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A Good Regulation Went Bad: Fractional Elk Graze New Mexico

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A Good Regulation Went Bad; Fractional Elk Graze New Mexico

I. Introduction

In 1989, the New Mexico State Game Commission (SGC) and Department of Game and Fish (DGF) promulgated the first of a new generation of regulations governing private landowner permits for elk.¹ These regulations proposed to provide compensation to landowners for elk which invade and destroy their private property.² With modifications, that original regulation was re-promulgated in 1995 as 19 N.M.A.C. 30.5, Private Land Elk License Allocation.³ The regulation requires landowners to demonstrate elk depredations, and once shown, allows the landowner access to a permit distribution system.⁴ Within that allocation system, the landowner receives permits based on a number of considerations, such as desired elk herd size, previous years' hunting successes within the Game Management Unit and the size of the ranch.⁵ These permits allow the bearer to claim elk licenses from the DGF for use during the subsequent hunting season.⁶

New Mexico required the regulation because elk are capable of causing substantial damage to private landowners' property and because of continuing interest in expanding the

¹ *Establishing a System for Allocating Elk Licenses on Private Lands and Public Lands Within Game Management Units*, New Mexico Department of Game and Fish, State Game Commission, Regulation No. 667, July 28, 1989.

² Gonzales, Santiago, R., *Access System for Private Land in New Mexico*, TRANS. 54TH N. A. WILDL. & NAT. RES. CONF. 179, 179 (1989).

³ *Compare* 19 N.M.A.C. 30.5, *Private Land Elk License Allocation*, State Game Commission, New Mexico Department of Game and Fish, April 1, 1995; *Amendment No. 1 to Regulation No. 667, Establishing a System for Allocating Elk Licenses on Private and Public Lands Within Game Management Units*, State Game Commission, New Mexico Department of Game and Fish, Order No. 3-92, May 20, 1992; *Regulation No. 667, Establishing a System for Allocating Elk Licenses on Private and Public Lands Within Game Management Units*, State Game Commission, New Mexico Department of Game and Fish, July 28, 1989.

⁴ 19 N.M.A.C. 30.5 § 7.7; 19 N.M.A.C. 30.5 § 8.5.1; 19 N.M.A.C. 30.5 § 9.1.

⁵ 19 N.M.A.C. 30.5 §§ 7 - 8.

⁶ 19 N.M.A.C. 30.5 § 8.1.

population of elk in the state.⁷ Rather than "tooth and claw" depredations caused by large carnivores, elk cause "displacement" depredations.⁸ Because elk compete with other ruminants for the same forage in the same habitat, elk can damage the economic viability of private lands.⁹ The regulation intended to compensate landowners for this displacement and for physical damage to property.¹⁰ However, the compensation to landowners is indirect and imprecise because the DGF does not match the compensation to the depredations, but rather only matches the quantity of permits allocated to the depredations.¹¹ Landowners must market the permits to receive the intended compensation, which leaves the actual compensation variable and inconsistent with the damage inflicted by elk.¹² The regulation fails its purposes because landowners are not guaranteed compensation by the permitting process.

The regulation is an inefficient allocation of wildlife resources because it shifts administrative costs to the landowner. This shift must be halted. This note will discuss regulatory options and recommend statutory authorization for a comprehensive administrative system. Section II will describe the process under the current regulatory system. Section III will discuss the shortcomings of this regulatory procedure. These shortcomings include both internal

⁷ See Gonzales, *supra* note 2, at 179-80.

⁸ See, e.g. WYO. STAT. § 23-1-901 © (1977) which provides that damages from depredations include the following:

"livestock damaged or killed by a trophy game animal, the damaged land, growing cultivated crops, stored crops, seed crops, improvements and extraordinary damage to grass."

See also COLO. REV. STAT. ANN. § 33-3-201 which was amended in 1993 to include the following finding:

"(a) Large-scale damage to the property of individual landowners by wildlife, particularly elk, is an increasingly common occurrence throughout Colorado;

"(b) While instances of such damage may be isolated, each can cause significant and potentially devastating consequences to the landowner involved..."

⁹ *Id.*

¹⁰ Santiago, *supra* note 2, at 179.

¹¹ See 19 N.M.A.C. 30.5 § 8.5.1; 19 N.M.A.C. 30.5 § 8.5.3.

¹² See generally Santiago, *supra* note 2; N.M.S.A. § 17-3-14.1 (Michie 1978); N.M.S.A. § 17-1-14 (Michie 1978).

and external difficulties; Section III discusses both types. Finally, Section IV will outline the recommended changes to the regulatory and statutory structure.

II. Background

The following section first discusses the regulatory history of 19 N.M.A.C. 30.5, and the recent changes made to it in the 1995 promulgation. Next it outlines the statutory bases for the regulation. Finally, it discusses the current regulatory procedure for acquiring, transferring, and using landowner elk permits and licenses.

The initial attempts at providing landowner compensation for elk depredations followed the DGF creation of a rudimentary license for private landowners.¹³ The DGF modernized the regulation in 1989 by promulgating Regulation No. 667.¹⁴ The SGC amended it in 1992 to extend the limited appeals process up through the DGF to the SGC.¹⁵ In 1995, the SGC made that regulation permanent and in a revised form in 19 N.M.A.C. 30.5.¹⁶ This revision codified the fuller appeals process described in Amendment 1 of Regulation 667, State Game Commission Order 3-92 as well as other structural and terminological changes. This codification included changes in the definitions used in estimation of elk populations¹⁷ and policies and procedures for issuing ranch-only permits.¹⁸

The first major change to the regulation expanded the variety of types of permits granted by allowing ranch-only permits for hunting and management. Permits can be made ranch-only

¹³ Santiago R. Gonzales, *Access Systems for Private Lands in New Mexico*, TRANS. 54TH N.A. WILDL. & NAT. RES. CONF. (1989) 179.

¹⁴ Regulation No. 667.

¹⁵ Amendment 1 of Regulation 667, State Game Commission Order 3-92, 1992.

¹⁶ 19 N.M.A.C. 30.5, State Game Commission, Department of Game and Fish of New Mexico, 1995.

¹⁷ See 19 N.M.A.C. 30.5 § 7.20.

¹⁸ 19 N.M.A.C. 30.5 §§ 8.6 - 8.9. For the purposes of 19 N.M.A.C. 30.5, ranch-only permits allow a claimed license to be used on the ranch it was allocated to and no further. Other permits allow greater degrees of access to the license holder, because licenses can be used on ranches up to and including all participating private property throughout the Game Management Unit. See generally *1995-1996 Agreement Concerning Harvesting of Elk on Landowner Property*, State Game Commission, New Mexico Department of Game and Fish, 1995 ("Landowner Agreement").

by request or by default¹⁹ if the landowner opts not to sign the Landowner Agreement.²⁰ The permits are specifically made ranch-only when the ranch size is greater than 10,000 acres, with or without landowner signature of the Agreement.²¹ This arrangement allows for ranch-by-ranch management within Game Management Units (GMUs),²² and seems designed to encourage big game hunting ranches.²³ When a landowner signs the access waiver in the landowner agreement, general permits are allocated which authorizes invasive hunting from any hunter bearing a permit for the general GMU.²⁴ For landowners, the compensation for depredation by elk is not derived from the access granted to hunters, but rather from the sale of permits to acquire licenses to kill animals.²⁵

Ranch-only permits serve a slightly different purpose for the landowner than the general permits because the permits limit access to private land and allow the purchase of the license to hunt.²⁶ With ranch-only permits, landowners can limit the damage caused by hunters by selecting the hunters allowed onto their private property more carefully.²⁷ The natural costs that

¹⁹ *Landowner Agreement, supra* note 18, at 1.

²⁰ The Landowner Agreement establishes some conditions and explanations for users of permits. The Landowner Agreement is only sent to landowners with depredations who applied for permits and had adequate acreage and depredations to qualify for a permit under the formulae contained in 19 N.M.A.C. 30.5.

²¹ *See* 19 N.M.A.C. 30.5 § 8.6 - 8.9.

²² 19 N.M.A.C. 30.5 § 8.6.

²³ 19 N.M.A.C. 30.5 § 8.7. Note that this same provision limiting the largest ranches to ranch-only status applies the same constriction to entire GMUs. *See* Table 1.

²⁴ *See Landowner Agreement, supra* note 18.

²⁵ *See* note 11 *supra*; Gonzales, *supra* note 2, at 180 ("Public access is granted to license holders without charge through a contract signed between the Department and landowner in exchange for an authorization.")

²⁶ *See* note 8, *supra*.

²⁷ The DGF grants these permits for the express purpose of limiting resident populations within the largest ranches to a specific levels. During the 1995 allocation, there were only 49 ranches which qualified for the mandatory ranch-only status by size and 103 which qualified by location. *See* 1995 Elk Landowner List, New Mexico Department of Game and Fish, 1995; Table 1; 19 N.M.A.C. 30.5 § 8.7. The focus of most of 19 N.M.A.C. 30.5 is on the management of elk within GMU boundaries. The allocation of ranch-only permits for use within "external

ranchers face are forage consumption and damage to fencing.²⁸ Allowing access to private lands could cause higher costs for the landowners while reducing the natural damages caused by the elk²⁹. These permits serve the additional purpose embodied in 19 N.M.A.C. 30.5 § 8.2, incorporating Section 7.2, which defines herd objective.³⁰ The Area Chief of a given GMU can issue ranch-only permits supplementary to the formula-based allotment the landowner received³¹. Though the discretion allowed is limited,³² the Area Chief could award, by accident or design, permits adequate to completely eradicate resident elk under the regulatory allowances made by "herd objective" or "estimated population trends."³³

Though the permit awarding system includes much discretion, the increased appeals

ranch boundaries" does little more than increase the intensity of elk management by defining GMU sub-boundaries. For the small landowners who receive only a few permits to sell, the cost of having numerous hunters from all across the Game Management Unit invade their ranch could be substantial.

²⁸ Gonzales, *supra* note 2, at 181.

²⁹ At some level, it is a simple tradeoff. As the number of successful hunters with valid permits on a unit of private property rises, the local elk population falls. However, hunters might accidentally panic elk, damage fences or forage while chasing and retrieving the elk or its carcass. Further, because elk will share forage with other species, there is a risk of damage to any cattle the landowner might own. These additional costs are not costs that the landowner would bear in the absence of hunting and are therefore attributable to the hunting. *See generally*, Boyd, Raymond J., *American Elk*, in *Big Game of North America*, 11 (Schmidt, John L. & Gilbert, Douglas L. eds. 1978).

³⁰ That provision states that "'herd objective' shall mean the desire to increase, decrease or maintain an existing estimated elk population at levels relative to previous-year estimates."

³¹ 19 N.M.A.C. 30.5 § 8.2.

³² 19 N.M.A.C. 30.5 § 8.2.

³³ The regulation defines herd objective as "the desire to increase, decrease or maintain an existing estimated elk population at levels relative to previous-year estimates." 19 N.M.A.C. 30.5 § 7.2. The regulation defines population trend as "the elk population trends (increase, stable, decrease) relative to previously estimated elk populations." 19 N.M.A.C. 30.5 § 7.6. It does not demand that ranch-only discretionary allocations be consistent with general state policies or that the Area Chief confirm a trend over time. With or without a conscious design, elk on a particular plot of land could be completely eradicated. *Compare* 19 N.M.A.C. 30.5 § 8.8.1 with 19 N.M.A.C. 31.8 § 8.1.4 (limiting depredation hunt permits to an additional 5% of total GMU allocation per year).

process contained in 19 N.M.A.C. 30.5 does not. The appeals process does significantly expand the public accountability of the DGF.³⁴ A landowner can challenge any formula-based allotment of permits.³⁵ The appeals process proceeds upward through the levels of administrative authority,³⁶ ultimately reaching the SGC,³⁷ where the challenger can present witnesses.³⁸ Prior to that SGC hearing, all other appeals are conducted without witnesses and require investigation by the administrative officer.³⁹ The final stage clearly raises the level of administrative accountability because it happens during regular and public SGC meetings.⁴⁰ Though the public cannot testify without some clear connection to the parties at the hearing,⁴¹ the process does guarantee review by the agency of its internal procedures if the landowner pursues a complaint. Further, the process ultimately presents the private criticism in a public forum.

These procedures described above are part of the authority to create, grant, and control the use of landowner permits vested in the New Mexico Department of Game and Fish and derived from a series statutory provisions guiding the DGF. Wildlife within the state are managed by the state for the public under a public trust doctrine.⁴² Pursuant to that authority, the legislature delegated the management responsibility to an administrative agency through a series of statutes. The most general statutory authority, N.M.S.A. § 17-1-1, provides policy guidance

³⁴ See generally 19 N.M.A.C. 31.8.

³⁵ 19 N.M.A.C. 30.5 §§ 9.1 - 9.2.

³⁶ See 19 N.M.A.C. 30.5 § 9.

³⁷ 19 N.M.A.C. 30.5 § 9.5.

³⁸ 19 N.M.A.C. 30.5 § 9.6.

³⁹ See generally, 19 N.M.A.C. 30.5 § 9.

⁴⁰ 19 N.M.A.C. 30.5 § 9.6.

⁴¹ 19 N.M.A.C. 30.5 § 9.6 provides that "If the State Game commission agrees to hear the appeal, a hearing shall be scheduled during a regular meeting. At that time a reasonable number of witnesses may be presented along with supporting documentation." The emphasis of the appeals process is on personal involvement. 19 N.M.A.C. 30.5 § 9.2.2 states that "If the landowner disagrees with the calculation, he may appeal the officers' findings by first filing a written appeal, with supporting documentation, to the appropriate Area Office Supervisor." The regulation does not prevent interested third parties from speaking, but such parties must be presented by either the DGF or the landowner. .

⁴² State ex rel. Sofecio v. Heffernan, 67 P.2d 219, 223 (N.M. 1936).

for the DGF by describing the legislative intent in granting power to the DGF.⁴³ N.M.S.A. § 17-1-14 (A)(13) allows the SGC to promulgate licensing procedures for hunting of any protected species. Further, N.M.S.A. § 17-1-14.1 allows the SGC to issue landowner permits and the appropriate regulations. N.M.S.A. § 17-3-31 provides similar authority for the DGF to issue permits for damage to crops.⁴⁴ These two authorizations can best be seen as providing the state the tools to compensate landowners for displacement and destructive losses caused by elk.

Under the current regulatory system, there are limited numbers of public licenses to kill elk.⁴⁵ Landowners may apply for and acquire these licenses independent of depredations on private lands. Those landowners experiencing depredations may apply for and receive additional special landowner permits to be used only on private deeded land. Applying for the permit is free, but use of the permit to claim a license requires payment of the statutory license fees.⁴⁶ The DGF allocates permits by use of mathematical formulae and by use of administrative discretion.⁴⁷ Once acquired, pursuant to signing the DGF's Landowner Agreement, the permits may be transferred among private parties without oversight by the DGF.⁴⁸ Licenses are more difficult to transfer. Once claimed, the licenses are bound by the DGF's seasonal constrictions⁴⁹ and by any

⁴³ That provision states that

"[i]t is the purpose of this act and the policy of the state of New Mexico to provide an adequate and flexible system for the protection of the game and fish of New Mexico and for their use and development for public recreation and food supply, and to provide for their propagation, planting, protection, regulation, and conservation to the extent necessary to provide and maintain an adequate supply of game and fish within the state of New Mexico."

N.M.S.A. § 17-1-1 (Michie 1978).

⁴⁴ That statutory provision states that "[t]he state game and fish warden [director of the department of game and fish] may grant permits to owners or lessees of land and for the capture or destruction on their lands of any protected game doing damage to their cultivated crops or property." N.M.S.A. § 17-3-31.

⁴⁵ See 19 N.M.A.C. 31.8.

⁴⁶ Landowner Agreement, *supra* note 18.

⁴⁷ 19 N.M.A.C. 30.5 § 7-8.

⁴⁸ Gonzales, *supra* note 2, at 180-181.

⁴⁹ 19 N.M.A.C. 31.8.

landowner options which might render the license ranch-only.⁵⁰ The landowner may appeal a limited number of administrative decisions,⁵¹ but not discretionary permit allocations or findings of no depredations. It is the use of the formula to determine base permit amounts, granting of discretionary permits to expand the allocation, and the very limited appeal of those results which are the most problematic for landowners and environmentalists together.

⁵⁰ See Landowner Agreement, *supra* note 18; 19 N.M.A.C. 30.5.

⁵¹ 19 N.M.A.C. 30.5 § 9.

III. Discussion

This section discusses the problems with the current version of 19 N.M.A.C. 30.5. Subsection A outlines the structural flaws in the regulation as well as the flaws created by the application of the regulation. It focusses on the tendency toward inaccuracy created by a lack of administrative duty to confirm depredations, problems created by the use of delayed responses to the measurement of depredations, errors in the regulatory treatment of marginal ranches with elk depredations, logical flaws in assuming that all ranches can economically advertise private landowner permits, and finally, the difficulties created by the appeals process. Subsection B outlines the regulation's failings when compared to other common and statutory law provisions. It focusses on a need for conjunctive analysis, considers the regulatory interference with the defense of private property, and inspects the regulation's weakening of private land trespass protection. Subsection C outlines the proposals for change of the current regulatory system. It discusses protecting the landowner from sudden shifts of elk between private land and modifying the appeals process to better serve the landowner.

A. Regulatory Problems: Lag, Fractionalism, and Disproportionality

Independent of difficulties with the application of 19 N.M.A.C. 30.5, the regulation creates problems because of its structure. It enforces a tendency toward inaccuracy because neither private landowners nor the DGF have a duty to inspect and report elk depredation levels. Further, the regulation provides disincentives to accurate reporting, leaving the DGF unable to safeguard the location and population of the elk. Also, the regulation's formulae produce a fractional elk problem which unfairly burdens small landowners.⁵² The only method of offsetting depredation losses, by selling the permits, fails to measure the cost to the landowner and to compensate for the loss commensurately. Finally, the appeals process, which does not allow challenge of departmental discretion, leaves the landowner without a method to guarantee a remedy for the problem: the elk on the land.

⁵² The fractional elk problem is a consequence of uneven division of the landowner elk permits within a GMU across the qualifying ranches of the GMU. Assuming constant returns from each permit sold, each ranch which merits permits will not get precisely the correct quantity of permits adequate to compensate the landowner for the depredations suffered because the total permits available are limited by biological demands not compensatory demands. *See* 19 N.M.A.C. 30.5 § 8.2.

1. Momentum Toward Inaccuracy

The regulation places no affirmative duties to report or verify elk populations on the landowner or the DGF.⁵³ Assuming most landowners derive some benefit from marginal presence of elk, landowners will report depredations when the cost of depredations and fence damage outweighs the benefit from their "wildlife values." The applicants for elk permits represent those landowners who want permits to hunt, to market, or to reduce the elk local population.⁵⁴ The further the level of depredations outweighs the landowner's "wildlife value," the greater the incentive to report. This incentive is heightened if the landowner observes sudden upward shifts in the resident elk population.

These shifts occur because elk are hunted throughout the full GMUs.⁵⁵ Because most permits are not issued for ranch-only use,⁵⁶ individual parcels within GMUs can eradicate local elk populations while other properties see little or no reduction. Because population management is a factor of the state-wide⁵⁷ and local elk population targets,⁵⁸ the regulation does

⁵³ In a regulation governing short-term technical assistance provided to landowners suffering from depredations and animal damage, the DGF must verify each landowner claim. It specifically provides that the aid will be provided only "[a]fter verification of the complaint." Regulation No. 673, *Depredation Assistance to Landowners*, State Game Commission, New Mexico Department of Game and Fish, August 18, 1989. In 19 N.M.A.C. 30.5, the DGF is only required to "evaluate requests for private land authorizations in accordance with the above procedures." 19 N.M.A.C. 30.5 § 9.1. Ironically, the more stringent verification standard is applied in the regulation which each landowner can use only once. See Regulation No. 673 § I.2.1.a.

⁵⁴ In this, I assume only that landowners have some private value for the wildlife resident on their land. Elk may be desired for a number of reasons, many of which are unlikely to bring the landowner financial compensation. See Brown, Perry J. & Manfredo, Michael J., *Social Values Defined*, in *Valuing Wildlife* (Decker, Daniel J. & Goff, Gary R. eds. 1987) 12, at 14-6. The economic losses from elk and the unpriced wildlife values counterbalance each other. The problem that this presents is two-fold: first that landowners may not have incentive to report depredations by elk immediately which disguises the total economic loss caused by elk; second that the state purpose for compensatory licenses may be ill-served by a regulation which does not account for this limitation on landowner incentives.

⁵⁵ 19 N.M.A.C. 30.5 § 8.1.

⁵⁶ Compare 19 N.M.A.C. 30.5 §§ 8.6 -8.8; 1995 Elk Landowner List.

⁵⁷ As a function of combined GMU goals; see N.M.S.A. § 17-1-1.

⁵⁸ 19 N.M.A.C. 30.5 § 8.4.

not account for individual shifts between ranches. The overall elk population in the GMU might meet desired targets,⁵⁹ but individual ranches would be much less depredated. When the GMU's target population is allocated, the allocation will be determined inaccurately for individual ranches, and the allocation of permits will remain inaccurate unless annual individual ranch inspections are made by the DGF.

Landowners have an incentive to report depredations accurately only when their level of depredation rises relative to previous measurements and the landowner could acquire additional permits. Every inspection of displacement depredations will be inaccurate to a degree. After an initial inspection, the only reason a landowner would reinspect for depredations is the opportunity to obtain more permits.⁶⁰ When more landowners participate within a GMU, the value of individual landowner depredations falls.⁶¹ Thus, there is incentive to resist increased participation and to inflate the individual level of depredations. This inflationary pressure is especially strong in smaller ranches which most risk being marginalized. Consequently, the depredations permits' requests are not accurate representations of the elk population at large, or of the burden experienced by landowners.

In addition to ineffectively controlling the landowner incentive to report depredations, the regulation puts no affirmative duty on the DGF to inspect depredations claims.⁶² During an appeal, it does require that the claim be verified and investigated,⁶³ but the subject of appeal is limited to the formula allotment, which limits the reach of the verification requirement.⁶⁴ The verification might reasonably include inspecting for depredations,⁶⁵ but such action is not specifically required. This narrow construction of the duty to inspect might be explained by the

⁵⁹ See 19 N.M.A.C. 30.5 § 8.2. This procedure does not consider burdens on individual ranches except within the context of total burdens within the GMU. See 19 N.M.A.C. 30.5 §§ 8.4 - 8.5 (governing only the fraction of total permits granted to a ranch)

⁶⁰ More accurately, a landowner would apply for permits only when the newly-acquired permits produce increased wealth for the landowner. Permits that go unmarketed produce little income; permits marketed for a much-reduced price might reduce net income.

⁶¹ This is a function of the load of elk on private land required to produce a percentage adequate to merit an elk permit. As the total acreage burdened by elk rises, if the landowner's burden does not rise with it, over time, the landowner will receive fewer permits.

⁶² See *supra* note 1.

⁶³ Compare 19 N.M.A.C. 30.5 § 9.3 with 19 N.M.A.C. 30.5 § 9.2.1.

⁶⁴ 19 N.M.A.C. 30.5 § 9.2.

⁶⁵ 19 N.M.A.C. 30.5 § 9.2.1.

statutory limitations of the DGF's ability to set prices for hunting license. By statute, the DGF must limit its administrative fees to administrative costs, and cannot change the prices of licenses.⁶⁶ Individual verification of depredations would entail inspections of over 2100 properties in 20 GMUs.⁶⁷ It is unlikely that the limited administration fees can cover the high costs of regular inspection, given a limited staff for the inspections, and the limitations on the departmental budget.⁶⁸

Failure to require inspections is not the only variable affecting the annual determination of elk population and permit goals. The regulation outlines the factors to be included in setting elk population targets.⁶⁹ One factor included is "herd objective."⁷⁰ Assuming there is a static target population for the state and within GMUs, the herd objective cannot be determined without information about the current population. The regulation provides for "estimated populations"⁷¹ and "estimated population trends,"⁷² but ignores the inevitable problem: these terms do not prescribe a procedure for estimation or verification in subsequent years.⁷³ It does not require the DGF to do additional calculations apart from subtracting hunter successes from the original estimates.⁷⁴ The regulation does not require full consideration of every relevant fact when making its required comparison, but instead relies on card surveys which are inherently

⁶⁶ N.M.S.A. § 17-1-14 (A) (13). The application process for a permit to kill elk is free. To actually claim the license, however, the fees are \$50 for New Mexico residents and \$400 for non-residents. N.M.S.A. § 17-3-13 (Michie 1978) governs the prices set for hunting licenses.

⁶⁷ 1995 Elk Landowner List.

⁶⁸ N.M.S.A. § 17-1-14(A).

⁶⁹ 19 N.M.A.C. 30.5 § 8.2 defines: "the criteria ... shall be herd objectives, estimated elk populations, estimated elk occupied habitat, relative elk densities, past harvest data, and estimated population trend."

⁷⁰ 19 N.M.A.C. 30.5 § 8.2. The regulation defines herd objective as "the desire to increase, decrease, or maintain an existing estimated elk population at levels relative to previous-year estimates."

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ 19 N.M.A.C. 30.5 § 8.

⁷⁴ 19 N.M.A.C. 30.5 § 8.3 - 8.4.

inaccurate because there is no requirement that the surveys be returned to the DGF.⁷⁵ Where the DGF could require full reporting by all hunters, it does not.⁷⁶ Where the DGF could collect and consider data about locations of hunting success within GMU's, it does not. Collecting complete data could provide valuable assistance in setting GMU-population goals as well as locations where discretionary permits would be desirable, but the current regulation defeats this purpose.

This method of deducing current populations from hunter successes magnifies any initial errors in the population census. Whether the original error is underestimation or overestimation of elk population, the consequence is marginalization of small landowners. In the first case, marginalization occurs because a restricted number of licenses⁷⁷ results in a higher elk burden being required per acre to qualify for a permit. In the second case the smallest ranches are denied compensation because the return per permit is lowered, making it economically inefficient for them to participate in the program. Current targets for permits are directly tied to hunting success.⁷⁸ When there are too few elk for the permits, hunters will be unsuccessful, resulting in more permits in the future,⁷⁹ and when there are too many elk, the hunting success in a given year will decrease the permits available in the future. In either case, small landowners cannot meet the demands of the system and the system stops providing small landowners compensation for the burden on their land.

2. Sudden Population Shifts and Annual Responses

The regulatory structure also fails because it does not directly bar manmade involuntary shifts of elk between private properties. In New Mexico, there are no substantive limitations on the ability of landowners to harass game. While it is illegal to take the game out of season,⁸⁰ regulations do not bar harassment by use of animals, vehicles, or other non-damaging

⁷⁵ 19 N.M.A.C. 30.5 § 7.18 provides that "'Card Survey' shall mean the elk hunter harvest survey provided by the Department for the purpose of determining elk harvest. Only those returned to the Department for analysis will be used." The regulation does not require that these surveys be returned to the DGF, and consequently, the information gleaned from analyzing the card surveys will not measure the elk populations as well as they might.

⁷⁶ 19 N.M.A.C. 30.5 § 7.17.

⁷⁷ 19 N.M.A.C. 30.5 § 8.4.2.

⁷⁸ 19 N.M.A.C. 30.5 § 8.4.2.

⁷⁹ 19 N.M.A.C. 30.5 § 8.4.2.

⁸⁰ N.M.S.A. § 17-1-14 (D).

techniques.⁸¹ When landowners waive their right to exclude trespassers in exchange for the permits,⁸² the landowner agreement makes no mention of barring harassment of game.⁸³ Even if the regulation or statutes prohibited harassment more broadly, there are problems of proof. The most difficult distinction is between incidental and deliberate harassment of game. Sudden shifts of population will not be prevented by barring harassment of game, but by requiring consistent monitoring of elk populations. When such a change is seen by the DGF, the permits allocated within the GMUs should be reevaluated to ensure accurate compensation.

Where there are sudden undesirable and reported invasions by elk, local officers can act to prevent undue burdens on the landowner. The permit process grants District Chiefs the power to award discretionary permits⁸⁴ or to hold special depredation hunts.⁸⁵ These responses to elk population changes are counterproductive, however. The first method is ineffective because these discretionary permits do not rely on clear management principles⁸⁶ for implementation.

⁸¹ Note that there are limitations on hunter methodology. Pursuant to N.M.S.A. § 17-1-14 (D) (Michie 1978), the state game commission controls "[t]he hunting, pursuing, capturing, killing, or wounding of any game animal, birds or fish in or upon any game refuge, rest ground, or closed water or closed area or during any closed season established or proclaimed by the state game commission." See also N.M.S.A. § 17-2-1 (Michie 1978). The DGF implements this authority in 19 N.M.A.C. 31.1, *Hunting and Fishing - Manner of Taking*, State Game Commission, New Mexico Department of Game and Fish, April 1, 1995. This regulation is specifically limited to methods of hunting. The only significant exception to that conclusion is N.M.A.C. 31.1 § 17.3 which provides that "[i]t shall be unlawful, at any time, to pursue, harass, harr, drive, or rally any protected species by use of or from a motor-driven vehicle, powerboat, sailboat, or aircraft." This prohibition, though made greater by the phrase "at any time," remains weaker than it might be because landowners remain free to harass game on foot, from horseback, or any permutation involving dismounting, hiking, or cycling in.

⁸² Landowner Agreement, *supra* note 7, at 1.

⁸³ See generally Landowner Agreement, *supra* note 7. In particular, the Landowner Agreement does not work to prevent the landowner from acquiring GMU-wide permits, selling them, and then harassing all the resident elk into leaving the landowner's property. In such a case, the landowner can reap the financial benefits of the arrangement and suffer few of the serious consequences of depredations and hunting. The regulation exacerbates this problem if the DGF does not make annual verification inspections.

⁸⁴ 19 N.M.A.C. 30.5 § 8.8.

⁸⁵ 19 N.M.A.C. 31.8 § 1; 19 N.M.A.C. 31.8 § 2.

⁸⁶ The regulation specifically provides: "The Director may authorize population reduction hunts for ... elk ... when justified in writing by department personnel." 19 N.M.A.C. 31.8 § 8.1.

There is no clear regulatory definition of when permits can be issued, and no evidence that they will be issued in accordance with broader plans for elk population or for landowner elk burdens.⁸⁷ The population goals for elk herds represent a public policy decision. Allowing discretionary permits without substantial guidance and supervision by either the public or officials accountable to the public directly undermines the policy which determined the population goals: it is no longer policy for New Mexicans generally, but a policy for the District Chiefs. The unlimited delegation of discretion leads to derogation of the statewide policy and a clear preference for local interests. The wildlife of the state is to be managed for the state, and the broader the local discretion, the less meaningful statewide management plans will be.

Just as discretion undermines the regulatory purposes, so do special depredation hunts. These special hunts are counterproductive to the goal of managing the elk herd population for the residents of the state and in ensuring compensation to landowners. The burden on private landowners of allowing public hunters onto privately-owned land is substantial. During the landowner-permit process, the landowner retains some control over the process of getting compensation. The only goal of out-of-season depredation hunts is population reduction,⁸⁸ and the landowner does not acquire title to the permits and cannot sell them for compensation.⁸⁹ Thus, these permits offer the landowner only the benefit of reducing the elk population,⁹⁰ but not compensation for resident elk and no second try at a compensatory hunt. Consequently, these hunts only provide localized benefits to selected ranchers. There is no showing that non-participating ranches have access to either depredation hunts or to discretionary permits.⁹¹ Therefore, the only method for reducing the elk burden forces landowners to suffer invasive hunting on their private land; those that do not wish to suffer the invasion are left without a legal remedy.

⁸⁷ See 19 N.M.A.C. 31.8 §§ 8.1- 8.2.

⁸⁸ 19 N.M.A.C. 31.8 § 8.1.4; 19 N.M.A.C. 31.8 § 8.2.4.

⁸⁹ 19 N.M.A.C. 31.8 § 8.2.5 provides: "An agreement will be signed by the landowner disallowing the ability to charge a fee for the authorizations or associated trespass rights."

⁹⁰ 19 N.M.A.C. 31.8 § 8.2.4.

⁹¹ The permits and proof must be applied for before consideration is made. The discretionary permits are "allocated to affected ranches" in cases where necessary "to achieve the desired harvest ... on a case-by-case basis." 19 N.M.A.C. 30.5 § 8.5; 19 N.M.A.C. 30.5 § 8.8.1.

3. Marginal Ranches and Fractional Elk

Because trophy hunters most value bull elk permits, the key to determining a ranch's compensation for elk depredations is the number of bull permits.⁹² The highest bidders pay for horns on the wall. The most frequent complaint by landowners is their inability to use cow elk permits for profit.⁹³ Ranches must advertise to sell the permits,⁹⁴ and the cost of advertising, added to the cost of bearing the elk, must be less than the price paid for the permit if it is to be profitable. When a ranch receives only one permit, it does not benefit from economies of scale in advertisement.⁹⁵ When the smallest ranch receives a single permit for a cow license, its expected return is much less, which exacerbates the problem. Thus, a larger ranch can use its bull elk permits and their higher return to offset the lower return from cow permits, while a smaller ranch cannot do so. The costs of carrying male and female elk on private land are essentially the same,⁹⁶ it is only the sale price of permits which distinguishes the value of the permits. Consequently, the smaller marginal ranch receives less compensation from the permit process, even with the same per-acre burden of elk. This difference in levels of compensation is

⁹² See Decker, Daniel J, et al., *Theoretical Developments in Assessing Social Values of Wildlife: Toward a Comprehensive Understanding of Wildlife Recreation Involvement*, in VALUING WILDLIFE (Decker, Daniel J. & Goff, Gary R. eds.) (1987) 90-1. Those authors suggest that hunters progress through stages of participation that can be characterized based on satisfaction of their needs. Even when a hunter moves to the highest level of participation, in which the hunter "finds satisfaction in the total hunting experience." The key is that "[t]here is a breadth of satisfactions available to him." *Id.* Consequently, even if the hunter progresses past the trophy stage, the hunter will still derive satisfaction from the trophy qualities of the target.

⁹³ Interview, Al Schneberger, Nov. 7, 1995.

⁹⁴ Advertisement here is used broadly to mean any communication initiated by private parties. At a minimum, it requires conversation which has opportunity costs, and at the most, it is purchased communication.

⁹⁵ Economies of scale in advertisement would produce a lower cost of advertising per permit sold. The notion is that a single advertisement might be adequate to sell one or a hundred permits, but the act of advertisement is a fixed cost which can be amortized amongst the total number of permits sold. The scope of this paper does not include substantial discussion of fragmentation of the permit market, diversification of the permit market, or the inherent flaws in advertising a single price in classified advertisement. These elements are decidedly secondary to the simpler notion that the cost of advertising can be spread amongst all permits sold.

⁹⁶ The cost of carrying a cow might be slightly higher if the cow is bearing a calf. Both the calf after birth, and the cow's increased consumption prior to calving, might raise the forage losses over those caused by bull elk. The distinction is likely to be slight, and certainly not key to the analysis of the burdens on the landowners.

aggravated when the landowner suffers substantial invasion of his land by hunters in the process of using the single permit allotted to their ranch.⁹⁷

In addition to the problems discussed above, the permit process creates fractional elk. These artificial elk are the fractional uncompensated land left when the regulatory formula divides the predetermined quantity of permits throughout the GMUs total occupied acres. The fractions in allocating permits occur for two reasons. First, because individual landowners do not have the undivided year-round attention of resident elk.⁹⁸ Elk migrate to summer and winter forages throughout the year, and consequently, landowners cannot measure depredations by simply counting elk.⁹⁹ Second, the fractions appear because ranch sizes are inconsistent with the occupied acreage requirement per landowner permit (a number which varies from GMU to GMU and from year to year).¹⁰⁰ These fractional elk appear in every ranch calculation, but as the ranch

⁹⁷ A landowner bears the full cost of hunter "misses" where hunters come onto the land and fail to take a licensed animal. A landowner wishing to drop the resident elk population as low as possible might sign the waiver and endure a great many "pass-through" hunters and their failures. See Agreement, *supra* note 7, at 1. At a minimum, a hunting failure results in higher future costs created by a larger resident elk population. The problem is exacerbated because there is no guarantee that this specific landowner will be compensated by additional permits in the future.

⁹⁸ See Boyd, Raymond J., *American Elk, in Big Game of North America* (Schmidt, John L, & Gilbert, Douglas L. eds.) 11, at 18-19. See also COLO. REV. STAT. § 33-3-201 which contains the finding that:

"(a) [r]uminating animals such as cows, deer, antelope, and elk tend to eat for short periods of time during the day and then move to resting places at other times, making it appear as though they are not continuously present; and

"(b) Notwithstanding such appearances, it is appropriate to recognize that when such animals graze on private or leased private land intermittently during any given day, the amount they consume may be comparable to the amount they would consume if they remained present and visible on such land for the entire day."

⁹⁹ See Boyd, *supra* note 45, at 18-19.

¹⁰⁰ When considering the effect on a single GMU, the formula in 19 N.M.A.C. 30.5 §§ 8.3 - 8.5 can be reduced to an occupied acreage requirement per permit allocated. This number will vary across GMUs for a variety of reasons. The number of participating ranches, the acreage of participating ranches, the percentage of hunting successes within the GMU, and the DGF's elk population estimates and targets will all influence this number. Once the formula adjusts the acreage of each participating ranch for its level of occupation and goals, this number can then be divided by the total landowner permits available. For example, assuming that every ranch in a GMU is sized as a multiple of 50 acres, using two diametric sizes like 50 acres and 5000 acres, and assuming, that the GMU formula determines that for each 30 acres a landowner permit will

size increases, the impact of the fractional elk decreases proportionally.¹⁰¹ When the formula is used to calculate permits, remainders in the division of total occupied weighted acres, and the total permits available, occur.¹⁰² The regulation does not give explicit preference to every applicant with bona fide verifiable depredations,¹⁰³ thus the regulation does not assure that every such applicant will get at least one permit.¹⁰⁴ Consequently, some landowners with depredations will be denied permits because of their ranch size.¹⁰⁵ Fractional elk represent much smaller burdens for larger ranches, because they will receive permits to sell and thereby offset the marginal uncompensated elk burden. When the smaller ranches receive no permits, they have no legal remedy for their elk burden and fall outside the ambit of the regulatory system.

4. Fixed Costs: Limited Benefits From Transfers

The sole method the regulation provides for compensating landowners for the burden of their depredations is the use or transfer of permits.¹⁰⁶ Once awarded, the permit becomes private property, fully transferable between buyer and seller.¹⁰⁷ Individual permits might be limited to ranch-only use, but the transfer of the permit is not barred. The profitability of the transfer is dependent on the individual landowner acting to advertise and negotiate the price for the permit, and thereby whatever compensation for the elk depredations, and the DGF does not intervene in that process.

The transfer process imposes costs on the parties, even if they negotiate conditions which

be awarded, the two ranches will suffer significantly different burdens. The smallest ranch will be uncompensated for 40% of the total burden suffered, while the larger ranch suffers only .04% uncompensation.

¹⁰¹ See Table 1.

¹⁰² See 19 N.M.A.C. 30.5 § 8.4.1; 19 N.M.A.C. 30.5 § 8.5.

¹⁰³ Compare 19 N.M.A.C. 30.5 § 8.5; 19 N.M.A.C. 30.5 § 8.8.

¹⁰⁴ 19 N.M.A.C. 30.5 § 8.8 provides: "additional landowner permits may be allocated to affected ranches."

¹⁰⁵ See Table 1.

¹⁰⁶ See Access for Private Lands in New Mexico, Santiago Gonzales, Trans. 54th N.A. Wildl. & Nat. Res. Conf (1989) 179 at 180.

¹⁰⁷ *Id.*

are most favorable to both. These costs include applying for the permits,¹⁰⁸ inspection by the landlord and verification by the DGF,¹⁰⁹ marketing the permit, and negotiating with a pool of potential buyers for the best price. Moreover, there will be technical costs because the return-maximizing landowner might need to waive the right to exclude other permit-bearing hunters.¹¹⁰ Though the landowner is not required to sign the waiver clause in the application,¹¹¹ a ranch-only permit would be less valuable to a hunter than a game management unit-wide permit. A landowner intending to market permits broadly and thereby to compete with other landowners across the state, would prefer to make the waiver and sell the more valuable permits, even with the higher internal costs.¹¹²

Landowners suffer other costs as part of the regulatory compensation process. Aside from privately-caused damage to fencing, which is punished by New Mexico law,¹¹³ the private parties bear the full costs of the hunting.¹¹⁴ In a competitive market for permit sales, the most cost-efficient sellers will be those who can minimize the transaction costs for each permit sold. The marketing and verification/inspection costs are fixed costs, and consequently are reduced per permit as the quantity of permits sold rises. These fixed costs are what provide the marginal profit between equal landowners. There will be other factors such as hunting amenities or

¹⁰⁸ *Id.*

¹⁰⁹ Landowner Agreement, *supra* note 18, at 2 instructs: "landowner ... will provide reasonable access to include keys and/or combinations if necessary, to locked gates for Department personnel."

¹¹⁰ Landowner Agreement, *supra* note 18, waiver clause, at 1.

¹¹¹ Landowner Agreement, *supra* note 18, at 1.

¹¹² There is also a prisoner's dilemma problem here. Each landowner can maximize the return gained by each permit if each other landowner also makes the waiver. Assuming that elk density across a GMU is consistent, this would not be problematic. If that density varies, it behooves a landowner with high elk density to refuse the waiver and to hoard the resident elk for the permits he can market. There is another reason to refuse the waiver in variable-density GMUs: a landowner making the waiver and possessing high density populations is likely to have more hunters on the land. That 'invasion cost' caused by other permits which the landowner did not profit from would be a disincentive to continue to waive the exclusionary right.

¹¹³ N.M.S.A. § 40-47-12 (1953); Brown v. Martinez, 361 P.2d 152 at 156.

¹¹⁴ Gonzales, *supra* note 2, at 181.

vehicle access which affect the price chargeable per permit.¹¹⁵ Consequently, the larger ranches can better minimize the per unit fixed costs, and will push smaller ranches, which cannot meet those reduced costs out of the permit-selling market.

Though its purposes are described as applying to all landowners, the regulation does not assure all landowners that their individual costs will be recovered by the sale of permits.¹¹⁶ Under the guise of granting all landowners the freedom to negotiate permit prices, the real effect of the regulation is to encourage the propagation of wildlife by a select few ranches which are the most profitable. The most lucrative ranching operations will not be those which merely market permits, but those which receive numerous permits and carry more bull elk.¹¹⁷ Large ranch owners can facilitate the growth of the resident elk herds.¹¹⁸ By removing cattle and growing the correct forage, the landowner can enhance the resident elk population, qualify for more landowner permits, and dominate the market. A large ranch owner might even have an incentive to under-report his burden to keep the total permits sold down, raising the value of permits within the GMU by limiting the supply of permits available. The result is that the compensation for depredations on private land accrues to a limited few that can offer a specialized service. Because they cannot compete for higher levels of compensation, small landowners have little incentive to participate aside from their own enjoyment. After personal consumptive demand for elk is fulfilled, elk are more likely to be chased off than destroyed in accordance with the regulatory goals.

¹¹⁵ If these beneficial conditions are incidental (such as easy vehicle access), then the goods are essentially the same. If they are created in response to hunter demand (such as lodging, guides, or blinds), the good provided has changed substantially.

¹¹⁶ Gonzales, *supra* note 2, at 180. Further, the regulation defines part of its scope as "[l]andowners who experience elk utilization within their deeded lands." 19 N.M.A.C. 30.5 § 2. Additionally, the criteria for establishing the desired elk populations do not include ensuring even the most rudimentary management of the landowner permit market (which might ensure that depredated landowners are guaranteed a recovery). *See* 19 N.M.A.C. 30.5 § 8.2.

¹¹⁷ *See* Table 2.

¹¹⁸ *See* Lueck, Dean, *Property Rights and the Economic Logic of Wildlife Institutions*, 35 NAT. RESOURCES J. 625, at 643. Lueck states "as the size of landholdings increases, the resulting decrease in the costs of contracting among landowners will increase the gains from transacting an agreement among the landowners and the more likely it is that the rights to the wildlife stock will be established." For a large landholder in New Mexico, the prophecy is self-fulfilling. Because the DGF already grants limited property rights to elk to landowners, applying Lueck's model indicates that the decreasing contract costs will favor the larger landowners. Applying this note's model (suggesting that there are substantial fixed costs), the implication is clear: the largest landowners and only the largest landowners have a direct and substantial interest in maintaining elk populations.

5. Administrative Failures: Appeals and Individual Arrangements

The regulation allows appeals of formula-based allotments.¹¹⁹ Landowners are not required to accept the offered permits,¹²⁰ but are limited to them if they do accept the allotment.¹²¹ The appeals process is strictly limited to the formula-based permit allotments.¹²² The landowner cannot challenge the award of discretionary permits.¹²³ Further, the landowner cannot challenge the gender-balance of the permit allotment, because the gender allotment is not generated as a function of the formula.¹²⁴ The regulation does not provide guidance for the allotment of discretionary permits, aside from some general descriptions,¹²⁵ and discretionary allotments are not reviewable by DGF administration or the public.¹²⁶ The gender burden of the allotment does not appear subject to administrative review, and no provisions for gender preferences for small ranches appear in the regulation.¹²⁷ An appeal of the gender distribution allocated to landowners in their permits would at least ensure a minimum return to small landowners. Ideally, preference should be given to granting bull-elk permits to small landowners.

Though the regulation allows appeals of formula allotments to the allotment given to the appealing landowner,¹²⁸ a number of other decisions should be appealable by landowners. For example, when a landowner is denied permits, and discretionary permits are awarded within the same GMU to other landowners, challenge to the inspection of lands and the relative elk burdens would be appropriate. Further, a landowner who was denied permits should be allowed to question the inspections of other local ranches and their allotments, since inaccuracy in the measurement of other ranches could bias the required burden upwards, leading to unjustified

¹¹⁹ 19 N.M.A.C. 30.5 § 9.2.

¹²⁰ Landowner Agreement, *supra* note 18, at 1; Gonzales, *supra* note 2, at 181.

¹²¹ See 19 N.M.A.C. 30.5 § 9.0; 19 N.M.A.C. 30.5 § 8.8.1.

¹²² 19 N.M.A.C. 30.5 § 9.2.

¹²³ *Id.*

¹²⁴ See 19 N.M.A.C. 30.5 § 8.4 - 8.5.

¹²⁵ 19 N.M.A.C. 30.5 § 8.2.

¹²⁶ 19 N.M.A.C. 30.5 § 9.

¹²⁷ 19 N.M.A.C. 30.5 § 8.5.

¹²⁸ 19 N.M.A.C. 30.5 §§ 9.1 -9.2.

denial.¹²⁹ By limiting the appeals process to formula-based allotments, the regulation encourages discretionary permits and prevents substantial public review. Because wildlife is managed for the benefit of the public, it follows that there should be some public accounting for discretionary decisions made by the DGF.

The regulation serves to govern two elements within the process of achieving state policy. First, it works to achieve the general state policy outlined in N.M.S.A. § 17-1-1,¹³⁰ and second, the specific state policy outlined by the determinations of population targets made by 19 N.M.A.C. 30.5¹³¹ and 19 N.M.A.C. 31.8.¹³² Its balancing of previous hunting successes and ultimate targets work to produce a state policy goal of harvests and revenue.¹³³ The closer total landowner participation comes to full participation, the more elk populations will reach the desired equilibrium. The fewer the claims in a GMU, the more individually important a landowner will be.¹³⁴ Specifically § 8.5.2 and .3 provide that a specific ranch's allotment is related to its proportion of the overall total ranch acres depredated by elk¹³⁵. The larger the to private land occupied by elk (depreciated by density of depredation), the larger the minimum required occupied acreage for a permit to be allotted¹³⁶. Consequently, with minimal participation, a small ranch will receive permits above the equilibrium, limiting its burden to a

¹²⁹ This is especially problematic where the GMU is a heterogenous blend of large ranches and smaller ones. Where there is homogeneity, the risk of this other ranch bias falls. *See* Table 1.

¹³⁰ 19 N.M.A.C. 30.5 § 3.

¹³¹ *See* 19 N.M.A.C. 30.5 § 3; 19 N.M.A.C. 30.5 §§ 8.1-8.5.

¹³² *See* 19 N.M.A.C. 31.8 § 13. Note that within this regulation, the discretion of the local District Chief to countermand the general social policy is limited. *See* 19 N.M.A.C. 31.8 § 13.1. Furthermore, the Area Chief's discretion to permit private land population reduction hunts ("depredation hunts") on private land is based on administrative input from the District Chief as well as input from the landowner. The actual numbers allocated through the formulae in 19 N.M.A.C. 30.5 §§ 8.3-8.5 are determined through the State Game Commission, and spelled out in 19 N.M.A.C. 31.8 §§ 13.6-13.7.

¹³³ *See* 19 N.M.A.C. § 8.2.

¹³⁴ 19 N.M.A.C. 30.5 § 8.5.

¹³⁵ 19 N.M.A.C. 30.5 § 8.5.

¹³⁶ 19 N.M.A.C. 30.5 § 8.5.3.

position lower than state policy prescribes. As participation rises, its burden will rise,¹³⁷ and its ability to offset the burden by compensation will fall. As noted above, small ranches suffer the greatest impact by the presence of even a few elk, when compared to larger ranches. The regulation thus puts increasing burdens on them to advertise, and to do so successfully. This could eventually drive the small-ranch participant from the market for bearing elk on private lands.

While this regulation implies a burden on landowners in planning desired elk populations for GMUs,¹³⁸ it discourages consideration of those burdens. The authority given to the DGF is plenary.¹³⁹ Its goals and methods of achieving those goals should be subject to public review. Further, the regulation does not provide for public planning and input¹⁴⁰ as it determines those methods and goals. This planning and input is not merely an abstract public desire for more wildlife expressed in terms of additional elk, it is a gauge of the changes in the local ownership and usage of land and a measure of the economic viability of certain types of land uses. If there were adequate demand, it could be cost-effective for ranches to specialize in outfitting and hunting rather than cattle ranching. The current regulation does not consider these and similar economic shifts and the role of the ranches in these changes when it plans for elk populations.¹⁴¹

In addition to the economic shifts that marketing elk can produce on ranches, other individual management decisions can have effects on elk populations. Individual landowners fencing out elk can have substantial effects on nearby residents, and even on the elk populations at large. Elk are significantly mobile - capable of migrating 250 miles between summer and winter seasons - and cross a number of terrains in New Mexico.¹⁴² They maintain seasonal

¹³⁷ 19 N.M.A.C. 30.5 § 8.5.

¹³⁸ Compare 19 N.M.A.C. 30.5 § 2, which provides that it serves "all hunters who wish to recreate on deeded lands in New Mexico," with 19 N.M.A.C. 31.8 which provides that agents of the DGF "may authorize population reduction hunts for ... elk ... when justified in writing." The first demonstrates an understanding of regular and continuous elk incursion on private lands, while the second responds to an incidental incursions by elk.

¹³⁹ N.M.S.A. § 17-1-1.

¹⁴⁰ 19 N.M.A.C. 30.5 § 8.1 provides only that: "The Director, upon approval of the State Game Commission, at the annual big game regulation Commission meeting, shall establish the number of elk licenses within game management units through use of the elk allocation system herein described." It does not provide for explicit inclusion of public preferences.

¹⁴¹ *Id.*

¹⁴² Boyd, *supra* note 45, at 19.

forage areas and shift between them.¹⁴³ Consequently, erecting elk-proof fencing could shift the migratory patterns of a specific herd or could make migration impossible. Without consideration of landowner interests and without accounting for fencing plans of landowners, interruptions in seasonal elk shifts and in population dynamics are possible. The incentive to use elk-proof fencing exists, and must be considered when the SGC determine long term elk population targets.

Furthermore, the elk's migratory patterns might be better managed in a regionally coordinated manner. It might be desirable to market regions as elk havens where hunters can hunt on private land without fear of damaging cattle or trespassing. By coordinating landowner desires for elk population levels, interest in elk-proof fencing, and the economic interest in commercial hunting of the elk, the returns to the state and the individual ranchers could be raised. Also, by coordinating those interests, direct compensation to landowners by interested parties could be facilitated. As it stands, the state does not consider the direct consequences of arrangements where private parties pay landowners to free their land from cattle or to use the land for free-roaming elk.¹⁴⁴ These types of "dedicated land for compensation" deals¹⁴⁵ would

¹⁴³ *Ibid.*

¹⁴⁴ Ranches are considered only in terms of their total deeded acreage. 19 N.M.A.C. 30.5 § 8.5. While the elk-proof fencing would affect the degree of depredations, this is only a factor if the DGF conducts regular inspections. Without a duty to report the reduced depredations, a landowner can undermine the purpose of 19 N.M.A.C. 30.5 § 8.5 by taking more permits than would be merited had the elk-proof fenced land been discounted from the total deeded acreage. The regulation does not explicitly consider the changes in practical environment caused by individual management decisions of this sort.

Additionally, the regulation does not account for arrangements where compensation is paid to landowners to remove cattle from private land. In such a case, the regulation would assume 100% occupation and award landowner permits accordingly. This exchange causes two possible results. First, the landowner can receive the economic windfall and sell the permits in addition to the prior agreement's compensation. If the purpose is to compensate landowners for elk displacement of cattle, the regulatory purposes are undermined. Second, if the landowner does not apply for permits and does not reap whatever windfall exists, the DGF will not accurately measure elk populations by its deductive methods. Consequently, the DGF must at least make some accounting for the change in use caused by these arrangements when it estimates population and allocates permits.

¹⁴⁵ Typically, the landowner agrees to dedicate a quantity of land for a specific use for monetary compensation. As Gonzales noted, other writers found that landowners felt that "wildlife had not paid its way" by matching the rates of return available from other uses. Gonzales, *supra* note 2, at 180. One way of allowing higher returns to wildlife uses is protecting

accurately measure the public interest in wildlife and elk specifically. It would seem appropriate for any elk on private land policy to consider this form of compensation, and to adjust for the effects on elk population and landowner permits.

In conclusion, there are five key failures of the regulation which undermine the purposes of the regulation. The regulation fails to manage the internal and external incentives operating on landowners as a group and individually. The smallest landowners have no special protection from the burdens of elk, and the regulation marginalized these ranches by inflicting the greatest burdens on them. Ultimately, the regulation fails its purposes because it allows excessive discretion and does not account for specialized land-use decisions.

B. Regulatory Inconsistencies: Common Law and Statutory Failings

While the regulation fails for all the reasons discussed above, the regulation also suffers from conflicts with the common law and statutory provisions of New Mexico law. First, regulation conflicts with statutory provisions because the DGF does not allow for cost-benefit consideration of the elk population, and fails to consider the long term shifts of the population. Second, the regulation prevents the landowner from protecting the land directly. Thus, the landowner loses control over the regulatory process on private land, which conflicts with the purposes of other statutory doctrines of land management. Finally, the regulation contradicts common law trespass protection because the regulation presumes the presence of elk on private land.

1. A Cost-Benefit Conjunctive Analysis is Needed

In a recent article, Dean Lueck posits a model in which landowner rights to wildlife should be extended under certain circumstances.¹⁴⁶ Though wildlife-related land uses can most easily be described as various combinations of wildlife and a single other use, the model conceives of multiple forms of use of the same plot of land. His model demonstrates that at times, because of contract costs, returns from wildlife uses will outweigh returns from more traditional uses, and that this leads to acquisition of private rights in wildlife.¹⁴⁷ The model assumes that the landowner retains control over the choice between competing uses for privately owned land.¹⁴⁸ If

these forms of compensation. Even assuming the DGF accounts for dedicated land in allocating permits to prevent a windfall to anyone, if the DGF accounts for the elk by reducing the elk population elsewhere, the public interest in changing the elk population is misserved.

¹⁴⁶ See Lueck, Dean, *Property Rights and the Economic Logic of Wildlife Institutions*, 35 N. RESOURCES J. 625.

¹⁴⁷ *Id.* at 643-645.

¹⁴⁸ *Id.* at 638-42.

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In conclusion, there are five key failures of the regulation which undermine the purposes of the regulation. The regulation fails to manage the internal and external incentives operating on landowners as a group and individually. The smallest landowners have no special protection from the burdens of elk, and the regulation marginalized these ranches by inflicting the greatest burdens on them. Ultimately, the regulation fails its purposes because it allows excessive discretion and does not account for specialized land-use decisions.

B. Regulatory Inconsistencies: Common Law and Statutory Failings

While the regulation fails for all the reasons discussed above, the regulation also suffers from conflicts with the common law and statutory provisions of New Mexico law. First, regulation conflicts with statutory provisions because the DGF does not allow for cost-benefit consideration of the elk population, and fails to consider the long term shifts of the population. Second, the regulation prevents the landowner from protecting the land directly. Thus, the landowner loses control over the regulatory process on private land, which conflicts with the purposes of other statutory doctrines of land management. Finally, the regulation contradicts common law trespass protection because the regulation presumes the presence of elk on private land.

1. A Cost-Benefit Conjunctive Analysis is Needed

In a recent article, Dean Lueck posits a model in which landowner rights to wildlife should be extended under certain circumstances.¹⁴⁶ Though wildlife-related land uses can most easily be described as various combinations of wildlife and a single other use, the model conceives of multiple forms of use of the same plot of land. His model demonstrates that at times, because of contract costs, returns from wildlife uses will outweigh returns from more traditional uses, and that this leads to acquisition of private rights in wildlife.¹⁴⁷ The model assumes that the landowner retains control over the choice between competing uses for privately owned land.¹⁴⁸ If

these forms of compensation. Even assuming the DGF accounts for dedicated land in allocating permits to prevent a windfall to anyone, if the DGF accounts for the elk by reducing the elk population elsewhere, the public interest in changing the elk population is misserved.

¹⁴⁶ See Lueck, Dean, *Property Rights and the Economic Logic of Wildlife Institutions*, 35 N. RESOURCES J. 625.

¹⁴⁷ *Id.* at 643-645.

¹⁴⁸ *Id.* at 638-42.

the control in question relies on rights to use the whole plot of private land to produce goods as the landowner chooses, then any time wildlife that the landowner does not have rights to invade that land, this diminishes the private rights. In applying Lueck's model to 19 N.M.A.C. 30.5, the question is whether the wildlife on private land is merely accidental overflow of wildlife from state land, or whether it is somehow distinct from public land wildlife, and therefore, whether the landowner should have some right to the wildlife on private land.

Under New Mexico statutory provisions, there is no distinction between overflow and privately-resident wildlife.¹⁴⁹ Elk are one of the many wildlife products managed by the DGF.¹⁵⁰ Assuming the legitimacy of its elk provisions, 19 N.M.A.C. 30.5 and 19 N.M.A.C. 31.8 must also meet the test implied in N.M.S.A. § 17-1-1. That statute defines the policy of New Mexico underlying the State Game Commission wildlife regulations. Thus, the population goals and corresponding permit allocations must meet a test of adequacy.¹⁵¹ State regulation of and private production of wildlife jointly produce wildlife where private lands voluntarily serve to expand production of state-sponsored goods, by contributing some fraction of their rights in land to the production of those state-sponsored goods.¹⁵² Assuming that New Mexico can coopt private land in this manner without significant input from landowners, the question is not whether more elk can be supported, but whether it is economically efficient to do so.¹⁵³ Because a number of wild ruminants compete for generally the same forage,¹⁵⁴ production of one species would require consideration of the burdens of the other species on the same lands.

Neither is this economic balancing a problem for only one type of landowner, or only a problem of balancing the interests of the DGF and a single landowner. Even though elk eat

¹⁴⁹ See generally N.M.S.A. § 17-1-1; N.M.S.A. § 17-1-14.

¹⁵⁰ Gonzales, *supra* note 2, at 180.

¹⁵¹ N.M.S.A. § 17-1-1.

¹⁵² See *supra* note 79; Gonzales, *supra* note 2, at 180-181. By deeming private property as probable habitat for elk, the DGF uses that private property for the public purpose of raising elk. See Lueck, *supra* note 146, at 655-61. The voluntarism of the relationship between the private landowner and the DGF is questionable. Even though there are certain regulatory elements which are entirely voluntary, landowners cannot opt to have no resident elk. See generally, Landowner Agreement, *supra* note 18; 19 N.M.A.C. 30.5.

¹⁵³ Compare N.M.S.A. § 17-1-1; 19 N.M.A.C. 30.5. Note that neither statute nor regulation defines an upper bound to the size of population. It seems likely that the only real upper bound would be the public willingness to allow the unrestricted expansion of elk on private land and the degree of administrative accountability to legislators and their invaded constituents.

¹⁵⁴ Boyd, *supra* note 45, at 20-1.

grass-type forage for the majority of the year,¹⁵⁵ if the herd loses substantial portions of their customary land because of elk-proof fencing, the herd can subsist on forested land.¹⁵⁶ Thus, for at least a few seasons, direct and damaging consequences can occur to a wide variety of rural landowners. The policy choices underlying the propagation of elk must be considered within the benefits that can be derived from propagating other species, including cattle. Unilateral planning for one species without explicit consideration of the attendant burdens produces inefficient results.

One of these results is that the only limiting factors on an individual species is the other species. On private lands, where cattle compete with elk, and a landowner is unable to substantially limit the elk without harassing them, the cattle become the adjusting factor. Given feed requirements for cattle and given limited forage product from the range, the elk drive cattle from the land. When cattle are displaced by elk or deer, the landowner receives limited compensation for the lost income. The effects on the cattle, whether from reduced carrying capacity leading to reductions in cattle herd size or from reduced feed for the cattle requiring increased dietary supplementation, directly affect the landowner. In certain cases, the displacement may bring a net improvement to the productivity of the land. In most cases, however, the landowner permit process is inadequate to compensate for losses incurred by every landowner. Without balancing the economic benefits with the costs shifted to landowners when propagating elk, the current policy does more harm than good.

2. Protecting Property: Regulatory Interference

Ranching is a risky business. Storms, drought, disease, predators, and elk can substantially affect a rancher's operation. The risk has always rested with the rancher: he has always borne the consequences for acts of nature. Though insurance may cover some forms of injury, New Mexico law supports the affirmative protection of property from other forms of injury.¹⁵⁷ For example, New Mexico issues crop-and-property licenses for destruction of animals

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See Stewart v. Oberholtzer, 258 P.2d 369 at 370 (1953) ("where the running of livestock is lawful, it is the duty of the owner of property to enclose it should he desire to keep roaming stock off his premises." See generally Woofter v. Lincoln, 309 P.2d 622 (1957); Gallegos v. Allemande, 157 P.2d 493 (1945). See also N.M.S.A. 30-8-13 ("Every owner or custodian of livestock shall exercise diligence to keep his livestock off the state public fenced highways."); N.M.S.A. § 47-17-3 (1953).

as innocent as jackrabbits.¹⁵⁸ These licenses serve the purpose of protecting private property.¹⁵⁹ The landowner must file a complaint and the carcass remains state property.¹⁶⁰ Allocation and use of elk permits is implicitly conditioned on compliance with the public trust doctrine which defines the state administration of wildlife.¹⁶¹ This trust relationship implies non-malignancy of use.¹⁶²

The current regulation does not contain a non-malignancy test.¹⁶³ There is no explicit statement of non-detrimental use, but other state statutes and regulations which allow landowners to defend their property (within certain guidelines) independent of state wildlife management goals and plans imply it strongly.¹⁶⁴ Thus, there is an inherent inconsistency when the state possesses property defense statutes and then deliberately plans for the wildlife to damage private property. The special forced-participation system created by 19 N.M.A.C. 30.5 interferes with

¹⁵⁸ See N.M. A.G. Op. 1379 (1936), at 120.

¹⁵⁹ N.M.S.A. § 17-3-31.

¹⁶⁰ See State ex rel. Sofecio v. Heffernan 67 P.2d 219, 223 (requiring lawful licensure for private possession). See also N.M.S.A. § 17-2-21 (requiring state officials to attempt to sell the carcass of animals taken illegally). See generally N.M. A.G. Op. 88-43.

¹⁶¹ State ex rel. Sofecio v. Heffernan, 67 P.2d 219, 233; N.M. A.G. Op. 88-43 at 1.

¹⁶² Non-malignancy here is used broadly to mean that the managed wildlife should not be used to the detriment of citizens.

¹⁶³ Compare 19 N.M.A.C. 30.5; 19 N.M.A.C. 31.8.

¹⁶⁴ The DGF controls depredation damage to provide land. It provides short term protection to landowners suffering injury caused by protected species without reference to type of animal causing the injury or type of injury caused. Regulation No. 673, *Depredation Assistance to Landowners*. The New Mexico Legislature provided that compensatory landowner permits be issued for elk and antelope damaging private land. N.M.S.A. §§ 17-3-14 -14.1 (Michie 1978). Further, the basis for those statutes is in N.M.S.A. § 17-3-31 (Michie 1978), which provides that the DGF "may grant permits to owners or lessees of land and for the capture and destruction on their lands of any protected game doing damage to their cultivated crops or property." Where a species is unprotected, the landowner's rights are significantly greater. In N.M.S.A. § 77-1-2 (Michie 1978), the Legislature provided "that it shall be the right of any owner of livestock so killed or injured by the actions of any dog to kill the dog while it is upon property controlled by the owner of the livestock."

the liability assumed by landowners for incidental contact with wildlife.¹⁶⁵ Instead of assuming that elk depredations will be an incidental effect of close contact with elk habitat,¹⁶⁶ the elk will be resident on private lands by plan of the DGF.¹⁶⁷

3. A New Statute Must Strengthen Trespass Protection

New Mexico statutory and common law assert private liability for contacts by either individuals, their real or personal property with other individuals, their real or personal property.¹⁶⁸ Landowners can be held accountable for the damage caused by their herds where causation can be proven,¹⁶⁹ except in specific circumstances where state interests subsume private uses and require private action to serve a public purpose.¹⁷⁰ When, as in the case of elk regulations, the state preempts wholly private liability for wholly private activities, the action has

¹⁶⁵ This interference is in part because the landowner is not the agent of protection, and in part because the protection given is not full prevention of invasion. *See* 19 N.M.A.C. 31 § 8.2; 19 N.M.A.C. 30.5 § 8.5; Gonzales, *supra* note 2, at 179-80.

¹⁶⁶ The physical proximity to otherwise undisturbed elk habitat is likely to produce coincidental contact with elk. The distinguishing factor between that accidental contact and the contact currently experienced is that the DGF plans for its elk population to be partly resident on private lands rather than merely making regulatory allowance for the occasional unintentional shift. *See* 19 N.M.A.C. 31.8 §§ 13.6 - 13.7.

¹⁶⁷ *See supra*, note 96.

¹⁶⁸ Two examples of this assertion are statutes which govern wild dogs and common law nuisance doctrines which govern overhanging tree limbs. N.M.S.A. § 77-1-2 provides that "[i]f any dog shall kill or injure any livestock, the owner or keeper of such dog shall be liable for all damages that may be sustained thereby." In the case of Abbinett v. Fox, 703 P.2d 177 (N.M. Ct. App. 1985), after reviewing the range of doctrines used in other states, the New Mexico Court of Appeals concluded that "[t]he privilege of a landowner to make use of his property as he sees fit is generally qualified by the requirement that he exercise due regard for the interests of those who may be affected by the landowner's activities on the property." It further held, given a finding of nuisance, that "[t]he trial court may grant both damages for already incurred injuries and injunctive relief to prevent future harm where there is a showing of irreparable injury for which there is no adequate and complete remedy at law." Abbinett v. Fox, 703 P.2d 177, 181-82.

¹⁶⁹ Abbinett v. Fox, 703 P.2d 177 at 181.

¹⁷⁰ *See* 618 P.2d 894: "the Legislature intended to protect the general public from injury by imposing liability on governmental agencies when they fail to maintain safe public highways." *Compare Grubb v. Wolfe*, 408 P.2d 756, decided in 1965, *with* N.M.S.A. § 30-8-13(B) (Michie 1978), enacted in 1966. *See also* 6 Nat. Res. J. 306.

two clear effects on private landowners. First, the state action may expand the legal liabilities for landowners without concomitantly expanding their protection. An example of this is that landowners must do more to protect their pasture land from elk depredations when the state increases the volume of those depredations. Second, the landowner may suffer reduced ability to seek legal redress for injuries. An example of this is that a landowner who harasses elk and forces them onto another landowner's property is not liable for the injuries thereby caused.¹⁷¹

As an example of the first effect, consider the statutory provision governing fencing along state highways. Because the condemnation of land for highways directly affected a rancher's pasture fencing, where New Mexico takes private land for the construction of highways, the state accepts the liability for maintenance of the new fences.¹⁷² Further, the state provides the material for constructing the fences.¹⁷³ Though the statute benefits one group substantially,¹⁷⁴ the statute implies a duty owed to all citizens.¹⁷⁵ The state concluded that its social goals of economic development and modernization, by adding and improving roads, merited acceptance of liability for their maintenance. Propagation of elk is a similar goal, and similarly, the decision to propagate elk puts a substantial and new burden on a specific portion of the human population. The regulation notwithstanding, fencing out the elk at substantial cost is the only legal method landowners have to prevent elk depredations.¹⁷⁶

As an example of the second effect on landowners, consider the inconsistency of the current regulation with trespass protection normally afforded the landowner. When a lawful fence exists, private parties are liable for trespass when their personal property (such as cattle)

¹⁷¹ Here, the fences were required because of the danger to the motoring public. See Firemen's Fund Insurance, Inc. v. Tucker, 618 P.2d 894, 898. Notice that N.M.S.A. § 30-8-13 (B)(2) requires that the Highway Department "post proper signs along all highways under its jurisdiction which are not fenced on both sides and which are adjacent to property containing livestock." See also Mitchell v. Ridgway, 421 P.2d 778, 780.

¹⁷² N.M.S.A. § 30-8-13(B)(1).

¹⁷³ *Id.*

¹⁷⁴ See Firemen's Fund Insurance Co. v. Tucker, 618 P.2d 894, 897; Mitchell v. Ridgway, 421 P.2d 778, 778.

¹⁷⁵ This duty is limited to preventing livestock from entering highways, not to general negligence in constructing inadequate fencing. Lerma v. State Highway Department of New Mexico, 877 P.2d 1085 ("to protect the motoring public from wandering livestock"); cf. Calkins v. Cox Estates, 792 P.2d 36, 41 (limiting a landowner's duty owed to the purpose of the fence).

¹⁷⁶ This is true when based on individual action. See N.M.S.A. 17-1-14 (D). The landowner could participate in a depredation hunt, but there is no guarantee of full exclusion of elk.

invades the land of others.¹⁷⁷ Because elk are presumed to be resident and because the definition of lawful fence does not require that the fence be elk-proof, there are two ways in which the current regulations undermine trespass protections: first, when landowners attempt to assert liability against other landowners whose cattle have trespassed; and second, when landowners attempt to assert liability against the state for the trespass of elk on private property. Proof of the trespass claim generally requires that the defendant have intent and knowledge for the invasion to occur,¹⁷⁸ but occasionally those two factors are implied by the circumstances.¹⁷⁹ Consequently, the difficult issue is whether acts by elk serve as a defense to the claim of trespass.¹⁸⁰ Whether or not the elk trampling fences serves as a defense against the claim of failure to maintain a lawful fence (and thereby allowing trespasses to occur), the consequences of elk muddle the issue of personal accountability. Clearly the elk add to the liability of one landowner and hinder the ability of neighboring landowners to protect themselves from trespass by cattle.

Further hindering redress, the landowner will be unable to assert liability against the state even though the DGF manages the elk with an understanding that they will migrate to private lands.¹⁸¹ There are a number of reasons for supporting the extension of liability. The DGF

¹⁷⁷ See Woofter v. Lincoln, 309 P.2d 622; Kingsolving v. Reed, 393 P.2d 20; N.M.S.A. §§ 47-17-1 -2.

¹⁷⁸ Gallegos v. Allemande, 157 P.2d 493.

¹⁷⁹ Id. at 494, where the court noted that "it did not necessarily follow that they 'intended' that they should graze on appellee's land." This statement implies a factual distinction; with sufficiently persuasive facts, the intent might be implied from those facts.

¹⁸⁰ Note that the problem is made more severe by the weak restrictions on harassment of game. Generally, this note assumes that neighboring landowners make similar uses of neighboring land. However valid the assumption is, a review of New Mexico law on the subject of trespass by cattle suggests several considerations. First, that many claims against ranching landowners are brought by dissimilar use landowners. See Gallegos v. Allemande, 157 P.2d 493 (plaintiff under grazed his land while the defendant overgrazed his); Stewart v. Oberholtzer, 258 P.2d 369 (plaintiff owned a decorated residential lot while defendant raised horses); Woofter v. Lincoln, 309 P.2d 622 (plaintiff raised alfalfa while defendant ran sheep); *but see* Kingsolving v. Reed, 393 P.2d 20 (plaintiff sued for rental value of forage taken from an unfenced lot by defendant's surrounding cattle). Second, that lawful fencing is the dispositive factual issue in many of these cases because without lawful fencing, the requirements of proof are too difficult to overcome. Third, that even if a lawful fence existed, it is entirely unclear that damage to that fence by elk is considered anything other than an accident of nature. This suggests that the increased burden falls on the private landowner who suffers the trespass. It is this type of increased burden that this note criticizes.

¹⁸¹ Gonzales, *supra* note 2, at 180-81.

intends to use those private lands as a part of its management plan. Further, the state makes no effort to restrict the movement of its elk herd, and additionally, the state even limits development on land leased from the state.¹⁸² Because the proof of willful conduct requires that it be specific to the claimant's property, a claim against the DGF may be unsupported by the specific facts of the case. However, maintaining elk herds too large to survive on public lands alone and knowledge that they migrate seasonally might serve to imply that the management was deliberate enough to incur state liability. In a common law suit, the implied proof might suffice against a private party. In New Mexico, it would fail because the state retains a limited sovereign immunity, and would need to waive it to be liable to private parties.¹⁸³

C. Mandatory Modifications: Protection from Shifts and Private Appeals

The existing regulation governing compensation for landowners is inefficient and fails to manage the burdens appropriately. Two problematic elements of the current regulation require change. The first is the lack of protection granted to private landowners from sudden elk herd shifts from other private land. The second is the lack of protection granted to landowners from the consequences of being unable to market permits. The following section discusses these two requirements.

1. Protecting Landowners From Shifts

Shifts of elk herds between private lands are the result of a failure to manage the incentives to keep elk on private land. The regulation fails because it does not account for higher financial returns available to landowners without resident elk. Within any regulatory framework which relies on having elk resident on private lands, when there is the opportunity for a

¹⁸² See N.M.S.A. § 9-7-51, which limits the improvements made on leased lands. Estimates of the cost for a mile of elk-proof fencing ranged to \$3000 per mile. By limiting state-land lessees to \$150 fence improvements, the state guarantees that mixed-ownership land cannot exclude elk.

¹⁸³ The New Mexico courts impose a "primary effect test." City of Albuquerque v. Redding, 605 P.2d 1156 (1980). This test resulted in waiver of immunity in Firemen's Fund Insurance Co. v. Tucker, 618 P.2d 894 (allowing suits against the N.M. Highway Department). Thus, the question would be the primary effect of the current statute or regulation, which does not explicitly allow for liability. The courts will construe waiver of sovereign immunity where the purpose is protection of the public, because "[t]he direction indicated . . . in interpreting the Tort Claims Act has been toward a liberal, rather than a narrow, construction of the Act." Firemen's Fund Insurance Co. v. Tucker, 618 P.2d 894, at 896. Consequently, the question is whether 19 N.M.A.C. 30.5 works to protect the public, and the answer is that it does not. Without this purpose, construed waiver of sovereign immunity is unlikely, and the landowner cannot maintain a suit for damages against the state.

landowner to derive more income without resident elk, the regulatory system will fail to achieve its goals because the landowner will always have a limited incentive to shift the elk from the land. Achievement of the general regulatory policies will be hampered by those incentives because of the consequences to the elk which could include death or reduced reproduction. Thus, it must be illegal to harass elk in any way.¹⁸⁴ Other states have adopted strict prohibitions on harassment. These prohibitions are inadequate on their own. It is imperative that the other motives for shifts in wildlife also be taken into account within the regulatory system in order to appropriately manage their consequences.

First, protection must be given to the small landowners. Any landowner who in good faith files a valid and proven depredation claim must be guaranteed either a permit or recovery from the state. This ensures that even the smallest landowners have incentive to report elk depredations. Further, it guarantees that the marginal ranches are not barred from recovering their losses and maintains the landowners' opportunity to realize their economic expectations.¹⁸⁵

¹⁸⁴ One solution to excessive non-fatal harassment of wildlife is to criminalize the attempted act. See WYO. STAT. § 23-1-102 (1977) which defines taking game as to "hunt, pursue, catch, capture, seine, fish, trap, kill, or possess, or attempt to hunt, pursue, catch, capture, seine, fish, trap, kill, or possess." This does not describe the full range of methods available to a landowner. See COLO. REV. STAT. § 33-1-102 (1990), defining harassment of game as "to unlawfully endanger, worry, impede, annoy, pursue, disturb, molest, rally, concentrate, harry, chase, herd, or torment wildlife." New Mexico does not describe harassment in any great depth. See *supra*, note *** (unsure of the number). General regulatory powers governing harassment are granted in N.M.S.A. § 17-2-2, which states "[t]he game animals ... herein defined shall be protected and hunting, taking, capturing, killing, or attempt to hunt, take, capture or kill of any or all species named herein shall be regulated by the state game commission." Consistent with that provision, New Mexico grants endangered and threatened species like protection, stating that "'take' or 'taking' means to harass, hunt, capture or kill any wildlife or attempt to do so." With either the broad or narrow definitions, the statutes err because they focus on the act of harassment and not the indicia of harassment. In doing so they protect only one part of the act, and in doing so, protect only one victim of the act. The recipient landowners must have some role in determining when an act of harassment occurs.

¹⁸⁵ This article suggests that a landowner formulates economic expectations annually. Sudden changes in elk populations interfere with these expectations. Further, the amount of herd shift interference with these expectations is proportional with the size of the ranch. This is another form of the marginal ranch problem: a single elk displacing a single cow matters much to a ranch which can only support one cow. The supporting land might be inadequate to merit a permit under the current regulations. As noted above, the only remaining methods for remediating the problem are illegal: no regulatory system should put such small landowners in a position to be tempted to violate the laws of the State.

Second, the state must maintain seasonal and perhaps daily elk measurement. Elk are prone to shifts during days and seasons.¹⁸⁶ They do not generally stay in the same area over long periods,¹⁸⁷ and they panic in groups.¹⁸⁸ During a given year, elk travel in herds of varying sizes.¹⁸⁹ This could affect a landowner's burden over the course of a year. Thus, a landowner's burden cannot be measured at a single time of day in a single season. More in-depth measurement of elk habits and populations is required to provide for a stable population of elk as it grows and hunting controls its population. Further, consistent and regular measurements would reduce the current incentive to chase off elk after initial verification and subsequent hunts.

Elk-proof fencing poses the largest risk to elk populations after hunters.¹⁹⁰ Within its broad responsibility for managing the elk species, the DGF should have limited oversight over fence installation plans to ensure that there is no substantial disruption of species behaviors caused by unilateral action. The landowner should apply for a permit to erect the fence,¹⁹¹ and the permit should include a certification by the landowner that the land suffered no elk depredations for over a year. With this certification, the landowner assumes the cost of fencing,

¹⁸⁶ Boyd, *supra* note 45, at 18.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* This is especially important for cases of harassment, because elk that panic in groups also trample fences. The closer the elk measurements approximate the various sizes of these groups the better the compensation will match the injury suffered. Panicking of elk is a serious factor when considering the smallest landowner's burden: even if the elk do not remain for a season or longer, trampling alone could do proportionally more damage to a small landowner's ranch.

¹⁸⁹ *Id.*, at 18-20.

¹⁹⁰ See Boyd, *supra* note 45, at 18, where he states that "Rocky Mountain Elk incur relatively large prenatal and postnatal losses. This apparently is due in large measure to restrictive forage conditions on winter ranges and, to a lesser degree on disease and predation."

¹⁹¹ This provision should not govern non-elk-proof fences. Raising permeable fences poses no significant risk to elk and placement of these fences is a ranch-management decision of which the DGF should play no part. Nor should this provision govern elk-proof fences that are outside the geographical limits of the DGF comprehensive elk habitat and fencing plans. The DGF's authority extends only to the elk and their likely and desired locations, and no further. A landowner wishing to raise elk-proof fencing outside the limits of the plan should not fall within DGF regulations solely because the fencing in question might impact elk habitat at some future time.

and the claim of no depredations is presumed to be valid.¹⁹²

The DGF should develop a comprehensive plan for the ideal levels and locations of elk in New Mexico. That plan should describe the location of the desired potential elk-proof fences. If the DGF adopts the privately-proposed fence as part of its long term plans for shifting the migratory patterns of elk within the state, the parties should share the cost of the fencing. The DGF and the landowner should divide the difference between the cost of the elk-proof fence and the cost of the elk-permeable fence¹⁹³ that the landowner could raise instead. The landowner should be immune from challenge of this plan, because the plan is DGF-based and sponsored. The DGF retains the option to not fence the property with elk-proof fencing. Because the result of this choice would be continued elk depredations, the option not to fence should result in annual compensation to the landowner¹⁹⁴ for the opportunity cost of not fully using the land for cattle while the depredations continue.¹⁹⁵

If the DGF opted to pay for fencing, the landowner should be under an affirmative duty to care for the fence. Failure to do so would bar depredations recovery by the landowner. Further, failure to raise the fence within a reasonable period would be deemed a waiver of liability for future depredations by elk. The DGF should provide written notice to the landowner of its intent to provide fencing costs. An adequate time period must be given to allow the landowner to make any necessary financial adjustments.

¹⁹² This presumption should be rebuttable. Either interested private parties or DGF should be permitted to challenge the presumption when the permit is issued. The compliance with DGF species plans for that GMU would make the fence permissible.

¹⁹³ This notion rests on the dual-user principle. The idea is that both users derive benefit from the fence, and it is inappropriate to shift the costs of fencing wholly to the private party. Colorado statutory provisions provide that the Colorado Division of Wildlife should furnish "sufficient and appropriate damage prevention materials" to landowners, or in the alternative, expose itself to liability for damages caused by wildlife. COLO. REV. STAT. § 33-3-103 (1990). The statute conditions the landowner's right to recovery for such damages in a number of ways. COLO. REV. STAT. § 33-3-103. That same provision requires the landowner to use and maintain the materials provided and to limit access fees charged to hunters for access to private lands. COLO. REV. STAT. § 33-3-103 (d) - (g). Quite clearly, the statute allocates the burdens of preventing depredations between the parties.

¹⁹⁴ The compensation should be for single-season displacement damage, and no more. The DGF should not be required to insure the landowner against future losses or damage to the cattle. In other instances, this is the replacement cost of the cattle.

¹⁹⁵ This rests on the principle that the elk displace cattle directly. The landowner would be required to file a depredation claim, describing the depredations, the location, and causes of depredation requiring compensation.

Under current regulations, the landowner may not contract with DGF to leave a portion of deeded lands for elk in exchange for exclusion of elk on other portions of the lands.¹⁹⁶ This type of ecological and economic compromise encourages development of a wildlife industry while limiting the direct invasion damages to the landowner. In effect, the landowner agrees to allow the DGF an easement to use part of the private lands for public purposes with the understanding that the remaining wholly private lands will not be invaded by resident wildlife. Where the landowner grants this form of easement, the DGF should pay for the elk-proof fencing. The lands used in this type of scheme should be selected in accordance with the DGF comprehensive plans for the species.

The DGF should provide the landowner the option to either accept direct monetary compensation or take permits in exchange for elk depredations. These permits function as access permits and licenses for possession of wildlife.¹⁹⁷ The access granted by permits should be ranch-only, but the permits should be transferrable within GMUs for use on other ranches. Landowners should have the full right to exclude hunters from their property and the freedom to limit damage by hunters to their lands. When the landowner accepts the permits, they become private property, and the landowner assumes liability for recovering adequate compensation. If the landowner opts not to participate in the market for elk permits, the landowner recovers only the cost of elk displacement: the access fees arranged between hunter and landowner are not limited.

B. Modifications of the Appeals Process

The appeals process requires substantial modification. Changes should include limiting the use of discretion, expanding the issues raisable on appeal, including inter-season hunts, and ensuring quick appeals. The need for regularity in the system is key because a more rigid system is a system which produces consistent results. This rigidity does not foreclose discretion on the part of local officers, but merely ensures that the use of discretion is consistent with the state policy objectives.

As discussed above, broad discretion on the part of local DGF officers inhibits achievement of the state policy governing elk. By allowing broad discretion, the current regulatory system escapes accountability for its effects on landowners. The system provides variable results and inconsistent compensation to landowners. Discretion in the permit allocation process must be limited by specific conditions and clear factors in the determination of who

¹⁹⁶ More accurately, the landowner must provide copies of deeds to the DGF showing title to all lands. It is unclear that a landowner can exempt a portion of lands from the consideration of total private deeded acres on the principle that the land cannot carry elk because of exclusionary fencing. See 19 N.M.A.C. 30.5 § 8.4 -8.5.

¹⁹⁷ Gonzales, *supra* note 2, at 180; see generally COLO. REV. STAT. § 33-3-103 (1990).

receives additional permits, and at what time. Adding systemic rigidity would allow the DGF to review GMUs for their compliance with the general goals.

On the other hand, some elements of the current regulation are too rigid. When revising the regulations, landowners should not be limited to a single hunting season for their permit-based compensation. Hunts serve a number of purposes,¹⁹⁸ not the least of which is reducing the elk burden on a landowner's property. This reduction is the purpose behind the special depredation hunts currently allowed on state lands.¹⁹⁹ This goal is valid on state lands as well as on private lands. Since the sale of permits is key to compensation of landowners,²⁰⁰ special hunting seasons on private lands should be allowed in instances where the hunt was unsuccessful within the GMU and the landowners received little compensation.²⁰¹ Landowners should be allowed to petition DGF for a special hunt, and the denial of a hunt should be appealable through the ordinary appeals process.

The speed of the appeals process is key to providing useful compensation to the landowner. Currently, the only deadlines the DGF uses are those it imposes on itself²⁰² and on the landowner filing the appeal.²⁰³ Functionally, correction of error in allocation of permits is

¹⁹⁸ See generally Gonzales, at 179-181; Wade, Dale A., *Economics of Wildlife Production and Damage Control on Private Lands*, in *Valuing Wildlife* (Decker, Daniel J. & Goff, Gary, R eds.) 154, at 158.

¹⁹⁹ See 19 N.M.A.C. 31.8 § 8.2.

²⁰⁰ Gonzales, *supra* note 2, at 180.

²⁰¹ In addition, the hunting season could be extended during the fall. This sort of discretion, for a single purpose, with clearly defined conditions would be desirable to achieve the state policy objectives. The two regulations, 19 N.M.A.C. 30.5 and 19 N.M.A.C. 31.8 do not work together. The first remains consistent with its goal, while the second undermines the DGF's incentive to encourage the first because the safety-valve depredation hunt will always be available. Gonzales quotes Aldo Leopold as instructing: "Recognize the landowner as the custodian of the public game on all private land, protect him from the irresponsible shooter, and compensate him for putting his land in productive condition." 19 N.M.A.C. 31.8 is inconsistent with the first and last of those three directives. The first because no incentive exists for the landowner to care for the wildlife if no benefit will accrue, the last because it prohibits compensation for the landowner. 19 N.M.A.C. 31.8 § 8.2.

²⁰² See Landowner Agreement, *supra* note 18, at 2.

²⁰³ See 19 N.M.A.C. 30.5 § 9.

limited by the hunting season, since they are issued annually²⁰⁴ for a specific hunt. Further, errors in allocation cannot be corrected because permits are deemed an annual compensation to the landowners,²⁰⁵ and additional compensatory seasons are unavailable. Existing deadlines do not ensure a speedy answer from DGF because they only serve to limit the use of permits by citizens. Other states instituted administrative deadlines which produce presumptive results favoring the landowner.²⁰⁶ While the landowner must still provide proof of the claim,²⁰⁷ by providing independent administrative deadlines, the arrangement removes the burden from the landowner.²⁰⁸ The burden of initiating a challenge must be borne by the landowner, and the burden of producing a speedy response by the DGF.

²⁰⁴ See 19 N.M.A.C. 30.5 § 8.1.

²⁰⁵ Moreover, permits are deemed a single compensation for the aggregate damages of the resident elk. See Gonzales, *supra* note 2, at 181, where he generalizes that "landowners see authorizations as a compensatory vehicle for the recovery of losses. ... Authorizations provide a vehicle for recovering those expenses caused by wildlife." Since the authorizations are available only once a year, and the depredations are not for prospective damages, the only interpretation remaining is that they serve to compensate for the annualized aggregate damages.

²⁰⁶ See COLO. REV. STAT. § 33-3-103 (2)(e); WYO. STAT. § 23-1-901 (c).

²⁰⁷ See COLO. REV. STAT. § 33-3-104 (3); WYO. STAT. § 23-1-901 (a).

²⁰⁸ A finding of no impact is distinguishable from no response. Where a level of appeals finds the information provided would leave the formula allocation unchanged, that level of appeal is terminated without prejudice against the DGF.

IV. Conclusion

The current regulatory system of allocating elk permits to landowners is inefficient. It creates disincentives to positive management and contradicts the doctrine the State Game Commission relied on in creating the regulation. It provides transfers of money to ranches, with a decided preference for transfers to larger ranches, which marginalizes small ranches and consequently excludes them from the compensatory process which 19 N.M.A.C. 30.5 creates. Consideration of other states' practices suggests a broad range of possible administrative schemes, some of which are particularly appropriate for New Mexico. The proposed statute in Appendix A works to correct the flaws in the current regulatory structure. Consequently, the author strongly advocates adoption of the proposed statutory scheme.

Table 1

Acreage Distributions for G.M.U. Residents Allocated Permits

Acres Unit #	1-50	51-100	101-250	251-750	751-1500	1501- 3000	3000- 6000	6000 +	Unit Total
2	0	2	2	5	5	3	5	3	25
4	21	16	27	48	31	36	16	15	210
5	8	7	25	49	27	15	8	1	140
6	34	40	46	36	5	5	1	2	169
7	0	0	1	6	2	1	1	1	12
9	1	0	1	3	2	2	2	6	17
10	1	0	1	9	6	9	4	2	32
15	10	9	12	28	22	10	12	4	97
16	10	10	17	13	7	3	7	10	67
17	0	0	0	2	4	7	1	1	15
21	0	0	2	0	1	1	0	0	4
34	3	4	8	12	2	2	0	1	32
36	0	0	2	4	0	3	2	3	14
45	0	0	12	12	1	3	2	1	31
46	0	3	4	3	2	5	3	6	26
47	0	0	0	0	0	0	0	1	1
48	1	1	6	8	11	3	2	4	36
49	0	2	11	7	4	4	1	0	29
50	1	0	4	17	5	1	2	1	31
51	1	7	16	20	1	1	0	0	46
52	3	8	18	13	3	1	1	0	48
53	3	10	9	7	2	0	4	1	36
54	0	0	0	0	2	3	1	3	9
55	1	0	3	2	3	3	5	11	28
56	0	0	0	0	0	1	1	1	3
57	0	0	0	11	8	10	4	9	42
58	0	0	0	0	0	1	1	1	3

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Table 2

Selected G.M.U. Acreage and Permit Type Distributions

Acres Unit #	1-50		51-100		101-250		251-750		751- 1500		1501- 3000		3001- 6000		6000+		Unit Totals		
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	
2	0	0	0	2	0	2	3	5	4	6	14	10	35	25	28	20	84	70	
5	0	8	0	7	18	8	86	19	100	25	105	28	118	31	31	7	458	126	
9	0	1	0	0	0	1	0	3	2	0	10	4	11	6	274	143	297	158	
16	0	10	2	9	7	14	15	13	12	7	9	7	23	22	69	77	137	159	
34	0	3	0	4	3	5	17	2	3	0	7	2	0	0	18	11	48	17	
45	0	0	0	0	12	0	17	0	4	0	11	0	14	0	1	0	59	0	
46	0	0	0	6	0	8	2	4	3	3	8	9	2	17	13	112	111	142	154
49	0	0	0	2	10	2	9	1	7	0	25	0	9	0	0	0	60	5	
53	0	3	5	5	9	4	25	6	10	3	0	0	52	12	21	4	122	37	
55	0	2	0	0	2	4	2	0	17	7	44	20	7	85	38	18	961	1111	
																	769 ²⁰⁹	840	96
																	71		
58	0	0	0	0	0	0	0	0	0	0	1	0	2	0	2	0	5	0	

²⁰⁹ Note that this quantity is significantly inflated by a single ranch which anomalously took 400 cow and 200 bull permits, the reverse of the pattern for the remainder of the unit.

Appendix A

Proposed Statute

- I. **Title.** This act shall be known as the "Landowner Elk Damage Compensation Act."
- II. **Purpose.** It is the purpose of this act to do the following:
 - A. To provide a mechanism, consistent with the biological needs of wildlife, to compensate private landowners for damage done to their property, real, personal, or otherwise, by elk managed by the State of New Mexico;
 - B. To ensure that landowners of properties of all sizes are compensated evenly for damage caused by elk, and to ensure that every ranch receives meaningful compensation for that damage;
 - C. To ensure that the management of wildlife responds to public interest by involving the public in setting its wildlife goals; and
 - D. To ensure that landowners have efficient, speedy, and effective recourse to obtain answer for their complaints regarding licensing and permitting decisions, applicable to the landowner, through an internal administrative appeals process.
- III. **Not Within Purposes.** It is not within the purposes of this act to provide a private cause of action against the State of New Mexico for damage caused by elk or within the purposes to create a private cause of action to recover for damage caused by elk owned by private parties.
- IV. **Definitions.** As used throughout the act, the following terms are defined for convenience.
 - A. "Harassment." Harassment of wildlife by private parties is any intentional act tending to annoy, bother, disturb, arouse, frighten, scare, panic, rally, intimidate, or terrify wildlife managed by the State of New Mexico. Harassment is non-fatal to the wildlife.
 - B. "Taking." Taking of wildlife by private parties is any intentional act which does, or significantly contributes to the proximate demise of wildlife managed by the State of New Mexico. Taking may occur indirectly pursuant to negligent acts having harmful consequences for the animals. Taking is fatal to the wildlife.
 - C. "Plan." The Plan is the regulatory plan promulgated by the New Mexico Department of Game and Fish and the State Game Commission consistent with the provisions contained herein.
 - D. "Depredations." Depredations by wildlife are damage to private property caused by wildlife managed by the State of New Mexico. Depredations, herein, are used to mean physical destruction of private property, as well as indirect damages which limit the productivity of private land. Both types of injury may be compensated through use of the Plan.
 - E. "Inspections." To verify that damages occur, the State of New Mexico must make physical inspections of private property to estimate damage. Where helpful and

possible, verification should be made in the company of the private landowner. Verification of destructive damage, such as downed fencing or damaged structures may be conducted through recordings, photographic or otherwise, which clearly demonstrate significant and unique physical features which identify the property in question as belonging to the landowner.

- F. "Permit." A qualifying landowner will be allocated elk license permits which allow the landowner to purchase elk licenses at a modest fee. These permits are transferrable amongst private individuals and are not controlled by license-possession requirements which limit a possessor to a limited quantity of licenses per calendar year.
- G. "Department." The Department is the New Mexico Department of Game and Fish and any subsidiary administrative agencies obliged to manage the wildlife of New Mexico.
- H. "Gender Ratio." For each Game Management Unit in which the Department allocates elk permits, the Department shall determine a Gender Ratio which governs the ratio between the genders (Bull and Cow) that the total elk population is reduced within the Game Management Unit. The determination of this ratio shall rely on all relevant statistics, such as degree of depredations suffered, population goals, ratio of public to private land, hunting successes of the two genders, and any other statistics that the Department finds relevant.

V. **Authorization for Promulgating Regulations.** The appropriate New Mexico regulatory agencies are hereby given authority to promulgate regulations consistent with these provisions. The provisions contained herein are to be viewed as guidance in the promulgation of those regulations.

- A. **Inspections and Duties.** The Department and landowner should comply with the following provisions as they apply to the Department or landowner.
 - 1. **Duty to Measure Wildlife Populations.** It is the duty of the Department to measure the elk population within the State of New Mexico on an annual basis. Reference to prior year hunting success and landowner participation are relevant concerns, but are inadequate to measure the elk population. The Department may not rely on previous depredations claims by landowners as a presumptively accurate measurement of elk depredations.
 - 2. **Duty to Inspect Landowner Claims.** It is the duty of the Department to inspect and verify all depredation claims by landowners.
 - 3. **Duty to Report Changes in Population.** Where a landowner applies files a depredation claim, and the Department verifies the claim, the landowner is under a duty to report significant changes in that population, especially large increases in population. The Department shall inspect and verify these claims, and account for them when allocating permits.
 - 4. **Duty to Obtain Permission.** Whenever the Department wishes to conduct inspections, the Department must:
 - a. Provide 48 hours notice, oral or otherwise, of the planned

- inspection time;
- b. Request permission from the landowner to enter the private property upon arrival at the private property;
- c. Choose an alternative time recommended by the landowner if the time requested is either inconvenient or likely to produce underrepresentation of the actual elk population on the private land; and
- d. Allow the landowner to escort the Department's representative(s) to the site(s) where depredations occur.

5. **Duty to Cooperate.** The landowner is under a duty to cooperate, when ever reasonably possible, with the Department in the inspections. If the landowner fails to allow access, or prevents inspection by the Department, the landowner will not be eligible for landowner permits for the year in which resistance occurs.

VI. **Allocation of Permits to Landowners Suffering Depredations.** The allocation of permits to landowners suffering quantified depredations shall be conditioned on the following provisions.

A. **Minimum Bull Permits.** When allocating permits to landowners, the first permit issued to any landowner shall be a Bull permit.

B. **Equality in Distribution of Further Permits.** The allocation of all further permits to the depredated landowners within a Game Management Unit shall be governed by the gender ratio. Consequently, the ratio shall be applied equally across all ranches within that Game Management Unit, as related by the characteristics the Department finds relevant.

C. **Discretionary Permits Distribution.** Any discretionary permits issued by the Department shall be issued consistent within the following guidelines:

- 1. **Public Information.** The number, gender, and recipient ranches of discretionary permits shall be made public information;
- 2. **Equal Ratios.** The allocation of discretionary permits shall be distributed consistent with the gender ratio for the Game Management Unit;
- 3. **Documented Justification.** The agent allocating discretionary permits shall provide a documented justification for allocating the permit, which shall be filed and access allowed to it upon request of the public. Mere landowner displeasure with an allocation is insufficient as a justification.
- 4. **Consistent With the Needs of the Wildlife.** No discretionary permit shall be allocated which causes significant changes in the resident elk population. Eradication of elk presence within a region is not a justification for discretionary permits.

VII. **Seasons and Depredation Hunts.** The Department may extend hunting seasons for specific Game Management Units for several reasons. Similarly, depredation hunts may be held for those reasons, and for others enumerated herein. These two extensions or modifications of existing seasons are conditioned in a number of ways.

A. **Extended Hunting Seasons for Game Management Units.** The Department may extend hunting seasons for specific Game Management Units based on the

following policies:

1. **Purpose is to Compensate Landowners.** Where landowners meet with little success in using elk licenses, the Department may extend the season. That extension is only to allow the landowners who failed to harvest elk to do so. No additional permits for this season may be allocated.
2. **To Bring Game Management Unit into Compliance with Plan.** Where the Department has developed the Plan, and established population goals, fencing plans, and land-use plans, the Department may extend hunting seasons to bring specific Game Management Units into compliance with the Plan. In such cases, a majority of landowners suffering deprecations within the Game Management Unit need not approve the extension.
3. **Majority Required.** For such a season extension to compensate landowners, a majority of landowners within the Game Management Unit who suffer elk deprecations must consent to the extension. If a majority is not in favor of the extension, it cannot be made.
4. **Only an Extension of Hunting Season.** Such extensions cannot be construed to allow the Department to hold additional hunting seasons. An extension must be held immediately following the regular hunting season.
5. **Profit to the Landowner.** When the Department extends the hunting season for a Game Management Unit, any profit or access fee the landowner wishes to charge for access or transfer of the permit remains with the landowner and does not revert to the State of New Mexico.

B. **Depredation Hunts.** Individual landowner property may be granted authority to hold depredation hunts where certain conditions are met.

1. **Population Changes.** Where the resident elk population on a specific property changes substantially, the Department and landowner may agree to hold depredation hunts, rather than waiting until permits are allocated.
2. **Lack of Majority.** Where the Game Management Unit landowners refuse to extend a hunting season, the Department may authorize depredation hunts on individual properties within those Game Management Units.
3. **Specific Management Goals.** Where the Department and private landowners consent to designate land as elk-free, pursuant to other agreements, or to raise elk-impermeable fences consistent with the Plan, the Department may conduct elk depredation hunts to eliminate resident elk populations.
4. **No Profit to the Landowner.** A landowner using a depredation hunt may not charge fees for access, use, or traverse of land pursuant to the depredation hunt. A landowner may not charge for the permits used in a depredation hunt. A landowner may opt to use all permits for a depredation hunt personally. The carcasses from a depredation hunt remain the property of the State of New Mexico.

VIII. **Appeals Process.** The landowner, and the public generally, may appeal certain administrative decisions rendered by the Department, subject to specific controls

described herein. The landowner, the public, and the Department operate under certain obligations during this appeals process. The Department shall create an appeals process consistent with these provisions.

A. **Grounds for Appeal.** The following shall be included as grounds for appeal of a Department decision.

1. **No Permits Allocated by Formula.** If a landowner applies for, and the Department denies, elk permits for the season, the landowner may appeal this decision. The Department shall consider evidence of permits allocated to other ranches, similarly situated within the Game Management Unit, in its decision. Where the Department grants discretionary permits to other ranches within the Game Management Unit, it shall be prima facie evidence that a landowner suffering depredations should receive a permit. The Department may rebut this presumption.
2. **Mathematical Error.** Where the Department commits a mistake in its calculation and allocation of permits, the landowner may present this error and if borne out on review, the Department shall correct the mistake. Similarly, the landowner may appeal any allocation based on an incorrect factual premise used by the Department when it allocates permits within the Game Management Unit.
3. **Gender Ratio Inconsistency.** Where the landowner receives an allocation of permits, and the gender of those permits is significantly different from the Gender Ratio established by the Department for the Game Management Unit, the landowner may appeal this. Similarly, the landowner may raise an appeal where other landowners within the Game Management Unit receive permits inconsistent with the Gender Ratio determined by the Department.
4. **Failure to Grant Discretionary Permits.** Where the landowner applies for, and the Department denies, a claim for discretionary permits, the landowner may appeal this decision. This appeal shall only be valid if there were other discretionary permits granted within the Game Management Unit.
5. **Appeal of Plan.** At its annual review of the contents of the Plan, the Department shall allow interested parties to request a reconsideration of the Plan. A request for reconsideration must be based on one or more of the following criteria:
 - a. Significant public interest in increasing, or decreasing, the amount of elk managed by the state. A request for reconsideration may be accompanied by petitions or other collected statements of community desires; and
 - b. Erroneous understanding of the elk, their population, or the impact on private lands. Any erroneous fact which the Department relies upon in designing, or modifying, the Plan may be presented in a request for reconsideration. Parties may also demonstrate that the

desired elk population may be managed in a way which impacts private land less.

6. **Appeal of Compensation for Shared Fencing Costs.** Where the Department opts not to rely on landowner-provided information about the cost of shared elk-proof fencing, the landowner may request arbitration of the matter. In such case, the Department shall nominate one arbitrator, the landowner shall nominate one arbitrator, and the two arbitrators shall nominate a third. These three arbitrators shall hear the matter and provide a binding answer within sixty (60) working days.
- B. **Obligations of the Department and Individuals.** The obligations of the individuals and the Department, during the appeals process, are the following.
1. **Individual Obligations.**
 - a. **Timeliness.** If the landowner wishes to raise an appeal based on any of the grounds described above, it must be made in a timely fashion.
 - (1) **Initial Permit Allocation Offer.** The landowner may raise an appeal up to twenty (20) days from the postmark on the initial permit allocation offer made by the Department.
 - (2) **Internal Appeals.** The landowner must raise an appeal of an internal appeals decision within five (5) days of the receipt of the previous internal appeals decision.
 - (3) **Appeal During Public Meetings.** A landowner wishing to appeal to be heard during a public meeting shall have fifteen (15) days from the last internal appeal stage to file the claim.
 - b. **Good Faith.** The landowner appealing an administrative decision shall operate on a good faith belief in the validity of the claim. Failure to do so shall be grounds for barring the landowner from receipt of permits for the next hunting season.
 2. **Department Obligations.**
 - a. **Timeliness.** The Department shall review any appeal in a timely fashion. These appeals shall be reviewed in accordance with the following guidelines.
 - (1) **Administrative Record Appeals.** During any stage of internal review, which the public may not attend, the Department shall provide an answer within five (5) working days, or before the beginning of the next hunting season, which ever is earlier.
 - (2) **Public Meeting Appeals.** During any stage of public review, which the public may attend, the Department shall provide an answer within thirty (30) days, or before the beginning of the next hunting season, which ever is earlier.
 - b. **Documentation.** For each stage of review, the Department shall

provide written opinions justifying its affirmance or change of previous administrative decisions. This written record may serve as the basis for a landowner's appeal, and is subject to appeal independent of the substantive merits of the landowner's claim.

(1) **Public Meetings.** For every stage of review held during meetings which the public may attend, the Department shall conduct the meeting as if it were quasi-judicial in nature. For any review held during public meetings, the Department need not supply written opinions to the landowner as a predicate to deciding the merit of the landowner's complaint, but shall provide one if requested to do so.

c. **Presumption of Validity.** The landowner's appeal claim shall be presumed to be valid, if presented to the Department in accordance with these guidelines. This presumption shall only affect claims which meet the Department's requirements for document production, and which are filed in a timely fashion. This presumption shall only affect claims which the Department fails to act on in a timely fashion. Where one stage of review fails to complete its review in a timely fashion, it shall be the duty of the officer(s) of the next stage of review to make the calculations and allocate permits accordingly, without regard to the truth of the landowner's claim.

IX. **The Coordinated Elk-Fencing Plan.** The Department shall create a Coordinated Elk-Fencing Plan which describes the state-wide goals for the populations and locations of Elk within the State of New Mexico. The Plan shall meet the following criteria.

- A. **State-Wide and Local Target Populations.** The Plan shall describe the overall State-wide elk population goals and the population goals for each Game Management Unit in which elk are to exist. These population targets shall set long-range population targets, in addition to annual intermediary population targets.
- B. **Impact on Other Managed Species.** For all other species of game which the Department manages, the Plan shall consider the impact of elk populations on their populations, their habitat, and locations within the State of New Mexico.
- C. **Migratory Patterns.** The Plan shall clearly describe the migratory patterns of the elk managed by the State of New Mexico. Care shall be taken to avoid interfering with these patterns, except where desirable, for other reasons, such as an interest in eliminating minor and insufficient elk populations from certain regions of the State of New Mexico.
- D. **Preference for Management of Elk on State Land.** Wherever practicable, the Department and the Plan shall manage the elk of New Mexico on public, rather than private, lands. This shall only be construed as a preference between locations otherwise equal in benefit to the State of New Mexico.

- E. **Minimized Impact on Private Landowners.** When considering the impacts of elk populations, the Plan shall choose the locations for elk which minimize the burden on private landowners caused by elk. This minimization standard shall only be used when there are two options, otherwise equal, for managing the elk.
 - F. **Respect Private Land-Management Decisions.** The Plan shall not assume that all private land-uses are equal. Where lands are expressly used for elk or wildlife, either to raise, harvest, or protect, the Plan shall include this in its calculations. Where the lands cannot be accessed by elk, the Plan shall consider this as well.
 - G. **Allow Elk-Proof Fencing.** The Department shall allow elk-proof fencing where such fencing is an element of, or not in contradiction of, the long range population goals for elk populations or their migratory patterns.
- X. **Cost-Sharing of Elk-Proof Fencing.** Where the private landowner desires to raise elk-proof fencing to protect private land from elk depredations, the Department shall have limited authority to supervise this plan. This authority shall be consistent with these provisions. Further, the actual compensation due a landowner for such fencing shall be governed by these requirements.
- A. **If Fence is Not Within the Plan.** The Department shall have no authority to manage fences which are not within the Plan's long-range population goals for region and size. Where a fence exists, the Department may not require its removal.
 - 1. **Elk-Permeable Fences.** Even within the short-range goals of the Plan, the Department may not exercise any authority over the use of elk-permeable fences.
 - B. **If Fence is Consistent with the Plan.** If the proposed elk-proof fence is consistent with the Plan's long-range population goals, the Department may use it as part of the Plan. Where the landowner desires to raise an elk-proof fence, the following provisions shall govern:
 - 1. **Permitting.** The Department shall give, or deny, the landowner the authority to raise an elk-proof fence. This permission shall only be granted when the landowner provides a written (including a map describing the property and proposed fencing) description of the property and the fencing plan.
 - 2. **Fencing Allowed.** Where the Department opts to allow the elk-proof fencing, the Department shall share the costs of the fencing with the private landowner.
 - a. **Fence Along the Plan's Border.** Where the proposed fence runs along with border of the Plan, the Department shall always allow the landowner to raise the fence.
 - (1) **Plan Amendments.** At its annual review of the Plan, the Department shall amend the Plan to explicitly allow for such fences to exist.
 - b. **Department Discretion in Accepting Landowner Claims.** Where the Department allows the elk-proof fencing, the

Department may compensate the landowner directly for half of the following costs:

- (1) **Cost of Labor.** The difference between the cost of raising elk-permeable fences and the cost of raising elk-proof fences shall be compensable;
- (2) **Cost of Fencing Materials.** The difference between the cost of fencing materials for elk-permeable fences and the cost of fencing materials for the elk-proof fencing shall be compensable.

c. **Department Refusal of Claim.** The Department may refuse to compensate the landowner for the claimed costs for reasons including:

- (1) **Failure to Minimize Costs.** If the landowner fails to minimize the expenses associated with raising the elk-proof fences, the Department shall not be forced to compensate the landowner;
- (2) **Outside of the Plan.** If the fencing is outside the reach of the Plan, the landowner may not be compensated for the costs of the fencing.

d. **Department May Supply Labor or Materials.** Where the Department will deny a landowner claim for compensation for raised fencing, the Department may opt to supply the landowner with the fencing materials, or may opt to raise the elk-proof fencing itself. In such a case, the Department shall not owe compensation to the landowner.

3. **Fencing Permit Denied.** Where the Department denies the landowner the permit to raise elk-proof fencing, this shall be prima facie proof of elk depredations on private land. The Department shall have the following administrative options at its discretion:

- a. **Offer of Permits.** The Department may offer the landowner sufficient permits to compensate the landowner for depredations suffered;
- b. **Direct Financial Compensation.** The Department may make direct financial compensation to the landowner;
- c. **Condemnation of Private Land.** The Department may condemn the private land consistent with other provisions of the New Mexico Statutes Annotated; and
- d. **Option to Raise the Fence Itself.** The Department may opt to raise the fence itself, without reference to the landowner.

XI. **Severability.** If any of the above provisions are found inconsistent with the Constitutions of the United States or of New Mexico, the violative provisions shall be severable from the remainder of the Act.