Right-To-Farm Law Headed to the SCOTUS?

Roger McEowen (roger.mceowen@washburn.edu) – Washburn University School of Law
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Overview

Every state has enacted a right-to-farm (RTF) law that is designed to protect existing agricultural operations by giving farmers and ranchers who meet the legal requirements a defense in nuisance suits. It may not be only traditional row crop or livestock operations that are protected. For example, the Washington statute also applies to "forest practices" which has been held to not be limited to logging activity, but include the growing of trees. *Alpental Community Club, Inc., v. Seattle Gymnastics Society, 86 P.3d 784 (Wash. Ct. App. 2004).* But, the RTF laws vary widely from state-to-state. One such law, the Indiana version (Ind. Code §32-30-6-9), may be headed to the Supreme Court of the United States (SCOTUS). It's not everyday that a request is made of the SCOTUS to hear an RTF law. What's going on?

The Indiana RTF law and the SCOTUS – it's the topic of today's post.

Right-To-Farm Laws

In general. The basic thrust of a particular state's RTF law is that it is unfair for a person to move to an agricultural area knowing the conditions which might be present and then ask a court to declare a neighboring farm a nuisance. Thus, the basic purpose of a right-to-farm law is to create a legal and economic climate in which farm operations can be continued. RTF laws can be an important protection for agricultural operations. But, to be protected, an agricultural operation must satisfy the law's requirements. One such common requirement is that a protected activity must be a farming activity. For example, in *Hood River County v. Mazzara, 89 P.3d 1195 (Or. Ct. App. 2004),* the state statute that protected farms against nuisance actions was held to bar a lawsuit against a farmer for noise from barking dogs. The use of dogs to protect livestock was held to be farming practice.

Types. Right-to-farm laws are of three basic types: (1) nuisance related; (2) restrictions on local regulations of agricultural operations; and (3) zoning related. While these categories provide a method for identifying and discussing the major features of right-to-farm laws, any particular state's right-to-farm law may contain elements of each category.

The most common type of right-to-farm law is nuisance related. This type of statute requires that an agricultural operation will be protected only if it has been in existence for a specified period of time (usually at least one year) before the change in the surrounding area that gives rise to a nuisance claim. *See, e.g., Vicwood Meridian Partnership, et al. v. Skagit Sand and Gravel, 98 P. 3d 1277 (Wash. Ct. App. 2004).* This type of statute essentially codifies the "coming to the nuisance defense," but does not protect agricultural operations which were a nuisance from the beginning or which are negligently or improperly run. For example, if any state or federal permits are required to properly conduct the agricultural operation, they must be acquired as a prerequisite for protection under the statute.

Subsequent changes and the Indiana RTF law. While right-to-farm laws try to assure the continuation of farming operations, they generally do not protect subsequent changes in a farming operation that constitute a nuisance after local development occurs nearby. *See, e.g., Davis, et al. v. Taylor, et al., 132 P.3d 783*

(Wash. Ct. App. 2006); *Trickett v. Ochs, 838 A.2d 66 (Vt. 2003)*; *Flansburgh v. Coffey, 370 N.W.2d 127 (Neb. 1985)*. If a nuisance cannot be established, however, the Indiana RTF law has been construed to bar an action when the agricultural activity on land changes in nature. For instance, in *Dalzell, et al. v. Country View Family Farms, LLC, No. 1:09-cv-1567-WTL-MJD, 2012 U.S. Dist. LEXIS 130773 (S.D. Ind. Sept. 13, 2012),* the land near the plaintiffs changed hands. The prior owner had conducted a row-crop operation on the property. The new owner continued to raise row crops, but then got approval for a 2800-head sow confinement facility. The defendant claimed the state (IN) right-to-farm law as a defense and sought summary judgment. The court held that state law only allows nuisance claims when "significant change" occurs and that transition from row crops to a 2,800-head hog confinement facility did not meet the test because *both are agricultural uses.* The court noted that an exception existed if the plaintiffs could prove that the hog confinement operation was being operated in a negligent manner which causes a nuisance, but the plaintiffs failed to prove that the alleged negligence was the proximate cause of the claimed nuisance. Thus, the exception did not apply and the defendant's motion for summary judgment was granted. The court's decision was affirmed on appeal. *Dalzell, et al. v. Country View Family Farms, LLC, et al., 517 Fed. Appx. 518 (7th Cir. 2013)*.

In another Indiana case, *Parker v. Obert's Legacy Dairy, LLC, 988 N.E.2d 319 (Ind. Ct. App. 2013),* the defendant had expanded an existing dairy operation from 100 cows to 760 cows by building a new milking parlor and free-stall barn on a tract adjacent to the farmstead where the plaintiff's family had farmed since the early 1800s. The plaintiff sued for nuisance and the defendant asserted the state (IN) right-to-farm statute as a defense. The court determined that the statute barred the suit. Importantly, the court determined that the expansion of the farm did not necessarily result in the loss of the statute's protection. For instance, the vastly expanded dairy remained covered under the same Confined Animal Feeding Operation permit as the original farm. In addition, the conversion of a crop field to a dairy facility was protected by the statute because both uses simply involved different *forms* of agriculture. The court also noted that the Indiana statute at issue protected one farmer from suit by another farmer for nuisance if the claim involved odor and loss of property value. Not all state statutes apply to protect farmers from nuisance suits brought by other farmers.

The *Himsel* Litigation

A more recent case involving the Indiana RTF law is *Himsel v. Himsel, 122 N.E.3d 935 (Ind. Ct. App. 2019)*. I have written previously about the *Himsel* case here: https://lawprofessors.typepad.com/agriculturallaw/2019/05/coming-to-the-nuisance-by-staying-put-or-when-200-equals-8000.html

The appellate court in *Himsel*, determined that the Indiana RTF law applied to protect the defendant because the change in the nature of the defendant's hog operation from row crop farming to a large-scale confined animal feeding operation (CAFO) involving 8,000 hogs was "not a significant change" that would make the RTF law inapplicable. In other words, 8,000 hogs in a confinement building raised by a contracting party that likely doesn't make management decisions concerning the hogs, doesn't report the associated contract income as farm income on Schedule F, and cannot pledge the hogs as loan collateral due to a lack of an ownership interest in the hogs, was somehow not significantly different from 200 hogs and 200 head of cattle raised by a farmer with associated crop ground who managed the diversified operation. Just the sheer number of hogs alone stands out in stark contrast. Also, unlike the *Obert's Legacy Dairy* case where the expansion of the dairy farm did not require a new permit, the hog operation in *Himsel* required a change in the existing zoning of the tract.

The plaintiffs in *Himsel,* members of the same family as the defendants, were found to have essentially come to the nuisance because one of them chose to retire from farming and remain on the land that he had lived on for nearly 80 years, and the other didn't move from the rural home they built in 1971. An 8,000-

head hog confinement operation and the presence of 3.9 million gallons of untreated hog manure was comparable to farming in this area in 1941.

The *Himsel* court also determined that a "taking" had not occurred because the plaintiff had not sold his home and moved away from the place where he grew up and lived all of his life, and the RTF law did not take the entire value of the plaintiff's property away. The appellate court, however, did not address the implications of whether its opinion essentially granted the CAFO an easement to produce odors across the plaintiffs' property.

The appellate court declined to rehear the case *(No. 18A-PL-645, 2019 Ind. App. LEXIS 314 (Ind. Ct. App. Jul. 12, 2019)),* and the Indiana Supreme Court declined to review the appellate court's decision by a single vote. *Himsel v. 4/9 Livestock, LLC, 143 N.E. 3d 950 (Ind. Sup. Ct. Feb. 20, 2020).* On July 17, 2020, a petition for certiorari was filed with the SCOTUS.

The Issue Before the SCOTUS – Unconstitutional Taking

The issue presented to the SCOUTUS is singular – whether the Indiana RTF law amounts to a taking of private property without compensation in violation of the Constitution's Fifth Amendment. Property rights are constitutionally protected under the Fifth Amendment and cannot be taken by governmental action without payment of just compensation. The Fifth Amendment applies to the states through the Fourteenth Amendment. What is involved in *Himsel* is not an outright taking of the plaintiff's land, instead the claim is that the RTF law constitutes a regulatory taking via obnoxious odors and other environmental contamination. I have written about regulatory takings here: https://lawprofessors.typepad.com/agriculturallaw/2019/10/regulatory-takings-pursuing-a-remedy.html But, is there any precedence for a RTF law being held unconstitutional. There is.

State court action. In 1998, the Iowa Supreme Court invalidated an Iowa law designed to preserve agricultural land and provide farmers protection from nuisance lawsuits. *Bormann v. Board of Supervisors in and for Kossuth County, 584 N.W.2d 309 (Iowa 1998).* The Iowa law allowed counties to designate agricultural areas of at least 300 contiguous acres. Farming operations conducted within a designated area were not subject to nuisance lawsuits if they operated properly. The court ruled that this immunity created a property right, an easement to create odors, over land adjacent to the agricultural area's boundary. As a result, the court ruled the Iowa law unconstitutional because the county did not pay the neighbors who would be required to endure the odors and the neighbors could not bring a nuisance action to limit or stop odor production. The SCOTUS declined further review. *Girres v. Bormann, 525 U.S. 1172 (1999).*

In 2004, the Iowa Supreme Court addressed the constitutionality of the Iowa RTF law. *Gacke v. Pork XTRA, L.L.C, 684 N.W.2d 168 (Iowa 2004).* In *Gacke,* the defendant built a confinement hog facility 1,300 feet to the north of the plaintiffs' farmstead which the plaintiffs had occupied since 1974. In the summer of 2000, the plaintiffs filed a nuisance action against the defendant claiming damages for personal injury, emotional distress and a decrease in the value of their property, and seeking a permanent injunction, compensatory and punitive damages. The defendant raised the Iowa right-to-farm statute as a defense**.** The pertinent part of the statute provides:

"An animal feeding operation…shall not be found to be a…nuisance under this chapter or under principles of common law, and the animal feeding operation shall not be found to interfere with another person's comfortable use and enjoyment of the person's life or property under any other cause of action."

Importantly, the statutory protection applies regardless of whether the animal feeding operation was established (or expanded) before or after the complaining party was present in the area. However, the protection of the statute does not apply if the animal feeding operation is not in compliance with all applicable federal and state laws for operation of the facility, or the facility unreasonably and for substantial

periods of time interferes with the plaintiff's comfortable use and enjoyment of the plaintiff's life or property, and failed to use generally accepted best management practices.

The plaintiffs claimed that the statute was an unconstitutional taking of their private property without just compensation in violation of both the Federal and Iowa constitutions. The trial court agreed, determining that the value of their property had been reduced by $50,000, and that the plaintiffs should be awarded $46,500 to compensate them for their past inconvenience, emotional distress and pain and suffering. However, the court refused to award any future special or punitive damages or injunctive relief.

On appeal, the Iowa Supreme Court held the right-to-farm law unconstitutional, but only to the extent that it denied the plaintiffs compensation for the decreased value of their property. In essence, the Court held that the statute gave the defendant an easement to produce odors over the plaintiffs' property, for which compensation had to be paid.

However, in 2004, the Idaho RTF law that granted immunity from nuisance lawsuits was determined not to amount to an unconstitutional taking of property. *Moon v. North Idaho Farmers Association, 140 Idaho 536, 96 P.3d 637 (2004)*. That same year, the Texas Court of Appeals reached the same conclusion concerning the Texas RTF law. *Barrera v. Hondo Creek Cattle Co., 132 S.W.3d 544 (Tex. App. 2004)*. In 2009, the Indiana Court of Appeals, contrary to the Iowa decision in *Bormann*, and consistent with *Barrera*, held that the right to maintain a nuisance contained in the Indiana RTF law did *not* create an easement. *Lindsey v. DeGroot, et al., 898 N.E.2d 1251 (Ind. Ct. App. 2009)*.

State legislation. In Colorado and North Carolina, the state RTF laws bar nuisance suits against "farming" operations that undergo major changes to the structure of the operation. Colo. Rev. Stat. §35-3.5-102; N.C. Gen. Stat. Ann. §106-701(a)(1). Utah, Nebraska and Oklahoma have built-in statutory "safe-harbors" providing protection from nuisance suits for significant changes to existing farming operations. Utah Code Ann. §4-44-102(2); Neb. Rev. Stat. §2-4403(2); Okla. Stat. Ann. tit. 50 §1.1.

Conclusion

RTF laws are a legitimate purpose of state government. The idea of promoting animal agriculture and incentivizing multi-generational farming operations and the local communities they support via an RTF law can bear a reasonable relationship to that legitimate objective. However, property rights are a fundamental constitutional right. Any law that impinges on such a right is subject to strict scrutiny. Thus, an RTF law that grants immunity from nuisance suits when the farming operation changes materially such that it becomes, in essence, an easement to commit a nuisance impacting an existing adjacent/nearby property owner cannot withstand strict scrutiny. However, that is only the case if the SCOTUS agrees to hear the *Himsel* case and decides accordingly. If not, the "patchwork quilt" of state court opinions will continue.