



## 2017 Ag Gag Update

J. David Aiken, UNL Ag Law Specialist

402-472-1848; [daiken@unl.edu](mailto:daiken@unl.edu)

April 5, 2017

1 of 14



## 2015 Idaho ag gag lawsuit

- Summary of current state ag gag statutes & legal challenges
- 2012 undercover Idaho dairy video & aftermath
- 2014 Idaho ag gag statute
- 2014 Lawsuit challenging Idaho statute
- 2015 Court ruling
- current appeal status
- Commentary

2 of 14



## Current state ag gag laws

- gen purpose: make undercover animal activist/employee videos illegal
- Kansas 1990: recording illegal with intent to cause harm
- Mont 1991: recording illegal with intent to criminally defame
- ND 1991: recording illegal without owner's consent
- Iowa 2011: recording illegal without owner's consent
- Utah 2012: recording illegal without owner's consent
- Missouri 2012: recording illegal unless turned over to law enforcement within 24 hours

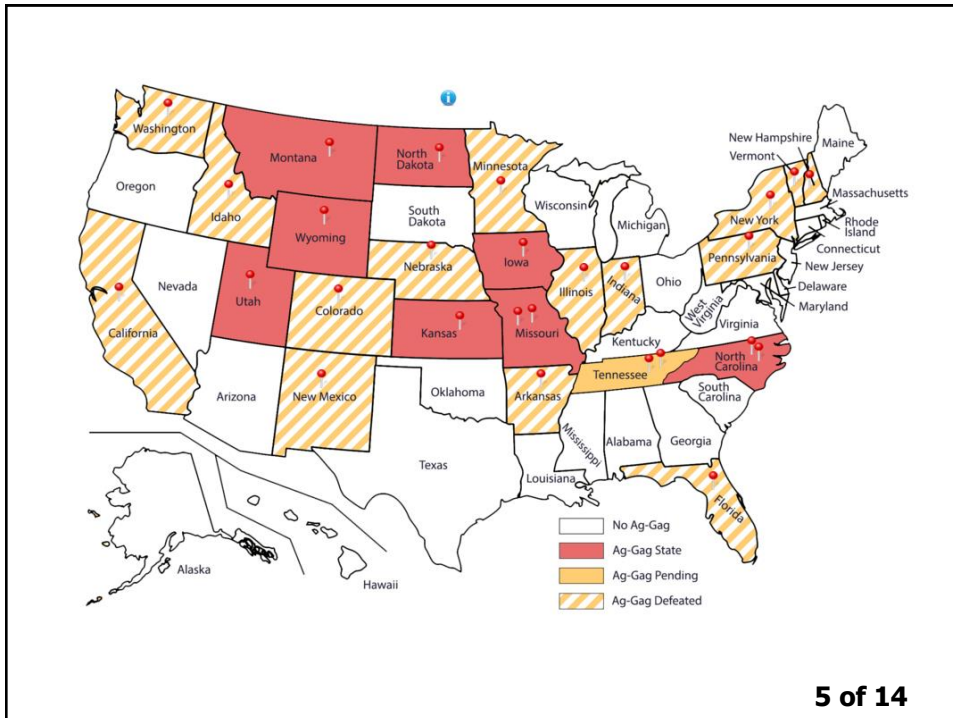
3 of 14



## ag gag laws, con't

- Idaho 2014: video recording illegal without owner's consent
- violation of all these statutes are criminal violations
- NC 2016: "property protection act:" property owner can sue videographer if video of private property is made public without property owner's permission
- Arkansas 2017: ditto
- violation of NC & Arkansas statutes are civil violations not crimes

4 of 14





## Undercover Idaho dairy video

- Mercy for Animals very active undercover “whistle-blowers” animal activist group
- In 2012 Mercy for Animals released undercover video of Idaho dairy workers using tractor to drag cow chained around her neck
- Workers repeatedly beating, kicking & jumping on cows
- Undercover video at Idaho dairy
- Video drew national attention

**6 of 14**



## Dairy video, con't

- Investigator turned video over to Mercy for Animals
- Mercy for Animals gave edited video to Idaho State Dept of Ag (ISDA)
  - Should have been unedited video IMO
- ISDA informed dairy owner of abuse
- After ISDA investigation finished, Mercy for Animals published the video on the internet
- Idaho Dairyman's Association sponsored Idaho ag gag statute, which was enacted in 2014
- Statute immediately challenged in federal court

7 of 14



## Idaho ag gag statute

- Statute created a new Idaho crime, "interference with agricultural production"
- Felony to among other things make videos of ag operations without ag facility owner's consent
- Federal district judge for Idaho ruled 8-3-15 that Idaho ag gag statute interfered with freedom of speech
- First court ruling on constitutionality of ag gag statute
- Ruling suggests that similar statutes requiring facility owner's permission to do video would be in trouble legally

8 of 14



## ruling

---

- Judge observed that Upton Sinclair's 1906 classic novel about the Chicago meatpacking industry--**The Jungle**-- which led to the creation of the 1906 Meat Inspection Act and the Pure Food & Drug Act, establishing the Food & Drug Administration—would have been criminalized by the Idaho ag gag act
- Judge also observed that investigative journalism, undercover journalism, and whistle blowing are all legitimate & protected forms of political speech in the US

9 of 14



## Ruling, continued

---

- Judge: ag gag law sought to punish those seeking to speak out on topics relating to the ag industry
- Would suppress speech by undercover investigators & whistleblowers concerning matters of great public importance
  - Safety of the public food supply
  - Safety of agricultural workers
  - Treatment & health of farm animals
  - Environmental impact of business activities

10 of 14



## Ruling, con't

- Private party media investigations (such as "60 Minutes") are a common form of political speech
- Such investigations into private matters are recognized and embraced as important political speech in Idaho
- Property rights argument: ag gag laws protect ag producer property rights
- Judge: private property rights are adequately protected by trespass, fraud, theft & defamation laws without restricting free political speech

11 of 14



## Ruling, con't

- "Although the State may not agree with the message certain groups seek to convey about Idaho's agricultural production facilities, such as releasing secretly recorded videos of animal abuse to the Internet and calling for boycotts, it cannot deny such groups equal protection of the laws in their exercise of their right to free speech."
- First court ruling that ag gag statute was unconstitutional
- Idaho ruling on appeal to 9<sup>th</sup> circuit federal court of appeals
  - ruling in 2017?
- Utah, NC ag gag statutes also in court—no decisions yet

12 of 14



## Undercover video/ ag gag policy arguments

- Video pro: abuse is occurring and undercover video operations may be the best way to reduce the incidence of abuse
- Video con: videos are embarrassing to ag, undercover employees are operating under false pretenses; activists may instigate the abuse
  - Hopefully should be evident from video whether abuse was instigated or not but this is a fair point IMO
- ag gag laws are almost certainly free speech violations

**13 of 14**



## commentary

- IMO if you want to implement an ag gag law, need to supplement it with a program to regularly inspect livestock facilities for animal abuse and fund the program to make it credible
- IMO ag gag laws that require videos to be given to law enforcement within 24/48 hours have a better argument that the purpose of the law is to stop any abuse rather than to suppress the video. Think a case like that where videographer did not turn video over in time is being litigated.
- IMO most ag gag proposals are recognized by the public to be a "cover your behind" knee-jerk reaction against animal activists, not a sincere attempt to improve farm animal welfare
- IMO--be proactive not reactive: when abuse videos surface, ag groups should say "this does not represent us & here is how we try to prevent this" instead of trying to throw the book at the undercover videographer IMO ☺

**14 of 14**