AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION

March 18, 2014 Meeting Minutes

MEMBERS PRESENT

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

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Sandra Jensen
Debra Freije

PARTICIPANTS AND GUESTS PRESENT

William Gooden
Stephen Snyder
Andrew Wells

Call to order and introductions

The Chair, Jane Ann Stautz, called the meeting to order at 11:25 a.m., EDT, on March 18, 2014 in the Lawrence Room of the Fort Harrison State Park, The Garrison, 6002 North Post Road, Indianapolis, Indiana. With the presence of all five members, the Chair observed a quorum. She, Doug Grant, R. T. Green, Jennifer Jansen, and Bob Wright introduced themselves.

Consideration and approval of minutes for meeting held on May 14, 2013

Doug Grant moved to approve, as presented, the minutes of the meeting held on September 17, 2013. 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" by the Administrative Law Judge and Objections in *Allen and Allen v. LaSalle and Department of Natural Resources,* Administrative Cause No. 12-176D.

Will Gooden presented argument on behalf of the Respondent, Holly LaSalle. "We filed the objections to Judge Lucas's Findings of Fact and Nonfinal Order on two basic premises. "Number one is that based on the evidence introduced at hearing," the nonfinal order "did not comply with substantial evidence that was introduced at the hearing. We also believe that in

certain circumstances, the findings and conclusions don't comply with applicable law, specifically as detailed in Natural Resources Information Bulletin #56 and the case law and statutory law upon which that is based."

Gooden continued. "We think this is a pretty simple and straight forward matter. Unfortunately, in this particular situation with this particular dispute and/or allocation of riparian rights, as it were, and rights of the public trust, we respectfully believe that the decision that was made did not properly adjudicate those claims and those competing interests. On balance, it's our position that at the hearing substantial evidence weighs specifically in favor of my client Holly LaSalle. I'm going to refer to 'Holly's pier' today as the subject just to make it easier. That's what this is all about." He focused upon three questions:

(1) Does Holly's pier encroach on the Allens' riparian ownership zone?
(2) Does Holly's pier unreasonably interfere with the Allens' riparian ownership and use of their property?
(3) Does Holly's pier unreasonably interfere with the public trust and public use of Tippecanoe as a public freshwater lake?

"We believe that based on the evidence that was introduced, the answer to those three questions is 'no'. It does not interfere unreasonably. First question, 'Does Holly's pier encroach into the Allens' riparian zone? The evidence is that the answer is 'no'. Specifically, there are two pieces of evidence that are most relevant to that." Gooden referenced Tab 9 of a binder provided to the AOPA Committee members. Included in Tab 9 was a memorandum from Bob Wilkinson, Head of Surveying and Mapping with the Division of Water, dated January 8, 2013, which was presented into evidence. Wilkinson wrote that based on principles in Information Bulletin #56 (along with a drawing and diagram), a perpendicular extension of the common property line of the Allens and LaSalle from the shoreline was proper. "But that has been recognized in the proceeding, because there is no specific authority for determining a situation like this where ownership on either side of a channel—Holly owns property on either side of the channel—since there's no specific legal principle applicable to that, a determination needs to be made about the centerline of the channel and then an extension of the riparian zone lakeward towards the navigable portion of Lake Tippecanoe. He concludes importantly that the lines that he has drawn on his diagram are approximate and that a professional land surveyor will need to be retained in order to accurately locate the property line's shoreline and the channel centerline."

Gooden referenced Tab 8, which contains three survey documents prepared by Walker and Associates that were presented as evidence. "The first document behind Tab 8 locates the boundary lines. LaSalle's property obviously is to the north toward the top of the page, and Allens' is to the south, 100 feet of lakeshore with concrete seawall with the Allens, and property extending back into the channel for Holly. They've located the property lines and indicated that the property lines extended directly out from the land. On the second page, the centerline of the channel is located, and an angular line is drawn towards the center of the navigable portion of Lake Tippecanoe, indicating the riparian boundary, extending to the center of the channel and then extending to the navigable portion of the lake."

Gooden said that the third drawing shows Holly's pier "as it was located in the relevant location for this dispute. But as it was located at the time, Judge Lucas had entered an interlocutory order requiring her to remove a significant portion of the pier. The pier posts remain, and you can see there that the line of the pier posts is indicated all the way into the navigable area of Lake Tippecanoe. So the evidence that was not controverted with any survey or any other evidence, that of the location of the riparian zones…is that 'No, Holly's pier doesn't encroach into the riparian zone and ownership of the Allens.'"

Gooden continued. "The second questions is, even if it doesn't, as the law requires, riparian owners must not unreasonably interfere with one another's rights whether they're technically within their boundaries or not." For this argument we will assume that Mr. Allen's testimony is true that Holly's pier makes it difficult for him to navigate into his mooring posts. "That's the only evidence of interference with the riparian rights of the Allens is that Holly's pier location made it difficult to navigate into the mooring posts of the Allens. Those mooring posts are the subject of Judge Lucas's order. As a matter of fact as part of the order, he ordered them to move the posts at least eight feet to the south away from the property line between LaSalle and the Allens. So even assuming that the interference occurs or the interference could potentially occur, as Mr. Allen has indicated, there isn't an unreasonable interference. We believe that's the case because the Allens have 100 feet of lakefront property from which they could and do regularly extend the pier to the line of navigability, as they are entitled to as a riparian owner, as Holly is entitled to do as a riparian owner. Holly's pier is less than 150 feet long. The Commission obviously has issued a rule that if a pier doesn't extend further than 150 feet, it's okay from a length perspective. Obviously, we would concede that a 40 or 50-foot pier could unreasonably interfere either with a neighboring riparian owner or the public trust, but there's no evidence of that in this situation. The evidence was of location vis à vis the boundary line. So the unreasonableness of the Order from the standpoint of the balancing of the rights is that ultimately the requirement was for Holly to either reduce the length of her pier to a point where there is no dispute that she would not be able to navigate a boat into the area of the channel that is shallow and algae-covered. Secondly, the alternative was given that she could extend a pier from the other property, the western property on the other side of the channel, which at a minimum would require constructing and/or rehabbing a bridge or figuring out some other way to get to the other side to extend a pier. The key point on this from our perspective is given the balancing of the uses and rights, if the Allens were required to locate mooring posts, piers, boats, whatever it is they wish to use to enjoy the riparian rights, some distance to the south with the location of Holly's pier in the disputed area, unquestionably—and there wasn't any contrary evidence at the hearing—the Allens could still use and enjoy the property and all the bundled riparian rights that they would be entitled to."

Gooden urged, "In fact, the Judge ordered them to move it eight feet. If they can move it eight, they can move it ten, they can move it 20. They can move it 30. There's 100 feet of lakeshore there. We think that's very important on balance. The burden to Holly in attempting to find a solution to enjoy her riparian rights, which includes specifically extending to a point of navigability, which the pier in the disputed location does, the evidence was it was somewhere around 4½ to five feet deep at the end of the pier versus the silted end and the algae-covered area in the channel."

With respect to the potential for interference with the public trust, Gooden urged there was no evidence that the length of the pier, to a point less than 150 feet out, interfered with the use of navigable area of Lake Tippecanoe. No member of the public issued a complaint nor was there any finding, by the Conservation Officer who testified, that it presented a safety issue. The pier in the disputed position clearly extends across to the opening to the channel but does not prevent access, and there was no evidence that it prevented all access.

Gooden stated that there was a photograph introduced at the hearing of a bass boat with its motor raised trolling back in the channel. The testimony was that kayaks and other small craft could navigate the area. "The issue of navigability, what we think is the most important from the evidence standpoint, is there wasn't any evidence that anything other than natural conditions affected the navigability of that channel—depth of the water, based upon the time of year, the water level at that time, algae, and things of that nature. There wasn't any specific evidence that blocking the channel was a result of the pier, but it was natural conditions. Based upon that, it's our position that the answer to these questions is 'No, the riparian rights and public trust were not interfered with.' The evidence weighs heavily in that favor. So we would ask that the order be reversed."

Jane Stautz deferred questions until Stephen Snyder provided argument on behalf of the Allens.

Stephen Snyder, attorney for Claimants, addressed the Committee. "Knowing that you don't have a complete record before you, and you didn't have an opportunity to review the voluminous records in this case, including the photographs, there's one thing that I want to start with. That is a photograph of the Allen pier with a pontoon boat moored at it and a photograph of the LaSalle pier, as it was installed. These are facts that were brought out at the hearing."

Snyder continued. "Holly LaSalle testified at the hearing that when she purchased the property, it did not have access to the lake. It was a county ditch that emptied into Lake Tippecanoe…. To have access to the navigable area of the lake, she had to dredge the channel. Subsequently, it had to be dredged again, and it had to be dredged again, in order to maintain adequate depth. During those periods of time, Mrs. LaSalle maintained a pier immediately in front of her property adjacent to her seawall at which two or three boats would be moored and would have access to the navigable portion of Tippecanoe Lake. At that point, the channel was navigable in the sense of what you and I think of as being navigable. However, the year in question was the year of the drought. As a result, that channel became much-more shallow, and access to the main part of the lake simply wasn't a possibility."

Snyder said testimony was that Mrs. LaSalle and her son could not get their speed boat off the lift in front of their property. "That was not an unusual occurrence in the year of the drought. Everybody suffered that consequence, including people who left their boats on their lifts a little too late in the season and simply couldn't get them off. That was an unusual year. The photograph you have is when the pier went out. It was subsequently ordered partially removed by Judge Lucas." LaSalle's request now is to "reinstall that pier to its full length, with the Allens moving their pontoon boat instead of five feet, eight feet south of the line. I think all that the Appellant in this case is asking you to do is reweigh the evidence. And believe me, there is a lot of evidence to be considered. The first thing is there was a view of the property by Judge Lucas.

Judge Lucas and Conservation Officers appeared at the site and looked at the situation prior to his entry of an order to remove a portion of the pier. A significant portion of the evidence that was considered by the Judge as part of his ruling was based upon his personal observation of the site and of the pier. The law in Indiana is that the administrative law judge is to be given great deference because it is assumed he has some expertise in the area in which he's making a decision. I would suggest to you that when you have a factually intense situation that the ability of the judge to draw on his experience and make a determination is crucial to the ultimate determination."

Snyder continued. "Mr. Gooden has landed on surveys. Mr. Wilkinson, who at the time of the writing of his memo was an employee of the Department of Natural Resources, died prior to the hearing. He was not available at the hearing for cross examination. The documents that you see were admitted as they can be even though they may have been a business record, and they may have been hearsay. They were admitted properly by Judge Lucas, but they can't be relied on as the sole basis for the decision. There has to be something else. The survey by Kevin Michel of Walker and Associates drew on what Mr. Wilkinson had done. I haven't historically argued with Mr. Wilkinson too much, and I have admittedly used Kevin Michel for the same services in other hearings. But the one they missed in this case was that they were dealing with the channel. Both of them seemed to hang up on the fact that Mrs. LaSalle owns on both sides of the channel. Therefore when they determined their opinion of the riparian lines, they drew a line right down the middle of that channel, saying 'Okay, Holly LaSalle owns on the west side, and she owns on the east side. Gosh, those lines must meet in the middle.' As Judge Lucas wrote in his opinion that fails to consider the public right to utilize a portion of the waters of Tippecanoe Lake."

Snyder said the administrative law judge "threw out a term that I have not heard before called the 'thalweg'. The thalweg is essentially the centerline of the channel, and presumed to be the area where navigation would be easiest, likely the deepest part of the channel, as opposed to right up against the shore. The photograph I gave you is a pretty good indication of what the shoreline is like on the west side of the LaSalle pier. What that pier does is cut across that thalweg, preventing the public from having any access to the northerly portions of the channel. Certainly, there's a photograph in the record showing a bass boat negotiating admittedly at a higher level of water. In fact, it was flood stage time at that point, because the following year Tippecanoe had floods instead of droughts. But it shows that that channel is navigable from the standpoint of the public going in and out, and that denying that navigability is a breach of the public trust and a breach of the obligation of the Department of Natural Resources to make sure that that public trust and the navigability or use of the public lake is protected."

Snyder continued. "So we have three things. We have an encroachment into the riparian area of the Allens because of the angle of this pier. The opinions of Mr. Michel and Mr. Wilkinson go way too far. The common line between the Allens and LaSalle should be extended a reasonable distance into the channel—not to the middle, because if you extend it at both sides to the middle, the public would be cut off of any access. It can only go out a reasonable distance. The courts have affirmed that theory in *Zapffe v. Srbeny* saying that you're entitled to a pier of reasonable distance out from the shoreline. That would serve Mrs. LaSalle's needs, especially in light of the fact that she understood when she bought the property, that it would probably require continual dredging to maintain sufficient depth to access the main body of the lake. If you properly draw

the riparian boundaries for Mrs. LaSalle, there is no possibility that you can then angle a line southwest out towards the middle of Tippecanoe Lake. Her boundary simply doesn't extend that far. The channel can't be 100% hers. It has to have an open space in the middle where the public can get in and out. The theory that this pier is far enough away from the west shoreline, which is essentially wetlands, just doesn't work. That's what was observed by the Judge personally. That's what was observed in the photographic evidence that was presented, and all that Mrs. LaSalle is asking you to do today is reweigh the evidence."

Snyder continued, "You have an administrative law judge who is as experienced as anyone in the State on these issues, who examined the site, who heard the testimony, who viewed all the photographs, and who made a determination." (1) The LaSalle pier interfered with the use of the Allens' pier. (2) It encroached on the Allens' riparian zone. (3) It violated the public trust. With those findings, based upon the facts that Judge Lucas saw, I think you're hard pressed to simply say 'Well, he must have seen something wrong.' He was there firsthand, and if you look through the record, especially the photographic evidence, you'll find that clearly there was a basis for his decision."

Andrew Wells addressed the Committee as attorney for the Department of Natural Resources. He said, "The DNR concurs with the argument made by Mr. Snyder. In addition, it's the Department's position that Judge Lucas's Findings of Fact and Conclusion of Law and Nonfinal Order are appropriate. We believe that the Nonfinal Order does comply with substantial evidence and with Indiana law. Specifically, we believe that the pier does infringe on the public interest, and Judge Lucas's Nonfinal Order takes that into consideration and addressed that appropriately."

The Chair opened the floor for comments or questions for counsel from the Committee members.

Doug Grant said, "Remind me how wide that channel is of the area."

Gooden replied, "Roughly 60 feet according to the survey."

Grant asked, "So riparian rights coming off from each side, it would be 30 feet?"

Gooden answered, "59 feet at the point where they measured it on the survey."

Grant asked, "Why can't the public still get in there even if they're crossing riparian rights? I mean, I have fishing boats in my riparian rights constantly."

Snyder responded, "If you look at the way the pier is attached on the east shoreline, it angles to within 16 feet of the west shoreline. The area between the pier and the west shoreline is so shallow you can't get boats in there. This pier is 150 feet long angling at roughly at 45 degrees across a 60-foot wide channel."

The Chair reflected, "Again, we do have some of the maps before us. I know we do not have all the evidence that was presented. I just want to make sure if we are considering any of the maps, all the parties have a clear understanding and agree with what we're looking at."

Gooden urged, "The key there, at least in our view, is the width." There is a "minimum width of 16 feet between the shoreline at the west corner of the channel and side of that of Holly's pier as proposed. There is the ability to navigate, not at all times and not by all crafts—maybe the better way to say that is not under all conditions."

R. T. Green inquired of Judge Lucas. "There was a term about how you determined riparian rights and the boundaries when it went through the channel, and it was the term that neither party had used before. What is that term, and would you explain it?"

The administrative law judge responded the word is "thalweg". It is an ancient word used for defining water boundaries. "Its origin is Danish, I think." The term describes the imaginary midline of a channel. It's typically somewhere in the middle of the channel and there was some consideration of where that line would be here or was likely to be." The channel is a modified inlet, "essentially a regulated drain…, a ditch, so it's not natural. You can have a thalweg that would be closer to one shore or the other. You could engineer it that way. There wasn't anything to make me think it was engineered extraordinarily here." The thalweg was viewed as roughly equivalent to the centerline of the channel.

Judge Lucas continued. "This case is factually unusual in that it has to do with placing piers within a drainage ditch that is also within the parameters of a public freshwater lake. In addition to a lake, it's a stream or ditch." *Zapffe v. Srbeny* talks about the "reasonableness test" as a limitation on pier length in a public freshwater lake. "It said what's reasonable probably depends on the unique characteristics of each public freshwater lake and where you are on the shore." But the decision added that one thing "for certain" is riparian rights do "not go to the center of the lake. The thalweg was, I thought, significant here because we had to deal with a channel not just with the main body of the lake. Following the same principle, that…you couldn't have the riparian rights go to the center of the lake, similarly in a channel situation, you couldn't have riparian rights go to the center of the channel." If riparian rights went to the center of a lake, "you'd have the theoretical possibility that everybody's pier could go to the middle," and no member of the public could use the lake. "You could certainly have that situation in a channel."

The Chair thanked the administrative law judge for explaining his use of the term, "thalweg".

Green continued, "I'm assuming" thalweg, and that word of art, "is not used in Information Bulletin 56, right?

The administrative law judge responded that Information Bulletin 56 is based mostly on decisions construing rights on public freshwater lakes, although many of the same principles apply to navigable streams. No decision had considered *Zapffe v. Srbeny* in the context of a stream. "So it didn't come up in Bulletin 56 because there was no case law that dealt with this factual situation."

Green reflected. "Okay. All right."

The Chair opened the floor for additional remarks or rebuttal from the attorneys for the parties.

Gooden offered additional perspectives. "On the concept of the thalweg, I think a couple of points are important. The surveys clearly, if maybe not thinking of the term…, took into account the concept of the centerline in the channel as a reasonable point to change the direction of the riparian zone that Holly enjoys. That makes a lot of sense when you talk about and think about the concept of the center of the channel or the thalweg—the line of navigability. One thing I would say, too, is I guess we're assuming in this case, and I don't know if there was any evidence of the actual depth at certain points of this channel, whether it was specifically deeper in the center than it was. Intuitively you think that, but I don't know what the evidence was about the depth. Setting that aside, the surveys are consistent with this concept. It goes to the centerline of the channel. The survey line and the riparian boundary then extends on an angle toward the open water—the navigable water of Lake Tippecanoe…. The channel isn't blocked past its centerline or its thalweg. The pier, at the point where it crosses out into the lake, is really over at the mouth of the channel, and you got a minimum distance of 16 feet. According to the survey, it points 20 and 30 feet back into the channel where once a craft that is otherwise able to negotiate that channel gets back in there. They've got the entire channel. I suggest the concept of the thalweg is involved in a situation, where if this were the case, the channel continued to extend to the south, and Holly had a pier that was extending out across the centerline thereby making it impossible to navigate from one end of the channel to the other. We'd be in that situation, but we're just not in that situation. The question here that we believe is pertinent is just whether or not that this extension of the pier…unreasonably interferes with anyone's right that they would otherwise have or ability that they would otherwise have as a member of the public to get to and/or use this channel. We don't think that the evidence is there to show that the location of the pier has anything to do with it. Rather the natural condition is the situation."

Gooden continued, "With respect to the survey, whether or not it goes too far or whether or not the Allens like the results of the survey, I guess I would say it's what we've got…. Personally, I think it's specifically in line with Bulletin 56 and the principles there. There isn't a specific direction in a situation like this where you have a channel that extends at this point from a public freshwater lake. The delineation of the boundaries and the use in this situation were eminently reasonable. The resolution of any dispute or of these competing rights clearly favors a situation where you don't require one of the equal riparian owners to do something that's in effect sort of a Herculean effort to enjoy the riparian rights when balanced against the neighboring riparian owners who have ample room, in our view, to do exactly what it is they have the right to do. One thing, from the standpoint of extending to the center, it's just patently clear that Holly's pier does not extend to the center of the navigable area of Lake Tippecanoe. It doesn't even come close. It extends out 150 feet, but that just puts it to the point of navigability for a boat. We're not getting into a situation where you're blocking the center of public freshwater lake."

The Chair asked if there were any further questions for counselor Gooden. With no questions, the Chair again called upon Stephen Snyder.

Snyder began. Here are "a couple of things to look at, and this is a series of exhibits, in particular 14 and 17, that were admitted. The blue line is the center of the public ditch that we're talking about in the channel. This is a 1965 aerial photo so you can see there's nothing here. This is the LaSalle property, right here, the larger property. That's the ditch. This is the LaSalle

property. That's the condition of the ditch in 1965. That's the centerline of the ditch. That's the condition of the channel. When you go to right after Mrs. LaSalle's purchase and her dredging, this is the result of the dredging that provided her with the access to the lake. It's pretty obvious that there was no access to the lake when she purchased the property. It was only after her dredging that she undertook herself, that she had access to the lake. Now what she's saying is 'I'm tired of dredging, and I want to put the burden on the Allens and use some of their riparian area to provide me with access that I knew I could only have if I dredged the channel.'"

The Chair asked Andrew Wells if he wished to make additional comments. Wells responded that he did not.

The Chair continued. "So we've heard the arguments before us here. We do have the proposed nonfinal order and the findings of fact." The Chair said she "would entertain a motion either to approve the order as presented or entertain modifications, or if there's denial."

Bob Wright observed, "I think the most reasonable way of looking at this is like Judge Lucas said. From a reasonableness standpoint, I just can't see that that pier being where it is, is reasonable."

Jane Ann Stautz added, "A matter of encroachment on riparian rights."

R. T. Green reflected, "It's my understanding that our job, with respect to the administrative law judge's order, is to first much like if we were sitting in a court of law, perhaps in Kosciusko County, and we look at to see if there's evidence to support his findings."

Stautz reflected, "Correct".

Green continued, "The inference from that evidence may be different from your opposing points of view, but if there's reasonable evidence to support his findings of fact, we perhaps should not go beyond that."

Stautz again reflected, "Correct".

Green said, "Number two is it's also if he inappropriately or applied the inappropriate law to the case at hand. Now, I don't want to profess that I know riparian rights because I'm relying upon these gentlemen as well as Judge Lucas. But what I'm hearing is that his approach to this, in using the thalweg, I'm not hearing that's inappropriate. I'm not hearing that's erroneous. If that's the case, regardless of my feelings whether the pier itself may be something I would not like or like, that's not my point. That's not our position in this situation. I'm asking the question whether there is anything in there that Judge Lucas concluded that's not supported by law. I'm not hearing that. I'm hearing inferences or reasonable conclusions may be different, but…I'm not hearing his application of law was inappropriate."

Green continued, "I would move that we accept his decision and his finding of facts" as the Commission's final agency action.

Jennifer Jansen seconded the motion.

The Chair said, "It has been moved and seconded that we accept the findings of fact and order as submitted. At this time is there any further discussion?"

No member of the AOPA Committee offered additional comments.

The Chair continued, "I would like to propose as possible amendments extensions of 30 days" from the nonfinal order "for the compliance time. If we look at April 1 and March 31, which is a very short brief amount of time" for compliance, that might pose unreasonable challenges.

Green concurred with the Chair's proposed amendments for extensions of 30 days for compliance. He accepted the suggestion as a friendly amendment to his motion. Jansen also concurred.

The Chair asked if there was any further discussion. There was none.

The Chair then called for a vote to approve the Findings of Fact and Conclusions of Law with Nonfinal Order, as presented by the administrative law judge but with compliance dates extended for 30 days, as the Findings of Fact and Conclusions of Law with Final Order of the Natural Resources Commission. On a voice vote, the motion passed unanimously.

The Chair thanked the attorneys for their excellent presentations.

Adjournment

Doug Grant moved to adjourn the meeting. Bob Wright seconded the motion. The motion was approved and the meeting adjourned at approximately 12:26 p.m.