

What Can Federal Regulation of Gold Dredging and Parasailing Teach Us About the Future of Cannabis and Privacy Regulations?

WRITTEN BY

Agustin E. Rodriguez | Matthew J. Fay

Hearty divers in Alaska seeking their fortune and humpback whales mating off of Maui have been the subject of reality shows, documentaries, and federal oversight — each capturing various levels of danger and excitement both literal and figurative to their subjects. In this article, we'll draw some lessons from these topics regarding the future of federal regulation of cannabis and privacy.

Reality Shows Bring Attention, Tragedy, and Oversight

Bordering on the Bering Sea, Nome, Alaska advertises itself as being Alaska's most famous gold rush town and "about as far away as you can get in Alaska while still enjoying the conveniences of the modern world."^[i] Mainly known in the Lower 48 as the ending point of the Iditarod dog sled race, Nome gained additional notoriety in the mainstream consciousness through the return of activity that originally put it on the map — the hunt for gold. But what started as a small commercial activity exploded in popularity more recently due to reality television coverage. In 2005, only five vessels were dredging for gold off the coast in Nome. By 2016 that number had shot up to over 100 largely due to the attention and fame brought to certain participants of reality television show *Bering Sea Gold*.^[ii]

In the beginning, federal oversight of this nautical prospecting activity was minimal to nonexistent. Since mostly small boats operated in state waters, regulators treated them as a low priority for enforcement. That all changed, however, with the deaths of two divers operating from these vessels in 2011 and 2014. These tragic events brought heightened public scrutiny and drove the U.S. Coast Guard to take a more aggressive approach to their regulatory activity. Starting in 2015, the Coast Guard deemed these vessels as "commercial" vessels and therefore subject to more intrusive and comprehensive federal laws and regulations. Since then, the Coast Guard has continued to periodically update its guidance to mariners and has maintained its at-sea enforcement during the period of the summer thaw.^[iii]

Whales Have Friends in Congress

Moving now from the 49th state to the 50th, let us turn our attention to the majestic humpback whale. To protect these whales during mating season — which runs between December 15 and May 15 — Hawaii enacted a law prohibiting "operat[ing] a thrill craft, or engag[ing] in parasailing, water sledding, or commercial high speed boating, or operat[ing] a motor vessel towing a person engaged in water sledding or parasailing on the west and south shore of Maui."^[iv] Those of us in winter climates in the Northern Hemisphere would quickly identify the

humpback mating season as running concurrently with weather that incite people to travel to Maui and engage in warm weather activities, such as parasailing. Fearing a significant hit to their business, parasail operators UFO Chuting of Hawaii, Inc. and K.M.B.S., Inc. filed suit in federal court and argued that the Hawaii state law was preempted by federal law, specifically the Marine Mammal Protection Act (MMPA), which permitted boat operators to sail up to 100 yards of humpback whales and which included a specific provision clarifying that the MMPA preempted state law.^[v] The federal district court judge agreed, and in July 2004, it ruled in favor of the parasail operators.^[vi]

Fall 2004 was a contentious period in Washington, DC, with partisan rancor running high due to the tight presidential election between President George Bush and Senator John Kerry. Likewise, protests against U.S. involvement in wars in Iraq and Afghanistan had strained the national unity that brought the country together following the 2001 9/11 terrorist attacks. Despite the partisan strife, the plight of humpback whales trying to mate off the coast of Hawaii denoted the one item of common interest that both parties supported. In a speed rarely seen, Congress included a provision in the 2005 Consolidated Appropriations Act, which passed in December 2004 — a mere five months after the district court decision — that authorized Hawaii (and only Hawaii) to enact laws protecting the humpback whale regardless of the preemption provision of the MMPA.^[vii] Using this change in the law, the state of Hawaii appealed the district court decision and prevailed at the circuit court level.^[viii]

Lessons Learned

If you have been following Troutman Pepper's articles on the *Regulatory Oversight* blog^[ix] on the cannabis industry and data privacy laws, then you are aware of the complex grab bag of state laws governing these practice areas in the face of contradictory or nonexistent federal law. For example, our colleagues' articles on the introduction of the Cannabis Administration and Opportunity Act^[x] and the enactment of the Colorado Privacy Act^[xi] highlight the difficulties clients face in trying to interpret legal requirements and liabilities caused by the disconnect between federal and state laws. In any event, below find lessons learned from gold dredging and parasailing as applied to cannabis and privacy regulatory compliance.

"Out of sight, out of mind" only works up to a point

Maintaining a low profile can delay a regulatory determination that adds costs and obligations to your business. However, when you enter the public eye, this heightens the risk that circumstances beyond your control — such as the tragic deaths of divers — will cause interest in your industry that will bring a public outcry to more heavily scrutinize and control your activities. So, while the reality show coverage may have originally brought fame and acclaim to those seeking their fortunes under the sea, it later also served as a conduit for governmental oversight that added cost to how the gold dredgers did business.

This signals a warning for the cannabis industry. The U.S. Department of Justice (DOJ) has kept a wary eye on marijuana legalization efforts since 2013 when it announced that while the DOJ would not challenge the legality of legalization in Colorado and Washington (and later additional states), it would preserve its right to vigorously enforce federal marijuana laws.^[xii] In the intervening years marijuana legalization continues to gain in both acceptance and popularity.^[xiii] But as the gold dredgers learned in Nome, even being on the frontier will not keep you from falling under the watchful eye of regulators should a tragedy befall your industry that galvanizes disapproval. For example, as our colleagues discussed in April,^[xiv] the House of Representatives passed the

Secure and Fair Enforcement (SAFE) Banking Act of 2021, but the Senate has yet to act on it. Without the necessary access to financial services, most cannabis-related legitimate businesses (CLBs) have been forced to conduct their transactions mostly in cash. While sad to ponder it, should a CLB or multiple CLBs suffer a high-profile incident, such as a robbery that results in injury or loss of life, this may turn public support against these businesses either locally or nationally or, on the flip side, against congressional delay in allowing basic banking services to cannabis businesses.

It's hard to fight a whale

The parasailing operators were not in competition with or trying to hurt the whales, but they became collateral damage when the government decided to take swift action to protect the whales. But note, the provision exempting Hawaii's state whale protection law from federal preemption was not passed in stand-alone legislation — it was added to a must-pass funding bill needed to keep the federal government open and running.

Clients interested in data privacy regulation should be aware that much like the parasailing operators, their fortunes can change quickly. While passage of a sweeping federal data privacy act seems unlikely since bills currently under consideration — such as the Setting an American Framework to Ensure Data Access, Transparency, and Accountability (SAFE DATA) Act^[xv] — are stymied in gridlock, the White House appears to have learned this lesson of tying action to topics more popular with the public. For example, the president announced in a larger antitrust and competition executive order that the White House was marshaling its resources against a number of perceived data privacy-related ills, including “... the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects.”^[xvi] And just as the parasail operators got stuck on the beach to protect the whales, clients may find themselves subject to tough and costly regulations if either the White House or Congress can find a popular topic to which they can tie data privacy regulations.

We're Here to Help

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^[i] See <https://www.visitnomealaska.com/>.

^[ii] See <https://www.arctictoday.com/for-fortune-hunters-dredging-alaskas-bering-sea-floor-for-gold-old-mining-traditions-blend-with-new-realities/>.

^[iii] See https://www.pacificarea.uscg.mil/Portals/8/District%2017/Sector%20Anchorage/GOLD%20DREDGING/Nome%20Gold%20Dredge%20Info%20Handout_2018.pdf?ver=2018-01-10-134925-523.

^[iv] See Haw.Rev.Stat. § 200-37(i).

[v] See Pub.L. No. 103-238, 1994 Stat 1636.

[vi] See *UFO Chuting of Haw., Inc. v. Young*, 327 F.Supp.2d 1220 (D.Haw. 2004).

[vii] See Pub.L. No. 108-447, § 213, 118 Stat. 2809 (2004).

[viii] See *UFO Chuting of Hawaii, Inc. v. Smith*, 508 F.3d 1189 (9th Cir. 2007).

[ix] See <https://www.regulatoryoversight.com/>.

[x] See <https://www.regulatoryoversight.com/2021/07/senate-democrats-unveil-new-comprehensive-federal-cannabis-legalization-bill/>.

[xi] See <https://www.troutman.com/insights/colorado-governor-signs-comprehensive-data-privacy-bill-how-does-it-compare-to-california-and-virginia.html>.

[xii] See <https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy>.

[xiii] See <https://www.troutman.com/insights/cannabis-law-an-update-on-recent-developments-related-to-the-cannabis-industry.html>.

[xiv] See <https://www.troutman.com/insights/safe-banking-act-of-2021-to-provide-cannabis-industry-access-to-financial-services-but-obstacles-remain.html>.

[xv] See <https://www.commerce.senate.gov/2021/7/wicker-blackburn-introduce-federal-data-privacy-legislation>.

[xvi] See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

Our Cannabis Practice provides advice on issues related to applicable state law. Cannabis remains an illegal controlled substance under federal law.

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