DEER AND ANIMAL BREEDING, PRESERVE HUNTING, AND GOVERNMENTAL INTERFERENCE: THE DILUTION AND UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY BY THE STATE

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I. INTRODUCTION

> Then God said, 'Let the earth bring forth living creatures after their kind: cattle and creeping things and beasts of the earth after their kind'; and it was so. God made the beasts of the earth after their kind, and the cattle after their kind, and everything that creeps on the ground after its kind; and God saw that it was good. Then God said, "Let Us *make man* in Our image, according to Our likeness; *and let them rule* over the fish of the sea and over the birds of the sky and over the cattle and over all the earth, and *over every creeping thing that creeps on the earth*."[1]

The acknowledgement of legal hunting rights can be traced back to at least the Roman Empire.[2] The Romans believed an individual's right to hunt or capture wild animals, although subject to some limitation, did not spring from the state but rather from nature itself.[3] Although Englishmen widely enjoyed the right to hunt on their own land prior to the Norman invasion by William the Conqueror in 1066, hunting rights emanated from, and were greatly restricted by, the crown thereafter.[4] Even after the signing of the Magna Carta in 1215 relieved the monarchy of some of its control over English wildlife, the nobility soon enacted game laws that severely limited hunting rights by class.[5]

The early American colonists brought with them a severe distaste for the hunting restrictions in England and met a land with near limitless wildlife for the taking.[6] Facing this new world, "[t]he logical policy for America was a policy of 'free taking,' recognizing everyone's right to take game."[7] The state courts strengthened this concept in their early decisions and refuted attempts to enforce

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1. *Genesis* 1:24–26 (emphasis added).
2. *See* Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 677 (2005).
3. *See id*. at 677–78.
4. *Id.* at 679–83.
5. Jeffrey Omar Usman, *The Game is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 TENN. L. REV. 57, 62–65 (2009); Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549, 552–53 (2004); ARIZ. GAME AND FISH DEP'T, AMERICA'S WILDLIFE—YESTERDAY, TODAY AND TOMORROW 1, *available at* www.azgfd.gov/i_e/ee/NAM/Final/NAM_WhoOwnsWildlife.pdf.
6. *See* Anna R. C. Caspersen, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357, 365 (1996) (referencing early cases regarding private ownership of wildlife over conservation); *see also* J.M. Kelley, *Implications of a Montana Voter Initiative that Reduces Chronic Wasting Disease Risk, Bans Canned Shooting, and Protects a Public Trust*, 6 GREAT PLAINS NAT. RESOURCES J. 89, 91–92 (2001).
7. Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U. L. REV. 703, 705 (1976).

prior English game laws.[8] For example, in *State v. Campbell*, a Georgia Superior Court rejected the endurability of the prior English game laws, finding them "not only penal to a feudal degree, but . . . productive of tyranny."[9] Despite attempts, this right to hunt and fish has never been federalized and, instead, has been deemed a privilege to be conferred by the states.[10] As the United States Court of Claims explained, "[n]o citizen has a right to hunt wild game except as permitted by the State."[11]

Nevertheless, the following states have included the right to hunt and/or fish in their state constitutions: Alabama,[12] Arkansas,[13] California,[14] Georgia,[15] Idaho,[16] Kentucky,[17] Louisiana,[18] Minnesota,[19] Montana,[20] Nebraska,[21] North Dakota,[22] Oklahoma,[23] Rhode Island,[24] South Carolina,[25] Tennessee,[26] Vermont,[27] Virginia,[28] Wisconsin,[29] and Wyoming.[30] The constitutions of Oklahoma, Tennessee, and Wisconsin include language that any regulation of the right to hunt and fish must be reasonable.[31] Furthermore, the legislatures of Florida, Georgia,

8. *See, e.g.*, McConico v. Singleton, 9 S.C.L. (2 Mill) 244, 244–45 (1818) (declaring that "the right to hunt on unenclosed and uncultivated lands has never been disputed, and it is well known that is has been universally exercised from the first settlement of the country up to the present time").
9. State v. Campbell, T.U.P.C. 166, 168 (Ga. Super. Ct. 1808).
10. Usman, *supra* note 5, at 70–71.
11. Bishop v. United States, 126 F. Supp. 449, 451 (Ct. Cl. 1954).
12. ALA. CONST. art. I, § 36.02 (West, Westlaw through 2012 amendments).
13. ARK. CONST. amend. 88, § 1 (West, Westlaw through 2013 first regular session).
14. CAL. CONST. art. 1, § 25 (West, Westlaw through ch. 4 of 2014 regular session).
15. GA. CONST. art. I, § I, para. XXVIII (West, Westlaw through 2013 regular session).
16. IDAHO CONST. art. I, § 23 (West, Westlaw through 2014 second regular session).
17. KY. CONST. § 255A (West, Westlaw through 2013 regular and 2013 extraordinary session).
18. LA. CONST. art. I, § 27 (West, Westlaw through 2013 regular session).
19. MINN. CONST. art. XIII, § 12 (West, Westlaw through 2013 first special session).
20. MONT. CONST. art. IX, § 7 (West, Westlaw through 2012 general election).
21. NEB. CONST. art. XV, § 25 (West, Westlaw through 2013 regular session).
22. N.D. CONST. art. XI, § 27 (West, Westlaw through 2011 regular session).
23. OKLA. CONST. art. II, § 36 (West, Westlaw through Nov. 2013 amendments).
24. R.I. CONST. art. 1, § 17 (West, Westlaw through 2013 amendments).
25. S.C. CONST. art. I, § 25 (West, Westlaw through end of 2013 regular session).
26. TENN. CONST. art. XI, § 13 (West, Westlaw through 2014 second regular session).
27. VT. CONST. ch. II, § 67 (West, Westlaw through 2012 general election).
28. VA. CONST. art. XI, § 4 (West, Westlaw through 2013 regular session).
29. WIS. CONST. art. I, § 26 (West, Westlaw through Dec. 2013 amendments).
30. WYO. CONST. art. 1, § 39 (West, Westlaw through Nov. 2012 amendments).
31. OKLA. CONST. art. II, § 36 (West, Westlaw through Nov. 2013 amendments); TENN. CONST. art. XI, § 13 (West, Westlaw through 2014 second regular session); WIS. CONST. art. I, § 26 (West, Westlaw through Dec. 2013 amendments).

and New Hampshire have statutorily recognized the right of their citizens to hunt and fish.[32]

There is great concern among hunting and fishing rights supporters for the need to constitutionalize and otherwise protect hunting and fishing rights within the states, particularly with the rising strength of animal rights groups, such as the Humane Society of the United States (HSUS), People for the Ethical Treatment of Animals (PETA), and the Quality Deer Management Association (QDMA).[33] Animal rights activists are well-funded and have made great headway in recent years in persuading the general public to pass legislation, which effectively bans vested hunting rights.[34]

The discovery of contagious diseases, such as Chronic Wasting Disease, in deer populations in various states has also led to stricter regulation of deer hunting in both the public domain and private hunting preserves.[35] In particular, deer hunting for sport and enjoyment on hunting preserves and landowners' rights as they pertain to farm deer have seen an onslaught of regulations in the last ten years, restricting the rights of farmers and property owners alike.[36]

This Article focuses on the right generally to hunt deer in Iowa, the effects of CWD inspired and driven regulations on the rights of hunters and hunting preserve owners and animal breeders, and the availability of constitutional "takings" protection to defend those rights.

II. THE STATE OF DEER HUNTING IN IOWA

A. *The "Right" to Hunt in Iowa*

Unlike the multitude of states previously mentioned, the right to hunt and fish is not codified in the Iowa Constitution. Article I, Section One of the Iowa Constitution states: "All men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defend-

32. FLA. STAT. ANN. § 379.104 (West, Westlaw through end of 2013 first regular session); GA. CODE ANN. § 27-1-3(a) (West, Westlaw through end of 2013 regular session); N.H. REV. STAT. ANN. § 207:58 (West, Westlaw through ch. 2 of 2014 regular session).

33. *See* NAEBA NEWS (N. Am. Elk Breeders Ass'n, Ayr, Neb.), May 2012, at 6–7, 9, 12, *available at* http://www.naelk.org/document_center.cfm?fid=1; Usman, *supra* note 5, at 82–83; *see also* Lisa Weisberg, *Legislative Proposals Protecting Animals in Entertainment: At The Crossroads*, 16 PACE ENVTL. L. REV. 125, 129 (1998) ("many state legislatures, perhaps feeling threatened by the recent string of successful state ballot initiatives that outlaw certain methods of hunting and trapping, have proposed amendments to their state constitutions in order to guarantee its citizens the right to hunt").

34. *See* Usman, *supra* note 5, at 82–83.

35. S*ee, e.g.*, IOWA ADMIN. CODE r. 21-65.9 (2014).

36. *Id.*

ing life and liberty, acquiring, possessing[,] and protecting property, and pursuing and obtaining safety and happiness."[37] Included in the right to possess property in Iowa, arguably, is the opportunity to hunt, although clearly subject to the regulations of the state. The Iowa Code regulates the taking of any wildlife within the state. Section 481A.38 of the Iowa Code states:

> It is unlawful for a person to take, pursue, kill, trap or ensnare, buy, sell, possess, transport, or attempt to so take, pursue, kill, trap or ensnare, buy, sell, possess, or transport any game, protected nongame animals, fur-bearing animals or fur or skin of such animals, mussels, frogs, spawn or fish or any part thereof, except upon such terms, conditions, limitations, and restrictions set forth herein, and [in] administrative rules . . . .[38]

Similarly, Section 481A.2 states: "The title and ownership of all fish . . . and of all wild game, animals, and birds . . . and all other wildlife, found in the state, whether game or nongame, native or migratory . . . are hereby declared to be in the state . . . ."[39]

The Iowa Department of Natural Resources (DNR) was founded with the general duty to protect and preserve the wild animals of the state and enforce the laws related to animals.[40] The DNR generally has the responsibility to monitor, protect, and control Iowa wildlife, including deer.[41] Despite the state's exclusive and rather unambiguous control over hunting and ownership of Iowa wildlife, the state does not take responsibility, nor may it be held liable, for damages caused by its wildlife.[42]

With this in mind, the Iowa Supreme Court recognized an exception to the prohibition on unsanctioned "taking" of wildlife, allowing private property owners to defend their land against intrusion and any subsequent damage caused by wildlife.[43] In *State v. Ward*, a farmer was prosecuted and convicted for shooting and killing a deer, without a license, that had eaten and destroyed the farmer's corn.[44] The Court, recognizing the farmer's right to defend his person and property, reversed the conviction on the basis that the "taking" was reasona-

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37. IOWA CONST. art. I, § 1 (West, Westlaw through 2012 general election).

38. IOWA CODE ANN. § 481A.38 (West, Westlaw through 2014 regular session).

39. *Id.* at 481A.2.

40. *Id.* at 456A.23.

41. *Id.*; *see also* Mindy Larsen Poldberg, Note, *Deer and Management: A Comprehensive Analysis of Iowa State Hunting Laws and Regulations*, 3 DRAKE J. AGRIC. L. 279, 289 (1998).

42. Metier v. Cooper Transp. Co., 378 N.W.2d 907, 914 (Iowa 1985) (holding that "[t]he State's interest more accurately is characterized as an ownership or title in trust," and "[t]o hold the State liable for all the conduct of its wild animals in every situation would pose intractable problems, and intolerable risks to the ultimate ability of the State to administer its trust").

43. *See* State v. Ward, 152 N.W. 501, 502 (Iowa 1915).

44. *Id.* at 501.

ble in light of the fact that the deer was "actually engaged in the destruction of the defendant's property" at the time of the shooting.[45] Importantly, however, the Court noted that the farmer did not "appropriate or conceal the carcass of the slain deer," but rather recognized the state's ownership of the deer by "tender[ing] the carcass to the appropriate officer."[46]

Thus, while the "right" to hunt in Iowa is more of a state granted privilege which abandons the "free taking" policy prevalent at the nation's founding, one can argue that Iowa has acknowledged that the legal scale should lean in favor of an individual Iowan's private property rights when confronted with the state's power to regulate its wildlife.

B. *Controlling Deer Population with Hunting*

Iowa is one of the premier places to hunt white-tailed deer—a member of the cervidae or cervid family—in America.[47] White-tailed deer are Iowa's only big game animal and can be found in every county in the state.[48] Chart-topping Big Trophy deer have been regularly found in Iowa, bringing both residents and non-residents alike out to hunt.[49]

According to the DNR, white-tailed deer have been abundant in the state for the past fifty years.[50] However, this has not always been the case. White-tailed deer were almost eliminated from Iowa's deer population before 1900.[51] This near elimination was due in part to uncontrolled exploitation for food and hides, which rapidly reduced the quantity of deer in Iowa.[52] In 1898, the 27th General Assembly closed the deer season year round.[53] The reestablishment of

45. *Id.* at 502. The Court specifically refused to opine "[w]hether a deer may be lawfully killed [today] by way of retaliation for the damage wrought by it yesterday, or whether it may be so killed by way of reprisal for damage wrought or threatened by other deer." *Id.*

46. *Id.* at 503.

47. *See IA DNR: 'Tis the Season for Poaching Cases*, OUTDOOR NEWS (Jan. 7, 2011), http://www.outdoornews.com/January-2011/IA-DNR-Tis-the-season-for-poaching-cases/.

48. IOWA DEER HUNTING, IOWA CONSERVATION COMM'N 2 (1974), *available at* http://publications.iowa.gov/15468/1/Iowa%20Deer%20Hunting.pdf.

49. *See* Joel W. Helmer, *Boone & Crockett Club Whitetails: A Geographical Analysis*, BOONE AND CROCKETT CLUB, http://www.boone-crockett.org/bgrecords/records_whitetail.asp?area=bgrecords (last visited April 9, 2014).

50. *See Deer Information*, IOWA DEP'T OF NATURAL RESOURCES, http://www.iowadnr.gov/Hunting/DeerHunting/DeerInformation.aspx (last visited April 9, 2014) ("By 1950 deer were reported in most countries and the statewide estimated topped 10,000.").

51. IOWA STATE UNIV., MANAGING IOWA WILDLIFE: WHITE-TAILED DEER 1 (1997), *available at* http://www.icwdm.org/publications/pdf/Deer/ISU_managewhitetaildeer.pdf.

52. *Deer Information*, *supra* note 50.

53. IOWA DEP'T OF NATURAL RESOURCES, WHITE-TAILED DEER, *available at* http://www.iowadnr.gov/portals/idnr/uploads/Hunting/deer_history.pdf?amp;tabid=1214.

deer in the state can be traced to the freeing and escape of captive herds, as well as natural immigration of deer herds into the state from neighboring states.[54] In 1894, thirty-five white-tailed deer escaped from the Cuppy captive herd.[55] In the early 1920s, approximately sixty deer escaped from the Singmaster farm in Washington County and situated themselves along the Skunk River.[56] A statewide estimate in 1936 pegged the deer population at between five and seven hundred deer.[57] This small herd multiplied to more than 13,000 by 1950, prompting the reemergence of regulated hunting.[58]

The first modern hunting season was held in December 1952 and 4000 deer were killed, or "harvested."[59] Deer populations increased dramatically across North America during the 1980s and 1990s, with current populations surpassing thirty million.[60] By 1996, the hunting season "harvest" topped 100,000.[61] As a result of the continuing expansion of urban areas and conversion of native landscapes into agriculture, the deer's natural habitat has been greatly reduced, leaving the remaining population stressed by high population densities.[62] Deer have increasingly moved into more urban environments, along the way causing damage to crops, trees, and shrubs, vehicular collisions, and possible disease transmission.[63]

Hunting, then, is a means of managing the deer population. Although many animal rights activists disagree with the inherent premise of population control via hunting, which they purport to find inhumane, without any sort of hunting, Iowa's deer population could grow at an annual rate of twenty to forty percent, resulting in a doubling of the population every three years.[64] In determining appropriate deer population levels for the purpose of issuing hunting licenses and regulating the hunting seasons in Iowa, the DNR purports to balance not only what they assess the habitat can support, but also what is deemed culturally acceptable; or, in other words, what Iowa farmers, motorists, and the com-

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. KERT VERCAUTEREN, THE DEER BOOM: DISCUSSIONS ON POPULATION GROWTH AND RANGE EXPANSION OF THE WHITE-TAILED DEER 16 (2003), *available at* http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1276&context=icwdm_usdanwrc.
61. LITCHFIELD, WHITE-TAILED DEER, *in* TRENDS IN IOWA WILDLIFE POPULATIONS AND HARVEST 2011, at 9 (2012).
62. IOWA STATE UNIV., *supra* note 51, at 4.
63. *Id.*
64. TOM LITCHFIELD, *supra* note 61, at 10.

munity at large find tolerable.[65] For the 2011–2012 hunting season, the DNR estimated that more than 144,000 deer were killed based on reported killings of 121,407 deer.[66] Overall, the deer population in Iowa has begun to decline in response to the DNR's goal of returning to mid-1990s population levels with estimated annual harvests of between 100,000 and 120,000 deer.[67]

C. *The Economics of Deer Hunting in Iowa*

In addition to providing the most effective form of population management, deer hunting has a significant impact on Iowa's economy. Deer hunting has an estimated economic impact of $214 million annually for Iowa, accounting for more than $137 million in retail sales, providing more than $67 million in earnings, contributing more than $30 million in federal and state taxes, and supporting more than 2800 jobs.[68]

In 2006, individual hunters spent approximately $835 annually on deer hunting-related expenditures in Iowa.[69] When considered against the estimated $22 million in crop losses caused by deer annually, in addition to costs related to motor vehicle accidents involving deer, deer hunting represents a major economic benefit to Iowa.[70] Private deer farms and hunting preserves, including Iowa's ten private shooting preserves dedicated to white-tailed deer,[71] are a major component of this economically valuable industry.

D. *The Role of Deer Farms and Preserves*

Iowa ranks forty-ninth among the fifty states in the amount of public land available for hunting, including the least amount of any Midwestern state.[72] On top of the scarcity of land open to public hunting, it is difficult and expensive for

65. Poldberg, *supra* note 41, at 284–85.

66. LITCHFIELD, *supra* note 61, at 10–11.

67. *Id.* at 16–17.

68. *Hunters Reported 5,800 Fewer Deer Harvested in 2012*, IOWA DEP'T OF NATURAL RESOURCES (Jan. 29, 2013), http://www.iowadnr.gov/hunting/ctl/detail/mid/2858/itemid/1189; DEER STUDY ADVISORY COMMITTEE, REPORT TO THE GOVERNOR AND GENERAL ASSEMBLY: A REVIEW OF IOWA'S DEER MANAGEMENT PROGRAM 24 (2009), *available at* http://www.iowadnr.gov/Portals/idnr/uploads/Hunting/deerstudyreport.pdf.

69. DEER STUDY ADVISORY COMMITTEE, *supra* note 68, at 24.

70. *Id.* at 27.

71. IOWA DEP'T OF NATURAL RESOURCES, IOWA PRIVATE SHOOTING PRESERVES (2012), *available at* http://www.iowadnr.gov/portals/idnr/uploads/Hunting/iapreserves.pdf?amp;tabid=471.

72. Jerry Perkins, *Hunters Gaining Ground*, DES MOINES REG., May 20, 2006, at D1.

non-residents to obtain the necessary hunting licenses and tags.[73] Currently the cost of obtaining a non-resident deer hunting license in Iowa is $551, in addition to non-refundable application fees.[74]

With fewer places to hunt deer in Iowa, and with the licensing fees and associated costs constituting a considerable investment to many hunters, deer hunting preserves present an attractive alternative to Iowa and out-of-state deer hunters.[75] In comparison to public hunting, white-tailed deer hunting preserves provide a longer season, less crowded grounds, licensing assistance, availability of trophy deer, and expert support. Hunting preserves also create spin-off revenue for the area in which the preserve is located, including hunting-related retail sales and tourism revenue for motels, restaurants, gas stations, meat processors, and taxidermists.[76] Further, since hunting preserves continue to operate while public hunting is off-season, they enable these economic benefits to continue for much of the year in rural areas that would otherwise see little tourism.[77] Non-residents especially may find such benefits enticing since they may be enjoyed for not much more than the cost of obtaining the requisite non-resident licenses.[78]

There are, however, opponents to these hunting preserves, particularly among animal rights groups. For example, the QDMA opposes white-tailed hunting preserves and argues that hunting preserves violate the Public Trust Doctrine,[79] involve the "[u]nnatural and extreme manipulation of white-tailed deer,"

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73. *See Iowa Nonresident Deer Application Instructions*, IOWA DEP'T OF NATURAL RESOURCES (2014), http://www.iowadnr.gov/portals/idnr/uploads/Hunting/nonres_deer_guide.pdf?amp;tabid=709. Non-resident hunters must submit to a lottery type drawing to gain eligibility for the requisite hunting license. *Id.*

74. *Id.* ($112 for the hunting license, $13 for the habitat fee, and $426 for the deer license).

75. *See* PEGGY BOEHMER, N. AM. GAMEBIRD ASS'N & N. AM. GAMEBIRD FOUND., PRESERVING WILDLIFE AND RURAL AMERICA, *available at* http://www.wingshootingusa.org/Tips_on_preserves/Preserves_wildlife_america.pdf.

76. *See* MARK LABARBERA, INT'L ASS'N OF FISH AND WILDLIFE AGENCIES, ECONOMIC IMPORTANCE OF HUNTING IN AMERICA 2, 3 (2002), available at http://www.fishwildlife.org/files/Hunting_Economic_Impact.pdf (showing that hunting generates $25 billion in retail sales, and the average hunter spends approximately $1900).

77. *See A Case for Legalizing Hunting Preserves*, DEERFARMER.COM, http://www.deerfarmer.org/index.php?option=com_content&view=article&id=145:a-case-for-legalizing-hunting-preserves&catid=26:hunting (last visited April 9, 2014) (argument in favor of allowing hunting preserves to increase revenue during slow seasons and increased employment).

78. *Compare id. with Iowa Nonresident Deer Application Instructions*, *supra* note 73.

79. *QDMA's Stance on Captive Deer Breeding*, QUALITY DEER MGMT. ASS'N, http://www.qdma.com/corporate/qdmas-stance-on-captive-deer-breeding (last visited April 9, 2014) (stating that because preserves are owned by the public and are entrusted to the government to be safeguarded for the public's long-term benefit, a violation occurs when such private preserves exist).

and potentially spread diseases both intrastate and interstate, the most hotly debated of which is the spread of Chronic Wasting Disease in white-tailed deer.[80]

Like many non-mainstream commercial industries with vocal public interest opponents, deer hunting preserves face increasing protest and regulation. While the majority of states do not ban outright the gaming preserve industry, the industry itself is state-regulated.[81] In total, twenty-seven states have complete or partial bans on hunting preserves ranging from bans on hunting native or exotic animals to bans on hunting all mammals other than foxes hunted by dogs.[82] Thus, twenty-three states have no bans regarding hunting preserves and, therefore, allow deer hunting on preserves, such as the many white-tailed deer preserves in Iowa. Further, there are no federal laws banning gaming preserves and the federal Animal Welfare Act and its corresponding regulations do not apply to game preserves, hunting preserves, or "canned" hunts.[83]

III. CHRONIC WASTING DISEASE AND ITS REGULATORY STATUS

A. *A Chronic Wasting Disease Introduction*

The discovery of Chronic Wasting Disease (CWD) in white-tailed deer has led to stricter statewide regulations for gaming preserves and has generally attracted negative attention to preserves.[84] CWD is a form of transmissible spongiform encephalopathy in cervids.[85] The *Cervidae* species known to be susceptible to CWD include: Rocky Mountain Elk, Red Deer, Mule Deer, Black-Tailed Deer, White-Tailed Deer, Sika Deer, and Moose.[86] Further, the origin of CWD is not definitively known, although there is speculation that CWD was derived from

80. KIP ADAMS & MATT ROSS, QDMA'S WHITETAIL REPORT 2013, at 24–25 (2013), *available at* http://www.qdma.com/uploads/pdf/WR2013.pdf.

81. *Captive Hunts Fact Sheet*, HUMANE SOC'Y OF THE U.S. (Aug. 17, 2012), http://www.humanesociety.org/issues/captive_hunts/facts/captive_hunt_fact_sheet.html (noting that about half the states ban captive hunts, but several major federal laws are inapplicable).

82. *See* Brian MacQuarrie, *Captive Hunting in Vermont Lures Amid Criticism*, BOS. GLOBE, Feb. 21, 2013, http://www.bostonglobe.com/metro/2013/02/21/captive-hunting-still-lures-amid-criticism/UNaw5ZcOVj9C2FOdXdSYZO/story.html; *see, e.g.*, WIS. STAT. ANN. § 951.09 (West, Westlaw through 2013) (showing that although Wisconsin has a partial ban affecting captive hunts, it does not preclude the hunting of farm raised deer on preserves).

83. *Captive Hunts Fact Sheet*, *supra* note 81.

84. *See id.*; *see also* E.S. Williams, *Chronic Wasting Disease*, 42 VETERINARY PATHOLOGY 530, 541 (2005), *available at* http://vet.sagepub.com/content/42/5/530.full.pdf+html.

85. Williams, *supra* note 84, at 530.

86. *Animal Health: Chronic Wasting Disease*, APHIS, USDA, http://nvap.aphis.usda.gov/animal_health/animal_diseases/cwd/ (last modified Jan. 3, 2014) [hereinafter *Chronic Wasting Disease*, APHIS].

scrapie, a neurodegenerative disease affecting sheep and goats.[87] Although the precise manner of transmission remains unknown, evidence suggests it is capable of both direct and indirect transmission through the urine, feces, saliva, blood, and antler velvet of infected cervids.[88] Prion, an abnormal protein thought to cause the disease, can be released in the bodily fluids of infected deer and is theorized by some to remain transmissible for years in the soil and natural environment.[89] Clinical signs of CWD infected deer show loss of body condition, changes in behavior, excessive drinking, drooling, and reduction in food consumption.[90] Death appears to be inevitable, with some wildlife officials suggesting a time frame from within a few weeks to a few months after exhibiting clinical signs of CWD.[91] It has been speculated that CWD may lead to local extinctions of infected deer populations if not controlled.[92] As demonstrated more fully below, this is simply untrue. Notwithstanding the noise surrounding CWD, it is important to note that there is a natural "species barrier" diminishing the susceptibility of humans to CWD and, to date, there has been no evidence of CWD transmission to humans.[93]

In 1967, CWD was first recognized as a clinical "wasting" syndrome in mule deer at a wildlife research facility in Northern Colorado.[94] The first known

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87. ELIZABETH S. WILLIAMS ET AL., CHRONIC WASTING DISEASE: IMPLICATIONS AND CHALLENGES FOR WILDLIFE MANAGERS 3 (2002), *available at* http://www.cwd-info.org/pdf/CWD PresentationatNAWNRC.pdf; *see also* Williams, *supra* note 84, at 540; *Scrapie*, CTR. FOR FOOD SEC. & PUB. HEALTH 1, http://www.cfsph.iastate.edu/Factsheets/pdfs/scrapie.pdf (last updated Apr. 2007).

88. WILLIAMS ET AL., *supra* note 87, at 6; Candace K. Mathiason et al., *Infectious Prions in Pre-Clinical Deer and Transmission of Chronic Wasting Disease Solely by Environmental Exposure*, 4 PLOS ONE 1 (June 2009), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2691594/pdf/pone.0005916.pdf; Samuel E. Saunders et al., *Occurrence, Transmission, and Zoonotic Potential of Chronic Wasting Disease*, 18 EMERGING INFECTIOUS DISEASES 369, 371 (March 2012), *available at* http://wwwnc.cdc.gov/eid/article/18/3/pdfs/11-0685.pdf.

89. Williams, *supra* note 84, at 541; CWD/EHD Information, IOWA DEP'T OF NAT. RESOURCES, http://www.iowadnr.gov/Hunting/DeerHunting/CWDEHDInformation.aspx (last visited April 9, 2014).

90. WILLIAMS ET AL., *supra* note 87, at 4–5; Williams, *supra* note 84, at 531.

91. *See* WILLIAMS ET AL., *supra* note 87, at 5; Williams, *supra* note 84, at 532.

92. John E. Gross & Michael W. Miller, *Chronic Wasting Disease in Mule Deer: Disease Dynamics and Control*, 65 J. OF WILDLIFE MGMT. 205, 213 (2001).

93. *See* Ermias D. Belay et al., *Chronic Wasting Disease and Potential Transmission to Humans*, 10 EMERGING INFECTIOUS DISEASES 977 (June 2004), *available at* http://wwwnc.cdc.gov/eid/article/10/6/pdfs/03-1082.pdf (providing research data of CWD instances in humans in Colorado and Wyoming); *see also* G. J. Raymond et al., *Evidence of a Molecular Barrier Limiting Susceptibility of Humans, Cattle and Sheep to Chronic Wasting Disease*, 19 EMBO J. 4425, 4429 (2000), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC302048/pdf/cdd433.pdf (providing in-depth analysis of human susceptibility to CWD).

94. *Chronic Wasting Disease Information – History*, APHIS, USDA, http://www.aphis.

case of CWD in farmed cervid populations in the United States was in 1997 when an elk was discovered with CWD in South Dakota.[95] As of the fall of 2012, at least fourteen states, including Iowa, reported cases of CWD positive farmed or captive deer and elk[96] and, as of 2013, CWD has been found in twenty states, as well as two Canadian provinces.[97]

Most states have instituted surveillance programs in endemic areas.[98] As of April 2013, the DNR had tested over 42,500 wild deer and more than 4000 captive deer and elk since surveillance began in 2002.[99] "Samples are collected from all 99 counties in Iowa; however[,] the majority are taken in the counties nearest to areas where CWD has been detected in other states. Samples are collected voluntarily from hunter-harvested deer at check stations and meat lockers."[100] Therefore, as there is no mandatory CWD testing for wild deer, it can potentially go, and likely *has* gone, undetected. For captive herds, there is "[v]oluntary surveillance for elk and deer, but no purchase or movement is allowed from herds not enrolled in a [CWD testing] program."[101]

> There are 153 cervid herds currently enrolled in Iowa's CWD Program. Of these, 104 herds are whitetail deer, 32 herds are elk, 4 with deer and [] elk species, 11 are county conservation boards premises[,] and 2 are park/zoos. These herds have a total of 4,867 cervids that are enrolled in the program, with totals of 1,002 elk, 3,840 whitetail, 3 fallow deer, and 19 mule deer.[102]

B. *Susceptibility of CWD in Whitetail Hunting Preserves vs. Wild Deer*

There is a belief among some that the increased population density of captive deer and elk herds increases the likelihood of CWD infections and that artificial feeding increases the likelihood of CWD transmission, although this

usda.gov/wps/portal/footer/topicsofinterest/applyingforpermit?1dmy&urile=wcm%3apath%3a/aphis_content_library/sa_cwd/ct_history (last modified Sept. 25, 2013).

95. *Id.*

96. *CWD/EHD Information*, *supra* note 89.

97. *Id.*

98. WILLIAMS ET AL., *supra* note 87, at 10.

99. MICH. DEP'T OF NATURAL RESOURCES, CHRONIC WASTING DISEASE AND CERVIDAE REGULATIONS IN NORTH AMERICA (2013), *available at* http://www.michigan.gov/documents/emergingdiseases/CWDRegstableState-Province_402847_7.pdf; *CWD/EHD Information*, *supra* note 89.

100. *CWD/EHD Information*, *supra* note 89.

101. *Regulations: Iowa*, CHRONIC WASTING DISEASE ALLIANCE, http://www.cwd-info.org/index.php/fuseaction/policy.stateRegulations?state=IA (last visited April 9, 2014).

102. Dee Clausen, *Chronic Wasting Disease – Update 2012*, ANIMAL INDUST. NEWS (Iowa Dep't of Agric., Des Moines, Iowa), 2012, at 7, *available at* http://www.iowaagriculture.gov/animalIndustry/pdf/2012Newsletter.pdf.

belief is speculative as all scientists and wildlife experts agree that the exact method of transmission is not understood.[103] Wayne Johnson, a member of the Iowa Whitetail Deer Association board of directors, has stated that increased CWD susceptibility of captive herds is a common misconception and that with CWD confirmed in all of Iowa's neighboring states, CWD was bound to show up in Iowa.[104] Similarly, Iowa Whitetail Deer Association spokesman Scott Kent provided an alternative reason for CWD positive results first showing up in Iowa's captive deer population: all confined deer in Iowa over the age of one are tested for CWD when they die, while only one percent of free-ranging deer are tested.[105] In other words, the increased rate of testing among captive deer is statistically bound to produce exponentially more positive results than the less frequent testing of free-ranging deer.

The first case of CWD in Iowa was discovered in July of 2012.[106] This discovery led to an outcry for stricter regulations with regard to hunting preserves, which one naysayer has described as the "Typhoid Mary of the ungulates."[107] Yet, calls that captive deer are responsible for the spread of CWD are unfounded. CWD is just one form of transmissible spongiform encephalopathy (TSE) which "affect[s] mammals, including cattle, sheep, goats, and mink."[108] TSEs are "a family of rare, progressive neurodegenerative disorders affecting animals and humans."[109] These diseases appear to have long incubation periods,[110] contrary to those who suggest a short exposure to manifestation time window.[111] Despite protestations that CWD started with captive cervids or herds, the fact is that "we know . . . little about some of the most critical information needed to manage it. Some examples of knowledge gaps include: how the disease actually originated; [and] the causal factors behind the appearance of the disease,

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103. *See* WILLIAMS ET AL., *supra* note 87, at 6; *see also* WILLIAMS, *supra* note 84, at 541.

104. Orlan Love, *Disease Raises Concerns about Deer Farms in Iowa*, GAZETTE, Sept. 21, 2012, http://thegazette/2012/09/21/disease-raises-concerns-about-deer-farms-in-iowa/.

105. *Id.*

106. Doug Smith, *CWD Found for First Time in Iowa*, STAR TRIB., July 20, 2012, http://www.startribune.com/sports/blogs/163226856.html.

107. Love, *supra* note 104 (quoting Senator Dick Deardon, Chairman of the Iowa Senate Natural Resources Committee).

108. James C. Kroll, *Chronic Wasting Disease: The Issues at Hand: A White Paper*, 39 J. OF THE TEX. TROPHY HUNTERS 26, Mar./Apr. 2014, at 26.

109. *Id.*

110. *Id.*

111. *See* Michele Angelo Di Bari et al., *Chronic Wasting Disease in Bank Voles: Characterisation of the Shortest Incubation Time Model for Prion Diseases*, 9 PLOS PATHOGENS 1, at 7 (Mar. 2013), *available at* http://www.plospathogens.org/article/fetchObject.action?uri=info%3Adoi%2F10.1371%2Fjournal.ppat.1003219&representation=PDF.

both historically and currently . . . ."[112] Indeed, "[n]o one knows how long CWD has existed within white-tailed deer populations . . . ."[113]

Various animal rights groups, governmental wildlife activists, and anti-hunting individuals contend that CWD can have a dreadful impact on the free-ranging white-tailed deer populations, such that over-regulation of the captive industry and implementation of Draconian measures is required of the captive breeding farms and hunting preserves.[114] The weight of the scientific evidence simply does not support this cause and effect. There was "no evidence that CWD was substantially increasing mortality rates during the duration of [a Wisconsin] study from 2002 to 2007," though the disease was relatively new to the area.[115] There was no difference in harvest rates between CWD infected and non-infected deer.[116] Although CWD may affect mule deer recruitment (the percentage of fawns that survive to the August and September time period), the "effects of CWD on recruitment can be reasonably omitted from estimates of the effect of the disease on mule deer population growth rate."[117] As recently as August 14, 2013, the Senior Wildlife Veterinarian for the Colorado Division of Parks and Wildlife testified under oath in Iowa that there are no real population effects on the Colorado wild cervid herd from CWD:

> Question by Iowa Assistant Attorney General: But overall you've testified that it was difficult to detect [an] effect or there was no effect?
>
> Answer by Dr. Michael Miller: Correct. . . . We've not seen any clear indication of dramatic declines in deer or elk numbers on a large geographic scale as a result of Chronic Wasting Disease.[118]

Thus, there is no scientifically-supported evidence that CWD has any impact on the population dynamics of white-tailed or mule deer.[119] In fact,

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112. Kroll, *supra* note 108, at 26.

113. *Id.* at 27.

114. *See, e.g.*, James E. Miller, *A Growing Threat: How Deer Breeding Could Put Public Trust Wildlife at Risk*, WILDLIFE SOC'Y NEWS (Dec. 14, 2012), http://news.wildlife.org/featured/a-growing-threat/.

115. *See, e.g.*, Seth B. Magle et al., *Survival of White-tailed Deer in Wisconsin's Chronic Wasting Disease Zone*, 19 NE. NATURALIST 67, 74 (2012).

116. Daniel A. Grear et al., *Demographic Patterns and Harvest Vulnerability of Chronic Wasting Disease Infected White-Tailed Deer in Wisconsin*, 70 J. OF WILDLIFE MGMT. 546, 551 (2006).

117. Jessie Dulberger et al., *Estimating Chronic Wasting Disease Effects on Mule Deer Recruitment and Population Growth*, 46 J. OF WILDLIFE DISEASES 1086, 1091 (2010).

118. Transcript of Contested Case Hearing at 290, *In re* Tom & Rhonda Brakke & McBra, Inc., No. 13DOA-001 (Aug. 13, 2013).

119. Kroll, *supra* note 108, at 28.

> by the time a doe becomes clinical for CWD, or even begins to be affected by it, she probably has reproduced at least twice. . . . and the average age of deer in most herds is well beneath the incubation time for the disease. . . . [T]he long-term impact of CWD will not be significant declines in deer populations. . . .
>
> (1) CWD has not been demonstrated to have significant impacts on deer population dynamics.
>
> (2) CWD has not been demonstrated to have a significant human health concern.
>
> (3) CWD has not been demonstrated to affect other species, particularly livestock.[120]

Yet another highly-regarded cervid expert has addressed the hysteria associated with CWD and found no compelling evidence to support concern over its effects on free-range populations:

> 'It is often stated that CWD is a threat to the natural resource, and "is a devastating disease to wild populations." This belief again is not supported by either scientific data or empirical observations through time. The USDA/APHIS data based on a huge sample collected over 10 years indicates that CWD occurs at a very low prevalence. The loss of 10–40 animals per one million animals due to CWD is not significant in wild populations when those populations number in the 100,000s or in the 1,000,000s. Therefore, clearly CWD is neither an epidemic nor is it population limiting. Losses at a level of 1–4 per 1000 are hardly "devastating." Populations of game animal species such as deer and elk are routinely harvested by hunters at a level of 10% to 25% without deleterious effects on those populations. A disease such as CWD with a prevalence rate of 0.1 to 0.4% will not have a significant effect on those populations. . . .
>
> Another popular misconception about CWD is that it is highly contagious. . . . CWD is a chronic disease (hence the name) and not an acute disease . . . If [CWD is indeed] a contagious disease then why does it exist with a very low prevalence rate and rare occurrence? If CWD is a contagious disease then why with a history of more than 45 years in North Eastern Colorado has CWD not completely eliminated populations of elk and deer in that area? If CWD is easily and often transmitted, why is the disease only found in 1–4 animals per 1000? The answer is obvious. Many of the widespread and accepted "facts" about the prevalence of CWD and the host distribution of CWD are erroneous, illogical, and untrue.
>
> It is notable that Dr. Beth Williams states that CWD "is more correctly perceived and classified as a special type of toxicity" than as an infectious disease.'[121]

120. *Id.* at 28, 37.

121. *Id.* at 37 (quoting DON DAVIS, WHAT WE KNOW ABOUT CWD THAT ISN'T SO?: A WHITE PAPER (2013)).

Thus, the Parade of Horribles being trumpeted by those using CWD to prop up their efforts to destroy the captive cervid and exotics industries is not science-based and vastly overblown.

C. *National Regulatory Scheme: The Herd Certification Program*

The regulation of CWD infected herds and their interstate movement has received much federal attention from the USDA Animal and Plant Health Inspection Service (APHIS). APHIS was established in 1972 to protect animal and plant health by enforcing the Plant Protection Act and the Animal Health Protection Act to prevent the introduction of foreign pests and diseases.[122] Pursuant to its power to regulate the interstate movement of animals in commerce, APHIS assumed the federal role in attempting to control the spread of CWD, particularly among farmed or captive cervids.[123] APHIS' stated goal with regard to cervid producers is "[t]o help producers avoid the [market] losses caused by CWD infection and risk,"[124] presumably by easing market concerns over CWD infected cervids by strictly limiting the interstate movement of captive cervids to those "certified" under APHIS' rules.

The teeth of APHIS' CWD regulatory scheme is found in Section 81 of the ninth volume of the Code of Federal Regulations (C.F.R.). This set of regulations provides that "[n]o farmed or captive deer, elk, or moose may be moved interstate" unless: (1) the cervid is "[e]nrolled in the [APHIS-approved] CWD Herd Certification Program and the herd has achieved Certified status;"[125] (2) the cervid is "captured from a wild population for interstate movement and release" and certified to be from a source population at low risk for CWD "based on a CWD surveillance program . . . approved by the State Government of the receiving State and by APHIS;"[126] (3) the cervid is moved directly to slaughter, provided the appropriate APHIS representative is given advanced notice;[127] or (4) the cervid is moved for research purposes and is accompanied by a research animal

122. Plant Protection Act, 7 U.S.C. § 7701 (2012); Animal Health Protection Act, 7 U.S.C. § 8301 (2012); *see also About APHIS*, APHIS, USDA, http://www.aphis.usda.gov/wps/portal/banner/aboutaphis (last modified Jan. 30, 2014).

123. Control of Chronic Wasting Disease, 9 C.F.R. pt. 55 (2013); Chronic Wasting Disease in Deer, Elk, and Moose, 9 C.F.R. pt. 81 (2013); *see also Chronic Wasting Disease*, APHIS, *supra* note 86.

124. Chronic Wasting Disease Herd Certification Program and Interstate Movement of Farmed or Captive Deer, Elk, and Moose, 77 Fed. Reg. 35,542, 35,542-43 (June 13, 2012) (codified at 9 C.F.R. pts. 55 & 81) [hereinafter CWD Herd Certification Program].

125. 9 C.F.R. § 81.3(a) (2013).

126. *Id.* at 81.3(b).

127. *Id.* at 81.3(c).

permit.[128] Importantly, the regulations explicitly waive federal preemption to allow states to enact even stricter CWD regulations.[129]

On August 13, 2012, the "Chronic Wasting Disease Herd Certification Program" (HCP) proposed by APHIS became effective.[130] Although the HCP is described as "voluntary," the strict regulations on interstate movement of captive cervids set forth in Section 81 of the ninth volume of the C.F.R. clearly make the program mandatory for those producers needing to move their cervids interstate.[131] Under the HCP, each state is allowed to create its own HCP with certain minimum requirements for APHIS approval, and, again, the states are allowed to implement stricter regulations than required by APHIS.[132] States choosing to participate in the HCP must create programs approved by APHIS that satisfy the following requirements:

> (1) Establishes movement restrictions on CWD-positive, CWD-suspect, and CWD-exposed animals, to prevent the spread of the disease, and requires testing of such animals[;]
>
> (2) Conducts traceback on such animals, to determine what other animals may be affected[;]
>
> (3) Requires testing of all animals that die or are killed . . .; [and]
>
> (4) Maintain[s] premises and animal identification for all herds participating in the CWD Herd Certification Program in the State. [133]

Similarly, herd owners wishing to participate in their state's HCP, must:

> (1) Identify each animal in their herds through approved means of identification and maintain a complete inventory of the herd . . .;
>
> (2) Add to their herds only animals that are from herds enrolled in the CWD Herd Certification Program . . .;
>
> (3) Maintain perimeter fencing adequate to prevent ingress or egress of cervids . . .; [and]

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128. *Id.* at 81.3(d).

129. *Id.* at 81.6.

130. *See id.* at 55.21–.25; *see also* CWD Herd Certification Program, *supra* note 124, at 35,542 (summarizing the HCP program and detailing additional changes made to federal CWD related regulations).

131. *See Chronic Wasting Disease Information – Herd Certification Program*, APHIS, USDA, http://www.aphis.usda.gov/wps/portal/aphis/home/?1dmy&urile=wcm%3Apath%3A/aphis_content_library/sa_our_focus/sa_animal_health/sa_cwd/Ct_farmed (last updated Feb. 25, 2014).

132. *See* 9 C.F.R. §§ 55.23, 81.6.

133. *See* CWD Herd Certification Program, *supra* note 124, at 35,543; *see* 9 C.F.R. § 55.23(a) (for more detailed qualifications for APHIS approved state HCPs).

> (4) Report to APHIS or the State all animals that escape or disappear, and report to APHIS or the State all animals that die or are killed and make their carcasses available for tissue sampling and testing. [134]

Herds are given a status based on the date they enrolled in the program.[135] Herds that do not have any CWD-infected or CWD-exposed animals for five years will be granted "Certified status," allowing herd owners to move the herd population across state lines.[136]

Currently, twenty-nine states have sought approval under the HCP.[137] Of these, twenty-three have been approved.[138] Iowa recently received approval, however, six other states' plans have received "Provisional Approval," which means that "the Administrator has determined a State CWD HCP does not meet all the national CWD HCP minimum requirements upon application to the program."[139]

The current frustration over aggressive state and federal regulations regarding cervids and exotics takes on added life when animal owners and enterprises see double standards employed by their own governments.

> [O]n March 2, 2013, officials at the South Dakota's Wind Cave National Park tore down part of the fence and used helicopters to release 200 of the estimated 950 CWD infected or exposed elk into Custer State Park. Since 1998, they have tested approximately 140 elk and found 45 positives. Despite the CWD prevalence, the elk herd has continued to grow. It is worth noting that Wind Cave National Park began as a National Game Preserve, a 4,000 acre game ranch, administered by the U.S. Biological Survey, Department of Agriculture, but you will only find this fact in the archives.[140]

If CWD is indeed the dire plague it is represented by some to be, then one wonders how at the same time that both federal and state governments are trying to micro-manage private herds into oblivion, the federal government, through means completely barred in every state with any CWD program, could foist such a high percentage positive herd on a state, and it would be permitted by the state.

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134. CWD Herd Certification Program, *supra* note 124, at 35,543; *see* 9 C.F.R. § 55.23(b) (explaining more detailed qualifications for individual herd owner obligations under APHIS approved state HCPs).

135. 9 C.F.R. § 55.24(a).

136. *Id.* at 55.24(a), 81.3(a)(1).

137. Listing of Approved State CWD Herd Certification Programs (HCPs), APHIS, USDA (Jan. 24, 2014), http://www.aphis.usda.gov/animal_health/animal_diseases/cwd/downloads/list_approved_st_cwd_herd_cert_programs.pdf.

138. *Id.*

139. *Id.*

140. Letter from Tom and Rhonda Brakke, to Fellow Producer 2 (Apr. 2, 2013), *available at* http://www.naelk.org/userfiles/file/Brakke%20CWD%20Crisis.pdf.

IV. IOWA'S REGULATION OF CAPTIVE DEER

A. *Regulation of Farm Deer Entering and Moving Within Iowa*

The regulations controlling the entry of farm deer and cervidae herds into the state of Iowa are governed primarily by Iowa Administrative Code, Agency 21, Chapter 65.[141] The Code prohibits entry of cervids into Iowa from an area considered endemic for CWD.[142] This includes cervids that originate from a herd that has introduced animals from an area endemic to CWD during the previous five years.[143] CWD-susceptible cervids, defined as white-tailed deer, black-tailed deer, mule deer, red deer, moose, elk, and related species and hybrids, are only allowed into Iowa from herds which are currently enrolled in and have satisfactorily completed at least five years in an official, recognized CWD monitoring program.[144] Each cervid entering Iowa must be accompanied by a pre-entry permit, which is requested by a licensed, accredited veterinarian and issued by the state veterinarian prior to movement, as well as a Certificate of Veterinary Inspection (CVI) signed by the veterinarian requesting the pre-entry permit.[145] The CVI must also list the pre-entry permit number, the CWD herd number, the anniversary and expiration dates, and the herd status.[146] Even cervids that are not identified as CWD-susceptible are only allowed into Iowa from herds which are currently enrolled in an official, recognized CWD monitoring program and must be accompanied by an identically detailed CVI.[147]

Iowa Administrative Code rule 21-66.14 governs the intrastate movement of cervids.[148] With the exception of those cervids moved to a state or federally-inspected slaughter establishment, the Code prohibits intrastate movement unless the cervids are accompanied by an intrastate movement CVI.[149] Further,

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141. IOWA ADMIN. CODE r. 21-65.9 (2014).
142. *Id.* at 21-65.9(2)(a).
143. *Id.* at 21-65.9(1)(a), (2)(b).
144. *Id.* at 21-65.9(1)(a), (2)(a).
145. *Id.* at 21-65.9(1)(b)–(c).
146. *Id.* at 21-65.9(2)(b). In addition, the following statement must be accurate and listed on the CVI of all CWD-susceptible cervids: "All Cervidae on this certificate originate from a CWD monitored or certified herd in which these animals have been kept for at least one year or were natural additions. There has been no diagnosis, sign, or epidemiological evidence of CWD in this herd for the past five years." *Id.*
147. *Id.* at 21-65.9(2)(c).
148. *Id.* at 21-66.14.
149. *Id.* at 21-66.14(1), (2)(d). The intrastate movement CVI must include "the CWD herd premises number, the herd status level, the anniversary date, and the expiration date," as well as the following statement: "There has been no diagnosis, sign, or epidemiological evidence of chronic wasting disease in this herd for the past year." *Id.* at 21-66.14(2)(d).

movement of CWD-susceptible cervids shall only be allowed from herds that have been enrolled in the Iowa CWD monitoring program and have successfully completed at least one year.[150]

B. *Regulation of Farm Deer and Whitetail Hunting Preserves*

The laws of Iowa divide regulation of captive cervids between those kept on farms and those kept or moved to hunting preserves. As the Iowa Code explains, "whitetail shall be considered farm deer until released onto [a] hunting preserve. Once released onto the hunting preserve, the whitetail and its progeny become preserve whitetail and are subject to regulation by the [D]epartment of [N]atural [R]esources."[151] Iowa Code Chapter 170 authorizes the Iowa Department of Agriculture and Land Stewardship (IDALS) with the cooperation of the Iowa DNR, to regulate deer farms and farmed deer, including farmed whitetails.[152] While CWD was not discovered in Iowa until 2012, the discovery of CWD in neighboring states set the stage for the Iowa CWD prevention plan and changes to Chapter 170 of the Iowa Code.[153] The 2005 Amendments to the Iowa Code saw the introduction of CWD regulations as codified in Section 170.3A, which directs IDALS to set up a disease control program that includes procedures for inspecting and testing deer, responses to the reported cases of CWD, and methods for deer owners to engage in the sale and movement of farm deer.[154] The 2005 Amendments also created the deer administration fund, which funds IDALS' CWD program through an administration fee of no more than two hundred dollars required of all deer farmers.[155]

The Code further sets forth certain fencing requirements for all Iowa deer farms.[156] Under Section 170.4, "[a] landowner shall not keep whitetail as farm deer, unless the whitetail [are] kept on land which is enclosed by a fence . . . constructed and maintained to ensure that whitetail are kept in the enclosure and that other deer are excluded from the enclosure."[157] The fence must be constructed

150. *Id.* at 21-66.14(1).

151. IOWA CODE ANN. § 484C.8(3) (West, Westlaw through 2014 regular session); s*ee also* IOWA CODE ANN. § 484B (for rules governing hunting preserves in general); *see also* IOWA CODE ANN. § 484C (for rules governing hunting preserves containing whitetails). Note that there are slight but distinct differences between the rules affecting hunting preserves in general and preserves containing whitetails.

152. IOWA CODE ANN. §§ 170.1A(1), 170.3; *see* IOWA ADMIN. CODE r. 571.112 (providing DNR regulations pertaining to hunting preserves in general).

153. *See* Smith, *supra* note 106.

154. IOWA CODE ANN. § 170.3A.

155. *Id.* at 170.3B–C.

156. *Id.* at 170.4.

157. *Id.*

and maintained as prescribed by IDALS' rules but, at a minimum, must be at least eight feet in height.[158] IDALS is tasked with certifying that fencing surrounding deer farms complies with the rules and may require that the owner's fence is inspected prior to approval.[159] The DNR may also periodically inspect deer farm fences by appointment with the enclosure's landowner.[160]

The Iowa regulations for hunting preserves and preserve whitetails are found primarily in Section 484 of the Iowa Code and Chapter 571.115 of the Iowa Administrative Code. Iowa Code Section 484C.2 authorizes the DNR to regulate hunting preserve whitetails, leaving IDALS in charge of regulating whitetails kept on deer farms.[161] Specifically, the DNR is authorized and directed to "develop, administer, and enforce hunting preserve programs and requirements . . . regarding fencing, recordkeeping, reporting, and the tagging, transportation, testing, and monitoring for disease of preserve whitetail."[162] After obtaining a preserve operator's license from the DNR, preserve landowners must annually register their preserve with the DNR and pay a fee set by the department not exceeding $350.[163] Preserve owners are also required to maintain certain records pertaining to sales, purchases, and harvests of whitetails and to submit an annual report to the DNR detailing preserve operations over the year.[164] Whitetail hunting preserves not in existence on or before January 1, 2005, must contain at least 320 contiguous acres,[165] be enclosed by a "deer-proof" boundary fence at least eight feet in height,[166] and post boundary signs reading "Registered Hunting Preserve" at each entrance, perimeter gate, and boundary corner of the preserve.[167] After initial inspection and approval by the DNR, the department is allowed to perform follow-up fence inspections by appointment or with forty-eight hours' notice.[168] All whitetails taken on a hunting preserve shall be tagged prior to being removed from the hunting preserve according to DNR rules.[169]

Preserve owners must test all preserve whitetails upon death (for any reason or cause) for CWD.[170] Any whitetail "[i]nfected with or recently exposed to

158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 484C.2(2).
162. *Id.* at 484C.4.
163. *Id.* at 484C.7; *see also id.* at 484B.4 (for hunting preserve application and license requirements).
164. *Id.* at 484C.9(2)(b); IOWA ADMIN. CODE r. 571-115.5 (2014).
165. IOWA CODE ANN. § 484C.5(1).
166. IOWA ADMIN. CODE r. 571-115.4.
167. *Id.* at 571-115.3.
168. *Id.* at 571-115.4.
169. IOWA CODE ANN. § 484C.10; IOWA ADMIN. CODE r. 571-115.6.
170. IOWA ADMIN. CODE r. 571-115.9.

any infectious, contagious, or communicable disease, or originat[ing] from a quarantined area" may not be transported or shipped into or within Iowa.[171] A minimum five-year quarantine is imposed on a preserve following a positive test result for CWD, which starts over if another positive animal is found, all during which there may be no animal movement in or out of the preserve.[172] Within thirty days following a positive CWD test, the preserve operator, the operator's veterinarian if requested, and a designated epidemiologist must formulate a herd plan, assented to by the DNR and the state veterinarian's office, that is "designed to reduce and then eliminate chronic wasting disease from the herd; to prevent the spread of the disease to other herds, both privately owned and wild; and to prevent reintroduction of chronic wasting disease after the herd is released from quarantine."[173] Further, the preserve premises must be cleaned under DNR supervision within fifteen days after any affected animals are removed.[174] Of course, all of this pre-supposes that the facility is operating or continues to operate as a licensed preserve.

V. THE CAPTIVE CERVID CONUNDRUM

Hysteria over CWD has been whipped up by the animal activists, wildlife officials, and the unsophisticated alike. The same animal rights groups that think all animals should roam the entire world free and that raising livestock or having pets is "slavery," continue to push their agendas through governmental agencies and members or followers who have infiltrated federal and state agriculture, natural resources, and wildlife departments and agencies.[175] Non-science-based rules, regulations, guidelines, and programs continue to spring up across the country in an effort to eviscerate an animal illness that, as set forth above, has no real effect on the survival of free range cervidae. The regulatory largess that has evolved over the past few years is taking dead aim at the captive cervid breeding and preserve enterprise, a significant economic engine which fosters the storied hunting traditions of our nation, and provides hunting opportunities not otherwise available in Iowa or the United States. Rules and regulations being promoted and adopted "willy nilly" that will swallow up the captive industry, such as higher fencing, double or triple fencing and testing, wire and electric fencing, travel permits, veterinary certification, ad hoc rule-making in the field,

171. *Id.* at 571-115.8.
172. *Id.* at 571-115.10.
173. *Id.*
174. *Id.*
175. *See e.g., Chronic Wasting Disease and Cervidae Regulations in North America,* CHRONIC WASTING DISEASE ALLIANCE, http://www.cwd-info.org/index.php/fuseaction/policy.regulationsMap (last visited April 9, 2014) (providing portal to view existing regulations of CWD).

wildlife law enforcement threats, intimidation of preserve owners, and stirring up opponents of these trades are all additional and unfunded costs engineered to be solely borne by the cervid farmer so as to put captive cervid commerce out of business.[176]

Animal enterprises are not going to just fade away when their land, animal property, businesses, and goodwill are regulated and stolen through manipulation of the Public Trust Doctrine and generalized, but spurious, public and animal health and welfare concerns. These governmental, confiscatory actions in our current "regulation nation" are being and should be met with constitutional takings claims for damages, reimbursement, indemnification, and fee sharing. Just as our forefathers fought the nobility's edicts and limitations on their natural hunting rights, so, too, should animal breeders and ranchers fight back at the ballot box and in the courts against reckless and politically-motivated restrictions on their business and private property.

VI. THE TAKINGS CHALLENGE: WHY THE ANIMAL INDUSTRY SHOULD WIN

The Fifth Amendment to the U.S. Constitution provides, "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[177] Although some cases present relatively straightforward facts that allow a simple analysis as to whether the government has taken private property without compensation, more often than not, especially when the taking results from a regulatory action enacted to secure some sort of purported public benefit, the analysis is much more difficult. At the heart of this analytical enigma is the Supreme Court's unwillingness, or inability, to provide a clear formula or framework for determining whether state action constitutes an impermissible taking.[178] Instead, the Court has opted for "essentially ad hoc, factual inquiries," involving "factual assessments of the purposes and economic effects of government actions."[179]

"Prior to Justice [Oliver Wendell] Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, it was generally believed that the Takings Clause reached only a 'direct appropriation' of property . . . ."[180] In *Pennsylvania Coal Co. v. Mahon*, the Court considered whether a newly passed Pennsylvania law prohibiting certain types of mining violated the Takings Clause as to mines existing at

176. *See e.g., id.*

177. U.S. CONST. amend. V.

178. *See* Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962) (acknowledging that no framework exists for determining a taking).

179. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Yee v. City of Escondido, 503 U.S. 519, 523 (1992).

180. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (citations omitted).

the time of law's passage and engaging in the newly prohibited mining.[181] Justice Holmes for the first time laid down that the "general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[182] Determining how far is "too far" has been the problem ever since.

In one of the seminal cases interpreting the Fifth Amendment's Takings Clause, and one of the first to extrapolate on the "too far" doctrine outlined by Justice Holmes, the U.S. Supreme Court considered in *Penn Central Transportation Co. v. New York City* whether the New York City Landmarks Preservation Commission's refusal to approve plans for construction of fifty-story office building over Grand Central Terminal, which had been designated a "landmark," constituted a taking as to the terminal's owner.[183] On the way to determining that the Commission's refusal did not constitute a taking, the Court set forth factors to be considered against the specific facts of each case, including: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[184] The Court explained that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose or perhaps if it has an unduly harsh impact upon the owner's use of the property."[185]

The Court, however, further explained that not every restriction on the use of private property by the state is a taking.[186] In the case before it, the Court explained, "Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated" but rather, focuses "on the nature and extent of the interference with rights in the parcel as a whole . . . ."[187] The Court held that no taking occurred, resting heavily on the finding that the law did not "interfere in any way with the present uses of the Terminal" and allowed the terminal owner to "continue to use the property precisely as it ha[d] been used for the past [sixty-five] years: as a railroad terminal containing office space and concessions" allowing the owner "to obtain a 'reasonable return' on [this] investment."[188]

181. 260 U.S. 393, 412–13 (1922).

182. *Id.* at 415.

183. 438 U.S. 104, 115–19; *see also* Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 ALA. C.R. & C.L. L. REV. 25, 29–30 (2013) (referencing the *Penn Central* analysis).

184. Penn Cent. Transp. Co., 438 U.S. at 124; *see* Durden, *supra* note 183, at 30.

185. Penn Cent. Transp. Co., 438 U.S. at 127 (citations omitted).

186. *See id.* at 130.

187. *Id.* at 130–31.

188. *Id.* at 136.

To analyze the improper taking by any state or governmental entity, one should consider *Arkansas Game and Fish Commission v. United States*, the U.S. Supreme Court's latest takings decision.[189] There, the Army Corps of Engineers enacted a program to assist farmers by releasing water from a dam at a slower deviated rate in the spring and summer months to accommodate certain local farmers' request to slow the release allowing for extended harvest ods.[190] This release occurred yearly for six years.[191] One hundred and fifteen miles downstream, the Dave Donaldson Black River Wildlife Management Area served as a hunting and recreation venue and a timber resource.[192] As a result of the three months of flooding yearly—up to six feet in height—a great percentage of the trees (more than eighteen million board feet of timber) were destroyed or degraded.[193] The damage also altered the character of the area. The destruction of the trees led to undesirable plant species, making natural regeneration of the area improbable without reclamation efforts.[194] The Court of Federal Claims awarded $5.7 million in damages to the Commission.[195] The Federal Circuit Court reversed.[196] Certiorari was granted by the Supreme Court to resolve the question of whether government actions causing repeated floods must be permanent or inevitably recurring in order to constitute an unlawful and unconstitutional taking of property.[197]

In its opinion, the Supreme Court stated that "[t]he Taking Clause is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[198] Furthermore, "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner."[199] In context, then, when the government, which represents the entire citizenry, unlawfully takes from an individual, then the public as a whole, through its government, shall pay recompense.

There is no magic formula that allows a court to decide whether or not there is a taking.[200] Most takings claims turn on situation-specific inquiries.[201]

189. Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012).
190. *Id.* at 516.
191. *Id.*
192. *Id.* at 515–16.
193. *Id.* at 515–17.
194. *Id.* at 516–17.
195. *Id.* at 517.
196. *Id.*
197. *Id.*
198. *Id.* at 518 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).
199. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002) (citing United States v. Pewee Coal Co., 341 U.S. 114, 115 (1951)).
200. *See* Ark. Game & Fish Comm'n., 133 S. Ct. at 518.

But it is clear that temporary takings cases are not confined to instances in which the government takes outright physical possession of the property involved.[202] "A temporary takings claim could be maintained as well when government action occurring outside the property [gives] rise to 'a direct and immediate interference with the enjoyment and use of the land.'"[203] "The determination [of] whether a taking has occurred includes consideration of the property owner's distinct investment-backed expectations, a matter often influenced by the law in force in the State in which the property is located."[204]

The Supreme Court focused on the "permanent" v. "temporary" rationale in its opinion, stating that this was what the trial court had focused on in its earlier opinion.[205] The trial court had awarded $5.7 million in damages based on its finding that a taking had occurred.[206] The Federal Circuit Court of Appeals nullified the award.[207] The Government's primary argument in *Arkansas Game and Fish Commission* was that reversing the Federal Circuit Court's decision risked the disruption of public works dedicated to flood control.[208] The Government argued that, in the takings analysis, the taking had to be permanent in order for a compensatory taking to occur.[209] The Government also urged the Court to make an exemption in the field of "takings" law for flooding by governmental water releases, if the flooding was only temporary.[210] The Supreme Court stated that, while the public interests here were important, they were not categorically different than the myriad of other interests at stake in takings claims.[211] The Supreme Court ruled that there is a category of "takings" which must lead to compensation even if they only last for a temporary period.[212] In other words, there was no "automatic exemption" for temporary interference in a takings analysis.[213] When a regulation or temporary physical invasion by government interferes with private

201. *Id.*
202. *See, e.g.*, *id.* (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)) (the law would also protect a property owner who has sacrificed economically beneficial uses of the land).
203. *Id.* at 519 (citing United States v. Causby, 328 U.S. 256, 266 (1946)).
204. *Id.* at 522.
205. *Id.* at 517.
206. *Id.*
207. *Id.*
208. *Id.* at 521.
209. *Id.* at 520.
210. *Id.* at 519.
211. *Id.* at 521.
212. *See id.* at 519 (stating a temporary taking could be actionable if it was a "direct and immediate interference with the enjoyment and use of the land").
213. *Id.* at 522.

property, the Supreme Court's decisions recognize that "time is indeed a factor in determining the existence *vel non* of a compensable taking."[214]

The factors in the takings analysis are not only the duration of the taking, but also a case-by-case analysis of all the factors that help resolve whether damage was done and whether it was severe enough to constitute a seizure of the property.[215] The opinion listed some of these other factors: (1) "the degree to which the invasion is intended or is the foreseeable result of authorized government action;"[216] (2) "the character of the land at issue;"[217] (3) "the owner's 'reasonable investment-backed expectations' regarding the land's use;"[218] and (4) the "[s]everity of the interference."[219]

The case was remanded back to the Federal Circuit Court of Appeals to take up the government's challenges to some of the other factors, as the Federal Circuit Court's opinion only relied on the temporary aspect of the takings argument.[220]

All of these categories, including the temporal analysis, are important when considering the facts and evidence of any case. The benefit of the recent *Arkansas Game and Fish* opinion is that the Supreme Court did not dance around the issue of "temporary" takings, but rather, at least in the area of flooding, directly held that government flooding, even if temporary in duration, is not exempt from the finding of a taking.[221] The Supreme Court cited prior regulatory takings cases for the proposition that the temporary nature of a land use restriction should not be given exclusive significance with respect to a takings analysis.[222]

For example, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, "Ordinance 81-5 and Resolution 83-21 effectively prohibited all construction on sensitive lands in California and on all [stream environment zones (SEZ)] in the entire Basin for [thirty-two] months, and on sensi-

214. *Id.* at 522; Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–29 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432–33, n. 10 (1982) (physical takings are fact specific inquiries).

215. *See* Ark. Game & Fish Comm'n, 133 S. Ct., at 522; Lucas, 505 U.S. at 1031; Phillips v. Wash. Legal Found., 524 U.S. 156, 170 (1998) (stating possession, control, and disposition are valuable rights even if the owner has no economically realizable value to the owner).

216. Ark. Game & Fish Comm'n, 133 S. Ct. at 522.

217. *Id.*

218. *Id.* (citing Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2001)).

219. *Id.*

220. *Id.* at 523.

221. *Id.* at 522.

222. *Id.* at 519.

tive lands in Nevada (other than the SEZ lands) for eight months."[223] It was these two moratoria that were at issue with regard to Petitioner's arguments that a taking had occurred without just compensation.[224] Petitioners were individuals who had purchased their properties prior to the effective date of the 1980 Compact primarily for constructing single family residences to serve as vacation and/or retirement homes.[225] When the individuals made the purchases, they did so with the understanding that such construction was authorized provided that they complied with all reasonable requirements for building.[226]

The opinion noted the differences "between a direct[, physical] government[al] appropriation of property without just compensation and a government regulation that imposes such a severe restriction [or regulation] on the owner's use of her property that it produces 'nearly the same result as a direct appropriation.'"[227] The Supreme Court turned to its decision in *Agins v. City of Tiburon*, which stated that a "regulation will constitute a taking when either: (1) it does not substantially advance a legitimate state interest; or (2) it denies the owner economically viable use of her land."[228] In *Tahoe-Sierra*, there was really no argument at trial that future building would result in an increase of additional problems for the lake.[229] Therefore, the legitimate state interest was not a colorable argument. The second factor of economic viability led to the analysis of the now well-known takings factors described in *Penn Central*.[230] The *Penn Central* analysis includes several considerations: (1) the regulation's effect on the landowner, (2) the extent to which the regulation interferes with reasonable investment-backed expectations, and (3) the character of the government tion.[231] Using these factors, the District Court noted the temporary nature of the regulations and that the "average holding time of a lot in the Tahoe area between lot purchase and home construction is twenty-five years."[232] The District Court held that the petitioners failed to introduce any evidence of harm and, in the ab-

223. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 312 (2002).

224. *Id.* at 313–14.

225. *Id.* at 312–13.

226. *Id.* at 313.

227. *Id.* at 314 (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1238 (1999)).

228. *Id.* (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1239 (1999)).

229. *See id.* at 314.

230. *See id.* at 315; Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

231. 438 U.S. 104, 124 (1978).

232. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1240 (D. Nev. 1999).

sence of this evidence, the court found that the petitioners did not have reasonable, investment-backed expectations that they would be able to build single family homes within the six year period involved in the lawsuit.[233] Based on the *Penn Central* factors, the District Court determined there was no taking.[234]

Not to be dissuaded, however, the District Court took another route in its final takings analysis and determined that there *was* a total taking because the moratorium had deprived the owners temporarily of all economically viable use of their land.[235] The District Court found that the Tahoe Regional Planning Agency's actions effected a taking, partly because the Ordinance did not have a fixed end.[236] The court ordered the Tahoe Regional Planning Agency to pay damages to petitioners for the thirty-two month period.[237] Both parties appealed, but the petitioners did not appeal the court's ruling that a taking did not occur under the *Penn Central* analysis.[238] In reversing, the Court of Appeals stated that, since the petitioners did not contest the Court's holding as to no taking under the *Penn Central* analysis, the only question on appeal was whether or not "a categorical taking occurred because Ordinance 81-5 and Resolution 83-21 denied the plaintiffs '*all economically beneficial or productive use of the land.*'"[239] This analysis for the Supreme Court was a wholly different analysis than a takings claim based on the *Penn Central* factors. "[T]he narrow inquiry before the Court of Appeals was whether the mere enactment of the regulations constituted a taking."[240] The Court of Appeals held there was no categorical taking "because the regulations had only a temporary impact on petitioners' fee interest in the properties."[241]

Petitioners were foreclosed from arguing that a taking occurred based on the *Penn Central* analysis.[242] They did argue that the "regulation imposes a temporary deprivation—no matter how brief—of all economically viable use [of the land] to trigger a *per se* rule that a taking had occurred."[243] The Supreme Court rejected this categorical rule as it applies to takings.[244] The Supreme Court held that "the answer to the abstract question whether a temporary moratorium effects

233. *Id.*
234. *Id.* at 1242.
235. *Id.* at 1245.
236. *Id.* at 1250–51.
237. *Id.* at 1255.
238. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 317 (2002).
239. *Id.* at 317–18 (citations omitted) (emphasis added).
240. *Id.* at 318.
241. *Id.*
242. *See id.* at 334.
243. *Id.* at 320.
244. *Id.* at 321.

a taking is neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances of the case."[245] The Court stated that, "the circumstances in this case are best analyzed within the *Penn Central* framework."[246] However, this opinion did not address any of the *Penn Central* arguments regarding a taking because this argument was waived by petitioners; this opinion only rejected a *per se* rule as it applies to takings.[247] The Supreme Court stated that this case presents the question of whether "the interference with property rights 'arises from some public program adjusting the benefits and burdens of economic life to promote the common good.'"[248] The Supreme Court also stated that physical takings cases and regulatory cases require different analyses for the Court.[249] Physical takings can be identified with a clear rule of taking possession of property for a public purpose; if so, then compensation is required. Regulatory takings entail a more complex factual assessment of the purposes and effects of governmental actions.[250]

The Court went through a host of cases and stated that "'where a property owner possesses a full 'bundle' of property rights, the destruction of [only] one 'strand' of the bundle is not a taking.'"[251] Thus, the Supreme Court in *Tahoe-Sierra* rejected the notion of a temporary taking of land for a duration of time.[252] In citing to the Restatement of Property, the Court stated that "[a]n interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest."[253] The Court found that both dimensions, the term of years and geographic interest, must be considered if a property interest is to be viewed in its entirety.[254] The Supreme Court held:

> a permanent deprivation of the owner's use of the entire area is a taking of the 'parcel as a whole,' whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a tempo-

245. *Id.*
246. *Id.*
247. *See id.* at 334.
248. *Id.* at 324–25 (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).
249. *Id.* at 323 (citing Yee v. Escondido, 503 U.S. 519, 523 (1992)).
250. *Id.*
251. *Id.* at 327 *(*quoting Andrus v. Allard, 444 U.S. 51, 65–66 (1979)).
252. *See id.* at 302.
253. *Id.* at 331–32.
254. *Id.* at 318 (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 774 (9th Cir. 2000)).

> rary prohibition on economic use, because the property will recover as soon as the prohibition is lifted.[255]

In rejecting the *per se* rule as it relates to regulatory temporary takings, the Supreme Court made clear it did not hold that the temporary nature of a land use restriction precludes finding that it effects a taking, but rather stated, "we simply recognize that it should not be given exclusive significance one way or the other."[256] In the Court's view, "the duration of the restriction is one of the important factors" that the courts should consider when determining regulatory takings claims.[257] "[W]e still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings . . . ."[258] The Supreme Court affirmed the decision of the Court of Appeals that no taking had occurred.[259]

A careful reading of *Tahoe-Sierra* reveals that the Supreme Court was not rejecting the notion of compensation for temporary takings, but was rather rejecting a *per se* rule when a temporary taking deprives the owner of all use of his or her land for only a period of time. The Supreme Court stated several times that the *Penn Central* factors should be used when there are regulatory takings at issue.[260] The Supreme Court has not foreclosed that there can be a regulatory taking when the regulation is temporary in nature. The length of the ban, moratorium, and/or regulation is one of the factors to be considered in the *Penn Central* analysis.[261]

To round out the takings analysis, the other cases cited by the U.S. Supreme Court in *Arkansas Game and Fish* should be considered. In *Sanguinetti v. United States*, the Supreme Court addressed the issue of a taking without just compensation following the building of a canal, which arguably increased flooding on appellant's lands.[262] The Supreme Court stated:

> [u]nder these decisions and those hereafter cited, in order to create an enforceable liability against the government, it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property.[263]

255. *Id.* at 332 (citing Agins v. City of Tiburon, 447 U.S. 255, 263 n. 9 (1980)).
256. *Id.* at 337.
257. *Id.* at 342.
258. *Id.* at 326.
259. *Id.* at 343.
260. *See generally id.*
261. *See id.* at 337–38.
262. 264 U.S. 146 (1924).
263. *Id.* at 149.

The conditions of this rule were not met in *Sanguinetti*, as the property had flooded prior to the building of the canal.[264] The Supreme Court basically stated that any increase in flooding was speculative.[265] The Court found "[a]ppellant was not ousted, nor was his customary use of the land prevented, unless for short periods of time."[266] The Supreme Court held the appellant had not shown that the overflow of water was the direct result of the canal, or that it was within the contemplation of, or reasonably anticipated by, the government.[267]

The *Sanguinetti* Court's rationale is applicable, particularly when the customary use of land as a breeding farm or hunting preserve is proposed to be prohibited completely, or, as in Iowa, at least limited over a period of time, for five years which can be re-triggered with another positive finding. Five years is not a short period of time, nor is this taking a seasonal issue, which is the factual scenario in many of the Supreme Court flooding cases.[268] While the Supreme Court has stated that its reasoning in regulatory and physical takings cases are different, the logic behind foreclosing any of the customary use of an owner's land is arguable in each factual scenario, whether the taking is regulatory or physical in nature. The state's prohibition of the use of a breeding farm or hunting preserve in absolute terms for an extended period of time is, in this author's opinion, an unconstitutional taking.

United States v. W.R. Cress, another water case, was also addressed by the Supreme Court in *Arkansas Game and Fish*.[269] As early as 1917, the Supreme Court recognized that it is the "character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."[270] The Supreme Court cited its opinion in *United States v. Lynah*, and stated: "[W]here the government by the construction of a dam or other public works so [it] floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the Fifth Amendment."[271] It is significant to note that, even though the flooding in *Cress* only depreciated the land's value by one-half, the Supreme Court still found that a taking had occurred and, in doing so, "substantially," though not totally, de-

264. *Id.* at 149–50.
265. *See id.* at 150.
266. *Id.* at 149.
267. *Id.*
268. *See, e.g.*, United States v. Cress, 243 U.S. 316 (1917); United States v. Lynah, 188 U.S. 445 (1903); Pumpelly v. Green Bay Co., 80 U.S. 166 (1871).
269. Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012); Cress, 243 U.S. 316.
270. *See* Cress, 243 U.S. at 328.
271. 188 U.S. at 470.

stroys its value (a case-specific fact question), then based on the logic of *Cress*, the state's action constitutes a complete taking of the property and business.[272]

In *United States v. Causby*, the Court addressed a regulatory taking where a landowner sued the United States alleging that the military planes the government flew over their property constituted a taking of his chicken business, which was destroyed.[273] The family also argued that they were frequently deprived of their sleep due to the airplanes.[274] The Court of Claims held that the landowner's property had depreciated in value and the United States had taken an easement over the property in the value of $2000.[275] The United States attempted to rest on the Air Commerce Act of 1926, which stated that the United States had "complete and exclusive" national sovereignty in the airspace over this country.[276] The Court held that flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.[277] However, the Court, in finding that a taking had occurred, stated it was not controlling that the use and enjoyment of the land were not completely destroyed.[278] It also stated that "[i]t is the *owner's loss, not the taker's gain*, which is the measure of the value of the property taken."[279] The Supreme Court agreed with the Court of Claims that a "servitude" had occurred on the land, but remanded to the lower court for a more precise finding of the type of easement and monetary damage to Plaintiff.[280]

It is apparent that the Supreme Court did not require a permanent taking of the property, even in the regulatory context, for an unlawful taking to have occurred. The landowners lost their chicken farming business and their personal enjoyment of the land as a result of the airplane use overhead, which was sufficient for the Court to find that a taking had occurred.[281] Quarantine, closure, or regulation and supervision of a hunting preserve or game farm will substantially diminish, if not effectively eliminate, the owner's commercial deer business, revenue, and the right to use and enjoy their own land. Thus, the law is clear that the complete loss of the use of the land as a result of the state's actions is not outcome determinative in the government's favor.

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272. *See* Cress, 243 U.S. at 328.
273. United States v. Causby, 328 U.S. 256, 258 (1946).
274. *Id.* at 259.
275. *Id.*
276. Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568; Causby, 328 U.S. at 260.
277. Causby, 328 U.S. at 264–65.
278. *Id.* at 262–63.
279. *Id.* at 261 (citing United States v. Miller, 317 U.S. 369 (1943)) (emphasis added).
280. *See id.* at 266–68.
281. *See id.* at 268.

In a lengthy opinion, the Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corporation* laid out the then-current status of "takings law" as it applied particularly to physical occupation by the government.[282] In *Loretto*, the plaintiffs argued that the New York statute, which stated that a landlord must permit a cable television company to install its CATV facilities on the properties and could not collect more than one dollar in compensation, constituted a physical taking of property for which compensation was owed.[283] The Supreme Court stated that a physical taking authorized by the government was a taking whether or not it was done in the public interest.[284] The Supreme Court, in citing its decision in *Penn Central*, stated that no set formula exists to determine whether compensation is constitutionally owed for a government restriction on property.[285] Ordinarily, the Court must engage in the *Penn Central* ad hoc factual inquiries, although the inquiries are not without standards.[286] The economic impact of the regulation, especially the degree of investment-backed expectations, is of particular significance.[287]

The recent *Arkansas Game and Fish* case and its forerunners confirm that even a temporary taking occurs when governmental action has a direct and immediate impact on property.[288] Under this analysis, compelling takings cases can be made out of the absolute nature of closures and quarantines, the duration of the quarantine period, the deprivation of all reasonable use of the land and animals during the sequester, and over-regulation and supervision after being permitted the exact same use in prior years. When considering the entire bundle of rights that runs with the land and the deer, juxtaposed against all the factors that the Supreme Court has considered in its takings analysis for the last one hundred years, these quarantine and animal depopulation and extermination cases constitute physical and regulatory takings.

In addition to the private property interests provided under the U.S. Constitution, the Iowa Constitution also provides similar protections from government takings. Article I, Section 18 of the Iowa Constitution provides that "[p]rivate property shall not be taken for public use without just compensation."[289] Due to the similarities between the Iowa Constitution's Takings Clause and the property protections provided under the Fifth Amendment to the U.S. Constitution, Iowa courts follow the U.S. Supreme Court's precedent in analyz-

282. *See generally* 458 U.S. 419 (1982).
283. *Id.*
284. *Id.* at 426.
285. *Id.* (citing Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)).
286. *Id.* (citing Penn Central Transp. Co., 438 U.S. at 124).
287. *Id.*
288. *See* Ark. Game and Fish Comm'n v. United States, 133 S. Ct. 511 (2012).
289. IOWA CONST. art. I, § 18 (West, Westlaw through 2012 general election).

ing takings cases under both the state and federal constitutions.[290] In such cases, Iowa courts employ the following analytical framework in determining whether a taking has occurred: (1) whether there is a constitutionally protected private property interest at stake; (2) whether this private property interest has been "taken" by the government for public use; and (3) if the protected property interest has been taken, whether just compensation has been paid to the owner.[291]

In *Loftus v. Department of Agriculture*, the Iowa Supreme Court considered the issue of takings in the realm of animal quarantine.[292] There, cattle owners contested a bovine law, wherein cattle were tested for tuberculosis and either quarantined or slaughtered if the tests came back positive.[293] The owners argued that the statute created an unconstitutional taking and violated due process.[294] The court laid out the law with respect to police power and general rules related to takings. The Court stated:

> To justify the state in thus interposing its authority [on] behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that *the means are* reasonably necessary for the accomplishment of the purpose, and *not unduly oppressive upon individuals.* The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.[295]

The *Loftus* Court stated that health measures, as a general conceptual matter, fall within the police power.[296] "Consideration of whether a particular legislative enactment is within the police power involves the substance of the law, as distinguished from the mere name given it."[297] Everything depends, therefore, upon the nature of the legislation and the method prescribed for its enforcement. Tested by those standards, the legislation fell within the police power and afforded due process of law.[298] The Court found that the bovine tuberculosis law was not unconstitutional in that it promoted the health of the peo-

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290. *See* Kingsway Cathedral v. Iowa Dep't of Transp., 711 N.W.2d 6, 9 (Iowa 2006) (beginning analysis with examination of relevant constitutional provisions).
291. *Id.* (citing Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 315 (Iowa 1998)).
292. *See* Loftus v. Dep't. of Agric., 232 N.W. 412, 414 (Iowa 1930).
293. *Id.*
294. *Id.*
295. *Id.* at 416 (emphasis added).
296. *Id.*
297. *Id.*
298. *Id.* at 418.

ple.[299] However, it is instructive to takings analyses that the *Loftus* Court found that, while owners may not be entitled to a hearing as to whether the cattle were diseased prior to destruction, they were entitled to such a hearing even if it occurred after the fact.[300] Should the cattle have in fact been healthy, the state was liable for compensation for the cattle.[301]

Thus, in Iowa, the test of whether governmental action amounts to an unconstitutional taking is essentially one of reasonableness. "The government may be required to compensate a property owner [for a taking] if the its action: (1) involves a permanent physical invasion of the property; or (2) denies the owner *all economically beneficial or productive use* of the land."[302] Stated differently, for purposes of the state constitutional right of just compensation, "while the government may regulate property to a certain extent, 'if the regulation goes *too far*, it will be recognized as a "taking."'[303]

Constitutional takings are "fact-intensive and require a careful examination of the challenged decision's economic impact and 'the extent to which it interferes with reasonable investment-backed expectations.'"[304] Regulatory schemes which substantially deprive landowners of the use and enjoyment of property, but are short of physical invasion or confiscatory regulation, may be nevertheless compensable, and finding the point at which such exercise of police power becomes a taking requires a *case-by-case* examination.[305] Iowa uses the three *Penn Central* factors to guide this inquiry: (1) the economic impact on the claimant's property; (2) the regulation's interference with the property owner's investment-backed expectations; and (3) the character of the governmental action.[306]

Even the exercise of police power may amount to a taking if it deprives a property owner of the substantial use and enjoyment of his property; the point at which police power regulation becomes so oppressive that it results in a taking cannot be generally defined and must be determined on the circumstances of each case. In *Van Zee* and *Hakes*, the court stated that the test is whether the collec-

299. *Id.* at 418–19.
300. *Id.* at 419.
301. *Id.*
302. Perkins v. Bd. of Supervisors of Madison Cnty., 636 N.W.2d 58, 70 (Iowa 2001) (citations omitted) (emphasis added).
303. Iowa Coal Mining Co. v. Monroe Cnty., 555 N.W.2d 418, 431 (Iowa 1996) (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)) (emphasis added).
304. *Id.* at 432 (citing Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 190–91 (1985)).
305. *Id.*
306. Kelley v. Story Cnty. Sheriff, 611 N.W.2d 475, 480 (Iowa 2000) (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

tive benefits to the public outweigh the specific restraints imposed on the individual.[307] Factors of particular importance include the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.[308] Also to be considered is the "character of the governmental action."[309] It is important, therefore, to consider the nature of the public interest involved and the impact of the restrictions placed on defendants' use of their land by the law or regulation at issue.[310]

Accordingly, based on both federal and Iowa state case law, the government's targeting of cervid and exotic breeders and hunting preserve owners with over-reaching regulations, rules, and agency action constitutes a taking which trumps the purported use of its police power. The only currently accepted method of testing of CWD in white-tailed deer in Iowa is post-mortem.[311] Since there is no USDA or Iowa accepted, viable or conclusive live test for CWD in deer (although several live and genetic tests in fact exist),[312] the state's position translates into the following syllogism: whether or not animals are in fact exposed to CWD, if a single cervid is found positive for CWD, a landowner's healthy preserve whitetails cannot be hunted or leave the preserve for fear of contamination and disease transmittal to other animals, including wild deer.[313] Accordingly, perfectly healthy deer are unable to be hunted for revenue, sold to another herd owner, travel either intrastate or interstate to other properties for hunting, sold for consumption, or put to any other revenue producing purpose. Instead, the owner must pay to feed and care for her animals without any recompense from the state, test each animal that dies, and then face the renewal of a new quarantine with any additional positive finding, which statistically is likely to occur given the higher number of the animals which are required to be tested. Under the current law and many proposed regulations, upon one deer testing positive for CWD following death, the preserve owner has, in this author's view, three Hobson's Choices, all of which come at her own expense: (1) de-population; (2) a five year quarantine

307. Iowa Nat. Res. Council v. Van Zee, 158 N.W.2d 111, 116 (Iowa 1968) (citing Benschoter v. Hakes, 8 N.W.2d 481, 485 (Iowa 1943)).

308. Penn Cent. Transp. Co., 438 U.S. at 124.

309. *Id.*

310. *See* Kent v. Polk Cnty. Bd. of Supervisors, 391 N.W.2d 220, 226 (Iowa 1986).

311. *See* IOWA DEP'T OF NAT. RES. & IOWA DEP'T OF AGRIC. & LAND STEWARDSHIP, CHRONIC WASTING DISEASE RESPONSE PLAN 9–10 (2010), *available at* http://www.iowadnr.gov/Portals/idnr/uploads/Hunting/cwd_joint_plan.pdf.

312. Kroll, *supra* note 108, at 34–35; *see* Williams, *supra* note 84, at 536; *see also Chronic Wasting Disease*, MO. DEP'T OF CONSERVATION, http://mdc.mo.gov/hunting-trapping/deer-hunting/deer-diseases/chronic-wasting-disease (last visited April 9, 2014).

313. *See* Emergency Order, In re Tom & Rhonda Brakke, No. 13DOA-001 (June 6, 2013) (ordering owners to quarantine all deer to avoid exposure to CWD).

of potentially healthy deer, which have in no way contracted the disease; or (3) complete closure and extinction of the business.

Even assuming that preventing the spread of CWD may be a rational state interest, which, based on the legitimate science, is doubtful, decimating the preserve owner's entire business in the process to achieve that goal triggers constitutional takings concerns. Currently, Iowa law allows the state to quarantine existing deer farms and preserves for five years upon the detection of just a single case of CWD in a herd.[314] Although arguably not a permanent taking per se, such a taking is certainly more than the temporary taking considered worthy of constitutional protection by the U.S. Supreme Court in *Arkansas Game and Fish.*[315] Moreover, it is indisputable that such an action invades a "constitutionally protected private property interest" and that such a taking is by the government without compensation.[316]

VII. CONCLUSION

Because any takings analysis under either the U.S. Supreme Court or Iowa Supreme Court's precedent involves an "ad hoc" determination based on the specific facts of each case, owners of preserve and farm operations existing at the time of or prior to the implementation of the chronic wasting disease regulations certainly have a strong argument that such regulations substantially interfere with their investment-backed expectations in creating and maintaining those preserves and farms. For them, unlike the claimants in *Penn Central*, they are not allowed to "continue to use the property precisely as it has been used" in the past.[317] Further, where the dynamics of the land at issue are such that it is not readily usable for or convertible to some other equally viable economic use, the negative economic impact on the preserve and farm owners is great. Not only is the preserve land essentially confiscated by the quarantine, but the deer thereon are forced to be slaughtered or kept and cared for at the state's direction with no recompense paid to the property owners. When a deer breeding facility is closed down, transport of deer therefrom is foreclosed by the state again at the loss of revenue to the owner, coupled with the care and feeding costs incurred without the ability to obtain any revenue stream from the state or paying customers. Even if the character of the government action is arguably in pursuit of a valid public health concern or interest, given their harsh and consuming effect on the land, their deer (whether depopulated or viable), the economic loss triggered by the quarantine,

314. IOWA ADMIN. CODE r 571-115.10 (2014).
315. *See* Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 522–23 (2012).
316. *See* Kingsway Cathedral v. Iowa Dep't. of Transp., 711 N.W.2d 6, 9 (Iowa 2006).
317. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136 (1978).

the constant care and maintenance costs for the farm deer, the embargo imposed on the sale and transport of the farm deer and their by-products, and the loss of reputation and goodwill, the state should be obligated to compensate the property owners for the taking of their private property, both land and deer, as well as the maintenance and other expenses associated therewith.