

STATE OF MICHIGAN



HON. THOMAS L. SOLKA
CIRCUIT JUDGE

25TH JUDICIAL CIRCUIT

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COUNTY COURTHOUSE
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November 19, 2012

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IN RE: Johnson v Stokes, et al
Marquette County File No. 12-50150-CZ

Dear Counsel:

Attached is a copy of the Court's decision on plaintiffs' motions for summary disposition, entered November 19, 2012. This order is being entered in the Marquette County case, Johnson v Stokes, et al.

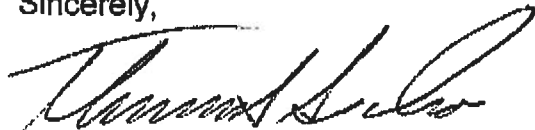
An original order captioned with the other four cases is also being sent to the clerks of Circuit Courts in Gogebic, Baraga, Cheboygan and Missaukee counties for entry in those files.

I will retain venue/jurisdiction for the time period for any motions for reconsideration or rehearing, or applications for leave for interlocutory appeal. In the event any motions are filed in relation to this decision within those time periods, they can be filed and noticed for hearing in the 25th Circuit under the change of venue order.

November 19, 2012
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After time has passed for any post decision motions, I will relinquish further scheduling back to each individual court absent any further stipulations as to venue change.

Sincerely,



Hon. Thomas L. Solka
Chief Circuit Court Judge

TLS/ck
Enclosure

cc: Hon. Roy D. Gotham
Hon. Charles R. Goodman
Hon. Scott L. Pavlich
Hon. William M. Fagerman

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MARQUETTE

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

Plaintiffs/Counter Defendants,

v

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

RODNEY A STOKES, DIRECTOR, MICHIGAN
DEPARTMENT OF NATURAL RESOURCES,
and the MICHIGAN DEPARTMENT OF NATURAL
RESOURCES, et al

Baraga County
File No: 12-6259-CZ

Cheboygan County
File No: 12-8291-CZ

Defendants/Counter Plaintiffs/
Third Party Plaintiffs,

Gogebic County
File No: 12-44-CZ

v

MELISSA PEREZ,

Missaukee County
File No: 12-8097-CZ

Third Party Defendant.

**DECISION AND ORDER ON PLAINTIFFS'
SUMMARY DISPOSITION MOTIONS**

These cases involve claims and counter-claims growing out of Michigan's Invasive Species Act, MCL 324.41301, et seq. For reasons stated in this decision plaintiffs' motions for summary disposition granting the relief requested in their complaints are denied.

Five cases from five different Michigan judicial circuits (Cheboygan, Missaukee, Baraga, Gogebic and Marquette counties) were consolidated with limited change of venue orders to the 25th Circuit Court to hear Plaintiffs' motions for summary disposition granting the relief requested in their complaints. The complaints filed in each case have common elements alleging the individual landowners' status, activities with pigs in their possession, and requested relief common to all complaints.

Plaintiffs (and defendants/counter plaintiffs in the Cheboygan County case¹) are land and pig owners that own animals for purposes of sale, slaughter, game on hunting estates or game ranches, and in one case as family pets.

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 lists of prohibited species by administrative order, MCL 324.41302.

Rule-making authority is delegated to the Michigan DNR by MCL 324.41307 which provides, "The department shall promulgate rules under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, necessary to implement this part." The Invasive Species statute, 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) makes it a felony (with imprisonment for

¹ All of the Plaintiffs and the Cheboygan County Defendants/Counter Plaintiffs will be referred to as "Plaintiffs" for purposes of this motion and decision.

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

Following delegation of that authority, 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 phenotype to identify *Sus scrofa* and distinguish it from other species. The DR goes on to list eight physical characteristics "one or more" of which "may" be used to identify a prohibited animal.

Plaintiffs filed suit against the Michigan DNR challenging the validity of the ISO and delegation of authority on constitutional and other grounds.

The Claims

The complaints all allege the ISO and Declaratory Ruling issued December 13, 2011, describing the scope and factual application of the ISO violate due process, equal protection of the laws, and constitutional separation of powers. Count One of the

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 R 299.3095

complaints requests a declaratory ruling under MCR 2.605 that the Department of Natural Resources Director lacks authority to issue the Invasive Species Order because that authority rests exclusively with the Department of Natural Resources Commission³. Count Two requests a declaratory ruling under the Administrative Procedures Act that the ISO is arbitrary, capricious and an abuse of discretion in the DNR exercising the delegated authority. Count Three requests a court declaration that the grant of administrative authority to the DNR violates the Michigan constitutional provisions requiring separation of powers among the legislative and executive branches of government. Count Four alleges the ISO violates the due process clauses of the United States and Michigan constitutions because the ISO is unconstitutionally vague, not giving plaintiffs and the public fair notice of what acts are or may be unlawful. Count Five asserts that the ISO violates the equal protection clauses of the United States and Michigan constitutions because it targets as illegal a swine species owned by plaintiffs while arbitrarily exempting other swine production facilities with the same species ("a pig is a pig, so why are my pigs illegal?") Count Six claims the ISO is a regulatory taking of plaintiffs' property without just compensation. Count Seven contends that to the extent the ISO provides an exemption for domestic hog production all of the animals activities of the plaintiffs are exempt for that reason.

³ This issue was decided adversely to Plaintiffs in *Mich. Animal Farmers Assoc. v DNRE*, C.O.A. No. 305302, March 1, 2012, unpublished

The Issue – Void for Vagueness?

The only issue before the court for this decision is plaintiffs' motions for summary disposition⁴ asking the court to summarily rule that the ISO is "void for vagueness," unconstitutional and unenforceable.

The Parties

Plaintiff Greg Johnson and his business Bear Mountain, LLC, own a 200-acre "hunting estate" in Marquette County which provides a "simulated hunting experience to harvest pigs." In 2010, he imported 29 "wild boar" from Manitoba for this hunting estate. He has registered his animals with a service mark as "Raging Russians." His game ranch advertising describes the animals as "genuine Russian boars."

Plaintiff Roger Turunen *dba* Hogan Land Improvement Co. is a farmer in Baraga County raising Russian boars bred for sale to game ranches throughout Michigan. Turunen also sold two pigs to plaintiff Matt Tingstad and third party defendant/counter third party plaintiff Melissa Perez.

Mark Baker and his family own and operate Baker's Green Acres in Missaukee County and among other farming activities the Bakers raise and sell purebred Mangalitsa pigs for human consumption. Baker provided testimony before a Michigan Senate committee hearing that he has three Russian boars⁵ on his farm (page 238 of the hearing transcript in the Cheboygan County case hearing on a motion for a preliminary injunction.)

⁴ Under MCR 2.116 (C) (10)

⁵ One of the boars is described in Bakers' Green Acres web site as "a Russian boer and therefore considered very heritage -- feral almost."

Defendant/counter plaintiff McKendricks own and operate a game ranch in Cheboygan County, "Renegade Ranch," consisting of over 300 acres offering hunts for Russian wild boar.

Plaintiff Matt Tingstad and Melissa Perez bought two pigs from plaintiff Turunen to slaughter and eat. However they made the mistake of naming them. As Tingstad testified in the Cheboygan County case, once you name a pig you don't eat it. These pigs have gone on to become family pets named Gretchen and Princess Goreya (as in "gore ya.")

Although each plaintiff is differently situated, the landowners contend by affidavits and exhibits that the pigs in their possession have never escaped their control. The pig owners also contend their operations constitute "domestic hog farming" operations (with the exception of the Tingstad/Perez animals) and are therefore exempt from enforcement action. Plaintiffs assert that it is impossible for them to determine whether or not their pigs are illegal under the ISO. Plaintiff Tingstad testified in the Cheboygan County case (and avers by his affidavit) that he was given two conflicting opinions by DNR officials as to whether Gretchen and Princess Goreya were illegal pigs. Tingstad says that in October 2011 he showed photos of his two pigs to DNR experts and was told that neither animal would be prohibited under the ISO. However, he was given a later opinion by the spring of 2012 that the pigs are in violation of the ISO.

In staff and expert affidavits, exhibits and deposition testimony, the DNR contends listing of the described swine as "invasive species" under the Invasive Species Act is necessary because of damage to Michigan agriculture, environmental resources and disease. According to DNR exhibits and testimony, there were no feral swine

sightings in Michigan 30 years ago. The DNR contends that as of June 2012, 385 feral swine have been spotted in 76 of Michigan's 83 counties, with the number of feral swine in Michigan estimated to be in the thousands.

Plaintiffs' motion contends the DNR's ISO listing "wild boar" as different from domestic pigs is unenforceable, vague, internally inconsistent and is being arbitrarily applied to plaintiffs.

Plaintiffs contend that all pigs are descendents of the Eurasian wild boar and that the various breeds or terms for the pigs listed in the ISO are all members of the same species, *sus scrofa*, including the exempted domestic pigs, *sus domestica*. The December 13, 2011, Declaratory Ruling issued by the DNR on request of the Michigan Animal Farmers Association lists nine phenotypical characteristics providing that "one or more" of these characteristics may be used to find that a particular animal is prohibited under the ISO. Plaintiffs argue that "one or more" of the characteristics listed in the declaratory ruling can be applied to any pig in the state of Michigan. The arbitrary nature of proposed enforcement is also found in the DNR's response to the Mangalitsa pigs on the Baker farm. Although the Mangalitsa pigs possess most of the phenotypes listed in the declaratory ruling, the defendant DNR has declared that Mangalitsa pigs are not subject to the ISO.

Plaintiffs support their motion with an affidavit of Donald C. Martinson, BS, DVM. Based on his veterinary and scientific training, Martinson offers the following opinions by affidavit:

... 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 specie *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 between these groups, and the domestic hogs are universally accepted as descendents of the Eurasian wild boar. Furthermore, they are phenotypically [visibly and measurably] similar to *Sus scrofa scrofa*, with little variation, and other factors do not clearly separate the groups.

The National Center for Biotechnology Information [NCBI], a federal agency who is a clearinghouse of taxonomic and other information, lists *Sus domesticus*, *Sus domestica*, *Sus scrofa domestica* as synonyms....

....Therefore domestic hogs and wild hogs, and feral hogs are all of the same species.

Common taxonomic definitions from several scientific resources make domestic pigs a subspecie of *Sus scrofa*. If the DNR intends to enforce this element of the ISO, all pigs, wild, feral AND domestic must go as they are one in the same species....

Having make considerable study of this subject, should I own a pig of any sort, and having advanced knowledge of biology, taxonomy, and the phenotypic expression of traits of pigs, and in accordance with the ISO as it is written, I would be unable to make a reliable judgment as to whether or not I would be a felon on April 1, 2012, the effective date of the order. (*affidavit abbreviated for this decision*)

The defendant DNR counters with an affidavit of Shannon Hanna, a wildlife biologist who offers contrary opinions by affidavit:

In my employment with the DNR, I am the specialist working on implementation of Invasive Species Order Amendment No. 1 of 2011. Among other duties, I researched swine phenotypes and genotypes to better outline characteristics of prohibited swine and helped to develop the Declaratory Ruling that outlines phenotype characteristics of prohibited swine...

In my role as the DNR specialist working on implementation of the Invasive Species Order, I attended *Sus scrofa* Invasive Species Training conducted by national wild hog expert Dr. Jack

Mayer from Savannah River National Laboratory, United States Department of Energy.

The Invasive Species Order identifies as a prohibited species the species *Sus scrofa Linnaeus*. *Sus* identifies the genus of animal, and *scrofa* is the species. *Linnaeus* merely identifies the taxonomist who named the species, Carl Linnaeus.

The separation of *Sus scrofa* (wild boars) and *Sus domestica* (domestic pigs) into different species is a scientifically accepted method of classifying these animals. Scientific and taxonomic resources classify wild boars and domestic pigs as separate species rather than subspecies....

...There are many criteria that are used for distinguishing animals as separate species. If two animals cannot breed and create fertile offspring, then they are considered separate species. However, the converse is not true. If two animals can breed and produce fertile offspring, this does not necessarily mean that they are the same species. For example, wolves (*Canis lupus*) and domestic dogs (*Canis familiaris*) are different species, but they can breed and produce fertile offspring. Similarly, *Sus scrofa* and *Sus domestica* can breed and produce fertile offspring, but they are different species.

Mangalitsa swine are a breed of domestic pig. Therefore, they are not *Sus scrofa* and not prohibited under the Invasive Species Order. Moreover, Mangalitsa swine do not exhibit the phenotype characteristics of *Sus scrofa* set forth in the Declaratory Ruling. ...

...In applying the Declaratory Ruling, DNR staff considers all of the characteristics as a whole. Certain characteristics are distinctive of Russian boars and are given greater weight, such as bristle-tip coloration and dorsal profile. If the DNR cannot determine with certainty that an animal is a Russian boar, based either on the animal's known species or the characteristics listed in the Declaratory Ruling, then the DNR will err on the side of caution and will not require that the animal to be dispossessed. (*affidavit abbreviated for this decision*)⁶

⁶ Because this decision is limited to the issue of "void for vagueness" and standing to challenge the statute as being unconstitutionally void for vagueness the court is making no fact findings on the conflicting expert opinions of Martinson and Hanna.

Standing

A statute may be challenged for unconstitutional vagueness on three grounds: (1) It does not provide fair notice of the conduct proscribed, (2) It confers on the government or trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, or (3) Its coverage is overbroad and impinges on First Amendment freedoms, *Burns v Detroit*, 253 Mich App 608 (2002).

Neither the Invasive Species Act nor Invasive Species Order impinges on First Amendment freedoms.⁷ Therefore plaintiffs' "void for vagueness" challenge can only be based on the ISO being so vague that citizens do not have adequate notice of what pigs are legal, and what are illegal, or that the DNR is arbitrarily selecting these plaintiffs for enforcement.

The defendant DNR contends these plaintiff pig owners lack standing to raise this void for vagueness constitutional challenge. Defendants contend a party has standing to challenge a law as unconstitutionally vague *only if the law is vague as to that party's conduct*, *Burns v Detroit supra*: "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."

On this point Michigan law of standing is consistent with the United States Supreme Court. *Village of Hoffman Estates v Flipside*, 455 US 489, 102 S. Ct. 1186

⁷ During oral argument, plaintiffs' counsel raised a First Amendment argument suggesting that some of the plaintiffs are being targeted because of their commercial advertising on the Internet and other media with the ads saying plaintiffs have "Russian Boars" or "Wild Boars." Plaintiffs argue First Amendment rights are therefore implicated. As the United States Supreme Court said in *Village of Hoffman Estates v Flipside*, 455 US 489, 102 S. Ct. 1186 (1982), "These arguments do not long detain us. First, the Village has not directly infringed the noncommercial speech of Flipside or other parties....Insofar as any commercial speech interest is implicated here, it is only the attenuated interest in displaying and marketing merchandise in the manner that the retailer desires." There is nothing in the Invasive Species Statute or the administrative Invasive Species Order impinging on the plaintiffs' First Amendment rights.

(1982) upheld a village ordinance banning sale of marijuana pipes, roach clips and other drug paraphernalia:

A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

A facial challenge, in this context, means a claim that the law is "invalid *in toto*" – and therefore incapable of any valid application.

"Vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *U.S. v Mazurie*, 419 U.S. 544 (1975). "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v Levy* 417 U. S. 733 (1974.)

The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. Such a provision simply has *no core*. P 1191 -1196

In *Michigan Wolfdog Association v St. Clair County* 122 F. Supp 2d 794 (E.D.

Mich 2000) the court held that the owners of "wolfdog" hybrids and their association, whose members owned wolf- dog crosses, lacked standing to assert a void for vagueness claim against a Michigan statute banning such animals.

Each of the plaintiffs have admitted in their pleadings, affidavits, testimony or exhibits to possessing russian wild boars, old world swine, feral hogs or hybrid russian boars or other *sus scrofa* described in the ISO. Plaintiffs therefore cannot be heard to claim the ISO is unconstitutionally vague.

However these plaintiffs have standing⁸ for courts to hear their claims that the delegation and exercise of authority under the ISO is (a) arbitrary, capricious or an abuse of discretion, (b) a violation of separation of powers, (c) a violation of the plaintiffs' due process and equal protection rights, and (d) claims of damages by reason of a regulatory taking or inverse condemnation by the government. These claims are not decided on this motion.

Plaintiffs' and Counter-Plaintiff's motions for summary disposition asking the court to declare the ISO unconstitutionally vague and invalid are denied. Plaintiffs' and Counter-Plaintiff's Complaints continue, however, as to the remaining claims.

This decision and order does not resolve all issues, or close the cases.

SO ORDERED.

Dated:

11/16/2012


Hon. Thomas L. Solka, Circuit Judge

c:

Date of mailing:

11/19/12

⁸ *Lansing Schools Education Association v Lansing Board of Education*, 487 Mich 349 (2010)