

**FILED**

**CORDRY SWEETWATER CONSERVANCY DISTRICT  
8377 Cordry Drive Nineveh, IN 46164**

**DEC 16 2004**

**CAUSE NO. 4213  
Resolution No. 2004-11**

*Benita Fox*  
CLERK BROWN CIRCUIT COURT

WHEREAS for the Cordry Sweetwater Conservancy District's (CSCD) property and the public safety.

BE IT RESOLVED that it is a violation of CSCD rules for any unauthorized person to move, deface, strike or damage a marking buoy that is owned by the CSCD.

BE IT FURTHER RESOLVED that any CSCD freeholder who allows a person to move, deface, strike or damage a marking buoy that is owned by the CSCD is also a violation of this resolution.

BE IT FURTHER RESOLVED that any person in violation of this rule shall forfeit their boat decal and lake and beach privileges for a period of 365 days from the date of the violation.

APPROVED this 9th day of December 2004 at Nineveh, Indiana.

*Tim Dearth*

Tim Dearth, Chairman

*Vernon McGaha*

Vernon McGaha, Vice-Chairman

*Horace Hays*

Horace Hays, Secretary

*Robert Mays*

Robert Mays, Board Member

*Paul Brinker*

Paul Brinker, Board Member

*Larry Harder*

Larry Harder, Board Member

*Norman Noe*

Norman Noe, Board Member

SUBSCRIBED AND SWORN TO before me, a Notary Public, this 9<sup>th</sup> day of December 2004.

*Martha Anderson*

Martha Anderson, Notary Public

MARTHA J ANDERSON  
NOTARY PUBLIC STATE OF INDIANA  
BROWN COUNTY  
MY COMMISSION EXP. JAN. 31, 2010

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December 7, 2004

Mr. Tim Dearth, Chairman  
Board of Directors  
CORDRY SWEETWATER CONSERVANCY DISTRICT  
8377 Cordry Drive  
Nineveh, Indiana 46164

Re: Rules and Regulations:  
Proposed resolution concerning buoys

Dear Chairman Dearth,

You have requested a review of the proposed resolution concerning buoys and an explanation of the Standards the Board must meet in adopting a resolution governing the use of the lakes.

## I. HISTORY

The proposed resolution is attached hereto, made a part hereof and is marked as "Exhibit A". The purpose of this resolution is to assess a penalty on anyone who would move, deface, strike or damage a marking buoy that is owned by the District and thus deter such disregard for a marking buoy and the safety warning it is designed to accomplish. The proposed resolution makes such action a violation of the CSCD's Rules; and therefore subject to the procedure governing Decals and Beach Rules and review by the appropriate Commission. Further any CSCD freeholder who allows a person to move, deface, strike or damage a marking buoy is also in violation of the CSCD's Rules and subject to the same penalty.

## II. CONSERVANCY ACT

As the District was established by the Brown Circuit Court pursuant to Chapter 308, Acts of 1957 (the Indiana Conservancy Act), we must look to this enabling act for guidance. The "Policy Statement" (Section 1) of the Act provided in part:

"The management of water being necessary to the welfare of Indiana, it is the policy of this act:

- (1) To enable the owners of land to organize special districts with power to tax and with other necessary powers so that maximum beneficial utilization can be made

- of the water resources of the state.
- (2) To provide in one act a general procedure through which each of the various legitimate purposes, authorized in section 3, may be attained where they are needed.”

One of the Purposes for which the District was established in the June 27, 1959 Order of the Brown Circuit Court was:

“Developing forests, wildlife areas and park and recreational facilities where feasible for beneficial water management.”

This Purpose encompassed the two lakes: Cordry and Sweetwater.

The Act gave enumerated duties and powers to the Board of Directors to implement its “purposes” encoded at IC 14-32-5-20. A copy of which is attached hereto, made a part hereof and is marked as “Exhibit B”.

In 1963 the Board of Directors submitted their “Final Plan” (now known as “District Plan”) to the Brown Circuit Court. The District Plan was Cordry Sweetwater Conservancy District’s plan to implement its Purposes and was approved by the then pertinent State Agencies and the Brown Circuit Court. The works of improvement included finishing both lakes: Cordry and Sweetwater.

In addition to the duties and powers enumerated in IC 14-33-5-20, the Indiana Conservancy Act provided further powers to implement a District Plan now encoded at IC 14-33-6-13. A copy of which is attached hereto, made a part hereof and is marked as “Exhibit C”.

As IC 14-33-5-20 and IC 14-33-6-13 are *in pari materia* they combine to give the District all necessary powers to construct, operate and maintain its works of improvements: towit: Cordry Lake and Sweetwater Lake and the respective dams and appurtenances.

### III. STANDARD

As the owner of the lake bottoms, dams and appurtenances and therefore the lakes themselves, the Cordry Sweetwater Conservancy District is responsible to the freeholders of the District and their guests to provide a reasonably safe environment for recreation on the lakes. This duty is inherent to its ownership of the lakes.

As a political subdivision of the State of Indiana, the District has the authority to promulgate rules and regulations to reduce the level of risk of harm by regulating conduct on the lakes. See Section: 1, 3, 4, 9 and 11 of Exhibit B and Section 7 and 10 of Exhibit C.

This standard to operate its works of improvement in a safe manner is also found in other statutes. For example, as the owner of the dams, Indiana requires the District to exercise prudence with due regard for life or property in maintaining and operating its dams and

appurtenant works. (See IC 14-27-7-2 a copy of which is attached hereto, made a part hereof and marked as "Exhibit D).

This "safety" standard is not only intrinsic with the ownership of the lakes, statutorily mandated for safe operation of dams; but more importantly, the failure to promulgate rules and regulations when the District had the authority to do so could subject the District to a suit for negligence. Our Courts not only find negligence when someone acts unreasonably, they also find negligence when someone fails to do something (omission) which a reasonably prudent person would do: The Rule of Law.

Finally, this "safety" standard essential to ownership, statutorily required and imposed by the body of legal cases that make up our Rule of Law should not be confused with that part of "safety" included in "police power" being: "that inherent and plenary power in state over persons and property which enables the people to prohibit all things inimical to comfort, safety, health, and welfare of society". The power used to regulate for "safety" in the District's proposed resolution and in its existing Rules & Regulations is not full, complete nor absolute. The "penalty" merely deals with the decal for boating or use of the lakes and beaches (privileges granted by the owner of the lakes and appurtenances not "rights" for a citizen of the state).

#### **IV. THE CONSERVANCY ACT AND STANDARD APPLIED TO THE PROPOSED RESOLUTION**

This proposed resolution is divided into two sections: the preamble ("Whereas") and the text ("Be It Resolved, etc"). This introduction is designed for the protection of District property and "the public safety". As merely a technical clarification, the preamble should not address "public safety" since this Board of Directors is proposing to regulate a *local* public improvement. May I suggest in lieu of "public safety" the phrase "local public safety" as the Board of Directors can only regulate that which it is statutorily designed to serve.

Turning to the text of the proposed resolution, the document creates a violation of the CSCD Rules - a fixed and known standard previously promulgated by the Board of Directors pursuant to statutory authority and essential to the ownership of the lakes. The text governs only "unauthorized persons". Hence, the Board has created a logical class of offenders (not arbitrary, capricious nor unreasonable) as the District must have authorized persons to set or re-set the buoys (warnings). The prohibited act is "to move, deface, strike or damage a marking buoy". Since the time-honored purpose of a buoy is to warn people of danger or protected areas, then the prohibited act is one involving an intentional disregard for human safety or a wanton disregard for life or property. Certainly, a type of activity that a reasonably prudent person would desire to proscribe.

However, your author recognizes the possibility that one could accidentally "strike" a buoy with a boat (e.g. a sudden blinding rainstorm). Since the proposed resolution cross-references the existing Rules & Regulations which provide for an appeal to the appropriate Commission, then the proposed resolution provides an avenue to make each case fact sensitive and not automatic.

Given the natural beauty and attraction of both Lakes, freeholders in the District often invite guests to join them. It is the duty of the host to be responsible for his/her guest's actions. Since the freeholder is responsible for knowing the Rules & Regulations of his/her District, then it is not arbitrary, capricious or unreasonable to apply the sanction against the host/freeholder.

As mentioned above, the sanction or penalty imposed does not involve the "rights" of a citizen of the State of Indiana, but the cession of a privilege previously granted by the owner of the Lakes.

Finally, this "sanction" as crossed-referenced through the Rules & Regulations concerning the destruction of District property could lead to a civil or criminal action. Certainly, the District is entitled to bring an action in law to recover the fair value of the property damaged or destroyed. Likewise, the District has the right, if not the duty, to file an affidavit of malicious trespass with the Brown County Prosecutor's Office.

#### V. CONCLUSION

The proposed Buoy Resolution accomplishes the purpose for which the Rule was designed to control: protection of the warning buoys. The proposed Buoy Resolution is consistent with the Indiana Conservancy Act and consistent with the legal requirements of ownership, statutory duties, and the duties imposed by the Rule of Law. The Buoy Resolution is not based upon nor invokes the "police power". The sanction imposed in the Buoy Resolution is logically connected to the protection of the warning buoys and involves only those privileges previously extended by the owner of the Lakes, dams and appurtenances.

If you or any Member of the Board of Directors should have any questions, please do not hesitate to call me.

Very truly yours,



Douglas E. Cregor

DEC/aac



EXHIBIT C

**14-33-6-13. Placing plan in operation — Powers of board. —**

(a) The board shall place the district plan in operation by constructing all works and maintaining the works in accordance with the district plan.

(b) If necessary to discharge these responsibilities, the board may do the following:

- (1) Levy taxes on the real property in the district.
- (2) Make assessments on the real property in the district, except the property that is exempt under IC 14-33-7-4, for exceptional benefits to the property and further assessments pro rata for maintenance and operation of the works of improvement.
- (3) Issue bonds and short and long term notes.
- (4) Incur other debts and liabilities.
- (5) Exercise the power of eminent domain, both inside and outside the boundaries of the district, in accordance with this article or another eminent domain statute. In the exercise of this power, due care shall be taken to minimize interference with other public interests involved.
- (6) Make payments for the fair value of all property taken under eminent domain proceedings, and in cases that are appealed, make the payments into court and proceed promptly in placing the district plan in operation.
- (7) Institute any type of civil legal proceedings in a court having jurisdiction over the person or property in question.
- (8) Purchase or rent property.
- (9) Sell services or property that are produced incident to the district plan at a fair and reasonable price.
- (10) Make contracts or otherwise enter into agreements with persons or federal or state agencies for construction, maintenance, or operation of any part of the district.
- (11) Receive and disburse money.
- (12) Lease land and other assets to municipalities, counties, and park boards of municipalities or counties, with the term and annual rental adequate to meet the district's repayment schedule for financing, if any, of the land and other assets leased. Municipalities, counties, and park boards of municipalities or counties may enter into leases without limitations of other statutes regarding the receipt of petitions, the duration of the term of the lease, or the distance of the land and other assets from the corporate boundaries. The municipalities, counties, and park boards may enter into leases:
  - (A) For terms as long as fifty (50) years;
  - (B) At locations that the municipalities, counties, and park boards determine would benefit the municipalities or counties; and
  - (C) Upon terms, conditions, and covenants that are fair and reasonable.

The board may pledge the rental income from the lease as revenue for services or property produced incident to the operation of the district.

(13) Perform necessary construction and maintenance work as follows:

- (A) Outside the district.
- (B) Outside Indiana if:
  - (i) There is voluntary agreement on the part of persons outside Indiana; and
  - (ii) The work will confer benefits to the real property in the district in excess of costs and damages to be paid by the district. [P.L.1-1995, § 26.]

EXHIBIT D

**14-27-7-2. Duties of owner.** — The owner of a dam, levee, dike, or floodwall and appurtenant works shall maintain and keep the structures and appurtenant works in the state of repair and operating condition required by the following:

- (1) The exercise of prudence.
- (2) Due regard for life or property.
- (3) The application of sound and accepted engineering principles.

[P.L.1-1995, § 20.]