonfinal Order.

Doyle explained that the Respondents do not live on the lake and their access to the lake is a strip of land that tees into the Respondents property that lies between the Dennis's property and

another property. The Respondents bought the property with the understanding that the strip of land was their access to the lake, which also had an existing pier in the lake at the time of purchase. The previous owners of the property maintained the pier and used the strip of land to access the lake. Doyle stated that there has been over 25 years of lake access and use of the strip of land by the current and previous owners of the properties.

Doyle stated, "We have an alleged public right of way, but it was used by [Respondents] under color of title as their access to the lake." Respondents obtained ownership of their properties in 2001 and put out a pier and maintained boats in the lake at the end of the strip of land.

Doyle stated that the historical evidence showed that the plat was drawn up in 1947 and at that time it was identified as "ditch and road to lake." The Whites created the subdivision called Nickel's Park and created the "ditch and road to lake." Doyle stated that it was the position of the Petitioners that the ditch and road was a public right of way and the Petitioners alleged that they had the riparian rights to half of the shoreline attributed to the strip of land. Doyle stated that the ALJ rejected the Petitioners claim that the plat was a public right of way and the Respondents agree with that decision. He added that even if the strip of land was a public right of way it does not mean that the Petitioners would be privy to half of any riparian rights.

Doyle stated that the only clear observation was that the Whites intended to keep the strip of land as personal land for them because the ditch and road were going to be an access point to the lake. He stated that the strip was not dedicated as a public road. Doyle stated that the Kosciusko County Auditor gave testimony at the administrative hearing that there were no records of taxation on the strip of land; it was not on the rolls as county property; and the county had no record of any acceptance of the land.

Doyle stated that the case law indicated that there should be clear intent when a public road is created or dedicated. He stated that there is no use of the word "public" and it is not called a "street" or a "highway." Doyle stated that the plat was recorded on July 17, 1947. On July 19, 1947 there was an abstract in the Kosciusko County record that the Whites conveyed an easement over the strip of land, and two months later the Whites conveyed a second easement over the strip of land. Doyle stated that the conveyed easements are an indication of personal rights retained. He said that if a person creates, records, and gets a plat approved they do not later have right to give easements over land dedicated to the city for a street. Doyle stated that the grant of easement is inconsistent with an intent to dedicate the strip of land to the public but the ALJ found it was still consistent because the easements granted them the same right to traverse the strip of land as had been granted to the public". He stated that the indication was that the Whites wanted to keep the strip of land; and therefore if they intended to keep it the Respondents could get adverse possession over the strip of land.

Doyle stated that the evidence is uncontroverted that the Respondents and previous owners of the property were the only people who moored boats or put out a pier from the strip of land. Doyle stated that the ALJ determined that it is still a public use of the pier. Doyle stated that the pier had never been used by the public and the Respondents were the only ones to use the pier and moor a boat. He stated that the decision by the ALJ takes away the Respondents' rights and devalues the property. Doyle stated that putting out the pier and mooring the boat is inconsistent

with using it as "just a member of the public." He stated that there was no evidence presented at the administrative hearing that any member of the public ever used the pier.

Doyle stated that the Respondents maintained the strip of land and used it as their access point to the lake. He noted that the strip of land as an access point for the Respondents was based on the representation when they purchased the property and the previous owners, the Stults's, when they purchased the property. Doyle stated "that the acts of giving the easements subsequent to recording the plat indicate a different intent than to make it a public road." He stated that there is no use of the word "public" and the Respondents presented evidence at the hearing from Kosciusko County that the strip of land was never accepted as a road. He stated that the Whites still maintained the strip of land as their personal right; and "therefore, since the Respondents use is under color of title they claim adverse possession to the land. The Respondents should, therefore, be allowed to put out a pier and boats at the access point."

Green asked whether the case originated with the ALJ or through the Kosciusko Superior or Circuit Court. Doyle explained that this matter originated with the ALJ.

Green asked whether Doyle was seeking an easement determination or a determination regarding the placement of piers and riparian rights.

Doyle answered, "[The Petitioners] were alleging they had riparian rights to the half, because it was a public right of way. Therefore [the Petitioners] still want to put piers over and block the public" and the Respondents. Doyle stated that the Petitioners have never claimed title over the strip of land and are only claiming that it is a public right-of-way, and that the Respondents should not have the right to put out a pier. He stated, "This isn't a quiet title action in state court to determine land rights, by way of adverse possession of the strip of ground, but only the riparian rights." Doyle stated that by the ALJ finding the strip of land a public right-of-way, she is saying that the Respondents now don't have a right to place a pier, because the public uses it and it isn't wide enough for everyone to put out a pier.

Green asked if there was a quite title action and the Circuit or Superior Court determined the strip of land to be public, would there then be a riparian rights controversy for the AOPA Committee to discuss?

Doyle answered that if a court determined that the strip of land was a public right-of-way and not a personal ownership then the Respondents could claim adverse possession.

Green noted that this matter may involve a jurisdiction issue; therefore, the matter should be in the local circuit court.

Doyle stated that he did raise a jurisdictional issue, "but I think as far the Petitioners, its moot. I say that because whether its public or private, [the Petitioners] don't have riparian rights over it." Doyle stated the Respondents are asking to affirm the ALJ's nonfinal order as to the Petitioners not having riparian rights whether it is public or private.

The Chair recognized Stephen Snyder, Counsel for Dennises.

Snyder stated that the Commission is the proper venue, because the matter is a riparian rights dispute. He stated that past ALJ decisions, affirmed by the AOPA Committee, and subsequently affirmed by the courts have indicated that the AOPA Committee has the authority to make determinations regarding real estate, when that determination is directly connected with a determination of riparian rights. Snyder said the true issue is a riparian rights issue. He explained that the Respondents are claiming that the strip of land is not a public way "based on the actions of people 70 years ago, which are suspect at best."

Snyder stated that the law in 1947 was not nearly as precise as it is now. "There is language or lack of language from older plats when things were done differently." Snyder stated that in *Plymate v. Paton and DNR*, 13 CADDNAR 28 (2012) involving a public right of way that had never been open, but was used by the public for access to a grocery store. A pier was placed on the right of way for 60 years. Snyder stated the decision by the Commission was that no one individual has the right to place a pier at the end of the public right-of-way for the reason that the public does not have riparian rights, and the riparian rights are vested in the adjacent property owners.

Snyder stated that a case from the late 1800s has been the law in Indiana that an adjacent property owner to a public way owns to the center line of the public way. Snyder stated that the question for the ALJ was "is this a public way?" He stated that the map shows as a ditch and road to lake and the law is clear. "When the plat is recorded and the first lot sold that it is an automatic dedication of all the roads and public ways within the plat boundaries." Snyder stated that there is no other language that is required or acceptance by county authorities to accept the dedication. Snyder stated it has been the law since the adverse possession statute and prescriptive easement statute was created. He stated that the Respondents have no right to claim adverse possession over a public right-of-way.

Snyder stated the fact that there is not property tax accessed to the strip of land does not mean that the property is not owned by anyone; someone owns the strip of land. Snyder stated that the ownership in this case is determined by common law where adjacent owners own to the center of the public way. Snyder stated that it was recorded that the Whites granted easement of the strip of land to adjacent owners after the plat was recorded, but the Whites may not have asked an attorney for legal advice on whether or not they had the authority to grant such an easement.

Snyder stated that the plat was recorded, the first lot was sold, and at that point all the streets and roads became dedicated to the public. Snyder stated the riparian rights are a part of the fee simple title to real estate. He stated the riparian rights associated with the strip of land are owned by the adjacent property owners of Lots 3 and 4, subject only to the rights of the public to use the ditch and road. Snyder stated that no one has the right to place a pier in the water accept a riparian owner or someone who has obtained the written permission of a riparian owner. Snyder stated that there is no doubt that the Respondents are not riparian owners. He stated that the Respondents live off lake and have no documents showing they have the approval from a riparian owner to put a pier out at the end of the road.

Snyder stated that he filed objections on behalf of the Petitioners, because the ALJ determined that the public had an interest in the riparian rights. Snyder stated that he disagrees and that the

public has the right to use the road, but that does not grant the public riparian rights or a right to place a pier in the lake in front of the strip of ground.

Snyder stated that the ALJ's Nonfinal Order should be affirmed with the exception that the nonfinal order places any limitations on the Petitioners from the use of the riparian area that is owned by them and the lake in front of the strip of land that is known as the ditch and road.

The Chair asked how to reconcile if the strip is a public access if there is a placement of a pier that would interfere with the public's access. Snyder answered that he believes this strip of land was not created as access to the lake, but it was created as a ditch and road to serve lots 3 and 4 on either side of the ditch and road.

Snyder stated that in *Abbs v. Town of Syracuse,* 655 N.E.2d 114, 115 (Ind. Ct. App.1995) "the ownership of the fee simple title to a lot abutting a street extends to the center of the street, subject only to the easement of the public for the use of the street." Snyder stated that in *Abbs* there was an intent on the grantor of the plat to make those riparian rights available at the end of the public streets to other owners in lots in the plat. Snyder stated that without that determination there is no right. He stated that in the matter in front of the AOPA Committee the Respondents property is not a part of the same plat, so the *Abbs* case does not apply.

The Chair asked if there were additional questions or rebuttal.

Doyle stated that this was a road to nowhere and it is called "ditch and road to lake." He stated that the Petitioners' "assertion is pure speculation with no evidence presented to support the claim that the ditch and road was intended to be an easement." Doyle stated that the Whites kept and owned the strip of land. Doyle stated that laches and estoppel also applies and the Respondents have owned the property for 15 years and for 30 years the owners of Lots 3 and 4 never objected to the placing of a pier and mooring of boats. "There was an assumption that the Respondents had a right to the lake."

Snyder stated that what is missing is that that there is not a connection between the properties owned by the Respondents and the plat historically or otherwise. He stated that there is no evidence that the Whites owned the property that the Respondents now own. "Why would they bother giving a stranger some right to put a pier out in a plat that they just created, which has the value that they were looking for without giving it away?"

Green stated if the law is such that the road and ditch by virtue of the law became a public easement and a public easement cannot be encumbered, "then, no, they can't put the pier out." He concluded that there is no adverse possession to a public easement.

R.T. Green moved to affirm, as presented, the Findings of Fact and Conclusions of Law and Nonfinal Order in the matter of *Dennis v. Sutton & Melendez,* as the Final Order of the Commission. Jennifer Jansen seconded the motion.

The Chair noted that motions were made and seconded. The Chair called for a vote. Upon a voice vote, the motions carried.

Consideration of Second Revised Findings of Fact and Conclusions of Law with Nonfinal Order Following Remand from the AOPA Committee in the matter of *Gorney v. Beerman and DNR (Intervenor) and Christoules (Third Party),* Administrative Cause No. 15-075W

The Chair recognized Andrew Palmison, Counsel for Beerman (Respondent).

Palmison explained that the parties had been in front of the AOPA Committee on January 31, 2017. He explained that the present dispute results from a disagreement regarding how the piers were supposed to be placed in connection with a mediation agreement. Palmison noted that the mediation agreement called for the parties to place their piers consistent with a diagram identified as Exhibit 4. He said that when the parties appeared before the AOPA Committee in January, the discussion was about the difference of three feet and five feet on the diagram. Palmison stated that the current dispute deals with the calculation of the distances for the placement of the pier.

Using Exhibit 4, Palmison explained that the parties agreed that the blue rectangle was 75 feet long, but the actual pier is 60 feet long. He stated that the Order requires the measurement of 60 feet according to the scale on Exhibit 4, then measured the distance from the western riparian line to the western portion of the blue rectangle, which is 8/32 of an inch which is approximately 11 feet. He stated that the Order took the total riparian zone width, from the survey, which was rounded down to 29 feet. Palmison stated that the riparian zone is 29 feet, and 11 feet is occupied between western riparian line and the western portion of the blue rectangle. He noted that the blue rectangle is five feet. Palmison stated that there is 13 feet left over and the pier needs to be placed at least 13 feet from the eastern riparian zone boundary.

Palmison stated that the Order measured west to east then subtracted out the riparian zone from the survey to deduce the second distance. Palmison stated, "If you did it the opposite way, you get a different result." He stated by measuring east to west, the distance between the eastern portion of the blue rectangle at 60 feet lakeward and the eastern riparian zone is 12 feet or 9/32 of an inch, not 13 feet. He said the presumed riparian zone is 29 feet. Palmison stated, "If you subtract 12 feet from 29 feet, the width of the riparian zone, according to the survey, you have 17 feet. Then if you subtract five feet blue rectangle you get 12 feet."

Palmison stated that the disparity is the result of the survey riparian zone at 29 feet, but if the entire riparian zone is measured at 60 feet out then it is actually 28 feet, which is one foot difference depending on how it is measured.

Palmison, stated that he is proposing to measure the distance on Exhibit 4, from the eastern riparian line to the eastern portion of the blue rectangle, which is 9/32 of an inch or 12 feet respectively. Then measuring the western portion of the blue rectangle to the western riparian line is 8/32 of an inch or 11 feet. Palmison stated, "Let's say we need to be 11 feet from the west and at least 12 feet from the east and then we've got our parameters. We know we have to be within that distance." He stated that the Respondents would get 12 feet on one side and 11 feet on the other. Palmison said that from the survey the riparian zone is 29 feet, not 28 feet, and then

the extra foot would get allocated somewhere. "But if there is not an allowance for the 12 feet on the one side then the mediation agreement is not being adhered to."

Palmison stated the Respondents proposal is set forth in the Request for Relief of the Respondents Objection to Second Revised Finding and Nonfinal Order that was filed on February 27, 2017.

The Chair asked if the Respondent was adjusting 1½ feet. Palmison answered that the adjustment was 1 foot. He stated that the Order said 13 feet.

The Chair noted that the Nonfinal Order reads "at least 16.5 feet west of [Beerman's] east riparian zone boundary at the shoreline and at least 13 feet west of [Beerman's] east riparian zone boundary".

Palmison said that there was a second, minor issue that deals with distances where the pier launches from the shore. He stated with the measurements at the lakeward end the Respondents proposal is that Paragraph 87(a) of the Nonfinal Order be modified to read as follows:

> "With the east side of the pier located at least 16 feet west of her east riparian zone boundary at the shoreline and at least 12 feet west of her eastern riparian zone boundary at the lakeward end based upon the existing 60 foot pier."

Palmison stated that Paragraph 87(b) of the Nonfinal Order can remain as written because there is no dispute on the measurements.

Palmison commented, with respect to the location of the pier at the shoreline, that the Rowland Associates, Inc. (Rowland) survey indicates the Respondents' property shoreline is 38 feet in length. Palmison stated that there are 38 feet behind the seawall, but the shoreline is not 38 feet, because the property narrows as it approaches the water. He stated that the distance of the shoreline is 36½ feet, which is consistent with the survey. He said the pier is three feet wide bisecting the shoreline with 16½ feet on one side and 17 feet on the other side of the pier.

Palmison stated that to correct the location of the pier at the shoreline the Respondents are recommending that Paragraph 87(a) of the Order be modified to "16 feet" instead of "16½ feet" and Paragraph 87(b) should be modified to "15 feet" instead of "16½ feet".

Green asked if the gross figures of distance between the yellow lines were product of measurement as a result of the mediated agreement. Palmison stated that he was not sure if the parties contemplated the placement of the piers at the time of the mediated agreement. He stated that the 28 feet measurement is raw measurement of the width of the Respondents' riparian zone at 60 feet from the shore.

The Chair recognized Mark Gorney (Mr. Gorney) and Rosemary Gorney (Mrs. Gorney), pro se.

Mr. Gorney stated that both he and Mrs. Gorney signed the mediation agreement that the Respondent was going to allow five feet of the riparian zone. Mr. Gorney stated that he and Mrs. Gorney were in agreement with the ALJ's previous Nonfinal Order. He explained that the Respondent used the Rowland Survey to dispute the riparian zone and objected to the ALJ's previous Nonfinal Order. Mr. Gorney stated that the AOPA Committee remanded the matter back to the ALJ for modification. Mr. Gorney stated that both he and Mrs. Gorney agree with the Second Revised Nonfinal Order.

Mr. Gorney stated that Rowland surveys property lines, but does not survey into the water. He stated that what the Respondents have and are using is a drawing and not a survey.

Mrs. Gorney added that the Respondent went from 15 feet of the Respondent's riparian zone boundary that is shared with the Petitioners down to 13 feet, but "now the Respondent is arguing for 12 feet."

Mr. Gorney stated, "We can't get boats in on either side because of the angle of [Beerman's] pier."

The Chair explained that when this AOPA Committee remanded the nonfinal order to the ALJ in January, the purpose of remand was to modify the nonfinal order such that to provide greater flexibility of distance as long as the Petitioners and Respondent were within their respective riparian area.

Mr. Gorney stated that the distance has not changed since January. He said that until the Beerman pier is moved neither he nor Beerman can moor boats.

Mrs. Gorney added that there is less than ten feet from the corner of the Respondent's pier to the riparian zone line.

The Chair asked the Gorneys if they were comfortable with the Second Revised Nonfinal Order. Mr. Gorney and Mrs. Gorney answered in the affirmative.

Green asked if the mediation agreement was agreed on by both parties to get their boats in and out. "So if the Committee was to deduct a foot then the intent of the agreement would be met, but is someone losing riparian rights?"

ALJ Jensen explained that certain findings and calculations in the first nonfinal order were not objected to, so the Second Revised Nonfinal Order was written such that those findings and calculations were retained. ALJ Jensen explained that according to the measurements that Palmison provided, "if you have 11 feet on one side and 12 feet on the other, that adds up to 23 feet…that leaves six feet for the rectangle box, not five feet."

The Chair stated thanked ALJ Jensen for her clarification of the issue. She noted that the AOPA Committee could not reweigh the evidence, but is tasked with the review based on the instructions to the ALJ on remand.

Green stated that the intent of remand was so to modify the nonfinal order so that the parties could get their boats in and out.

Jennifer Jansen moved to accept the Second Revised Findings of Fact and Conclusions of Law, as presented, as the Final Order of the Commission. R.T. Green seconded the motion.

The Chair noted that a motion was made and seconded. The Chair called for a vote. Upon a voice vote, the motion carried.

Update on Proposed Rule Packages for the AOPA Procedural Rule Amendment (Administrative Cause No. 17-002A) and the Participation\Representation in AOPA Proceedings (Administrative Cause No. 16-116A)

Dawn Wilson, of the Commission's Division of Hearings, explained that the proposed rule amendments, *AOPA Procedural Rule Amendment* (17-002A) was given preliminarily adoption by the full Commission in 2014, but subsequently, additional amendments were made in December 2016. She explained that 312 IAC 3-1-9 is amended to clarify the authority of the Secretary of the Commission to affirm a nonfinal order issued by an ALJ approving an agreed order entered by the parties when the ALJ is not the ultimate authority. She noted that in situations where the ALJ is the ultimate authority, an agreed order would not need to go back to the Commission's Secretary for affirmation. Wilson said the proposed rule language would be presented to the Commission for preliminary adoption.

Wilson explained that this AOPA Committee reviewed the proposed rule amendment *Participation/Representation in AOPA Proceedings* (16-116A) at its October 28, 2016. She noted that this AOPA Committee recommended that the proposed rule language be presented to the Indiana State Bar Association's Unauthorized Practice of Law Committee (UPLC). Wilson stated that the proposed rule language was presented to the UPLC, and in February 2017, she participated in a teleconference with UPLC members. She noted that the group was interested in reviewing the proposed language and provide a response within 60 days.

The Chair thanked Wilson for her efforts in moving the proposed rule forward.

Sandra Jensen updated the AOPA Committee on the Attorney General's Opinion on corporate representation in administrative hearings. She noted that the Opinion was originally offered as an unofficial opinion, but has now been made official. Jensen suggested that following receipt of input from the UPLC the proposed rule be forwarded to the Attorney General's Office for input regarding the rule's consistency with the Attorney General's Opinion.

The Chair indicated agreement.

Adjournment

The meeting was adjourned at 2:35 p.m., EST.