

The SANDBAR

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Legal Reporter for the National Sea Grant College Program

We Otter Know Better: FWS May Terminate Otter Relocation Program

Also,

Indiana's Public Trust Doctrine: Whose Shore Is It Anyways?

North Carolina Swine Farm Litigation Raises Right-to-Farm and Environmental Justice Issues

VRB-OK: Court Denies Short-Term Rental Ban in Beach Community

Green RICO? Targets of Environmental Advocacy Campaigns Claim It's Racketeering

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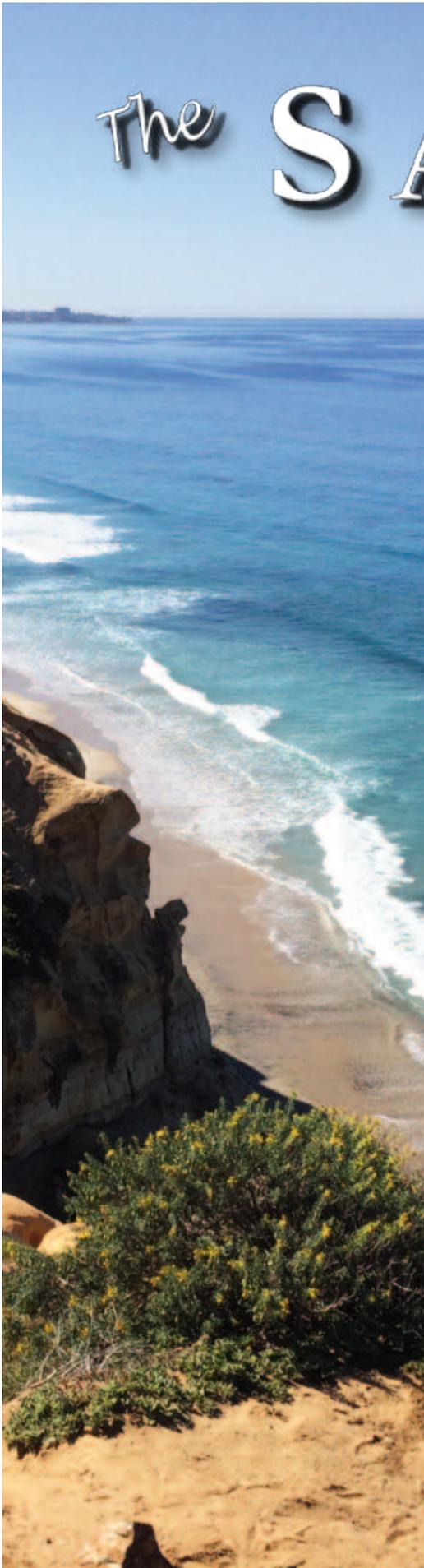


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WE OTTER KNOW BETTER: FWS MAY TERMINATE OTTER RELOCATION PROGRAM

Grace M. Sullivan¹



Photograph of sea otters courtesy of Allan Wu.

In 1987, the U.S. Fish and Wildlife Service (FWS) implemented an otter relocation plan intended to stimulate the population of southern sea otters (also known as California sea otters), but the population continued to dwindle. Since its goals never came to fruition, the FWS evaluated and officially terminated its program in 2012. Upset about losing their unique set of benefits from the program, several fishing industry advocates sued the FWS in 2013, claiming the agency did not have the authority to terminate its program without an act of Congress. In March, the U.S. Court of Appeals for the Ninth Circuit ruled in favor of the FWS, holding that the agency has the authority to terminate its failed program, and the sea otters have the autonomy to choose their habitats once again.²

Background

After the FWS placed California sea otters on the endangered species list in 1977, the agency began researching and developing its otter relocation plan. The idea was to move a certain number of otters to a remote channel island to form a secondary population, which could ensure the success of the species

if the parent population suffered a disaster like an oil spill. To confirm it had the power to carry out this plan, the FWS asked for express authority from Congress. In response, Congress passed Public Law 99-625, allowing the FWS to relocate an experimental population of otters, provided that the agency's plan was sufficiently detailed.³

Activists for the local fishing industry expressed concerns about the plan's effect on their business. California sea otters eat the same oysters and abalones that many anglers seek, and a new population of otters could mean competition for the fishing business in that area. Because of these concerns, Congress added a requirement that the FWS designate a "management zone," which came to be known as the "no otter zone," around the new population. All otters within this zone would be considered members of the experimental population, and the FWS would be responsible for removing them back to the translocation zone. Additionally, anglers would not be liable under either the Marine Mammal Protection Act (MMPA) or the Endangered Species Act (ESA) for incidentally harming or killing an otter in this area.

Armed with explicit authority from Congress, the FWS published its otter relocation plan.⁴ The FWS's plan was to establish the new otter population at San Nicolas Island by first introducing individuals in holding pens and releasing them to the island to hunt and establish territory. Notably, the FWS's plan detailed five criteria for determining the success of the program. The agency stated that if any of the failure criteria were met, it would consider the program failed, terminate the experimental population, and return any remaining otters to the range of their parent population.

Program Implementation

In the first three years of its program, the FWS relocated 140 California sea otters to the area zoned for the experimental group, but the new population failed to thrive. Most of the otters either died from the stress of relocation or swam back to their parent population, leaving only fourteen adult sea otters at San Nicolas Island by spring of 1991.⁵ The FWS continued to monitor the population and revisit its initial plan with input from experts, but the experimental population remained insubstantial. In 2000, the FWS evaluated its efforts to capture and remove sea otters from the management zone and determined that continuing to follow its original containment plan would jeopardize the likelihood that any sea otter populations could grow. The FWS officially discontinued the practice of removing otters from the management zone in 2001, but it remained the "no otter zone" that provided immunity for incidentally harming or killing otters.⁶

In 2009, a group of environmental organizations sued the FWS for "unnecessary delay" in terminating the failed relocation program. According to one organization, The Otter Project, continuation of the program without the capture and release aspect meant that the agency simply maintained a large area where California sea otters enjoyed fewer protections than they should have under the ESA and the MMPA, at no further benefit to the species.⁷ The FWS settled the suit by agreeing to make a final decision about the program's future by the end of 2012. The 2012 program analysis revealed that only fifty sea otters were living in the San Nicolas Island area, and the FWS decided to terminate the program, allowing any otters in either the translocation zone or the "no otter zone" to remain there.⁸

The Ninth Circuit's Decision

Its 2012 termination of the otter relocation program landed the FWS back in court when fishing industry advocates claimed that the FWS did not have the authority to terminate the program under Public Law 99-625. Two different cases and five years in lower courts led to the

consolidated decision by the Ninth Circuit in March. The court ruled that the plaintiffs had standing to bring the claim, because they faced a "concrete and particularized harm" due to the reduction of shellfish population in the management zone.⁹ However, the court determined the FWS's decision to terminate the entire otter relocation program, including the end of catch-and-release operations in the management zone and immunity for anglers, was reasonable under the two-part test from *Chevron, U.S.A., Inc. v. Natural Resource Defense Council*.

The *Chevron* doctrine is used for interpreting ambiguous statutes, so its first question asks whether Congress has spoken clearly on an issue. If not, the second *Chevron* question asks whether an agency's interpretation of the ambiguous statute is reasonable. If it is, the agency's decision must be upheld.¹¹ The court held that the statute is silent on termination of the program and determined that the FWS was reasonable in interpreting the statute. The statute granted the FWS permission to begin the program for a certain purpose, which also implies the power to terminate that program if the purpose can no longer be served.¹²

Conclusion

The Ninth Circuit noted that it "would make no sense whatsoever" to accept the fishing industry advocates' argument that the government agency, which serves to protect wildlife, must continue to operate parts of a program that has proven more detrimental than helpful to an endangered species.¹³ The decision put the relocation plan and the "no otter zone" to a definitive end, meaning that California sea otters can resume populating where they please with full statutory protections. ♻

Endnotes

¹ 2020 J.D. Candidate, University of Mississippi School of Law.

² *Cal. Sea Urchin Comm'n v. Bean*, 833 F.3d 1173 (9th Cir. 2018).

³ Pub. L. 99-625 § 1(b).

⁴ 52 Fed. Reg. 29,754 (Aug. 11, 1987).

⁵ 77 Fed. Reg. 75,266 (Dec. 19, 2012).

⁶ 66 Fed. Reg. 6,649 (Jan. 16, 2001).

⁷ *No Otter Zone*, The Otter Project (2016).

⁸ 77 Fed. Reg. 75,271.

⁹ *Cal. Sea Urchin Comm'n* at 1181.

¹⁰ *Id.* at 1183.

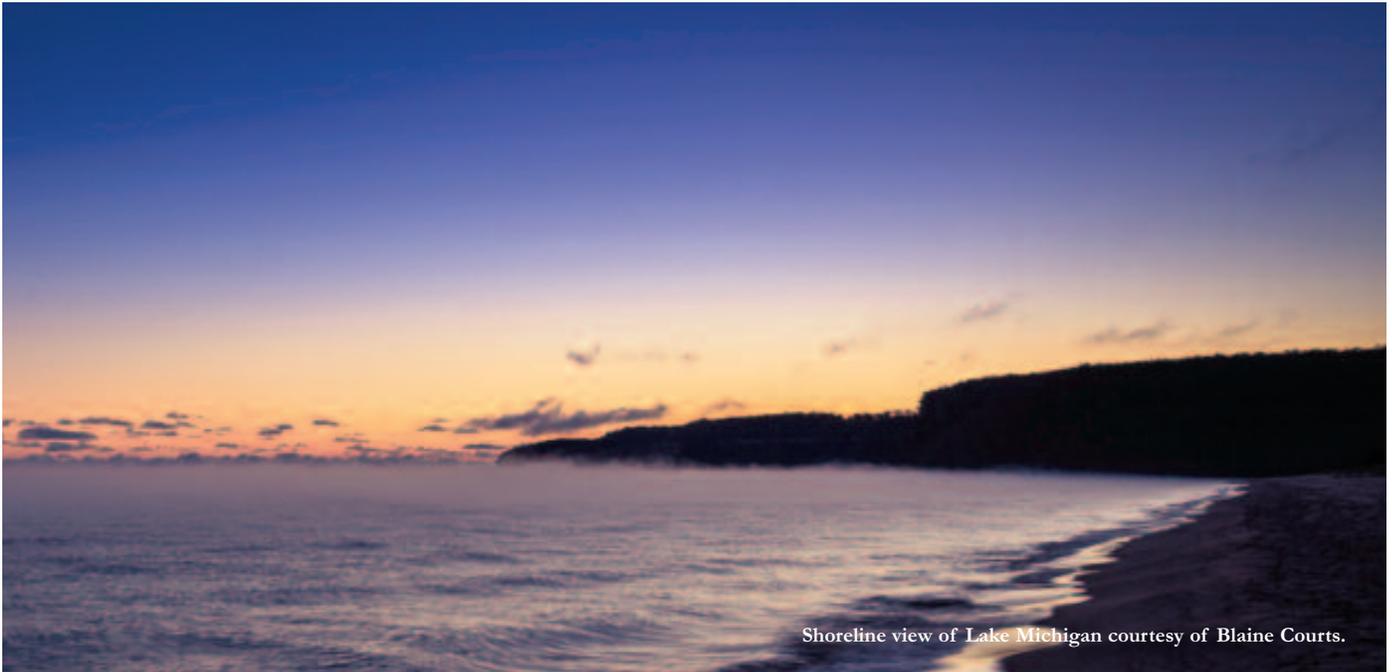
¹¹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

¹² *Cal. Sea Urchin Comm'n* at 1184.

¹³ *Id.* at 1183.

INDIANA'S PUBLIC TRUST DOCTRINE: WHOSE SHORE IS IT ANYWAYS?

Rachel Buddrus



Shoreline view of Lake Michigan courtesy of Blaine Courts.

Picture the scales of justice, one side holding private rights and the other holding public rights. A recent case in Indiana determined which rights weighed more heavily on the shore of Lake Michigan. In February 2018, in a benchmark opinion, the Indiana Supreme Court ruled that the shore of Lake Michigan belongs to the state and its residents.² In its decision, the court maintained that walking on the beach below the Ordinary High Water Mark (OHWM) in Indiana is a legally protected public use. This decision came after a series of disputes between private property owners and the State of Indiana and its Department of Natural Resources (DNR).

Background

Don and Bobbie Gunderson, waterfront property owners on Lake Michigan, filed suit against Indiana and its Department of Natural Resources in 2014 seeking a declaratory judgment on the extent of their littoral rights to the shore of Lake Michigan. The Gundersons argued that their property rights extended to the water's edge and that they should be allowed to exclude the public from their property. Several environmental organizations intervened in

the Gundersons' suit, joining the state as defendants. The groups maintained that the area in question belonged to the state under the public trust and equal footing doctrines.

The public trust doctrine is a common law doctrine that provides that certain resources should be protected for the use and enjoyment of the general public. While this doctrine is frequently debated, as the scope varies among states, it is widely accepted that the navigable waters of the states and the lands beneath are held in trust for the public. Under the equal footing doctrine, all states acquired title to public trust lands upon entering the union. The Gunderson case was the first time Indiana courts determined who owned the shore of Lake Michigan, whether the public could use those shores, and what uses were allowed.

Lower Courts

The trial court held that the Gundersons' property ends at the northern boundary, which was characterized as the water's edge. At the same time, the trial court held that Indiana holds all lands below the OHWM in trust for the public. The court found that the state holds legal title to the land below the OHWM as defined by the DNR's administrative

boundary, which was defined not only by physical characteristics on the shore but also by a fixed elevation of 581.5 feet. The trial court recognized that the public and private interests overlapped and specified that the Gundersons could not infringe upon the public's protected rights to the beach.

THE PUBLIC TRUST DOCTRINE IS A COMMON LAW DOCTRINE THAT PROVIDES THAT CERTAIN RESOURCES SHOULD BE PROTECTED FOR THE USE AND ENJOYMENT OF THE GENERAL PUBLIC.

The Gundersons appealed the trial court's decision. The appeals court found that the public's rights to the shore of Lake Michigan are governed by the public trust doctrine, but the shore was only open for limited public uses. The appeals court also found the DNR's administrative boundary invalid and held that common law defined the OHWM. Finally, the appeals court noted "that the northern boundary of the Gundersons' property... [is the] ordinary low water mark, subject to public use rights up to the OHWM."³ Following this decision, the Gundersons appealed the case to the Indiana Supreme Court.

Indiana Supreme Court

The Indiana Supreme Court asked, "What is the precise boundary at which the State's ownership interest ends and private property interests begin?"⁴ In other words, who owns the Indiana shore of Lake Michigan? The court needed to "determine the boundary of the bed of Lake Michigan that originally passed to Indiana at statehood in 1816 [, and] decide whether the State has since relinquished title to land within that boundary."⁵

First, the court noted that when Indiana became a state in 1816, it gained title to the bed of Lake Michigan up to the OHWM, including temporarily exposed shores. The court agreed that the Gundersons had misconstrued several statutes and doctrines in arguing that the water's edge is the legal boundary, including the Northwest Ordinance of 1787, the federal Submerged Lands Act, and the equal footing doctrine. Rather than supporting the Gundersons' arguments, the court noted that these statutes and principles affirm the state's title in the beds of navigable waterways. Next, the Gundersons argued that Indiana had relinquished title to the land in question. The court clearly stated that without a legislative conveyance, the state may not surrender its public trust lands. In this case, the court found there was no such conveyance.

Finally, the court discussed the scope of public trust uses allowed below the OHWM on Indiana's Lake Michigan shoreline. The court recognized the common law's public trust triad of protected uses as navigation, commerce, and fishing. However, the court also acknowledged that the public trust doctrine must be flexible and able to "be molded and extended to meet changing conditions and needs of the public it was created to benefit."⁶ Therefore, the court held that "at a minimum, walking below the natural OHWM along the shores of Lake Michigan is a protected public use in Indiana[.]" and any expansion beyond that is to be left to the discretion of representative lawmaking branches of government such as the General Assembly.⁷ At the conclusion of the court's opinion, it affirmed the trial court's ruling that the state holds title to the Lake Michigan shore in trust for the public, but reversed the trial court's decision that private property interests overlap with those of the state.

Conclusion

This landmark decision could affect the nearly "10,000 miles of Great Lakes shoreline" and the future uses of shore properties.⁸ Littoral owners' property ends at the OHWM, and they cannot restrict the public's access to the shore. This court's decision means anyone can walk along the shore of Lake Michigan, provided they are walking below the OHWM. This opinion represents a clarification of private-property rights in Indiana. The Indiana Supreme Court ruling could be appealed to the U.S. Supreme Court. If this were to happen, it is likely that other plaintiffs would get involved, especially since the Gundersons have since sold their lakefront property. The future of this case remains to be seen, but for now the "Lake Michigan shoreline belongs to all Hoosiers."⁹ ❧

Endnotes

¹ 2019 J.D. Candidate, University of Mississippi School of Law.

² *Gunderson v. State*, 90 N.E.3d 1171 (Ind. 2018).

³ *Gunderson v. State*, 67 N.E.3d. 1050 (Ind. Ct. App. 2016).

⁴ *Gunderson*, 90 N.E.3d at 1173.

⁵ *Id.* at 1175.

⁶ *People ex rel. Scott v. Chicago Park Dist.*, 360 N.E.2d 773, 780 (Ill. 1976).

⁷ *Gunderson*, *supra* note 2.

⁸ *Kenneth K. Kilbert, The Public Trust Doctrine and the Great Lakes Shores*, 58 CLEV. ST. L. REV. 1 (2010).

⁹ Dan Carden, *Indiana Supreme Court Rules Lake Michigan Shoreline Belongs to all Hoosiers*, THE NORTHWEST INDIANA TIMES (Feb. 14, 2018).

NORTH CAROLINA SWINE FARM LITIGATION RAISES RIGHT-TO-FARM AND ENVIRONMENTAL JUSTICE ISSUES

Amanda Nichols¹



Photograph of a piglet on a North Carolina farm
courtesy of Ucumari Photography.

North Carolina is the second highest producer of commercial pork—raising an estimated 7.5 million hogs annually in just five of its eastern counties.² All those animals produce an equally astonishing amount of waste—around 15.5 million tons of feces per year, according to the U.S. Government Accountability Office.³ Methods of managing that waste as well as the close proximity of many concentrated animal feeding operations (CAFOs) to residential areas has yielded a wave of litigation

against North Carolina-based Murphy-Brown LLC, a subsidiary of China-owned Smithfield Foods, Inc. Concerns have also arisen amongst advocacy groups who decry Murphy-Brown's disproportionate siting of CAFOs in low-income communities and communities of color—an environmental justice issue. While only one case has thus far been decided, this body of litigation sheds light on how general nuisance and state right-to-farm laws operate in the context of industrialized livestock operations.

Background

Beginning in the 1970s, tensions rose between farmers and residents of urban developments that were encroaching into traditionally rural areas and existing farmlands. These tensions gave rise to growing complaints and increased nuisance lawsuits against farmers. Such lawsuits often involve allegations by neighboring property owners that the odor, dust, or noise associated with the farming operations is interfering with their ability to use and enjoy their property. In response to this litigation trend, all fifty states passed “right-to-farm” legislation to provide protections to farmers against certain types of legal actions. The specific provisions of right-to-farm laws vary by state, but generally the bills protect agricultural operations from nuisance claims when certain conditions are satisfied.

North Carolina’s right-to-farm legislation most notably protects existing farm operations when conditions in or around the area of the operation have changed so long as the operation has been functional for more than one year and wasn’t a nuisance at the time it began.⁴ However, nuisances resulting from negligent or improper operation are excluded from right-to-farm protection.

THE SPECIFIC PROVISIONS OF RIGHT-TO-FARM LAWS VARY BY STATE, BUT GENERALLY THE BILLS PROTECT AGRICULTURAL OPERATIONS FROM NUISANCE CLAIMS WHEN CERTAIN CONDITIONS ARE SATISFIED.

Other state law in North Carolina also limits recovery of monetary damages in nuisance litigation filed against agricultural operations. H.B. 467—passed in 2017—caps the amount of money property owners living near “agriculture and forestry operations,” including swine farms, can collect in nuisance lawsuits.⁵ Specifically, successful plaintiffs can only collect damages equal to the reduction in their property’s fair market value. While North Carolina’s governor at the time initially vetoed the bill, citing his view that it would provide “special protection for one industry,” that veto was overridden in a subsequent congressional vote, and the bill then became law.⁶ While the original text of the bill would have negated the twenty-six pending lawsuits against Murphy-Brown, the final text of the statute allows those cases to proceed as planned. Critics of the bill’s damages cap argue that the “fair market value” language is harmful to plaintiffs since their property’s value may already be significantly lowered due to nearby CAFOs.⁷ However, the statute’s proponents argue it protects “hardworking farm families” from an onslaught of “frivolous lawsuits” filed by unscrupulous attorneys.⁸

Litigation

The twenty-six cases against Murphy-Brown were filed by plaintiffs living in close proximity to its North Carolina swine CAFOs. Those plaintiffs seek monetary damages for the company’s negligent operation of its farms that, they argue, created a nuisance. Specifically, plaintiffs complain about the odor and resulting health impacts caused by Murphy-Brown’s waste treatment procedures.

On industrial swine farms such as these, pigs are made to stand on slatted flooring, through which their fecal matter will fall and eventually be funneled into a “lagoon” along with urine, blood, and other bodily fluids. These lagoons are often open to the air – allowing intense odors to accumulate in the area around the farm. To exacerbate matters, when lagoons reach full capacity, their contents are liquefied and sprayed onto a field via a large sprayer that transforms the liquid into a mist. Plaintiffs in these cases argue that this process allows particulate waste to drift onto their nearby residential property, making it a vile sensory experience and human health hazard to enjoy time outside. Plaintiffs also argue that Murphy-Brown’s parent company, Smithfield, possesses the financial resources to manage its pigs’ waste in a way that minimizes odor and nuisance to nearby property owners but has chosen not to do so.

While numerous cases have been filed, only one has been ruled upon thus far.⁹ The jury in that case, involving North Carolina’s Kinlaw Farms, awarded each of the nine plaintiffs compensatory damages of \$75,000 and imposed a \$5 million punitive damage award for each plaintiff—amounting to \$45 million in total.¹⁰ However, the trial court recently granted Murphy-Brown’s motion to cap the punitive damages based on a North Carolina limiting statute. Instead, the court decided to impose only \$250,000 per plaintiff—dropping the total punitive damages award to \$2.25 million.

Considering North Carolina’s right-to-farm legislation, some critics have wondered why these cases were allowed to proceed in the first place. The cases were allowed to progress due to a pre-trial summary judgment ruling that focused on the portion of the state’s legislation protecting agricultural operations from nuisance claims because of changed conditions.¹¹ Leading up to this ruling, the plaintiffs argued that they or their predecessor landowners had lived locally prior to the farms being built, and, thus, there could be no “changed condition” in the area for right-to-farm protections to apply. The court agreed and noted that the plaintiffs’ housing land use had been in existence well before operations at Murphy-Brown’s farms began. Thus, the plaintiffs’ nuisance claims had nothing to do with changed conditions in the area, and North Carolina’s right-to-farm legislation did not bar those claims.



Photograph of pigs on a North Carolina farm
courtesy of Ucumari Photography.

Environmental Justice Issues

Looking past litigation, many advocacy groups have also commented on the environmental justice issues inherent in the siting of swine CAFOs in North Carolina. The Environmental Protection Agency (EPA) defines “environmental justice” as the “fair treatment...of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.”¹² The EPA also defines “fair treatment” to mean “no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.”¹³

In North Carolina, roughly 160,000 North Carolinians live within a half-mile of a pig or poultry farm. However, in Duplin County—where many of the lawsuits against Murphy-Brown originated—there are roughly 2.3 million hogs, more than anywhere else in the state. Nearly 12,500 people in Duplin (more than 20% of the county’s residents) live within a half-mile of a pig or poultry farm. This matters largely because of the health risks associated with living so close to industrial swine operations. For example, research conducted by a North Carolina epidemiologist revealed a correlation between air pollution from hog farms and higher rates of nausea, increases in blood pressure, respiratory issues such as wheezing and increased asthma symptoms for children, and overall

diminished quality of life for those living so close. What makes this an environmental justice issue comes in the epidemiologist’s other findings—that North Carolina’s hog operations disproportionately affect African Americans, Hispanics, and Native Americans. This is a common type of environmental justice issue, where industrial operations are sited in low-income communities or communities of color while those who live there often cannot afford to leave—potentially resulting in serious impacts to health and quality of life.

In response to the previously mentioned epidemiological findings as well as others, several North Carolina environmental justice groups filed a Title VI complaint with the EPA in 2014. Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives federal funding or other federal financial assistance. This complaint alleged that the North Carolina Department of Environmental Quality (DEQ) allowed industrial swine facilities to operate with “grossly inadequate and outdated systems of controlling animal waste” resulting in an “unjustified disproportionate impact on the basis of race and national origin against African Americans, Latinos, and Native Americans.”¹⁴ After a thirteen-month-long mediation, parties reached a settlement agreement in May of this year—with the DEQ committing to new policies to ensure compliance with federal civil rights laws, including

a language access program and the development of an environmental justice tool to examine the demographic, health, and environmental characteristics of communities impacted by the DEQ's policies.¹⁵ The DEQ also agreed to changes in the draft of its swine general permit that will be considered in the upcoming stakeholder process for the next swine general permit.¹⁶ While steps such as these may help to mitigate future environmental justice issues in the state, only time will tell what practical effect these settlement terms will have on affected parties in North Carolina.

Conclusion

With many nuisance cases pending, and the road paved for progress on the environmental justice front, it would seem as if the tide is shifting in favor of those allegedly harmed by swine CAFOs in North Carolina. However, the story does not stop there. In the wake of the *McKiver* ruling in May, the North Carolina legislature took action to further limit nuisance litigation filed against agricultural operations.

On June 14, the North Carolina Farm Act of 2018¹⁷ passed in both the House and Senate—enacting provisions that would tightly restrict when neighboring property owners can file nuisance lawsuits against farms producing odors or other noxious conditions. The legislation protects agricultural operations from nuisance lawsuits even when the nuisance results from the negligent or improper operation of an agricultural facility. Furthermore, the bill modifies the conditions that must exist prior to filing nuisance lawsuits and even further restricts punitive damages recovery. The bill will soon go before Governor Roy Cooper to determine if it will become law or suffer veto.

Developments have been made in other states as well. Iowa, in particular, hosts a legal battle similar to the Smithfield litigation, with residents planning to sue the state over harmful air emissions from industrial hog farms.¹⁸ However, industry representatives are pushing back against such actions, with Agriculture Secretary Sonny Perdue calling the original \$50 million judgment in the case mentioned above “despicable,” and Kiera Lombardo of Smithfield Foods describing the lawsuits as “an outrageous attack on animal agriculture, rural North Carolina, and thousands of independent family farmers who own and operate contract farms.”¹⁹

Legislation may also prove to be a barrier in other states. Just as North Carolina successfully implemented H.B. 467 as well as the legislation capping punitive damages, other states are free to do the same. As more of the North Carolina cases are decided and cases in other states are filed, both environmental advocates and the agriculture industry will begin to see unveiled the true future of nuisance actions filed against industrialized livestock operations. ☘



Photograph of pigs on a North Carolina farm courtesy of Justin Leonard.

Endnotes

- ¹ Ocean and Coastal Law Fellow, National Sea Grant Law Center.
- ² Ken Fine & Erica Hellerstein, *Hogwashed, Part 1*, INDY WEEK, July 12, 2017.
- ³ *Id.*
- ⁴ N.C. GEN. STAT. § 106-701 and 106-702.
- ⁵ *Id.* at § 106-702.
- ⁶ *Hogwashed, Part 1* at 1.
- ⁷ *Id.*
- ⁸ *Id.*
- ⁹ *McKiver et al v. Murphy-Brown, LLC*, No. 7:14-cv-00180-BR, 2018 WL 1881508 (E.D.N.C. May 7, 2018).
- ¹⁰ Compensatory damages are money awarded directly to plaintiffs in cases where loss has occurred as a result of the negligence or unlawful conduct of another party. Punitive damages are awarded to punish the defendant if compensatory damages are deemed an inadequate remedy. Although their purpose is not to compensate the plaintiff, they will often receive all or some of the punitive damages award.
- ¹¹ *In re North Carolina Swine Farm Nuisance Litigation*, No. 5:15-CV-00013-BR (E.D.N.C. Nov. 8, 2017) (order granting partial summary judgment).
- ¹² *Learn About Environmental Justice*, U.S. Environmental Protection Agency.
- ¹³ *Id.*
- ¹⁴ *With Groundbreaking Title VI Settlement Signed, North Carolina Environmental Justice Organizations Vow to Continue Their Fight*, WATERKEEPER ALLIANCE (May 3, 2018).
- ¹⁵ *Id.*
- ¹⁶ *Id.*
- ¹⁷ S.B. 711, 2017 Gen. Assemb., Reg. Sess. (N.C. 2018).
- ¹⁸ Christina Cooke, *Iowa Residents to Sue the State Over Air Emissions from Industrial Hog Farms*, CIVIL EATS (May 16, 2018).
- ¹⁹ *Id.*

VRB-OK: COURT DENIES SHORT-TERM RENTAL BAN IN BEACH COMMUNITY

Terra Bowling¹

Beachfront homeowners are in the enviable position of living where many want to vacation. In recent years, beachfront homeowners increasingly have rented their homes to vacationers on sites like VRBO and Airbnb. While the homeowners profit, not all neighbors or local governments approve of the short-term rentals. Local governments miss out on occupancy tax they would otherwise recoup from hotels; homeowners worry that the vacationers will not be conscientious tenants.

In response, some local governments have enacted ordinances banning short-term rentals. Some homeowners' associations have also attempted to limit the practice. This spring, a California court ruled on a beachfront homeowners' association's attempt to limit short-term rentals.¹

Background

Mandalay Shores, a neighborhood located on the California coast, is comprised of more than 1,400 residences, many of which have been historically used for short-term rental. In June 2016, Mandalay Shores Community Association (Mandalay Shores) adopted a resolution banning rentals shorter than 30 days. Violation of the ban would result in fines ranging from \$1,000-\$3,000.

In August 2016, a representative of the California Coastal Commission advised Mandalay Shores that the short-term rental ban was considered "development" under the California Coastal Act and therefore required a coastal development permit. The association was advised to work with the city and the Coastal Commission before developing policies related to short-term rentals. Homeowners in the Oxnard Shores community brought suit shortly thereafter. The Ventura County Superior Court upheld the short-term rental ban, finding that it was not "development" under the Coastal Act.

Appellate Court

The California Coastal Act protects beach access in a 1,000-yard coastal zone.² The Act requires a coastal development permit for any actions deemed "development." Development is defined to include "change in the density or intensity of use

of land..."³ California courts have broadly interpreted the term. The court noted one case in which the court found that closing and locking a gate that is normally open for beach access is "development."⁴ In another, "no trespassing" signs on a Malibu beach access constituted "development."⁵

In this instance, the court noted that the neighborhood policy changed the intensity of use and access to single family residences in the coastal zone. While short-term rentals were common before the ban, they were now prohibited. The court noted that the short-term rental problems, such as parking, noise, and trash, were matters for the city and the Coastal Commission.

IN THIS INSTANCE, THE COURT NOTED THAT THE NEIGHBORHOOD POLICY CHANGED THE INTENSITY OF USE AND ACCESS TO SINGLE FAMILY RESIDENCES IN THE COASTAL ZONE.

Conclusion

In the end, the court found that the short-term rental ban unlawfully blocked beach access. If the neighborhood wishes to pursue a short-term rental ban, it will need approval from the city and the Coastal Commission. For now, homeowners can continue to rent their homes to those who want to reside next to the shore, if only for a little while. 🍷

Endnotes

¹ Greenfield v. Mandalay Shores Cmty. Ass'n, 21 Cal. App. 5th 896 (Ct. App. 2018).

² CAL. PUB. RES. CODE § 30103(a).

³ *Id.* § 30106.

⁴ Surfrider Foundation v. Martins Beach 1, LLC 14 Cal. App. 5th 238 (2017).

⁵ LT-WR, L.L.C. v. California Coastal Com., 152 Cal. App. 4th 770 (2007).

GREEN RICO?

TARGETS OF ENVIRONMENTAL ADVOCACY CAMPAIGNS CLAIM IT'S RACKETEERING

William B. Bedwell¹



Photograph of the Canadian Boreal Forest courtesy of Kate Ramsayer.

Greenpeace and energy developers are at odds over a recent legal strategy that attempts to penalize environmental groups for their political protests and activism under a federal law aimed at organized crime. Thus far, in the only presently resolved case, the U.S. District Court for the Northern District of California sided with the environmentalists. The court suggested that these suits are not commenced in good faith but, rather, are aimed at silencing free speech and protected protest.

Background

The Racketeering Influenced and Corrupt Organizations Act (RICO) is a federal law passed to address organized crime. It provides for enhanced criminal penalties and a civil cause of action for certain acts performed as part of an ongoing criminal organization. A RICO violation occurs when 1) the conduct 2) of an enterprise 3) occurs through a pattern of racketeering activity. Racketeering activity for the purposes of the act is mail fraud, wire fraud, or extortion.²

One law firm, Kazowitz, Benson & Torres LLP, sued Greenpeace on behalf of Resolute Forest Products in 2016³ and then on behalf of Energy Transfer Partners in 2017⁴ alleging the organization was violating RICO by its media and fundraising campaigns against the groups' activities. The Resolute Forest Products suit was dismissed in October 2017.⁵ Greenpeace's motion to dismiss the Energy Transfer Partners suit is currently pending in the U.S. District Court for the Western District of North Dakota.⁶

Resolute Forest Products Lawsuit

Resolute Forest Products is a timber industry group operating in the Canadian Boreal Forest. Resolute entered into the Canadian Boreal Forest Agreement (CFBA) with Greenpeace, other timber companies, and environmental groups in 2010. In the CFBA, the timber groups agreed to voluntarily expand protected areas within the Boreal Forest, develop recovery plans for at-risk species, address climate change, and take steps to improve local communities. Two years later, Greenpeace withdrew from the agreement and launched its "Resolute: Forest Destroyer" campaign, claiming that Resolute was harvesting timber in areas in violation the CBFA.⁷

Resolute sued Greenpeace in response in federal court in California alleging that the campaign, through disseminating falsehoods and making bribes and extortive threats, had caused Resolute to lose \$100 million (CAD) and constituted a violation of RICO. Greenpeace responded calling the suit a "Strategic Lawsuit Against Public Participation" or "SLAPP" suit. Greenpeace claimed the suit was a "an effort to muzzle protected speech," which in this case included "statements about the company's poor environmental record," and was "brought with the obvious intent to silence" Greenpeace's speech regarding a matter of public importance.⁸ Greenpeace moved to have the suit dismissed under California's anti-SLAPP statute.

California's anti-SLAPP statute, however, does not apply to federal claims, such as RICO violations. The court, however, still dismissed the suit. The court found Resolute failed to plead the RICO claims with required specificity or adequately allege proximate cause for the claims. Additionally, Resolute's state law defamation claims were dismissed, because the court found their allegations did not constitute a finding of actual malice. The court found that, although Resolute listed reports authored by Greenpeace, which it alleges were fraudulent racketeering activity, it failed to identify the author of the reports and never specifically identified the "misconduct" or "specific content" that "constitut[ed] the fraud in the reports."⁹

Because allegations of RICO violations are essentially allegations of fraud, the acts and allegations in question must be described with particular specificity by the party bringing the lawsuit. To determine if a RICO claim adequately alleges proximate cause between the racketeering activity and the

furthering of a criminal enterprise, courts look to three factors. The factors are whether 1) there are more direct victims of the alleged wrongful conduct, 2) it will be difficult to ascertain the amount of the plaintiff's damages attributable to the defendant's wrongful conduct; and 3) the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.

In analyzing whether Resolute's RICO claim adequately alleged proximate cause, the court found that Resolute fell short under each factor. Resolute did not "explain how it is the victim of Greenpeace's fundraising scheme, given that the only persons who could have been defrauded were the donors who gave money" to Greenpeace.¹⁰ The court also found that determining damages to Resolute caused by Greenpeace's advocacy would be very difficult, because, as Resolute had previously acknowledged, "there are numerous reasons why a customer might cease or interrupt its relationship with Resolute."¹¹ The results of these two findings demonstrated to the court that it would require complicated rules apportioning damages, and provided an additional reason for the court to rule Resolute failed to plead proximate cause as required for its RICO claim. The court then went on to explain that Resolute could not show extortion because Greenpeace had not demanded any property from Resolute itself.

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Energy Transfer Partners Lawsuit

Greenpeace now faces a similar RICO suit again filed by the Kazowitz law firm, this time on behalf of Energy Transfer Partners. The Energy Transfer Partners lawsuit stems from protestors' actions during the construction of the Dakota Access Pipeline. Energy Transfer Partners is one of the developers of the Dakota Access Pipeline. It claims that the pipeline protests, which Greenpeace along with another environmental organizations helped organized, violated RICO. Specifically, Energy Transfer claims that these "putative not-for-profits" and "rouge eco-terrorist groups" used criminal activity and disinformation campaigns to target Energy Transfer with "fabricated environmental claims" resulting in the infliction of billions of dollars in damages on the company stemming from the pipeline protests.¹² The pattern of criminal activity alleged, similar to the previous suit, is defrauding charitable donors



Photograph of the Canadian Boreal Forest courtesy of Drew Brayshaw.

and federal and state tax authorities by Greenpeace claiming to be a tax-free charitable organization, inciting cyber-attacks, intentionally and maliciously interfering with Energy Transfer’s business relationships, and causing threats of violence and the purposeful destruction of private and federal property.

Greenpeace filed a motion to dismiss the suit. The motion states it is “obvious that all Energy Transfer is really complaining about is garden-variety environmental advocacy, not a criminal conspiracy” and that “in light of the prior case brought against Greenpeace by Energy Transfer’s law firm, it appears clear that Greenpeace is being targeted by repeated lawsuits for the purpose of chilling its free speech.”¹³ The motion is currently pending.

Conclusion

Whether the North Dakota court follows the California court’s lead and dismisses this lawsuit remains to be seen. But if the court does dismiss Energy Transfer’s RICO violation claim, the innovative tactic of silencing environmental protestors by painting environmental non-profits as organized crime rings may fade away. ♻️

Endnotes

- ¹ Staff attorney for the Mississippi Center for Justice.
- ² 18 U.S.C. §§ 1961-1968.
- ³ See Ashley Stilson, *Bonano, Gambino, Greenpeace? Resolute Forest Files Civil Suit Against Greenpeace Under Anti-Mafia Law*, 15.4 THE SANDBAR 9 (Oct. 2016).
- ⁴ Complaint, *Energy Transfer v. Greenpeace Int’l*, No. 1:17-cv-00173-CSM (W.D. N. Dakota Aug. 22, 2017).
- ⁵ *Resolute Forest Prod., Inc. v. Greenpeace Int’l*, 302 F. Supp. 3d 1005 (N.D. Cal. 2017).
- ⁶ Greenpeace Motion to Dismiss Pursuant to Rule 12(B)(6), *Energy Transfer*, *supra* note 4.
- ⁷ Stilson, *supra* note 3.
- ⁸ Dwyer, C. (August 22nd, 2017) *Dakota Access Pipeline Owner Sues Greenpeace for ‘Criminal Activity’*.
- ⁹ *Id.* at 19.
- ¹⁰ *Id.*
- ¹¹ *Id.* at 23
- ¹² Complaint, *supra* note 4.
- ¹³ Greenpeace Motion to Dismiss, *supra* note 6.



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Littoral Events

American Fisheries Society Annual Meeting

August 19-23, 2018
Atlantic City, NJ

For more information, visit: <https://afsannualmeeting.fisheries.org>

ALA 2018 Annual Educational Symposium

October 25-27, 2018
Portland, OR

For more information, visit: <https://www.aglaw-assn.org/2018-annual-educational-symposium>

9th National Summit on Coastal and Estuarine Restoration and Management

December 8-13, 2018
Long Beach, CA

For more information, visit: <https://www.estuaries.org/2018-summit-general-info>