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SURVEY OF INDIANA ADMINISTRATIVE LAW

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INTRODUCTION

This survey provides a glimpse and an update into the world of Indiana administrative law. Despite calls from our highest Court that the entire system of the administrative state should be up to challenge, the past year has seen executive agencies busier than ever in Indiana. In the absence of a full-scale challenge to the extreme deference agencies have accrued for themselves, those agencies continue to be the major channel through which Hoosiers interact with their government.

I. AGENCY POWER

In the last survey issue,¹ the authors highlighted Justice Slaughter's concurrence in the denial of transfer in the case *Indiana Department of Natural Resources v. Prosser*.² That case had taken several turns before it reached the Indiana Supreme Court. The Department of Natural Resources (the "DNR") had denied Prosser's application to construct a concrete seawall.³ He applied for administrative review, but an administrative law judge (an "ALJ") working for the DNR agreed with the Department, as did the Natural Resources Commission.⁴ Prosser petitioned for judicial review, and the trial court agreed with his position; the court reversed the Department's denial.⁵

The court of appeals restored the agency's decision.⁶ The question came down to whether a dredging process had previously extended the shoreline near

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1. Vivek Hadley & Alexander Carlisle, *Survey of Indiana Administrative Law*, 53 IND. L. REV. 773 (2021).

2. Ind. Dep't of Nat. Res. v. Prosser, 139 N.E.3d 702, 702-03 (Ind. 2020) (Slaughter, J., concurring).

3. Ind. Dep't of Nat. Res. v. Prosser, 132 N.E.3d 397, 398 (Ind. Ct. App. 2019), *trans. denied*, 139 N.E.3d 702 (Ind. 2020).

4. *Id.*

5. *Id.*

6. *Id.*

Prosser's proposed seawall—in which case Prosser should prevail—or whether the shoreline had not been extended.⁷ Since a DNR witness said the shoreline had not been extended, the court of appeals ruled that no court could second-guess that determination.⁸ “In the end, it was ALJ's job to evaluate the testimony of witnesses and other evidence for credibility and weight, and the ALJ's evaluation of their evidence strikes us as neither arbitrary nor capricious. We will not second-guess the ALJ's determinations in this regard.”⁹

Prosser sought transfer, and our supreme court declined, thereby leaving in place the court of appeals' ruling.¹⁰ Justice Slaughter concurred; but while he agreed that the court of appeals had applied the prevailing standard of review with fidelity, he took special care to note that he was willing to question the entire system of administrative law standard of review:

I write separately to note my deep concerns with prevailing administrative law as codified in AOPA and interpreted by our courts. Under the current system, a government agency both finds the facts and interprets the statutes that supply the rules of decision, and the courts' only role (as we have interpreted AOPA) is to defer to all aspects of the agency's decision-making. Neither judge nor jury finds facts. And no court gives a fresh, plenary interpretation to the agency's determination of law or to its application of law to the facts.

In a future case, where the issues are raised and the arguments developed, I am open to entertaining legal challenges to this system for adjudicating the legal disputes that our legislature assigns agencies to resolve in the first instance, subject only to a highly circumscribed right of judicial review as set forth in AOPA.¹¹

The timing of this call came at a perhaps inopportune time. Issued in February 2020, this concurrence was published just a month before executive agencies across the nation took the lead in responding to, and issuing rulings and guidance about, the COVID-19 pandemic.¹² Since that ruling, there has not been a reported case taking up Justice Slaughter's invitation to challenge the entire system of administrative review. Practitioners in this area would be well advised to at least reserve such an argument in the alternative to the standard challenges; while acknowledging that such a challenge could likely only gain purchase once it reached Indiana's highest court.

Contrary to the direction Justice Slaughter appears to want agency law to take, the reported cases of the survey period regularly showed administrative agencies flexing their powers. In this regard, Indiana's Bureau of Motor Vehicles has been particularly active over the past year.

7. *Id.* at 401.

8. *Id.* at 402.

9. *Id.*

10. *Ind. Dep't of Nat. Res. v. Prosser*, 139 N.E.3d 702, 702 (Ind. 2020).

11. *Id.* at 702-03 (Slaughter, J., concurring).

12. *See generally* Ind. Exec. Order Nos. 20-02 to 20-53 (2020).

In *Sims v. Indiana Bureau of Motor Vehicles*,¹³ Jeremy Sims had applied to a trial court for specialized driving privileges (“SDP”).¹⁴ Although Sims complied with the applicable procedures—including serving his application on the Bureau and the prosecuting attorney—his application did not specify a proposed expiration date for his requested SDP.¹⁵ The prosecutor did not file an appearance, and no one opposed Sims’s SDP petition.¹⁶ Accordingly, the trial court granted Sims’s request and set an expiration date of December 11, 2028.¹⁷

Following that order, the BMV—represented by the Attorney General—filed an appearance and submitted a motion to correct error.¹⁸ The BMV noted Indiana Code section 9-30-16-3(c), which, during the relevant time, limited the duration of an SDP to two and one-half years.¹⁹ The trial court deferred to the BMV’s position and amended its previous order.²⁰

Sims found this inappropriate; he noted Indiana Code section 9-30-16-3(b), which says that “[a] prosecuting attorney shall appear on behalf of the bureau to respond to a petition filed under this subsection.”²¹ Even though Sims served the prosecuting attorney, the prosecuting attorney never appeared.²² Thus, Sims’s argument continued, the Attorney General had no right to step in on behalf of the BMV and advocate for a decrease in the length of the SDP he had originally secured for himself.²³

The court of appeals sided with the BMV’s exercise of authority. The panel noted that while Indiana Code section 9-30-16-3(b) says that the prosecuting attorney “shall” appear on the BMV’s behalf in such cases—and other cases involving the statute indeed had prosecuting attorneys appearing on the BMV’s behalf²⁴—nothing in the statute outright forbids the Attorney General from doing the same.²⁵

The panel further noted Indiana Code section 4-6-1-6, which “provides that

13. *Sims v. Ind. BMV*, 157 N.E.3d 1 (Ind. Ct. App. 2020).

14. *See* IND. CODE § 9-30-16-3 (2019) (“If a court orders a suspension of driving privileges under this chapter, or imposes a suspension of driving privileges under IC 9-30-6-9(c), the court may stay the suspension and grant a specialized driving privilege as set forth in this section.”).

15. *Sims*, 157 N.E.3d at 2.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* The panel noted that the General Assembly had since amended the statute to allow an SDP to be granted “for a period of time as determined by the court” without the “two-and-one-half year durational limit on specialized driving privileges.” *Id.* at 2 n.1 (quoting IND. CODE § 9-30-16-3(c) (2020)).

20. *Id.* at 2.

21. *Id.* (quoting IND. CODE § 9-30-16-3(b) (2019)).

22. *Id.*

23. *Id.*

24. *See* *Ind. BMV v. McClung*, 138 N.E.3d 303, 307 (Ind. Ct. App. 2019); *see also* *Prosecuting Attorney v. Hammer*, 92 N.E.3d 649, 650 (Ind. Ct. App. 2017).

25. *Sims*, 157 N.E.3d at 4.

the Attorney General may ‘represent the state in any matter involving the rights or interests of the state . . . for which provision is not otherwise made by law.’”²⁶ The panel found that the BMV, acting through the Attorney General, had the right to ensure accurate compliance with Indiana Code section 9-30-16-3(c), which only allowed for SDPs extending two and one-half years.²⁷ The panel did not explain why section 9-30-16-3(b)’s language stating that the prosecuting attorney “shall” appear on the BMV’s behalf would not qualify as a “provision . . . otherwise made by law.”²⁸ Interestingly, the BMV as the appellee filed a motion to publish the case in order to make it a precedential decision²⁹; typically, only the losing party on appeal moves to publish in order to increase the likelihood of obtaining transfer.³⁰ But in *Sims*, the BMV and the Attorney General moved to publish, making sure the decision could be cited in other litigation.³¹

Overall, *Sims* had colorable arguments regarding the proper representation of the BMV in SDP cases—an argument backed up by the traditional representation, as noted by the *Sims* panel itself.³² But the panel granted the BMV the right to enforce strict compliance with the statutes involving its powers.

The court of appeals also reversed a trial court’s decision regarding an SDP determination in *Indiana Bureau of Motor Vehicles v. McClung*.³³ McClung committed several driving infractions, resulting in three simultaneous driving suspensions, two of which were indefinite.³⁴ McClung filed a petition for specialized driving privileges under Indiana Code section 9-30-16-4.³⁵ The trial court granted the petition and ordered that the driving privileges “not expire until further court order.”³⁶ As in the *Sims* case above, the Attorney General appeared on behalf of the BMV and filed a motion to correct error, arguing that the grant of specialized driving privileges could at most extend for two and one-half years.³⁷ The trial court denied that motion, so the BMV appealed.³⁸

The court of appeals panel noted that two sections within the applicable statute could apply to the fact pattern of the case.³⁹ Indiana Code section 9-30-16-

26. *Id.* (quoting IND. CODE § 4-6-1-6).

27. *Id.*

28. *Id.*; see also IND. CODE § 4-6-1-6.

29. *Sims*, 157 N.E.3d at 5.

30. See generally *Supreme Court Transfer Dispositions (2021)*, APP. CLERK’S OFF., <https://www.in.gov/courts/clerk/transfer/> (last visited Nov. 11, 2021) [<https://perma.cc/ZMY9-EGCC>].

31. See IND. R. APP. P. 65(D).

32. *Sims*, 157 N.E.3d at 4.

33. *Ind. BMV v. McClung*, 138 N.E.3d 303, 305 (Ind. Ct. App. 2019).

34. *Id.*

35. *Id.*

36. *Id.* at 306.

37. *Id.*

38. *Id.* at 307.

39. *Id.* at 309 (citing IND. CODE § 9-30-16-3 to -4 (2019)).

3 (“Section 3”) at the time⁴⁰ said in relevant part:

(a) . . . If a court orders a suspension of driving privileges under this chapter, [or under another chapter not at issue here], the court may stay the suspension and grant a specialized driving privilege as set forth in this section.

(b) An individual who seeks specialized driving privileges must file a petition for specialized driving privileges in each court that has ordered or imposed a suspension of the individual’s driving privileges. Each petition must:

- (1) be verified by the petitioner;
- (2) state the petitioner’s age, date of birth, and address;
- (3) state the grounds for relief and the relief sought;
- (4) be filed in the court case that resulted in the order of suspension; and
- (5) be served on the bureau and the prosecuting attorney.

A prosecuting attorney shall appear on behalf of the bureau to respond to a petition filed under this subsection.

(c) [Except for instances where suspension of privileges is terminated under a subsection not at issue here], regardless of the underlying offense, specialized driving privileges granted under this section shall be granted for:

- (1) at least one hundred eighty (180) days; and
- (2) not more than two and one-half (2 1/2) years.

(d) The terms of specialized driving privileges must be determined by a court.⁴¹

In contrast, Indiana Code section 9-30-16-4 (“Section 4”) provides as follows:

(a) An individual whose driving privileges have been suspended by the bureau by an administrative action and not by a court order may petition a court for specialized driving privileges as described in section 3(b) through 3(d) of this chapter.

(b) A petition filed under this section must:

- (1) be verified by the petitioner;
- (2) state the petitioner’s age, date of birth, and address;
- (3) state the grounds for relief and the relief sought;
- (4) be filed in the appropriate county, as determined under subsection (d);
- (5) be filed in a circuit or superior court; and
- (6) be served on the bureau and the prosecuting attorney.

(c) A prosecuting attorney shall appear on behalf of the bureau to respond to a petition filed under this section.

40. The statute has since been amended. *See supra* note 19.

41. *McClung*, 138 N.E.3d at 309 (quoting IND. CODE § 9-30-16-3(a)-(d)).

(d) An individual whose driving privileges are suspended in Indiana must file a petition for specialized driving privileges as follows:

(1) If the individual is an Indiana resident, in the county in which the individual resides.

(2) If the individual was an Indiana resident at the time the individual's driving privileges were suspended but is currently a nonresident, in the county in which the individual's most recent Indiana moving violation judgment was entered against the individual.⁴²

McClung's request fell under Section 4, not Section 3, because his suspension was by the bureau in an administrative action rather than by court order under Section 3.⁴³ He argued that the two-and-a-half-year limit in Section 3 therefore did not apply.⁴⁴ He also argued that Section 4 could not really incorporate Section 3, as indicated in Section 4(a), because Section 4 could not be harmonized with Section 3(b)—Section 3(b) instructs petitioners to seek relief “in each court that has ordered or imposed a suspension of the individual's driving privileges,” while Section 4 instructs petitioners to seek relief “[i]f the individual is an Indiana resident, in the county in which the individual resides.”⁴⁵

The panel disagreed with the first argument, finding that Section 4(a) unambiguously incorporates Section 3(c).⁴⁶ But the panel found some justification for the second argument, since the two sections are potentially at odds with each other.⁴⁷

Having found the statute ambiguous, the panel faulted the trial court for attempting to impose meaning itself. The panel noted:

[I]n interpreting an ambiguous statute, we defer to the interpretation of the administrative agency charged with enforcing the statute, provided that the agency's interpretation is reasonable. It is well settled that a reasonable interpretation by an administrative agency is entitled to “great weight,” unless the agency's interpretation is inconsistent with the statute itself.⁴⁸

As the supreme court put it in *West v. Office of Indiana Secretary of State*, “if the agency's interpretation is reasonable, we stop our analysis and need not move forward with any other proposed interpretation.”⁴⁹ The panel noted that the BMV

42. *Id.* at 309-10 (citing IND. CODE § 9-30-16-4(a)-(d)).

43. *Id.* at 305.

44. Brief of Appellee at 7-8, *Ind. BMV v. McClung*, 138 N.E.3d 303 (Ind. Ct. App. 2019), 2019 WL 8643353, at *7-8.

45. *See id.*; *McClung*, 138 N.E.3d at 309-10 (quoting IND. CODE § 9-30-16-3 to -4).

46. *McClung*, 138 N.E.3d at 311.

47. *Id.* at 311-12.

48. *Id.* at 308 (citing *State v. Young*, 855 N.E.2d 329, 335 (Ind. Ct. App. 2006); *Chrysler Grp., LLC v. Review Bd. of Ind. Dep't of Workforce Dev.*, 960 N.E.2d 118, 123 (Ind. 2012)).

49. *West v. Office of Ind. Sec'y of State*, 54 N.E.3d 349, 353 (Ind. 2016) (citations omitted).

had offered a reasonable interpretation: that petitioners have to go to different courts depending on the underlying reason for their suspension.⁵⁰ Under precedents like *West*, that means the judicial branch stops its analysis, and has no further say in the matter.

The BMV similarly flexed its authority in *Indiana Bureau of Motor Vehicles v. Douglass*, another case in which the BMV challenged a trial court's action and won.⁵¹ In that case, Douglass resided in Marion County in 2014.⁵² He moved to California in June of that year, surrendering his Indiana driver's license and obtaining one from California.⁵³ Two months later, Indiana's BMV sent a letter to Douglass's last known Indiana address alleging that he was a Habitual Traffic Violator, and that his driving privileges would therefore be suspended for ten years beginning in September 2014.⁵⁴ That notice gave Douglass only eighteen days to seek administrative review.⁵⁵

Three and a half years later, California's Department of Motor Vehicles got wind of Indiana's BMV's actions, and California's DMV sent Douglass a letter saying that until he received a clearance from Indiana's BMV, California's DMV would cancel his driver's license within thirty days.⁵⁶ Douglass sought administrative review from the decision of Indiana's BMV, stating that there must be a mistake arising from his move.⁵⁷ But Indiana's BMV disagreed; its records indeed confirmed that Douglass had three driving-related offenses.⁵⁸ Finding no material error in its prior determination, the BMV denied Douglass's request.⁵⁹

Douglass filed a petition for judicial review and a motion for a preliminary injunction, given the impending cancellation of his California license.⁶⁰ The trial court granted his injunction to keep the status quo, and then granted his petition.⁶¹ The trial court found that at the time Indiana's BMV had issued its notice, Douglass had become a California resident; thus, it should have been up to California to decide his driving privileges.⁶² Accordingly, the trial court concluded that:

At the time of BMV's suspension of [Douglass'] privileges, its records contained a material error in that [Douglass] no longer held an Indiana

50. *McClung*, 138 N.E.3d at 312-13.

51. *Ind. BMV v. Douglass*, 135 N.E.3d 598, 599 (Ind. Ct. App. 2019), *reh'g denied*, (Jan. 28, 2020).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 599-600.

58. *Id.* at 600.

59. *Id.*

60. *Id.*

61. *Id.* at 600-01.

62. *Id.*

driver's license or driving privileges that were granted by Indiana, and in fact was (and is) a California residen[t] and licensee.

. . . BMV's failure to recognize its error and failure to recognize California's authority to grant driving privileges also constitutes a failure by BMV to give Full Faith and Credit to the California driving privileges given to [Douglass].⁶³

The court of appeals reversed the trial court and just like in *Sims*, allowed Indiana's BMV to enforce driving statutes in the way the BMV saw fit.⁶⁴ The panel recited the familiar deferential standard of review in agency law cases:

We may set aside an agency action only if it is

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.

Ind. Code § 4-21.5-5-14(d). A trial court and an appellate court both review the decision of an administrative agency with the same standard of review. We defer to the agency's expertise and will not reverse simply because we might have reached a different result. The burden of demonstrating the invalidity of the agency action is on the party to the judicial review proceeding that is asserting the invalidity of the action. Review of an agency's decision is largely confined to the agency record, and the court may not substitute its judgment for that of the agency. We give deference to the administrative agency's findings of fact, if supported by substantial evidence, but review questions of law *de novo*. On review, we do not reweigh the evidence.⁶⁵

Reviewing the applicable statutes, the panel found that Indiana Code section 9-30-10-4(b) defines a habitual violator as “[a] person who has accumulated at least three (3) judgments within a ten (10) year period for any of the following violations, singularly or in combination, and not arising out of the same incident.”⁶⁶ Under Indiana Code section 9-30-10-5, the BMV must mail a notice that the driver is a habitual offender, and must inform the driver that he is entitled to administrative review and that the suspension then takes effect thirty days later.⁶⁷ The panel found that Douglass indeed had three qualifying offenses, and that the BMV had taken the steps indicated in the statute; therefore, Indiana's BMV had the right to suspend his license, and the trial court had no right to

63. *Id.* at 601 (first two alterations and last alteration in original).

64. *Id.* at 603-06.

65. *Id.* at 602 (case citations omitted).

66. *Id.* at 603 (quoting IND. CODE § 9-30-10-4(b) (2019)).

67. *Id.* (citing IND. CODE § 9-30-10-5).

disagree.⁶⁸ And although both Indiana and California are parties to the Interstate Driver's License Compact,⁶⁹ nothing in that interstate compact restricted Indiana's BMV's ability to suspend a license.⁷⁰ Thus, notwithstanding the impact it would have on Douglass's ability to maintain a California driver's license, Indiana's BMV acted within its authority to enforce the statutes under its auspices, so the panel reversed the trial court.⁷¹

Another success for the BMV was the court of appeals' reversal of the trial court in *Indiana Bureau of Motor Vehicles v. Schneider*.⁷² There, Gregory Schneider sought, and received, an order from a trial court mandating that the BMV issue a certificate of title for a truck he purchased at an auction.⁷³ The certificate of title was lost, so Schneider filed an application with an Affidavit of Restoration for a Salvage Motor Vehicle signed by a Terre Haute Police Department officer.⁷⁴ The officer averred that he had examined the vehicle and that it was properly salvaged.⁷⁵ The trial court therefore issued an order instructing the BMV to issue a certificate of title upon receipt of the applicable fees.⁷⁶

Four months later, the BMV filed a motion for relief from judgment.⁷⁷ The BMV stated that it had not received service, but that once it ran the truck through its system, it found a record indicating that the truck had been officially "crushed" in Louisiana two years before.⁷⁸ Indiana Code section 9-22-3-18 prohibits the issuance of a certificate of title for a vehicle designated in any state as being junked, dismantled, or any similar term.⁷⁹ Thus, the BMV argued that the trial court's order was contrary to law.⁸⁰

The trial court was sympathetic to Schneider's plight, noting "[Schneider] said he wants a salvaged title or whatever. I mean, he just wants to drive the car which is understandable[.] . . . I'll order the BMV to issue him a salvaged title and then, let's just see what . . . they do this time."⁸¹ What the BMV decided to do was appeal.⁸²

The panel reversed. It noted that Indiana's Salvage Motor Vehicles Act offers

68. *Id.* at 606.

69. *See* IND. CODE § 9-28-1-3 (2021); CAL. VEH. CODE, § 15000 (Deering 2021).

70. *Douglass*, 135 N.E.3d at 604-05.

71. *Id.* at 606.

72. *Ind. BMV v. Schneider*, 136 N.E.3d 270, 271 (Ind. Ct. App. 2019).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 272.

79. *Id.*

80. *Id.*

81. *Id.* (citation omitted).

82. *Id.*

a narrow category of vehicles that qualify for a “salvage title.”⁸³ The panel noted, “Schneider provided proof that the vehicle was inspected by a police officer and deemed roadworthy. He also showed the trial court a picture of the vehicle at the July hearing and the trial court observed that ‘it looks fine.’”⁸⁴ Even so, the panel noted that the truck did not fall neatly within the definitions of the statute.⁸⁵ The panel also noted the Louisiana designation that the truck had been “crushed.”⁸⁶ Notwithstanding the fact that an Indiana police officer, not to mention the trial court judge, looked at the truck and saw that it was not crushed, the panel still accepted the BMV’s argument that the term could mean substantially the same thing as “junk,” “dismantled,” “scrapped,” or “destroyed” under Indiana Code section 9-22-3-18.⁸⁷ Under that statute, no title can be issued in Indiana for the truck.⁸⁸ Even with police officer testimony and the trial court’s confirmation that the truck was not scrapped, the court of appeals enforced the BMV’s position to the contrary.⁸⁹

The focus on BMV cases through the survey period might seem narrow. But in the cases described above, many broad principles of agency law emerge: the power of agencies; their ability to overturn trial courts; and the judiciary’s relative impotence to exercise its discretion to do justice (as the court views it) in contradiction to an agency’s position.

Many of these principles were likewise in play in *Miami County v. Indiana Department of Natural Resources*,⁹⁰ but the case highlights one of the instances in which an agency does not have full discretion to impose its will. The case involved deciding which governing body was responsible in the event of a failing dam. In 1990, a property developer created a subdivision and constructed seven dams to make lakes for the residents.⁹¹ The developer put road easements on top of the dams, and by 2005, the Miami County Commissioners adopted a resolution accepting the roads into the county highway system.⁹²

In 2014, the Department of Natural Resources issued notices of violation to the county and to the owners of the property upon which the dams were located (“Owners”), alleging that as “owners” of the dams, they were responsible for their upkeep.⁹³ Both the County and the Owners sought review from the Natural Resources Commission regarding who “owned” the dams.⁹⁴ Indiana Code section

83. *Id.* (citing IND. CODE § 9-22-3-3 (2019)).

84. *Id.* at 273 (citation omitted).

85. *Id.*

86. *Id.* at 274.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Miami Cty. v. Ind. Dep’t of Nat. Res.*, 146 N.E.3d 1027 (Ind. Ct. App.), *trans. denied*, 159 N.E.3d 569 (Ind. 2020).

91. *Id.* at 1028.

92. *Id.*

93. *Id.* at 1029.

94. *Id.*

14-27-7.5-4 provides the definition of “owner”—

an individual, a firm, a partnership, a copartnership, a lessee, an association, a corporation, an executor, an administrator, a trustee, the state, an agency of the state, a municipal corporation, a political subdivision of the state, a legal entity, a drainage district, a levee district, a conservancy district, any other district established by law, or any other person who has a right, a title, or an interest in or to the property upon which the structure is located.⁹⁵

The NRC found that both the County and the Owners were “owners” of the dams, but limited the County’s liability to the need to repair and maintain the roadways.⁹⁶ The fee simple Owners, in contrast, would bear the brunt of the maintenance and repair.⁹⁷

The parties sought judicial review, and the trial court went even further against the County.⁹⁸ It confirmed that the County was an “owner,” but rejected the NRC’s compromise that would limit the County’s responsibility to the top of the dam.⁹⁹ Instead, the trial court found that the County was an owner of the dam in the full sense of the word.¹⁰⁰

The County appealed, and argued along one of the few threads that allows for success against an agency: namely that the DNR and the NRC misapplied an unambiguous statute.¹⁰¹ As the panel noted, it must “give effect to, and implement the intent of the legislature as expressed in the plain language of its statutes. . . . If a statute is unambiguous, that is, susceptible to but one meaning, we must give the statute its clear and plain meaning.”¹⁰²

The panel focused on the words in Indiana Code section 14-2-7.5-4, which says that a person is an owner of a dam if he has an interest in the property “upon which” the dams are located.¹⁰³ The court of appeals found that the dams were only “upon” the Owners’ land, and that the County’s easements were then “on top of” the dams.¹⁰⁴ Accordingly, the panel found as a matter of law that the County was not an owner of the dam, such that it had no obligation to contribute to its upkeep or maintenance.¹⁰⁵

Miami County shows that litigants must be strategic in their challenges to agency actions. By arguing that the DNR and NRC made a legal error, Miami

95. IND. CODE § 14-27-7.5-4 (2020).

96. *Miami Cty.*, 146 N.E.3d at 1029.

97. *Id.*

98. *Id.*

99. *Id.* at 1030.

100. *Id.*

101. *Id.*

102. *Id.* (quoting *Fight Against Brownsburg Annexation v. Town of Brownsburg*, 32 N.E.3d 798, 805-06 (Ind. Ct. App. 2015)).

103. *Id.* at 1031.

104. *Id.*

105. *Id.*

County was able to have a full, de novo hearing on its argument.¹⁰⁶ Notably, the panel did not analyze whether the statute's language was ambiguous; had it done so, then arguably the NRC's interpretation would have prevailed. But by framing the argument in terms of an unambiguous statute and an unambiguous legal error, Miami County was able to prevail.

The litigants challenging an agency's action (or lack of action) likewise found success in *Monster Trash, Inc. v. Owen County Council*.¹⁰⁷ In that case, Monster Trash applied for a license to operate a solid waste transfer station.¹⁰⁸ The Indiana Department of Environmental Management ("IDEM") requested that Monster Trash provide a document from Owen County indicating that no rezoning or variance would be required before Monster Trash operated.¹⁰⁹ The relevant County officials, however, refused to issue the document.¹¹⁰ Monster Trash sought a declaratory judgment, but the trial court ruled in the County's favor.¹¹¹ Monster Trash appealed.¹¹²

The court of appeals applied a familiar standard in agency law: under Indiana Code section 36-7-4-1614(d), litigants can obtain relief "if the court determines that a person seeking judicial relief has been prejudiced by a zoning decision that is [. . .] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹¹³ As in the *Miami County* case, the court noted that the dispute involved a question of interpreting legal texts (an ordinance rather than a statute this time), and that "[t]he express language of the ordinance controls our interpretation, and our goal is to determine, give effect to, and implement the intent of the enacting body."¹¹⁴

The County pointed to the relevant ordinance that said, "All junkyards, race tracks, waste incinerators, and waste transfer stations (not licensed and approved by the State of Indiana) are non-permitted uses in the Owen County Jurisdictional Area"¹¹⁵ The County posited that this meant that Monster Trash's transfer station was prohibited; but the panel disagreed, noting that such use is permitted so long as Monster Trash obtained the license from IDEM.¹¹⁶ Since the County's legal interpretation "is simply not true," the panel went on to say, "we have little trouble concluding that not only is the County's refusal to issue the requested document not in accordance with the clear provisions of subsection 3.5, it also

106. *See id.*

107. *Monster Trash, Inc. v. Owen Cty. Council*, 152 N.E.3d 630 (Ind. Ct. App.), *clarified on reh'g*, 158 N.E.3d 1272 (Ind. Ct. App. 2020).

108. *Id.* at 631.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 632 (alteration in original) (quoting IND. CODE § 36-7-4-1614(d) (2020)).

114. *Id.* at 632-33 (citing *Shaffer v. State*, 795 N.E.2d 1072, 1076 (Ind. Ct. App. 2003)).

115. *Id.* at 633 (citation omitted).

116. *Id.*

qualifies as arbitrary, capricious, and an abuse of discretion.”¹¹⁷ As the panel noted, “[w]e can conceive of no legal justification for refusing to issue a document that does nothing more than accurately state the law.”¹¹⁸ So the panel reversed with instructions for the County to issue the necessary documentation to Monster Trash.¹¹⁹ Once again, a litigant seeking to overturn an agency decision found success by framing the dispute as a pure question of legal interpretation.

Litigants in *Hamilton Southeastern Utilities, Inc. v. Indiana Utility Regulatory Commission*¹²⁰ employed a similar strategy, albeit with less success. That case involved a utility company seeking a percentage increase in a billing rate, and another percentage management fee.¹²¹ The Indiana Utility Regulatory Commission (“IURC”) denied those requests, and ultimately, the court of appeals affirmed that decision.¹²² Much of the opinion relates to IURC-specific issues, beyond the scope of this survey. But one argument the utility company made is instructive for this survey’s purposes.

As a final argument against the IURC’s denial, the utility company argued that an Order issued in 2019 in effect amounted to an “agency rule.”¹²³ The utility company invoked *Ward v. Carter*,¹²⁴ a case discussed in a previous survey.¹²⁵ In *Ward*, our supreme court analyzed a change made by the Indiana Department of Correction to the drug cocktail used in lethal injections.¹²⁶ *Ward* argued that the change violated the Administrative Rules and Procedures Act (“ARPA”) because the new cocktail amounted to an administrative rule change that needed to be adopted and promulgated through ARPA’s procedures.¹²⁷ Our supreme court ultimately disagreed, noting that an administrative rule involves: “(1) ‘an agency statement of general applicability to a class;’ (2) that is ‘applied prospectively to the class;’ (3) that is ‘applied as though it has the effect of law;’ and (4) that ‘affect[s] the substantive rights of the class.’”¹²⁸ Since the new drug cocktail did not proscribe *Ward*’s or any other member of the public’s conduct—and instead only dealt with internal government policy or procedure—the Court found that it was not an administrative rule.¹²⁹

117. *Id.* (emphasis omitted).

118. *Id.*

119. *Id.*

120. *Hamilton Se. Utils., Inc. v. Ind. Util. Regulatory Comm’n*, 135 N.E.3d 902 (Ind. Ct. App. 2019), *trans. denied*, 143 N.E.3d 952 (Ind. 2020).

121. *Id.* at 904.

122. *Id.* at 913.

123. *Id.* at 912.

124. *Ward v. Carter*, 90 N.E.3d 660 (Ind. 2018).

125. See Alexander Carlisle & Manuel “Manny” Herceg, *Survey of Indiana Administrative Law*, 52 Ind. L. Rev. 589, 611-15 (2019).

126. *Ward*, 90 N.E.3d at 661.

127. *Id.*

128. *Id.* at 662 (alteration in original) (quoting *Villegas v. Silverman*, 832 N.E.2d 598, 609 (Ind. Ct. App. 2005)).

129. *Id.* at 666.

The utility company in *Hamilton Southeastern* attempted to analogize its case to one involving an administrative rule.¹³⁰ A creative argument aimed at litigating under a more favorable standard of review, the panel ultimately rejected the argument.¹³¹ It noted that Indiana law’s definition of “rulemaking action” explicitly excludes “agency actions,” which in turn are defined to include “[t]he whole or a part of an order.”¹³² The IURC’s Order applied only to the one utility company before it—not the entire class of utility companies—so it was not an inappropriate administrative rule.¹³³

Although the argument ultimately proved unsuccessful, it demonstrates a litigant cognizant of the prevalent standard of review in agency law cases. As the panel noted earlier in that opinion, “[i]f the subject at issue is within the Commission’s area of expertise, the Commission ‘enjoys wide discretion and its findings and decision will not be lightly overridden simply because we might reach a different decision on the same evidence.’”¹³⁴ Arguing the facts on appeal will nearly always prove to be a long shot, since agency determinations are upheld based on the presence of any evidence in the record supporting them.¹³⁵ In contrast, “an agency action is always subject to review as contrary to law, but this constitutionally preserved review is limited to whether the Commission stayed within its jurisdiction and conformed to the statutory standards and legal principles involved in producing its decision, ruling, or order.”¹³⁶ By framing an argument alleging an improper administrative rule promulgation, the utility company was able to press its appeal on a more favorable standard of review.

During the survey period, some litigants went beyond simply asking a court to overturn an agency’s decision; instead, they sought to hold the agencies themselves liable for their actions. Perhaps surprisingly, given the wide deference granted to agencies noted above, some of these litigants found success.

In *Schon v. Frantz*,¹³⁷ Michaele Schon (a cast member of *The Real Housewives of D.C.* and the wife of Neal Schon, one of the founders of the band Journey¹³⁸) alleged she was injured at a concert. According to Schon, Journey performed a concert at the Allen County War Memorial Coliseum on March 31,

130. *Hamilton Se. Utils., Inc. v. Ind. Util. Regulatory Comm’n*, 135 N.E.3d 902, 912 (Ind. Ct. App. 2019).

131. *Id.* at 912-13.

132. *Id.* at 912 (quoting IND. CODE §§ 4-22-2-13(c)-(d), 4-21.5-1-4 (2019)).

133. *Id.* at 913.

134. *Id.* at 907 (quoting *Citizens Action Coal. of Ind., Inc. v. S. Ind. Gas & Elec. Co.*, 120 N.E.3d 198, 207 (Ind. Ct. App. 2019)).

135. *See id.*

136. *Id.* at 908 (quoting *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1016 (Ind. 2009)).

137. *Schon v. Frantz*, 156 N.E.3d 692 (Ind. Ct. App. 2020).

138. Carolyn Zinko, *Wondrous Wedding for Neal Schon, Michaele Holt Salahi*, SFGATE (Dec. 18, 2013), <https://www.sfgate.com/entertainment/article/Wondrous-wedding-for-Neal-Schon-Michaele-Holt-5067411.php> [<https://perma.cc/GRV5-LG3R>].

2017.¹³⁹ She said that during the band’s final song—naturally, it was “Don’t Stop Believing”—she moved to the front of the stage to film a confetti release.¹⁴⁰ She says that a security guard pushed her with two hands into the sound system.¹⁴¹ The security guard disputed that account.¹⁴²

Neither the trial court nor the court of appeals reached the merits of that dispute; instead, the case focused on whether the Indiana Tort Claims Act (“ITCA”) immunized the Coliseum itself from Schon’s claims.¹⁴³ Indiana Code section 34-13-3-3 provides: “‘a governmental entity . . . is not liable if a loss results’ from certain enumerated conditions and acts, including an ‘act or omission of anyone other than the governmental entity or the governmental entity’s employee.’”¹⁴⁴ A “governmental entity” for purposes of that statute is “a political subdivision of the state,” which includes counties and “board[s] or commission[s]” of the county.¹⁴⁵

The panel noted that the Allen County War Memorial Coliseum is owned by the Board of Commissioners of Allen County.¹⁴⁶ “A board of commissioners is the county executive and transacts the business of the county in the name of ‘The Board of Commissioners of the County of ____.’”¹⁴⁷ Indiana statutes expressly permit Counties (and their Boards of Commissioners) to set up memorials, which the Commissioners of Allen County had done in the form of a concert venue.¹⁴⁸ “Thus, Allen County, acting through its Commissioners, established the Coliseum and is operating it through the Trustees pursuant to statute.”¹⁴⁹ The panel held, “[T]his relationship is sufficiently direct such that the Coliseum is not a separate entity from Allen County and/or its Commissioners for purposes of the ITCA.”¹⁵⁰

After finding that the security guard was an independent contractor, the panel concluded that the County, the Commissioners, and the Coliseum were immune from suit under the ITCA.¹⁵¹ Tongue in cheek, the panel capped the opinion with a footnote: “While the governmental immunity statute may seem harsh, a wise man once said, ‘Some will win, some will lose, some were born to sing the blues.’”¹⁵²

The litigants in *State v. Alvarez ex rel. Alvarez*¹⁵³ found more success getting

139. *Schon*, 156 N.E.3d at 695.

140. *Id.*

141. *Id.*

142. *Id.* at 696.

143. *See id.* at 695-96.

144. *Id.* at 699 (quoting IND. CODE § 34-13-3-3 (2020)).

145. *Id.* (quoting IND. CODE §§ 34-6-2-49, 34-6-2-110).

146. *Id.* at 700.

147. *Id.* (quoting IND. CODE § 36-2-2-2).

148. *Id.*

149. *Id.* at 701.

150. *Id.*

151. *Id.* at 702.

152. *Id.* at 703 n.5 (quoting JOURNEY, DON’T STOP BELIEVING (Columbia Records 1981)).

153. *State v. Alvarez ex rel. Alvarez*, 150 N.E.3d 206 (Ind. Ct. App. 2020).

past ITCA protections for executive agencies. In that case, the plaintiffs sued IDEM and the Indiana State Department of Health (“ISDH”) in connection with environmental contamination in East Chicago, Indiana.¹⁵⁴ The City of East Chicago had built a public housing complex on land formerly occupied by a lead products company, and near other lead smelting operations.¹⁵⁵ In the mid-1980s, IDEM and ISDH learned that children who lived near the housing complex had high levels of lead in their blood, and further tests confirmed that conclusion.¹⁵⁶ Neither agency, however, notified the residents of these findings.¹⁵⁷

Meanwhile, the United States Environmental Protection Agency (“EPA”) performed its own tests and received the same results.¹⁵⁸ The U.S. EPA informed residents of the elevated lead levels, and by July 2016, East Chicago Mayor Anthony Copeland had requested all residents to find new housing.¹⁵⁹

Alvarez and over three hundred other former residents filed a lawsuit against several local governmental entities, as well as IDEM and ISDH.¹⁶⁰ As to these two defendants, the plaintiffs alleged negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress.¹⁶¹ IDEM and ISDH moved under Indiana Trial Rule 12(C) for a judgment on the pleadings, arguing that the ITCA immunized them from these claims.¹⁶² The trial court denied the motion, so the agencies appealed.¹⁶³

Indiana Code section 34-13-3-3 says, “A governmental entity or an employee acting within the scope of the employee’s employment is not liable if a loss results from the following: . . . The performance of a discretionary function[.]”¹⁶⁴ In determining whether an act involved a “discretionary function” for purposes of ITCA immunity, case law distinguishes between “planning functions” and “operational functions.”¹⁶⁵ “Planning functions involve the formulation of basic policy characterized by official judgment, discretion, weighing of alternatives, and public policy choices. On the other hand, operational functions involve the execution or implementation of already formulated policy.”¹⁶⁶ Planning functions are shielded from liability, but operational functions are not.¹⁶⁷

Arguing for ITCA immunity, IDEM and ISDH made the somewhat unsavory

154. *Id.* at 211.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 211-12.

159. *Id.* at 212.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 213.

164. *Id.* (quoting IND. CODE § 34-13-3-3 (2020)).

165. *Id.*

166. *Id.* (quoting *Lee ex rel. Estes v. Bartholomew Consol. Sch. Corp.*, 75 N.E.3d 518, 526 (Ind. Ct. App. 2017)).

167. *Id.*

argument that “the decision of when and how to warn citizens of possible lead exposure is a discretionary function.”¹⁶⁸ The agencies also argued that “the decision to warn the public about contamination involves weighing budget concerns and assessing priorities. State Defendants maintain that, if they are overaggressive in warning about environmental dangers, it could ‘cause havoc.’”¹⁶⁹ The court of appeals accepted neither argument; it pointed out that “[d]iscretionary function immunity does not protect a governmental entity from liability ‘when no policy-oriented decision-making process has been undertaken.’”¹⁷⁰ The plaintiffs’ complaint alleged—and courts must accept as true—that IDEM and IDSH did not take a conscious, policy-oriented decision to not inform residents of the environmental risks; to the contrary, plaintiffs’ claims sounded in negligence. The panel rejected the other arguments brought by the agencies as coming too early in the case.¹⁷¹

CONCLUSION

During this survey period, there were not any watershed cases fundamentally altering the contours of administrative law. Despite Justice Slaughter’s notable willingness to challenge the entirety of the system, the dominant characteristic of that system has been its continuity. The cases above include agencies showcasing their power, including frustrating trial courts’ attempts to achieve what might seem like common sense results. It has also involved agencies exercising their professional discretion to decide difficult issues involving complex facts. And it has involved litigants successfully challenging agency actions as being contrary to unambiguous statutes; and even litigants proceeding with cases to hold agencies financially liable for failure to discharge their regulatory responsibilities. If there is to be a sea change in administrative law, it must wait for the future.

168. *Id.* at 213-14.

169. *Id.* at 214 (citation omitted).

170. *Id.* at 215 (quoting *Boyland v. Hedge*, 58 N.E.3d 928, 934 (Ind. Ct. App. 2016)).

171. *Id.* at 215-19.