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A Word from the Editorial Committee

This issue of the Ag Law Update focuses on critical legal issues in animal production, addressing challenges both new and familiar to agriculture. Our diverse group of authors from private practice, NGO, and academia provide updates and insights on Right to Farm, Proposition 12, Avian Influenza, and fraud and trespass on livestock operations. We thank them for sharing their expertise with the AALA membership. Please enjoy this issue, and feel free to send comments and suggestions for the Update to the Editorial Committee.

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ANIMAL PRODUCTION ISSUES

Right-To-Farm Update

by Jake Parker
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Since AALA's November 2021 symposium, appellate courts in Iowa and North Carolina have issued important opinions upholding their respective state's right-to-farm statutes. This article summarizes the opinions and offers a brief concluding comment.

1. Iowa Upholds Right-to-Farm Law, Reversing Prior Case Law

In *Garrison v. New Fashion Pork, LLP,* 21-0652 (Iowa issued June 30, 2022) the Iowa Supreme Court fundamentally reframed its right-to-farm jurisprudence. After an initial foray into federal court, Plaintiff, a former sheep farmer, filed suit in Iowa district court alleging that Defendants' hog operation was liable for nuisance, trespass, and drainage law violations. *Garrison*, slip op at 3. Defendants moved for summary judgment under Iowa's right-to-farm statute. Citing *Gacke v. Pork Xtra, LLC,* 684 N.W.2d 168 (Iowa 2004), Plaintiff responded, asserting that (1) Iowa's right-to-farm statute, *see* Iowa Code § 657.11, was unconstitutional as applied to him under the Iowa Constitution's inalienable rights clause, and (2) the statute's damages cap was unconstitutional, both facially and as applied. *Garrison*, slip op. at 8.

The trial court granted summary judgment to Defendants on Plaintiff's facial challenge to the damages cap, but held a hearing on the as applied claims. *Id.* at 9. It subsequently granted summary judgment to Defendants. *Id.* at 10. Plaintiff appealed.

Before the Iowa Supreme Court, Plaintiff again argued the statute was unconstitutional as applied. Defendants argued to the contrary, inviting the Iowa Supreme Court to overrule *Gacke. Id.* at 10-11.

In a divided opinion, the Iowa Supreme Court accepted Defendant's invitation and overruled *Gacke*. Acknowledging Iowa's unique status as the only state to have declared its right-to-farm law unconstitutional, *see id.* at 15, the majority began by reviewing its significant right-to-farm decisions, *Bormann v. Bd. of Supervisors,* 584 N.W.2d 309 (Iowa 1998), *Gacke,* and *Honomichl v. Valley View Swine, LLC,* 914 N.W.2d 223 (Iowa 2018). Based on this review, the majority stated that plaintiffs who sue farms for nuisance may not "rely on a takings theory to recover other noneconomic damages for nuisance, such as loss of enjoyment of the property." *Garrison*, slip op. at 14 (citation omitted). However, the majority observed that *Gacke* "found a different path to challenge" Iowa's right-to-farm statute via the State Constitution's inalienable rights clause. *Id.* Under *Gacke,* a farm nuisance plaintiff could avoid Iowa's right-to-farm statute, if they had: (1) "received no particular benefit" from the statute other than those "inuring to the public in general;" (2) "sustained significant hardship;" and (3) "resided on their property long before any animal operation was commenced" and "spent considerable sums" to improve their property "prior to construction of" defendant's farm. *Id.* at 14-15. *Honomichl* affirmed *Gacke's* three-part test in a divided opinion.

The *Garrison* majority criticized *Gacke* and *Honomichl* for failing to "cite[ ] any authority for adopting the three part test" and noted that "[n]o other court in any jurisdiction has adopted or used the test." *Id.* at 15. The majority further stated that "Iowa is the only state to hold that the statutory immunity available under its right-to-farm law is unconstitutional in any manner." *Id.* at 15-16 (collecting cases). After noting that *Bormann's* takings rule was not at issue, the majority then overruled *Gacke's* and *Honomichl's* inalienable rights holdings, arguing that *Gacke's* three-part test "is difficult to administer and requires unnecessary and duplicative litigation." *Id.* at 22, 29. In its place, the majority held that courts should apply rational basis review to inalienable rights challenges to Iowa's right-to-farm law. *Id.* at 21.

Applying that relaxed standard, the majority noted that "CAFOs are controversial," but asserted that "it is not our role to second-guess the legislature's policy choices." *Id.* at 28. The majority stated that "protecting and promoting livestock production is a legitimate state interest, and granting partial summary judgment from nuisance suits is a proper means to that end." *Id.* at 31. Further, it observed that Iowa's right-to-farm law "did not absolutely eliminate nuisance claims against CAFOs . . . , but only imposed reasonable limitations on recovery rights." *Id.* at 34. Therefore, the majority held that the trial court

properly granted summary judgment to Defendants. *Id.* at 34-36.

The dissenting justices argued that the majority's opinion overlooked the inalienable rights clause's function as a check against "unduly oppressive" legislation, *id.* at 57-62 (Appel, J., dissenting), violated the principles of *stare decisis, id.* at 63 (Appel, J., dissenting), 66-74 (McDonald, J., dissenting), and eroded property rights by misapplying the rational basis standard, *id.* at 74-87 (McDonald, J. dissenting).

2. North Carolina's Right-to-Farm Amendments Upheld, Further Appeal Possible

For almost a decade, North Carolina has been at the epicenter of the right-to-farm world. In 2013, more than five hundred plaintiffs sued Murphy-Brown, a hog-farm subsidiary of Smithfield Foods,[3] and approximately eighty of its contract growers in state court, alleging defendants were creating nuisances in the operation of their hog farms. The cases were voluntarily dismissed soon after filing, but they reappeared a year later in federal district court, with Smithfield as the only named defendant. The cases asserted the nuisance theory in an unprecedented way: through a mass tort action. After years of hotly contested litigation, five juries, made up almost entirely of urban residents living in and around Raleigh, rendered verdicts against Smithfield. In three cases, juries issued multi-million dollar damage awards that were subsequently reduced under North Carolina's punitive damages cap.

In 2017 and 2018, the North Carolina General Assembly enacted two amendments to North Carolina's right-to-farm statute. The first essentially capped the value of damages that plaintiffs may receive in farm nuisance actions to the value of a plaintiff's property. N.C. Gen. Stat. § 106-702. The second revised the substantive portion of the statute, moving North Carolina from a "changed conditions" state to a statute of repose state. It also limited punitive damages to cases involving significant environmental harms. Now, to bring a farm nuisance claim in North Carolina, a plaintiff must: (1) legally possess real property that is located within a half-mile of the source of the alleged nuisance; and (2) file the action within one year of the farm's establishment or the date of a fundamental change. N.C. Gen. Stat. § 106-701(a). Under the statute, a fundamental change does not include, among other things: a change in ownership or size; the use of new technology; or changes in the type of agriculture produced. Id. § 106-701(a1). The amendments were enacted notwithstanding gubernatorial vetoes and high-profile opposition from environmental and social justice organizations.

On June 19, 2019, three organizations that had opposed the amendments in the General Assembly challenged them in state court. Plaintiffs alleged the amendments facially violated three provisions of North Carolina's Constitution: (1) the "Law of the Land Clause," *i.e.*, its substantive due process provision, N.C. Const. art I, § 19; (2) its prohibition on the enactment of local, private, or special laws, N.C. Const. art II § 24; and (3) the right to jury trial, N.C. Const. art I § 25. Because Plaintiffs asserted a facial challenge, the case was transferred to a panel of three trial court judges. *See* N.C. Gen. Stat. § 1-267.1. The panel dismissed Plaintiffs' suit on December 23, 2020.

The North Carolina Court of Appeals heard Plaintiffs' appeal on December 1, 2021. Twenty days later, the Court issued a unanimous opinion affirming the trial court. *Rural Empowerment Ass'n for Cmty. Help v. State*, 281 N.C. App. 52 (2021). Observing Plaintiffs' heavy burden to show North Carolina's right-to-farm law "is unconstitutional in all its applications," *see id*. at 60, the Court applied well-settled law to reject each of Plaintiffs' claims. As with the Iowa Supreme Court in *Garrison*, North Carolina's intermediate appellate court found: "Our State's long-asserted interest in promoting and preserving agriculture, forestry, livestock, and animal husbandry activities and production . . . clearly rests within the scope of the State's police power." *Id*. at 62.

In January, Plaintiffs filed a petition for discretionary review with the North Carolina Supreme Court, which was still pending at the time this article was written.

3. A brief comment

While acknowledging differing views regarding the wisdom of right-to-farm statutes, the upshot of *Garrison* is that Iowa now joins every jurisdiction that has considered the question, including North Carolina, in finding right-to-farm laws to be proper ends to accomplish the legitimate state purpose of promoting agricultural production. In *REACH,* the North Carolina Court of Appeals closed the door to facial challenges to the state's right-to-farm law. Only time will tell if as-applied challenges develop in the Tar Heel state.

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[1] The majority also affirmed the trial court's grant of summary judgment to Defendants on Garrison's trespass and drainage law claims. Garrison, slip op. at 36-39.

[2] In the spirit of transparency, the author has been heavily involved North Carolina's right-to-farm saga as an advocate for North Carolina's farmers. Accordingly, he requests grace as he attempts to maintain a sense of impartiality below.

[3] For ease of reference and given its more widely-known name, the author has elected to refer to Murphy-Brown as Smithfield throughout this article.

U.S. Supreme Court to Decide Fate of California Prop. 12

by Merrit Jones, Jennifer Jackson, Brandon Neuschafer and Luke Westerman
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The U.S. Supreme Court is poised to decide the pork industry's challenge to California's Proposition 12, a law that restricts certain confinement practices in industrial animal agriculture. The Court has granted certiorari in *National Pork Producers, et al. v. Ross*, and is expected to decide the case between December of this year and June 2023.

Prop. 12 was passed by nearly 63 percent of voters in a 2018 ballot measure. The law prohibits the sale in California of pork, egg, and veal where the animals were not housed in compliance with the following requirements:

- Sows must have at least 24 square feet of living space. In industrial-scale operations they currently have about 14 square feet. The law effectively bans "gestation crates," or narrow metal enclosures with slatted floors that confine pregnant sows to only sitting and standing, and restrict them from turning around. According to the industry, the crates minimize aggression and prevent competition for food. They have become increasingly controversial, and have been banned in nine states: Rhode Island, Maine, Massachusetts, Oregon, Florida, California, Arizona, Colorado, and Michigan. Ohio plans to phase them out by 2026.

- Egg-laying hens must have at least 144 square inches of living space, banning industry practices that confine egg-laying hens in "battery cages" so small that they cannot spread their wings.

- Veal calves must have at least 43 square feet of living space.

Any sale in California of pork, eggs, and veal from animals where these requirements are not met is a crime punishable by a fine or jail sentence, or subject to a civil action for damages. The law applies to sales in California, regardless of where the animals were housed.

Prop. 12 was scheduled to take full effect this year, but California is still finalizing the regulations to implement it. In January of this year, a California state court barred the state from enforcing the law for 180 days after the regulations are issued.[1]

It's the sow housing requirements, and in particular their application outside of California, that are being challenged in the pork industry lawsuit. Petitioners National Pork Producers Council (NPPC) and American Farm Bureau Federation (AFBF) argue that this violates the "dormant Commerce Clause," which is derived from the federal government's constitutional authority to regulate interstate commerce, and under which the U.S. Supreme Court has held that state laws are preempted where they "regulate commerce in a manner disruptive to economic activities in the nation as a whole."[2] Petitioners point to the fact that while California consumes about 13% of pork in the U.S., it has only about 0.133% of the national breeding herd, and meeting the Prop. 12 standards would be extremely expensive.

There have been other legal challenges to Prop. 12. In *North American Meat Institute v. Becerra*, the district court rejected similar arguments by the plaintiffs that Prop. 12 directly regulates extraterritorial conduct in violation of the Dormant Commerce Clause.[3] The Ninth Circuit affirmed,[4] and the Supreme Court denied certiorari.

In *Iowa Pork Producers Association v. Bonta*, a lawsuit brought by an Iowa based industry group with several individual pig farms as co-plaintiffs, plaintiffs make a similar interstate commerce claim, as well as introducing several new constitutional arguments involving due process, federal authority, and a claim that the law unfairly discriminates against out-of-state producers in violation of the Constitution's Privileges and Immunities Clause. The case was initially filed in Iowa state court before being transferred to Iowa federal court, dismissed, and refiled in California – and then dismissed in March by the California district court.[5] The industry group has filed an appeal.

In the case filed by NPPC and AFBF, the district court granted the defendant's motion to dismiss, and the Ninth Circuit affirmed.[6] In doing so, the Court held that significant upstream effects outside the state do not violate the Commerce Clause even if the burden of the law falls primarily on other states so long as the only conduct regulated is that in California. "A state law may require out-of-state producers to meet burdensome requirements in order to sell their

[1] *Cal. Hispanic Chambers of Commerce et. al. v. Ross et. al.,* Case No. 34-2021-80003765 (Superior Court of California, County of Sacramento).
[2] *Certioari granted in National Pork Producers, et al. v. Ross,* 142 S.Ct. 1413 (U.S. March 28, 2022).
[3] *North American Meat Institute v. Becerra,* 420 F. Supp. 3d 1014 (C.D. Cal. 2019)
[4] *North American Meat Institute v. Becerra,* 25 Fed. Appx. 518 (9th Cir. 2020).
[5] *Iowa Pork Producers Association v. Bonta,* No. 2:21-cv-099940-CAS, 2022 WL 613736 (C.D. Cal. Feb. 28, 2022).
[6] *National Pork Producers, et al. v. Ross,* 6 F.4th 2021 (9th Cir. 2021).

products in the state without violating the dormant Commerce Clause," the Court reasoned.

The petition for writ of certiorari argues that since nearly all of the pork sold in California is imported from other states, Prop 12 "in practical effect regulates wholly out-of-state commerce." Petitioners allege that Prop. 12 requires "massive and costly" alteration to swine facilities nationwide and will be "policed by intrusive inspections of out-of-state farms conducted by California's agents." Petitioners also argue that Prop. 12 has no human health rationale and rests "only on philosophical preferences about conduct occurring almost entirely outside California," and therefore cannot be justified by the costs and the "wrenching effect of the law on interstate commerce."

The State of California's response argues that Prop 12 is "an in-state sales restriction" that "does not have impermissible extraterritorial reach merely because some out-of-state businesses will opt to modify their production or distribution practices in order to serve the enacting State's market." The State points to other state laws across the country that may have ripple effects both within the enacting state and elsewhere, such as labeling or quality requirements. The State also questions the petition's claim that it would be impossible for pork producers to segregate their operations and produce California-specific products that comply with Prop 12, pointing to various large businesses now requiring supply chain specializations and to pork producers and suppliers who have announced they will comply with the Prop 12 restrictions. The State also notes that Prop 12 does not expressly provide for any out-of-state inspections by California officials to ensure compliance with Prop 12. Such inspections are merely part of a proposed regulation from the California Departments of Food and Agriculture and Public Health. If the final version includes similar language, the Petitioners can challenge said regulations at that time.

The petition was supported by amicus briefs from 20 state governments, the Canadian Pork Council, 14 business or farm associations outside California, and the National Association of Manufacturers and Cattlemen's Beef Association. Rather than file amicus briefs for California, the Humane Society of the United States, the Animal Legal Defense Fund, and other anti-cruelty groups intervened as parties in the case.

2022's Highly Pathogenic Avian Influenza Outbreak

by Brook Duer
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1. Introduction

On February 8, 2022, the first case of highly pathogenic avian influenza (HPAI) in U.S. commercial poultry (poultry housed for meat or egg production and resale) was confirmed by USDA's Animal and Plant Health Inspection Service (APHIS) in DuBois County, Indiana. Starting on that date, those areas of the country where commercial poultry and egg production are concentrated became the single-minded focus of every federal and state animal health official.

Generally, federal and state veterinarians, their trained staffs, and the nationwide network of federal and state veterinary laboratories toil in relative obscurity, tending to animal disease detection and control efforts that seldom come to the public's attention but are vital to ensuring animal production agriculture can continue to meet market demands. For attorneys involved in agricultural law, animal disease control is rarely even on the radar. But 2022 has been very different.

What follows is a brief overview of 2022's HPAI outbreak in commercial poultry and what may be expected over the balance of 2022.

2. Overview of 2022 HPAI Outbreak

The initial North America detection of HPAI, of the subtype H5N1, actually occurred in December 2021 in wild waterfowl in Newfoundland and Labrador, Canada. In the subsequent months, detections grew and the HPAI virus was confirmed in U.S. wild birds, backyard flocks (raised for purposes other than the sale of birds or eggs), commercial poultry of all species, and even wild mammals.

During April 2022 alone, there were well over one hundred confirmed infected commercial poultry premises in twelve states. But, as of August 1, 2022, the first phase of the 2022 HPAI outbreak in commercial poultry had concluded. July 2022 saw only three new detections confirmed in commercial birds, all in turkey flocks in Utah.

Each confirmed detection results in the depopulation of all poultry on the premises in order to immediately contain the virus and attempt to prevent any spread. As of August 12, 2022, the APHIS totals are 40.14 million birds depopulated from 189 commercial

flocks in 39 affected states. The hardest hit states (suffering the loss of at least 2 million commercial birds) were: Iowa (13.37 million); Nebraska (4.85 million); Pennsylvania (4.22 million); Colorado (3.56 million); Wisconsin (3.02 million); and Minnesota (2.96 million). Egg layers and pullets were the overwhelming majority of birds lost in those states, excepting Minnesota which suffered almost exclusively turkey losses (as it did in the last U.S. HPAI outbreak in 2015).

A wealth of information is obtainable through the USDA APHIS "Avian Health" website, and in particular the database titled, "2022 Confirmations of Highly Pathogenic Avian Influenza In Commercial and Backyard Flocks." This APHIS database is interactive with data downloadable in user-defined spreadsheet formats.

The geographic focus of the most recent previous U.S. HPAI outbreak of 2015 was exclusively the Upper Midwest. The virus was contained to a few states but resulted in approximately 50 million birds depopulated. The 2022 outbreak has been geographically widespread and transmitted from wild birds migrating north via all the major migratory flyways across the U.S. This has resulted in confirmed detections in wild birds from as far east as Newfoundland, as far west as Alaska's Aleutian Islands and as far south as the Florida Everglades. The U.S. Department of the Interior's U.S. Geological Survey (USGS) and National Wildlife Health Center maintain mapping of all confirmed 2022 HPAI detections, including wild birds, commercial poultry, backyard flocks and wild mammals.

The reasons behind the wide scope of 2022's outbreak, as compared to 2015, will ultimately be the subject of avian pathology studies and analysis in the coming years. However, presently, federal and state animal health officials must now ready themselves for phase two of the 2022 HPAI outbreak arriving in the coming months once wild bird migration resumes in a southerly direction in preparation for winter. Conditions will soon exist again for HPAI transmission from migratory wild birds via bodily fluids released during overhead flight and/or while alighting on the ground or structures.

The geographic scope, frequency, and duration of resumed 2022 HPAI detections is unknown, as is whether this or some other subtype of HPAI may become a permanent presence in wild avian and other wild animal populations after the widespread nature of this outbreak. Presently, there is no HPAI vaccine approved for use in the United States or anywhere in North America, with arguments on both sides about whether such a vaccine would help disease control or simply hinder disease detection of a virus with so many subtypes.

One potential variable subject to human control during phase two of the 2022 HPAI outbreak, and which could impact transmission in the coming months, is the effectiveness of the lessons learned so far about: (a) strict biosecurity practices on the farm and by all visitors to the farm; (b), increased vigilance in keeping all domestic commercial poultry housed strictly indoors; and (c) ensuring the closure and sealing of all structural openings in housing facilities. Organic production, or other "free range" husbandry practices that involve giving commercial poultry outdoor access, remain a continuing topic for state animal health officials to address with producers and third-party certifiers to reduce transmission risks.

Having provided an overview of 2022's HPAI outbreak and its anticipated future course, an examination of several legal aspects of animal disease control may be instructive.

3. General Regulatory Scheme for Disease Control

A traditional primary tool of regulatory control in animal disease detection and control is a quarantine order. The issuance of quarantine orders by the authorized animal health authority is done by official publication in the Federal Register or its state equivalent. Quarantine orders, as opposed to promulgated regulations, can be flexible, adaptable, and customizable to individual diseases and changing circumstances. On the federal level, the issuance of quarantine orders are authorized by 7 U.S.C. § 8301 – 8322, (Animal Health Protection). On a state level, Pennsylvania, for example, authorizes quarantine orders pursuant to its Domestic Animal Law, at 3 Pa.C.S.A. §2329.

There is no federal preemption regarding animal disease detection and control so federal and state jurisdiction remains concurrent. However, federal supremacy and the fact that USDA APHIS controls the purse strings of Congressionally appropriated indemnity funds payable to owners for depopulated animals, dictates an extremely intimate level of cooperation between federal and state animal health officials, as well as cooperation from premise/bird owners.

In the case of a known and potentially recurring poultry disease such as HPAI, and to avoid having to individually craft voluminous quarantine orders for each outbreak, USDA APHIS primarily operates its HPAI response efforts by reference to a published guidance document titled USDA APHIS HPAI Response Plan: The Red Book (Updated May 2017). The Red Book consists of 224 pages outlining all aspects of USDA APHIS' intended method of operation during an HPAI outbreak, but leaving it open that "further policy guidance may also be released depending on what is requested, required, and based upon current events."

The Red Book provides detailed protocols for HPAI controls that will be incorporated by reference into either individualized APHIS quarantine orders, or preferably voluntary compliance agreements signed by the owner of an infected premise or birds. Cooperation is exchanged for receiving federal assistance in completing its obligations re: depopulation, disposal, and disinfection sufficient to allow the infected poultry premise to be re-populated and put back into production.

Thus far, 100% cooperation has been forthcoming in all instances of infection, but resorting to injunctive relief from state or federal courts would be the avenue to enforce quarantine orders and violations of a previously executed compliance agreement.

The Red Book provides the basic framework used in state regulatory controls. One example is Pennsylvania's General Quarantine Order: Virus Control for Highly Pathogenic Avian Influenza, last updated and officially published in the Pennsylvania Bulletin on April 30, 2022. "General quarantine orders" are those applicable to a particular geographic areas and activities within that area, while "special quarantine orders" are those applicable to individual premises, bird owners or growers.

4. USDA APHIS Indemnity and Compensation Resources

One issue that attorneys may find themselves needing to quickly familiarize themselves with is the question of the eligibility and process by which a premise or bird owner may be eligible for USDA APHIS indemnity payments for losses. The USDA APHIS website is not well organized on this topic. Therefore, the following is a more user-friendly outline of USDA APHIS's essential resources on HPAI producer indemnity and compensation:

A. Process and Procedure

- HPAI Response: Overview of Finance & Administration Procedures (Feb. 2022). This document is the outline of the process to be followed to be paid for birds/eggs and potentially virus elimination if not done 100% by USDA APHIS contractors.
- This document extensively incorporates contents of another guidance document, titled: VS Guidance 8603.2 Procedures for Indemnity and Compensation Claims in Cases of H5/H7 Low Pathogenicity Avian Influenza Infection in Poultry. Within this document are mentioned forms that can be found either: (a) directly within VS Guidance 8603.2 discussed above; or (b) on the APHIS webpage titled, Highly Pathogenic Avian Influenza (under the green drop-down menu titled "Response and Policy Information" and then under the heading "Finance and Administration Processes").

B. Producer Indemnity (payment for birds and eggs destroyed)

- HPAI Response: Poultry Indemnity Valuation (Apr. 2022) – This document explains the process and how valuations are set.
- USDA Indemnity Values for 2022: Commercial Table (Mar. 2022) – This document contains the actual published amounts for 2022 for birds/eggs.
- VS Indemnity Values for 2022: Specialty Table (Mar. 2022) – This document contains the actual published amounts for 2022 for specialty birds/eggs.

C. Producer Compensation (payment for services provided in depopulation, carcass disposal, and disinfection, i.e. collectively "virus elimination")

- HPAI Virus Elimination: Per-Square-Foot Rates for Floor-Raised Poultry (Sept. 2020 – still current as of 8/1/22). – This document explains the process, how amounts are set and contains the actual published amounts.
- HPAI Virus Elimination: Per-Cubic-Yard Flat Rates for Table Egg-Laying Bird Barns and Table Egg Storage and Processing Facilities (Sept. 2020- still current as of 8/1/22) – This document explains the process, how amounts are set and contains the actual published amounts.

Agriculture Fraud and Trespass: Legislative and Litigation Update

by Eldon McAfee
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The discussion of agriculture fraud legislation and litigation has historically focused on what many perceive as attempts by confinement livestock producers to hide what is occurring on their farms in violation of First Amendment free speech protections. On the other hand, livestock producers have long maintained the issue is property rights – the right to protect one's property from those who have no right to be on the property. The Eighth Circuit Court of Appeals focused on property rights when it found Iowa's 2012 "ag fraud" statute constitutional in *Animal Legal Def. Fund v. Reynolds*, ruling that a trespass is a legally cognizable harm and the right to exclude others from one's property is paramount.[2] In this article we review Iowa's path to the Reynolds decision, including a summary of other state laws on ag fraud and trespass, and discuss implications for the Iowa statute and livestock producers in light of the legal developments.

Generally, state ag fraud and trespass statutes impose criminal sanctions and civil liability to individuals entering agricultural and other food production related property without the consent of the property owner. Some statutes also punish individuals who obtain employment at agriculture facilities under false pretenses.

State ag fraud and trespass laws

Iowa and other states have attempted to pass ag fraud and trespass statutes but have largely been unsuccessful in court against First Amendment free speech challenges. Before looking more closely at Iowa's legislation and litigation, we will summarize what has occurred in other states.

Arkansas

In 2017, Arkansas enacted Arkansas Code § 16-118-113 which imposes liability on anyone who knowingly gains access to a non-public area of a commercial property without authority, including employees entering the premises for reasons other than holding employment. The U.S. Court of Appeals for the Eighth Circuit allowed the case to proceed last year when it reversed the district court's earlier ruling that the challengers lacked standing to bring the action.[3]

Utah

In 2012, the Utah Legislature enacted an ag fraud statute criminalizing recording agricultural operations. [4] Five years later, the U.S. District Court of Utah ruled that the statute violated the First Amendment freedom of speech clause.[5]

Wyoming

In 2015, the legislature passed legislation criminalizing trespassing to unlawfully collect resource data.[6] The legislation was amended in 2016 to specify trespassing involved individuals entering private land only, removing the penalties to individuals on "open land." [7] The U.S. District Court held in 2017 that the 2016 statute was unconstitutional on First Amendment grounds.[8]

North Carolina

In 2015, North Carolina passed the Property Protection Act that imposed civil penalties on employees who took videos or photos in non-public areas and shared them with individuals outside of their employers or law enforcement.[9] The bill was originally vetoed by the governor, but the legislature overturned the veto.[10] In 2020, the U.S. District Court struck down the law as violating the First Amendment.[11]

Idaho

In 2018, the Ninth Circuit Court of Appeals ruled that Idaho Code § 18–7042 (2014) criminalizing entry into an agricultural production facility by misrepresentation violated the First Amendment but that the statute criminalizing obtaining records of an agricultural production facility by misrepresentation did not violate the First Amendment.[12] The Court also ruled that the statute criminalizing obtaining employment with an agricultural production facility by misrepresentation with the intent to cause economic or other injury to the facility's operations, property, or personnel, did not violate the First Amendment.[13] Finally, the Court ruled that the statute prohibiting a person from entering a private

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[1] The author would like to thank his law clerk, Keegan Cassady, a 3L at Drake University Law School, for her contributions to this article.
[2] *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781 (8th Cir. 2021).
[3] *Animal Legal Def. Fund v. Vaught*, 8 F.4th 714 (8th Cir. 2021).
[4] Utah Code § 76-6-112 (2012).
[5] *Animal Legal Def. Fund, v. Herbert*, 263 F.Supp.3d 1193 (D. Utah 2017).
[6] Wyo. Stat. § 6-3-414(c) (2015).
[7] Wyo. Stat. §§ 6-3-414 (2016).
[8] *W. Watersheds Project v. Michael*, 353 F.Supp.3d 1176, 1191 (D. Wyo. 2017).
[9] N.C. Gen. Stat. §§ 99A-1, 99A-2 (2015).
[10] House Bill 405, N.C. Gen. Assembly (June 3, 2015), https://www.ncleg.gov/BillLookup/2015/h405.
[11] *PETA v. Stein,* 466 F. Supp. 3d 547 (M.D.N.C. 2020)
[12] *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1199 (9th Cir. 2018).
[13] *Id.* at 1201.

agricultural production facility and, without express consent from the facility owner, making audio or video recordings of the conduct of an agricultural production facility's operations violated the First Amendment.[14]

Kansas

The most recent appellate court decision examined the Kansas ag fraud statute and found it unconstitutional. Kansas Statutes Ann. §§ 47-1825-1828 imposes criminal and civil penalties if individuals take pictures or videos without consent of the owner and with intent do damage animal facility. The U.S. Court of Appeals for the Tenth Circuit held earlier this year that the statute was viewpoint discriminatory in violation of the First Amendment.[15]

Iowa's path to *Reynolds*

Between 2012 and 2016 Iowa adopted four ag fraud and trespass statutes. During this time, the Iowa legislature kept a close eye on Idaho's law and court decisions interpreting that law. Looking at the chronological order of Iowa and Idaho legislation and litigation reveals much about the thought process of Iowa's legislature in enacting these laws, and how other states were reacting as well:

- 2012: The Iowa legislature enacted Iowa Code § 717A.3A (2012) (agriculture production facility fraud) which established criminal penalties for using false pretenses to obtain a job at or access to an agricultural operation.
- 2014: As discussed above, the Idaho legislature enacted Idaho Code § 18–7042 (2014).
- 2018: The Ninth Circuit Court of Appeals ruled that the 2014 Idaho statute criminalizing obtaining employment with an agricultural production facility by misrepresentation with the intent to cause economic or other injury to the facility's operations, property, or personnel, did not violate the First Amendment. The Court found the remainder of the law, including the access provision, unconstitutional.[16]
- 2019:

  The U. S. District Court for the Southern District of Iowa ruled that Iowa's 2012 ag fraud law violated free speech rights.[17] Iowa appealed the decision.

  The Iowa legislature enacted Iowa Code § 717A.3B (2019) (agricultural production facility trespass) drafting it to be substantively identical to Idaho's 2014 statute.

  The U.S. District Court for the Southern District of Iowa in 2019 granted Plaintiff's Motion for Preliminary Injunction prohibiting enforcement of Iowa Code § 717A.3B pending a final decision in the case.[18] That decision was issued in 2022. See discussion below.
- 2020: The Iowa legislature enacted Iowa Code § 716.7A (2020) (food operation trespass).
- 2021:

  The Iowa legislature enacted three criminal statutes:

  Iowa Code § 716.13 (2021) (interference with transportation of agricultural animals)

  Iowa Code § 716.14 (2021) (unauthorized sampling).

  Iowa Code § 727.8A (2021) (cameras or electronic surveillance devices – trespass).

  The Eighth Circuit Court of Appeals ruled that the provision in the 2012 Iowa ag fraud law making it a crime if a person willfully "obtains access to an agricultural production facility by false pretenses" did not violate First Amendment free speech protections because it exclusively prohibits lies associated with a legally cognizable harm—trespass to private property. The Court found that trespass, even though it may cause only nominal damages to the property owner, is nonetheless a legally cognizable harm and cited a recent U.S. Supreme Court decision stating that "[t]he right to exclude is one of the most treasured rights of property ownership."[19] All three Justices joined in this ruling, with each writing separately.[20] The Court then ruled, with one Justice dissenting, that the employment provision of the law violated the First Amendment because the law did not require that the false statements be material to the employment decision.[21]

  Iowa Code § 727.8A (cameras or electronic surveillance devices – trespass) was challenged in U.S. District Court, Southern District of Iowa as a violation of free speech rights.[22] This case is currently pending.

  The Tenth Circuit Court of Appeals struck down a Kansas statute that prohibited trespassing by use of deception or false speech with intent to damage the facility.[23]

[14] *Id.* at 1203.
[15] *Animal Legal Def. Fund v. Kelly,* 9 F.4th 1219 (10th Cir. 2021), cert. denied, 596 U.S. __ (U.S. April 25, 2022) (No. 21-760).
[16] *Wasden*, *supra* note 12, at 1190.
[17] *Animal Legal Def. Fund v. Reynolds*, 353 F.Supp.3d 812 (S.D. Iowa 2019).
[18] *Animal Legal Def. Fund v. Reynolds*, No. 19-00124, 2019 WL 8301668, at *20 (S.D. Iowa Dec. 2, 2019).
[19] *See Reynolds*, *supra* note 2, at 786 (citing *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021)).
[20] *Id.*
[21] *Id.* at 787.
[22] *Animal Legal Def. Fund v. Reynolds*, No. 4:21-cv-00231-SMR-HCA, 2022 WL 777231 (S.D. Iowa 2021).
[23] *Kelly*, *supra* note 15.

- 2022:

  An Iowa District Court, citing the Eighth Circuit's ruling in Reynolds, ruled that the 2020 Food Operation Trespass statute is constitutional.[24]

  The U.S. District Court for the Southern District of Iowa held that the 2019 agricultural production facility trespass law (Iowa Code § 717A.3B) constituted a violation of the First Amendment.[25] The Court followed the reasoning of the Tenth Circuit in Kelly and without analysis distinguished the Eighth Circuit ruling in Reynolds. This case is currently on appeal to the Eighth Circuit.

Implications

The Eighth, Ninth and Tenth Circuit Courts, as well as an Iowa District Court, have reached different conclusions on the constitutionality of relatively similar statutes. The Ninth Circuit in Wasden upheld Idaho's employment provision but not the access provision. The Eighth Circuit in Reynolds upheld Iowa's access provision but not the employment provision. And the Tenth Circuit in Kelly in essence, and contrary to Reynolds, gave more weight to rights of free speech than to property rights.

Given the continuing legislative activity and litigation uncertainty surrounding these laws, livestock producers are well advised to take steps to protect their property interests, including the following:

- Maintain physical security such as locks on building doors and entrance gates to the property;
- Maintain electronic security such as video surveillance cameras and motion-sensor lighting;
- Continue the more time-honored approach to security such as posting no trespassing signs;
- In the employment context, although maybe easier said than done, conduct extensive and detailed interviewing of job applicants.

Finally, livestock producers should adopt animal welfare policies and ensure all employees are trained in proper animal husbandry. Employees should be instructed and encouraged to report any employee who is not following proper husbandry. After all, putting all legal issues aside, animal well-being remains the most critical issue in the ag fraud and trespass debate.

[24] *Iowa v. Johnson*, Case No. FECR035902 AGCR036244, Iowa District Court for Wright County (Jan. 18, 2022).
[25] *Reynolds, supra* note 22.

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