

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MARQUETTE

GREGORY JOHNSON, an individual,
and BEAR MOUNTAIN, LLC,

Plaintiffs/Counter-Defendants,

v

RODNEY A. STOKES, Director, Michigan
Department of Natural Resources and the MICHIGAN
DEPARTMENT OF NATURAL RESOURCES,

Defendants/Counter-Plaintiffs,
_____ /

MATTHEW J. TINGSTAD,

Plaintiff,

v

RODNEY A. STOKES, Director, Michigan
Department of Natural Resources and the MICHIGAN
DEPARTMENT OF NATURAL RESOURCES,

Defendants,
_____ /

ROGER TURUNEN, d/b/a HOGAN
LAND IMPROVEMENT CO.,

Plaintiff/Counter-Defendant,

v

RODNEY A. STOKES, Director, Michigan
Department of Natural Resources and the MICHIGAN
DEPARTMENT OF NATURAL RESOURCES,

Defendants/Counter-Plaintiffs.
_____ /

HON. THOMAS L. SOLKA
Marquette County
File No: 12-50150-CZ

FILED & ENTERED
25TH CIRCUIT COURT

MAR 21 2014

MARQUETTE COUNTY CLERK
Gogebic County
File No: G12-44-CZ

Baraga County
File No.: 12-5259-CZ

DECISION AND ORDER ON MOTIONS FOR SUMMARY DISPOSITION

"A pig is a pig" and Defendants' branding Plaintiffs' pigs as unlawful invaders is arbitrary and unreasonable argue the Plaintiffs. Defendants respond that Plaintiffs' pigs are descendents, variants, or genetic cousins of wild eurasian boars and present a plague of environmental destruction of Michigan's forests, farmlands and livestock.

These three cases are again before this court by a stipulated motion and order for partial change of venue and consolidation of the 12th Circuit Case, *Turunen v Stokes*, Baraga County file 12-6259-CZ, *Tingstad v Stokes*, Gogebic County file 12-44-CZ, and *Johnson v Stokes*, file 12-50150.

Both sides have moved for summary disposition and declaratory relief.

For reasons discussed in this decision, Plaintiffs' motions for summary disposition are granted in part and denied in part. Defendants' motion for summary disposition is granted in part and denied in part.

The court concludes that the Defendant DNR Director and his successors have statutory and administrative authority to issue Invasive Species Orders (ISOs) and Declaratory Rulings (DRs). The delegation of this power from of the legislature under the circumstances of this case does not violate constitutional separation of powers between the legislative and executive branches of government. Defendants' motion for summary dismissal of Plaintiffs' claims in Counts V – Director's Authority to Issue ISOs, and VII – Separation of Powers, is granted under MCR 2.116 (C)(7) and MCR 2116 (C)(10), see *Michigan Animal Farmers Assoc. v DNRE*, unpublished, COA # 305302 (2012) 2012 Lexis Mich. App. 377.

However, the court grants Plaintiffs' request for Declaratory Relief under MCR 2.605 and concludes that the Invasive Species Order and Declaratory Ruling at issue in these cases are

arbitrary and an unreasonable classification of pigs under the control of these Plaintiffs as illegal invasive species. The ISO and DR violate the Equal Protection and Due Process clauses of the United States and Michigan Constitutions, denying equal protection of the laws, without a rational basis, to these Plaintiffs and others owning hybrid pigs. The court also finds no genuine issue of material fact that the animals in the possession and under control of these Plaintiffs meet the exemption set forth in the ISO for *sus scrofa domestica*. Plaintiffs' motions for summary disposition on Counts VI - APA, VIII – Due process, IX Equal Protection, and XI – Satisfaction of Exemption, are granted under MCR 2.116(C)(9) and (10). Count X – Taking of Property is dismissed as moot.

The court grants Plaintiffs' request for equitable relief enjoining Defendants from enforcing the ISO and Declaratory Ruling, as written, against these Plaintiffs and their property, but stays the effect of this order pending appellate review.

Background

Plaintiff Greg Johnson owns and operates Bear Mountain, LLC, in Marquette County. This 210 acre parcel is "designed to offer a simulated hunting experience where customers pay a fee for an outdoor Upper Peninsula experience and the opportunity to harvest pigs or other livestock" (Plaintiff's Complaint averment 8). Animals on this private game hunting preserve are contained within a 3-part containment system constructed by Plaintiff Johnson to prevent pigs from escaping and becoming wild or feral. He has suffered no loss of swine livestock through escape. Website and other advertising by Johnson holds this property out to be a location where customers can "hunt Russian boar". He previously populated the game ranch by purchasing 29 "wild boars" from Canadian Classic Wild Boar Co-op Limited of Saskatchewan.

They were imported into the United States under a United States Department of Agriculture permit in October 2010. He has since purchased swine from Plaintiff Roger Turunen.

According to an affidavit submitted by Mr. Turunen, he is a member of the Michigan Animal Farmer's Association, owning a farm in Baraga, Michigan, where he raises Russian boars for sale to game ranches throughout Michigan. According to his affidavit, the Russian boars he raises are under his husbandry and management. They are fenced, kept in pens, and not permitted to run at large. The video of his farming operations show the animals are corralled, penned, tested for disease, and fed like any other domestic hog production facility. In 2010 he sold approximately 650 Russian boars to game ranchers in Michigan, and anticipated selling as many as 850 in 2011.

Plaintiff Tingstad purchased two boars from Turunen, and at the outset of this litigation maintained those animals as family pets at his home in Gogebic County, Michigan.¹

The Invasive Species Act, MCL 324.41301, makes it unlawful to possess certain listed species of plants, fish and animals that are not native to, naturalized in, or if naturalized, not widely distributed in, Michigan. By statute, the Michigan legislature delegated authority to the Michigan Department of Natural Resources to add to or delete from the list of prohibitive species by administrative order, MCL 324.41302.

Rule-making authority was delegated to the Michigan DNR by MCL 324.41307, which provides, "The department shall promulgate rules under the Administrative Procedure Act of 1969, 1969 PA 306, MCL 24.201 - 24.328, necessary to implement this part." The Invasive Species Act, MCL 324.41303, bars individuals from knowingly possessing prohibited species (except under limited circumstances, none of which apply to this case). MCL 324.41309(3)

¹ The Tingstad claim may be moot, more *anon*.

makes it a felony with imprisonment for up to two years and a fine of not less than \$2,000 for a person to knowingly possess a listed unlawful species.

During the period July 12, 2010 through December 06, 2010, DNR staff submitted a Memorandum to the DNR director recommending Invasive Species Order Amendment No. 1 of 2010 adding feral swine to the invasive species list. That recommendation was signed off by the Chiefs of the Wildlife, Forest Management, Fisheries, Recreation, Law Enforcement, Resource Management and Stewardship divisions of the Defendant DNR. The director concurred in the recommendations.

As a result of this background work and recommendations, the Michigan Department of Natural Resources adopted and published Invasive Species Order Amendment No. 1 of 2011.

That ISO provides:

40.4 Additional Prohibited Species.

Section 40.4(1) - Possession of the following live species, including a hybrid or genetic variant of the species, an egg or offspring of the species, or of a hybrid or genetically engineered variant, is prohibited: (b) wild boar, wild hog, wild swine, feral pig, feral hog, feral swine, Old world swine, razorback, eurasian wild boar, Russian wild boar (*sus scrofa Linnaeus*). This subsection does not and is not intended to affect *sus domestica* involved in domestic hog production.

In a December 13, 2011 Declaratory Ruling², the DNR said it would use phenotypes³ to identify *sus scrofa*⁴ to distinguish illegal invasive swine from legal swine. The DR goes on to list eight physical characteristics, "one or more of which may be used to identify a prohibited animal":

² Issued pursuant to the Administrative Procedures Act, MCL 24.263 and Rule 95 of Administrative Rules pertaining to the organization and functions of the MDNR, MAC R299.3095.

³ "Phenotype", the observable properties of an organism, such as shape, color, size that result from interaction of its total genetic makeup with the environment. Merriam-Webster Dictionary.

⁴ *Sus scrofa Linnaeus* the taxonomic term (i.e., classification of organisms in an ordered system indicating natural relationships) for pigs and wild boars.

- Bristle-tip coloration: *Sus scrofa* exhibits bristle tips that are lighter in color (e.g., white, cream, or buff) than the rest of the hair shaft. This expression is most frequently observed across the dorsal portion and sides of the snout/face, and on the back and sides of the animal's body.
- Dark "point" coloration: *Sus scrofa* exhibit "points" (i.e., distal portions of the snout, ears, legs, and tail) that are dark brown to black in coloration, and lack light-colored tips on the bristles.
- Coat coloration: *Sus scrofa* exhibit a number of coat coloration patterns. Patterns most frequently observed among wild/feral/hybrid types are: wild/grizzled; solid black; solid red/brown; black and white spotted; black and red/brown spotted.
- Underfur: *Sus scrofa* exhibit the presence of underfur that is lighter in color (e.g., smoke gray to brown) than the overlying dark brown to black bristles/guard hairs.
- Juvenile coat pattern: Juvenile *Sus scrofa* exhibit striped coat patterns. This consists of a light grayish-tan to brown base coat, with a dark brown to black spinal stripe and three to four brown irregular longitudinal stripes with dark margins along the length of the body.
- Skeletal appearance: *Sus scrofa* skeletal structure is distinct. Structures include skull morphology, dorsal profile, and external body measurements including tail length, head-body length, hind foot length, ear length, snout length, and shoulder height.
- Tail structure: *Sus scrofa* exhibit straight tails. They contain the muscular structure to curl their tails if needed, but the tails are typically held straight. Hybrids of *Sus scrofa* exhibit either curly or straight tail structure.
- Ear structure: *Sus scrofa* exhibit erect ear structure. Hybrids of *Sus scrofa* exhibit either erect or folded/floppy ear structure.
- Other characteristics not currently known to the MDNR that are identified by the scientific community.

The constitutional deficiency is that, according to Defendants' own experts, non-feral, domestic swine may also possess "one or more" of these phenotypes. At the risk of being singled out for felony prosecution, how is a swine owner of an animal with "one or more" of these

phenotypes to know whether he and his animals are subject to prosecution or civil action by the state?

On considering motions for summary disposition under MCR 2.116 (C)(10), the court considers affidavits, pleadings, depositions, admissions, and other documents in a light most favorable to the non-moving party. Summary disposition is granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Miller v Purcell*, 246 Mich App 244 (2001). The proper test for a motion for summary disposition based on failure to state a valid defense is whether defendants' defenses are so untenable as a matter of law that no factual development could deny plaintiffs' right to recovery, *Hanon v Barber*, 99 Mich App 851 (1980). These standards for summary relief have to be considered, however, in relation to complaints for declaratory relief in cases of actual controversy in which the court is authorized to declare the rights of an interested party seeking declaratory judgment, MCR 2.605.

In a response to a FOIA Request (Exhibit 4, Attachment C), the Michigan DNR identified the resources and experts used to identify and describe Invasive Swine Species. These included Wild Pigs in the United States: Their History, Comparative Morphology and Current Status 2008, Mayer, J.J., and I.L. Brisbin. The FOIA response also identified the following scientists and experts: Dr. John Mayer, Dr. Ronald Bates of Michigan State University, and Tom Guthrie of the Michigan State University Extension.

Two of the experts relied on by the Michigan Department of Natural Resources, John J. Mayer and I. Lehr Brisbin, Jr., authored a study published in Texas Natural Wildlife titled "*Distinguishing Feral Hogs from Introduced wild boar*". The abstract of the article states "Three types of introduced wild swine have been found in the United States: feral hogs, Eurasian wild boars, and hybrids between these two types. The article concluded "based on what is now

known, the identification of completely reliable defining characteristics for the three forms has yet to be achieved". Mayer and Brisbin indicate, "wild populations of swine in the United States were derived from two types of founding stock: (1) Eurasian wild boar, and (2) domestic/captive/feral swine." In other words, what the Michigan DNR seeks to ban as an invasive species under the ISO and Declaratory Ruling can be eurasian wild boar, domestic/captive swine that have become wild and feral, or a hybrid of the two. The article concludes "the ability to distinguish among the three forms of wild *sus scrofa* in the United States has improved over the past 50 years, but still remains somewhat insufficient."

Mayer and Brisbin authored another study, *Wild Pigs in the United States, Their History, Comparative Morphology and Current Status*, Plaintiffs' Exhibit 5. They point out that domestic swine and wild swine are related, both descendents of the eurasian wild boar. The term *sus domestica* used in Defendants' ISO and DR is not recognized by Mayer and Brisbin in their study. Their taxonomic term for domestic swine is *sus scrofa domestica*, and their taxonomic term for the eurasian wild boar is *sus scrofa scrofa*, showing that Defendants' ISO and DR are describing the same animal or hybrids and variants thereof, one legal - *sus scrofa domestica*, and one illegal - *sus scrofa scrofa*, both sharing phenotypes "any one or more of which" may be used to identify a prohibited animal.

Another expert relied on by Defendants in developing the ISO and DR is Thomas Guthrie of Michigan State University Extension Service

In his deposition (Plaintiffs' Exhibit 6) he testified that any of the 126 breeds of domesticated swine (*sus scrofa domestica*) have potential of causing the same environmental damage as *sus scrofa scrofa* on escaping from a farm confinement and becoming free ranging. He testified a "feral pig" is any free-roaming pig, not a particular breed of pig.

Another of the experts identified by Defendants in developing the ISO and DR is Dr. Ronald Bates, Ph.D., also of Michigan State University. As to the eight phenotype characteristics identified in the declaratory ruling, Dr. Bates testified, "But it was my understanding that these were going to be used in their totality, not individually, such that, if a pig has erect ears, they weren't going to classify it as invasive necessarily." However, the declaratory ruling issued under the Invasive Species Order, again, says that "one or more" of the phenotypes may be used to identify a prohibited animal.

Dr. Bates, in his deposition, also described the adaptation of domestic swine to the wild and becoming feral and wild:

It is my understanding that - that, in the wild population, there has been migration of domestic pigs into that population. So over generations of time, they will adapt to their environment. So the term "transition" would mean that, as pigs that have been introgressed back into the wild population either on their own or for release for a variety of reasons would - would then, as over generations of time, become more adapted to their environment. Bates page 32.

Plaintiffs' Exhibit 12 is an affidavit of Donald C. Martinson, DVM. He agrees with Mayer and Brisbin that the taxonomic term for domestic pigs is *sus scrofa domestica*, not *sus domestica*,⁵ as used in the ISO:

Similarly, the wild pig, *sus scrofa*, is often classified as the subspecies, *sus scrofa scrofa*. There are several other subspecies of *sus scrofa*. Domestic pigs are identified as a subspecies of *sus scrofa* and are thus named *sus scrofa domestica*. There have been moves to separate the domestic pigs from the species *sus scrofa*, and to name them *sus domestica*. There are other moves to reclassify other domestic animals as separate species. This flies in the face of scientific taxonomy as interbreeding can and does occur in these groups, and the domestic hogs are universally accepted as descendants of Eurasian wild boar. Furthermore, they are

⁵ Also in agreement with the Interagency Taxonomic Information System (ITIS) made up of the U.S. Depts. of Commerce, Interior, Agriculture and the EPA and Smithsonian Institution. ITIS describes the term *sus domesticus* as "invalid" and a "junior synonym" of *sus scrofa*.

phenotypically similar to *sus scrofa scrofa*, with little variation, and other factors do not clearly separate the groups.

The legal problem with the Invasive Species Order at issue is that, under the Invasive Species Act, it subjects an individual to felony prosecution for possessing a pig that may be a hybrid or genetic variant of a combination of pigs that can only be identified by one or more of eight specific physical characteristics, any one or more of which may be shared by *sus scrofa domestica* involved in domestic hog production.

In response to Plaintiffs' First Request for Admissions from Defendants (Exhibit 3), the Plaintiff DNR admits that "not every phenotype characteristic is unique to *sus scrofa Linneaus*. Some of the characteristics in the list may be shared by some breeds of the species *sus domestica*. As stated in the description for ear structure and tail structure, hybrids of *sus scrofa Linneaus* may exhibit floppy or erect ears, and may exhibit straight or curly tails. It is true that all pigs in the State of Michigan will have floppy or erect ears, and will have straight or curly tails."

In short, at the risk of committing a felony, how is one to know whether a hybrid pig possessed by a farmer or game rancher such as Plaintiff Turunen or Johnson is, or is not, in violation of the ISO and Statute?

Repeatedly used throughout the staff recommendations to the DNR Director and the ISO are the terms "wild" and "feral" swine. The ISO makes illegal all swine that are "wild" or become "feral" including hogs involved in domestic hog production. Yet Defendants would declare illegal swine on Mr. Turunen's farm and Mr. Johnson's hunting preserve, even though they are under farming husbandry and in captivity, because the animals share "one or more" phenotypes with legal swine.

Legal analysis

Under Article 1, Section 2 of the Michigan Constitution of 1963, "No person shall be denied the equal protection of the laws". Under the 14th Amendment of the United States Constitution a state may not deny "to any person within its jurisdiction the equal protection of the laws." Absent a fundamental right or suspect classification, neither of which is involved in this case, a legislative or administrative order of classification does not violate equal protection guarantees if it has a rational basis. *Petrus v Dickinson County Board of Commissioners*, 184 Mich App 282 (1990).

If there are not fundamental rights or a suspect classification involved, the test applicable to deciding whether a statute or administrative order comports with equal protection guarantees involves a determination of whether the classification is based on natural distinguishing characteristics bearing a reasonable relationship to the object of the legislation, or whether the classification is arbitrary or unreasonable, *McAvoy v H.B. Sherman Company*, 401 Mich 419 (1977).

A party attacking a statutory or administrative classification on equal protection grounds has a heavy burden of demonstrating that the classification lacks a reasonable basis, *Forest v Parmalee*, 402 Mich 348 (1978) and, in determining validity of legislative classifications challenged on equal protection grounds, the courts must proceed cautiously and defer to reasonable legislative and administrative judgments. *Manistee Bank and Trust Company v McGowan*, 394 Mich 655 (1975). The court considers Plaintiffs' challenges to the constitutionality of the ISO under these standards.

The ISO and DR, if enforced, would also deprive Plaintiffs of their property interest in the pigs they own and have in their possession. Article 1, Section 17 of the Michigan Constitution of

1963 provides that no person shall be deprived of property without due process of law. Although there are no procedural due process impingements by the ISO or DR, substantive due process requires the existence of reasonably precise standards to be utilized by administrative agencies in performance of delegated legislative tasks. Standards must be as reasonably precise as the subject matter requires or will permit, *Krohn v Board of Medicine*, 98 Mich App 129 (1980). The test for determining non-compliance of a statute or administrative order with substantive due process is whether it is unreasonable, arbitrary, or capricious, or bears no real and substantial relation to the object sought to be obtained by the statute or order, *Dolson v Assigned Claims Facility SOS*, 83 Mich App 596 (1978).

Conclusions

Based on the exhibits submitted by both parties, there is no serious dispute of fact of the ecological, agricultural, and forest damage, in addition to disease threats, caused by wild and feral swine. Plaintiffs do not challenge the legislative or administrative objective of preventing this environmental damage and spread of disease.

However, this court concludes Plaintiffs are right in their claim that the ISO and DR constitutes an unreasonable and arbitrary classification of the swine under their control and husbandry as unlawful invasive species compared with the swine under the control and husbandry of other pig farmers. The ISO makes it a felony to possess a hybrid or genetic variant of any wild boar, hog, swine, feral pig, hog, swine, eurasian wild boar or Russian wild boar.

There is no material dispute of fact that what Defendants describe as *sus domestica* (legal swine) and *sus scrofa scrofa* (illegal swine) are both descendants of the eurasian wild boar and are genetically related. The ISO authorizes law enforcement officials to declare a pig

with "one or more" of the physical characteristics described in the order as illegal, while the same enforcement official could declare another animal with "one or more" of the physical characteristics as legal. This leaves the court to conclude that the current ISO and classification constitutes an unreasonable and arbitrary classification. And because the classification can potentially make Plaintiffs and others similarly situated felons under the law, the court concludes the ISO and DR do not meet the standards for a reasonable and rational classification under the equal protection and due process clauses of the Michigan and United States Constitutions.

Beyond the constitutional issues, this court also concludes there is no material dispute of fact that the animals under the possession and control of these Plaintiffs meet the exemption under Section 40.4(b) for animals in domestic hog production - so-called *sus domestica*. The domestic hog farming operation of Plaintiff Roger Turunen and the game ranch operation of Gregory Johnson both maintain all of the animals under their ownership and control in secure, fenced areas.⁶

The entire thrust of the ISO and DR is to prohibit and prevent feral and wild swine. "Feral" is an animal "having escaped from domestication and becoming wild." - *Merriam/Webster Dictionary*. Plaintiff Turunen's video, Exhibit A, shows hogs in a domestic farming setting that could neither be regarded as "feral" or "wild". "Wild" is also defined in the *Merriam/Webster Dictionary* as "living in a state of nature; not tamed or domesticated, living in nature without human control or care: not tame." Both Plaintiff Johnson's and Plaintiff Turunen's animals, as depicted in the exhibits and affidavit, depict animals under the control and care of their owners.

⁶ It was suggested during oral arguments on these motions that Plaintiff Matthew Tingstad and Counter-Defendant Melissa Perez (Tingstad's wife) in the Gogebic County case have lost their two pigs to "swine heaven" and may no longer have a standing in this case. This court will leave that factual determination to the 32nd Judicial Circuit, Gogebic County, where that individual case is venued.

Decision and Orders

In summary, this court concludes the subject ISO and DR, as written, are unenforceable because this unreasonable and arbitrary classification does not meet the equal protection and due process standards of the Michigan and United States Constitutions. The court further concludes the animals under the control and possession of these Plaintiffs are neither "wild" nor "feral" and meet the exception described in the ISO.

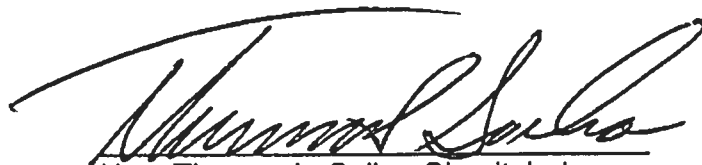
To the extent enforcement of the ISO against these Plaintiffs would constitute a taking of their property under an administrative order not meeting constitutional standards, the court grants Plaintiffs' request for an injunction barring enforcement of the order against these Plaintiffs.

However, recognizing that an appeal of this decision is probable, with state-wide implications beyond these individual Plaintiffs, pursuant to MCR 2.614(D) and MCR 7.209(A), the court, in the exercise of discretion, stays the effect of this order pending appeal to the Court of Appeals. This stay is entered without requirement of a bond, MCR 2.614(E).

SO ORDERED.

Dated:

3/21/2014



Hon. Thomas L. Solka, Circuit Judge

c: Joseph O'Leary
Glenn W. Smith
Danielle Allison-Yokom
Kelly M. Drake
Harold J. Martin
Hon. Charles R. Goodman
Hon. Roy D. Gotham
Jerry Kole, SCAO Region IV Administrator

Date of Mailing:

03/21/2014