THE
INDIANA COURT OF APPEALS

Cause No. 18A-PL-02500

CENTER FOR WILDLIFE ETHICS, INC.,	)	
Appellant,	)	Appeal from La Porte Superior Court #1
v.	)	
	)	Trial Court No. 46D0l-1711-PL-1931
CAMERON F. CLARK, in his Official capacity as Director of the Indiana Department of Natural Resources,	)	The Honorable Michael S. Bergerson, Judge
Appellee.	)	

APPELLANT'S PETITION FOR REHEARING

Laura Nirenberg, No. 29292-46
E. Anne Benaroya, No. 5173-95-TA
CENTER FOR WILDLIFE ETHICS
4988 W. 150 North
La Porte, IN 46350
(219) 379-4401
Laura@c4we.org
Anne@c4we.org

Attorneys for Appellant, Center for Wildlife Ethics, Inc.

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Pursuant to Ind. Appellate Rule 54(A)(2), Appellant, Center for Wildlife Ethics, Inc., (CWE) respectfully petitions this Court to rehear its unpublished opinion affirming the trial court's order granting Appellee Indiana Department of Natural Resources' (IDNR's) motion to dismiss CWE's (April 2018) Amended Complaint.

STATEMENT OF ISSUES

I. Did the Court err in holding Ind. Code § 14-22-2-6 enables the IDNR to permit recreational/non-commercial (rifle) hunting (deer) on state park properties without first having made a rule in compliance with the public notice and comment requirements in Ind. Code §§ 4-22-2 et seq.?

II. Did the Court err in ruling that Ind. Code § 14-22-2-6 enables IDNR to use emergency rules when the agency suspends statutory rights and duties that primarily effect the general public but are not listed in Ind. Code § 14-10-2-5?

III. Did the Court err by basing its holding on IDNR's argument that CWE's Amended Complaint failed to state a claim rather than the trial court's ruling that CWE's Amended Complaint was moot?

ARGUMENTS

I. Ind. Code. § 14-22-2-6 does not enable IDNR to permit recreational/non-commercial (rifle) hunting (deer) on state park properties without first having made a rule in compliance with the public notice and comment requirements in Ind. Code §§ 4-22-2.

The central error in this Court's opinion is that it imputes statutory authority to IDNR that does not exist. The ruling also assumes IDNR's statutory authority to prohibit recreational/non-commercial hunting authorizes the agency to permit that same activity. A recreational/non-commercial hunt and a "controlled hunt"[1] may appear identical but the acts are entirely different for purposes of IDNR's rulemaking duties.

The IDNR's power to act is limited to the authority expressly and affirmatively granted to the agency by statute; the law is well-established. In *Indiana Department of Natural Resources v. Whitetail Bluff, LLC,*[2] this Court addressed that very issue and held that the authority conferred on IDNR by Ind. Code § 14-22-1-1 does not authorize the IDNR to regulate (permit or prohibit) hunting (privately owned animals) unless the agency has independent, affirmative legislative authority granted from another statutory source.[3] In *Whitetail Bluff*, IDNR's key argument was that the two sections of I.C. § 14-22-1-1 should be

[1] A controlled hunt must be authorized by the Controlled Hunt statute (Ind. Code § 14-22-6-13). A controlled hunt may take place at any time outside the designated hunting seasons or during those seasons, it matters not. In contrast, recreational/non-commercial hunt is any hunt that takes place during any lawful hunting season.

[2] *Ind. Dep't of Nat. Res. v. Whitetail Bluff, LLC*, 25 N.E.3d 218 (Ind. Ct. App.) (Vaidik, N., dissenting), *trans. denied*, 31 N.E.3d 977 (Ind. 2015).

[3] *Id*. at 229.

construed independently from each other.[4] The agency argued the language in I.C. § 14-22-1-1(b) generally authorized IDNR to "protect and properly manage the fish and wildlife resources of Indiana"[5] and thereby granted authority to regulate hunting privately-owned wild animals (deer) even though section § 14-22-1-1(a) exempted wild animals that are: "(1) legally owned or being held in captivity under a license or permit as required by this article; or (2) otherwise excepted in this article."[6] This Court rejected IDNR's argument, "*[w]e are hard-pressed to understand why the exception described in subsection (a) was created if it was not to be understood in juxtaposition to the general conferral of authority set out in subsection (b*)."[7] The broad language "protect and properly manage" articulated legislative goals but did not authorize IDNR to take any specific action to meet those goals. Furthermore, the exception established a specific, fact-based standard that clearly identified the exempted wildlife. Additionally, this Court rejected the amici's arguments that IDNR's administrative rules augmented the agency's

[4] The legislature amended I.C. § 14-22-1-1 in 2016 (P.L.89-2016, Sec. 5, S.E.A. 109) but the amendment does not change the legal maxim that the legislature must affirmatively grant IDNR specific authority to permit or prohibit hunting wildlife. The 2016 amendments emphasize the significance of the holding rather than changing it.

[5] *Whitetail Bluff*, 25 N.E.3d at 225.

[6] *Id.*

[7] *Id.* at 226.

statutory authority because the validity of an administrative rule is not self-generating and "depends entirely upon whether the subject matter addressed in those provisions falls within the scope of authority granted to the relevant agency by the General Assembly."[8]

In the instant case, Ind. Code § 14-22-6-1[9] generally establishes IDNR's administrative authority to regulate hunting or "taking", but the agency's authority to authorize hunting is expressly limited by the Controlled Hunt statute.[10] The Controlled Hunt statute, a legislative prohibition, explicitly distinguishes state parks from other "public properties" by prohibiting "taking" or any destruction of wildlife on those properties unless the "taking" promotes the specific property's

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[8] *Whitetail Bluff*, 25 N.E.3d at 228.

[9] I.C. § 14-22-6-1 (2019)

IC 14-22-6-1 Taking of wild animals governed by laws and rules

Sec. 1. A person may not take, chase, or possess a wild animal, except as provided by:
(1) a statute; or
(2) a rule adopted under IC 4-22-2 to implement this article.

[10] Ind. Code § 14-22-6-13 provides: Sec. 13. If the director:
(1) determines that a species of wild animal present within a state park or historic site poses an unusual hazard to the health or safety of one (1) or more individuals;
(2) determines, based upon the opinion of a professional biologist, that it is likely that:
(A) a species of wild animal present within a state park or historic site will cause obvious and measurable damage to the ecological balance within the state park or historic site; and
(B) the ecological balance within the state park or historic site will not be maintained unless action is taken to control the population of the species within the state park or historic site; or
(3) is required under a condition of a lease from the federal government to manage a particular wild animal species;
the director shall authorize the taking of a species within the state park or historic site under rules adopted under IC 4-22-2.
http://iga.in.gov/legislative/laws/2018/ic/titles/014#14-22-6-13 (last accessed May 19, 2019).

ecological health. The Controlled Hunt statute thereby prohibits recreational or non-commercial (rifle/any) hunting on those properties.

The Controlled Hunt statute applies only to state park and historic site properties. In contrast, Indiana Code § 14-22-2-6 applies to other "public properties" within IDNR's purview. Pursuant to I.C. § 14-22-2-6, IDNR promulgated 312 Ind. Admin. Code § 8-2-3(d). Subsection (d) of that code authorizes IDNR to permit recreational/non-commercial hunting on four classes of "public property": (1) state forest properties, (2) reservoir properties, (3) wildlife preserves administered by IDNR and (4) nature preserves (under circumstances specified by the Division of Nature Preserves). State parks and historic sites are not included in this list. In contrast, IDNR, pursuant to the Controlled Hunt statute, promulgated prohibitive rules that forbid hunting on state park properties and limit "taking" on those properties to IDNR employees and express agents.[11]

The Rifle-Hunting statute's[12] legislative history demonstrates that the legislature intended for that statute to include only those properties where IDNR

[11] 312 Ind. Admin. Code 9-2-11(a) (2019). Sec. 11. (a) **An individual must not take or chase a wild animal, other than a fish, in a state park or a state historic site except for employees of the department that are authorized** to take a nonendangered: (1) nonmigratory bird; (2) mute swan; (3) mammal; or (4) reptile; on a state park that is causing damage or threatening to cause damage or creating a public safety or health threat. (Emphasis added.)

[12] Ind. Code § 14-22-2-8. http://iga.in.gov/legislative/laws/2018/ic/titles/014/#14-22-2-8 (last accessed May 20, 2019).

already had statutory authority to permit non-commercial/recreational hunting. There is no evidence the legislature intended the statute's pilot program to include state parks and historic sites. The proposal that became the Rifle Hunting statute originated in the House and was engrossed as HEA 1231 on February 24, 2016.[13] Although the Senate did not sponsor companion legislation, that Chamber considered a Motion substituting "state-owned hunting areas" for privately-owned land.[14] Although the Senate ultimately rejected "state-owned hunting areas" in favor of the original private property limitation, the Motion demonstrates the legislature intended to maintain the status quo by limiting rifle-hunting to properties where I.C. § 14-22-2-6 already authorized IDNR to permit recreational/non-commercial hunting. The Rifle Hunting statute's limited life span and the legislature's dispute as to public verses private property demonstrates the statute does not intend to supersede the Controlled Hunt statute. The legislative discussion in the Rifle Hunting statute does not mention the Controlled Hunt statute in any respect. The Controlled Hunt statute governs the class of "public

[13] Public Law 110-2016 (Enacted Mar. 22, 2016). http://iga.in.gov/legislative/2016/bills/house/1231/ (last accessed May 18, 2019).

[14] The Motion states, "*Engrossed House Bill 1231 be amended to read as follows: Page 1, line 7, delete "privately owned land" and insert "state owned hunting areas*"…Senate Motion MO123105/DI 92 (Emphasis added.) http://iga.in.gov/legislative/2016/bills/house/1231#document-bbc85cc1 (last accessed May 18, 2019)

property" that are state parks and historic sites which stand separate and apart from other "public property" governed by I.C. § 14-22-2-6.

IDNR's nomenclature, "non-commercial hunt" does not change the conduct at issue here. The Controlled Hunt statute prohibits recreational/non-commercial (deer) hunting on state park properties. "Taking" wildlife on state park properties is an activity that is limited to IDNR employees and express agents without exception, even if the exception appears minimal (four days). IDNR may re-define recreational hunting as "taking" but verbal sophistry fails the agency's rule-making duties to the entire public, rifle-hunters and the non-hunting public alike.

II. This Court erred in ruling that Ind. Code § 14-22-2-6 enables IDNR to use emergency rules when the agency suspends statutory rights and duties that primarily effect the general public but are not listed in Ind. Code § 14-10-2-5.

In 2017, the Indiana General Assembly amended Ind. Code § 14-10-2-5 to authorize IDNR to use emergency rules to regulate water recreation (Ind. Code § 14-15).[15] The legislature could have included the Rifle-Hunting statute in that amendment since the Rifle-Hunting statute was amended at the same time in the same House Bill. Rather than adding the Rifle-Hunting statute to I.C. § 14-10-2-5,

[15] P.L. 195-2017, Sec. 172; H.E.A. 1415 (2017). http://iga.in.gov/legislative/2017/bills/house/1415#document-0d021974 (last accessed May 20, 2019).

the legislature amended the equipment portion of the Rifle Hunting statute but did not include a provision authorizing IDNR to use emergency rules.[16]

This Court erred in ruling that IDNR's dedicated emergency rule statute, I.C. § 14-10-2-5, is merely a list of examples. The Court's ruling suggests that the statute, an exception to the rule that IDNR must use the public promulgation procedure in Indiana's Administrative Rules and Procedures Act (ARPA),[17] allows the exceptions to swallow the rule. IDNR, like all administrative agencies, has power to deviate only when the agency makes rules that do not effect the general public or otherwise have the force of law.

In *Villegas v. Silverman*, 832 N.E.2d 598, 608-610, (Ind. Ct. App. 2005), this Court established when an agency's act has the "effect of law" triggering the duty to comply with the ARPA's public notice and comment procedures. There, the court held the Bureau of Motor Vehicles' documentation requirements for obtaining Indiana drivers' licenses, permits, and identification cards were subject to the ARPA's promulgation procedure because they affected individual rights

[16] P.L. 195-2017, Sec. 7; H.E.A. 1415 (2017). http://iga.in.gov/legislative/2017/bills/house/1415#document-0d021974 (last accessed May 20, 2019).

[17] An administrative "rule" is defined in Ind. Code § 4-22-2-3(b) as "the whole or any part of an agency statement of general applicability that: (1) has or is designed to have the effect of law; and (2) implements, interprets, or prescribes: (A) law or policy; or (B) the organization, procedure, or practice requirements of an agency." http://iga.in.gov/legislative/laws/2018/ic/titles/004/#4-22-2-3 (last accessed May 20, 2019).

and/or obligations. More significantly, the licensing requirements primarily affected the general public rather than the agency.

Here, as in *Villegas*, IDNR's act authorizing private actors to engage in conduct limited to IDNR/government actors effects the general public, rifle-hunting and non-hunting public alike, has the "effect of law", and triggers the public notice and comment requirements mandated by the ARPA. The ARPA's legislative history provides additional guidance. In 2013, the legislature addressed all the statutes at issue here when it recodified and amended the ARPA's emergency rule provision.[18] The HEA 1055 (2013), Sec. (a), listed and struck all the statutes that authorized IDNR (and other agencies) to use emergency rules. Specific to IDNR, HEA 1055, Sec. (a), Subsection (2) listed I.C. § 14-22-2-6 and I.C. § 14-22-6-13, the Controlled Hunt statute; Section (a), Subsection (15) listed IDNR's emergency rule statute, I.C. § 14-10-2-5. After having stricken the three IDNR statutes, and others, from the ARPA, HEA 1055, Subsection (b) added language expressly cabining the IDNR's discretion to use emergency rules by limiting the use of that procedure to only those statutes that expressly delegate authority to the agency to use emergency rules, "(b) A rule may be adopted

[18] P.L. 140-2013, Sec. 1; H.E.A. 1055. http://www.in.gov/legislative/bills/2013/HE/HE1055.1.html (last accessed May 19, 2019).

under this section if a statute delegating authority to an agency to adopt rules authorizes adoption of such a rule."[19]

The 2013 amendment to the ARPA's emergency rule provision resolves any doubt about whether the ARPA establishes or delegates authority to deviate from the promulgation procedure when the substantive statute at issue does not expressly delegate that authority. IDNR does not have statutory authority to use emergency rules to permit private rifle-hunting licensees to engage in that conduct on state park properties. Neither the Controlled Hunt statute nor the Rifle-Hunting statute authorize IDNR to use emergency rules. And, neither statute is listed in the agency's emergency rule statute (I.C. § 14-10-2-5) which expressly weds IDNR's authority to use emergency rulemaking to I.C. § 4-22-2-37.1.

III. This Court erred by basing its holding on IDNR's argument that CWE's Amended Complaint failed to state a claim rather than the trial court's ruling that CWE's Amended Complaint was moot.

The Controlled Hunt statute does not authorize IDNR to permit private hunting licensees to act as stand-ins for the agency without first having promulgated a rule in compliance with I.C. §§ 4-22-2 (ARPA). The LSA Document #18-279(E) relies on the Controlled Hunt statute and does not mention

[19] I.C. § 4-22-2-37.1 (2019). http://iga.in.gov/legislative/laws/2018/ic/titles/004/#4-22-2-37.1 (last access May 19, 2019).

the Rifle-Hunting statute; however, the lower court's ruling relies solely on the Rifle-Hunting statute. For that reason, the Rifle Hunting statute warrants analysis.

Although the Rifle-Hunting and Controlled Hunt statutes use the same language requiring IDNR to "adopt rules"[20], they impose that duty for entirely different reasons. The Controlled Hunt statute predates the Rifle-Hunting statute by over two decades and establishes permanent prohibitions on hunting state park properties. In contrast, the Rifle-Hunting statute establishes a temporary pilot program that enables IDNR to authorize rifle-hunting to study its effects from mid-2016 to June of 2020 when the statute expires. The statute did not include "public property" or require IDNR to "adopt rules" until 2018 when it was amended to authorize rifle-hunting on "public property" generically.[21] The Rifle Hunting statute, despite its three iterations, has never once mentioned the Controlled Hunt statute. And, there is no evidence the legislature intended the Rifle Hunting statute to affect the Controlled Hunt statute in any way, let alone supersede it.

The Controlled Hunt statute authorizes only IDNR and its employees to "take" specified wildlife on the specified state parks. The statute requires IDNR to "adopt rules" and may authorize the agency to use emergency rules to implement "taking" but only because the statute limits "taking" or management activities to

[20] I.C. § 14-22-2-8(e) (2018); I.C. § 14-22-6-13 (2016).

[21] I.C. § 14-22-2-8 (2018).

IDNR, a government entity and applies only to state park properties.[22] IDNR's authority to manage wildlife on state parks by "taking" is not controversial or at issue here. However, there are no IDNR employees or agents "taking" deer on state park property in this situation.

IDNR published LSA Document #18-279(E) on July 4, 2018. The Document states:

> "*Under IC 14-22-6-13, the director finds white-tailed deer have caused, and will continue to cause, measurable damage to the ecological balance within these properties, and the ecological balance within these properties will not be maintained unless action is taken to control their populations…*
> *(b) In order to apply for a license…, an individual must be at least eighteen (18) years of age by November 12, 2018, and possess [a deer hunting license]…*
>
> *(c) All eligible applicants…will be entered into a random drawing…*
>
> *(d) Individuals may apply as a single applicant…*
>
> *(e) The drawing described in this [section] shall be conducted on a random basis…*
>
> *(f) Each individual issued a license under this [section] may be randomly assigned to specific management units…requirements set forth in the assignment…." (emphasis added.)*

IDNR's role in this case is analogous to the agency's role in *Blinzinger v. Americana Healthcare Corp.*, 466 N.E.2d 1371 (Ind. Ct. App. 1984). In that case, this Court affirmed the principle that "an agency has no power, discretionary or

[22] 312 IAC 9-2-11(a) (2019).

otherwise, to issue rules or regulations except as provided by statute"[23] when distinguishing an agency's act that constitutes an internal policy from an act having the effect of law that must be promulgated.

In *Blinzinger*, the agency, now known as the Indiana Family and Social Services Administration, issued a "directive' that froze Medicaid compensation rates for healthcare providers whose decertification was pending. Like IDNR, the agency in that case argued the ARPA's promulgation process was unnecessary, the "directive" was merely an "internal policy" as its enforcement and related duties would fall, primarily, to the agency's staff and other government workers/state employees.[24] The court rejected that argument because it trivialized the real-world impact of the agency's act. The government/state workers would have been tasked with enforcing the directive but that, alone, did not make the directive an "internal" policy or exempt from the public notice and comment/promulgation requirements mandated by the ARPA.[25] Like the government workers in *Blinzinger*, the government workers here are merely administering a policy at best. Merely administering the policy does not make the conduct at issue a government act or

[23] *Blinzinger*, 466 N.E.2d at 1377 (citing, *Indiana Air Pollution Control Board v. City of Richmond*, 457 N.E.2d 204 (Ind. 1983)).

[24] *Id.* at 1372.

[25] *Id.* at 1377.

internal to IDNR. For that reason, IDNR's conduct that is LSA Document 18-279(E) is not exempt from the APRA's public notice and comment requirements.

CONCLUSION

CWE respectfully requests that this Court rehear this case because the Court's memorandum opinion is at odds with this Court's previous rulings and those of the Indiana Supreme Court. This Court's opinion imputes statutory authority to IDNR that does not exist and, arguably, never could without running afoul of the state and federal constitutions. The dispute between the majority and dissent in *Whitetail Bluff* [26] resolves the issue here. The generalized purpose stated in IDNR's enabling legislation does not authorize the agency to regulate in the absence of any specific grant of affirmative legislative authority. Ind. Code § 14-22-2-6(d), construed consistently with the Controlled Hunt statute, authorizes IDNR to use emergency rules but only for internal policies that have no effect on the public. IDNR's emergency rule statute (I.C. §14-10-2-5) provides the agency with express legislative authorization to deviate from the promulgation process by using emergency rules for the specified statutes, but neither the Rifle-Hunting nor the Controlled Hunt statutes are listed.

[26] *Ind. Dep't of Nat. Res. v. Whitetail Bluff, LLC*, 25 N.E.3d 218 (Ind. Ct. App.) (Vaidik, N., dissenting), *trans. denied*, 31 N.E.3d 977 (Ind. 2015).

CWE alternatively requests that this Court remand this case to the trial court because the lower court adjudicated only one of the three claims raised in CWE's Amended Complaint. The lower court failed to rule on the claims arising from LSA Document #18-279(E), which relies on the Controlled Hunt statute. Instead, the lower court ruled only on the issues arising from the 2018 amendment to the Rife-Hunting statute, and based the ruling on an erroneous finding that the amendment mooted all claims. Accordingly, the trial court's ruling is clear error and the case should be remanded.

Respectfully submitted,

/s/ Laura M. Nirenberg
Laura M. Nirenberg, Attorney #29292-46

/s/ E. Anne Benaroya
E. Anne Benaroya, Attorney #5173-95-TA
Center for Wildlife Ethics
4988 W. 150 North
La Porte, IN 46350
(219) 379-4401
Laura@centerforwildlifeethics.org
Anne@centerforwildlifeethics.org

CERTIFICATE OF WORD COUNT

I hereby verify that this brief contains no more than 4,200 words as required by Indiana Appellate Rule 44(E).

/s/ Laura M. Nirenberg
Laura M. Nirenberg

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2019, the foregoing document was electronically filed and electronically served upon the following:

Frances Barrow, Attorney No. 15115-22
Deputy Attorney General
IGCS, 5th Floor
302 West Washington Street
Indianapolis, IN 46204-2794
Telephone: (317) 233-0555
Frances.Barrow@atg.in.gov

/s/ Laura M. Nirenberg
Laura M. Nirenberg, Atty. #29292-46
Center for Wildlife Ethics