

# CHRONIC WASTING DISEASE: TAKINGS IN THE DEER BREEDING INDUSTRY

*Hannah Ward*<sup>†</sup>

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## ABSTRACT

*Texas Parks and Wildlife Department (TPWD) retains authority over all wildlife in the state of Texas, which currently includes all captive deer. Chronic wasting disease (CWD) is a degenerative disease that occurs in deer where TPWD is fighting with euthanasia of infected and exposed deer. This depopulation is negatively affecting the breeding and hunting industries in Texas because captive deer are seen as public property that do not require compensation under the Fifth Amendment takings clause. The only payment deer owners may receive is a small indemnification fee. This Article emphasizes the view that captive deer are private property and must be justly compensated upon depopulation. Upon being recognized as private property, or livestock, deer owners can rightfully fight for fair market value of any euthanized animals by TPWD. Many have already left the industry because of the financial strain the CWD regulations impose. The Texas economies that rely on the industry will continue to dwindle if the unjust*

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<sup>†</sup> JD Candidate, May 2024, St. Mary's University School of Law; B.S. 2020, Texas A&M University. The author extends gratitude to Professor Emilio Longoria and fellow classmates for editorial support, as well as various persons in the outdoor industry who assisted with research for this project.

*compensation continues, so too will others facing similar unjust procedures for condemned animals.*

## I. INTRODUCTION

Assume it is the 1920s. Your family tirelessly works to hold onto your family land and animals, while those around you are leaving agriculture for the big city.<sup>1</sup> You are trying to survive the Great Depression and the loss of livestock due to the extreme winters paired with summer droughts.<sup>2</sup> Fast forward nearly a century. Family members pass throughout the years, but the legacy lives on through your ranch which grows to maintain over 500 head of cattle.<sup>3</sup> In 2007, however, after almost a century of the family ranch being passed from generation to generation, brucellosis infects your herd.<sup>4</sup> The USDA tries to stop it, but the only way they can is to slaughter your herd.<sup>5</sup> Years of genetics, thousands of dollars gone, and your family livelihood destroyed.<sup>6</sup> What do you receive from it? A fraction of what the

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1. An estimated 60,000 people left Montana during the 1920s, following the “bust” of the homestead boom. Derek Strahn, *Homestead Act Launches a New Era in Montana* (Aug. 24, 2023, 9:14 PM), <https://www.umt.edu/this-is-montana/columns/stories/homestead-act-part-three.php> [<https://perma.cc/N5ED-ZNSN>].

2. While farms were typically more equipped to weather hard times because they had their own food, they were still affected by snowstorms during winter and droughts in the summer. Farms that were hit harder by economic losses of the Great Depression were unable to feed as many animals, but relief came for many when the government enacted the Agricultural Adjustment Act, which sent money to farmers in need. *Great Depression and the Dust Bowl*, STATE HIST. SOC’Y OF IOWA (Aug. 24, 2023, 9:32 PM), <https://iowaculture.gov/history/education/educator-resources/primary-source-sets/great-depression> [<https://perma.cc/EMV7-HRKW>].

3. The Bridger herd hosted almost 600 cows and calves on a ranch that had been started in the 1920s. Jan Falstad, *Herd Tainted by Brucellosis Packed up, Sent to Slaughter*, BILLINGS GAZETTE (July 16, 2007), [https://billingsgazette.com/news/state-and-regional/montana/herd-tainted-by-brucellosis-packed-up-sent-to-slaughter/article\\_d0de46a3-1337-5874-9854-0be8d31b369a.html](https://billingsgazette.com/news/state-and-regional/montana/herd-tainted-by-brucellosis-packed-up-sent-to-slaughter/article_d0de46a3-1337-5874-9854-0be8d31b369a.html).

4. *Id.*

5. 284 calves, 289 cows, 16 bulls, and one steer were slaughtered, as required by the USDA to preserve the state’s brucellosis-free status. *Id.*

6. “It’s just a sinking feeling in the pit of your stomach, and we didn’t understand all the ramifications . . . [w]e didn’t understand that the whole herd could be eliminated because of one cow,” said Sandy Morgan, owner of the majority of the depopulated herd. Jan Falstad, *Loss of Herd to Brucellosis Test Leaves Couple Reeling*, BILLINGS GAZETTE (May 25, 2007) [hereinafter *Loss of Herd to Brucellosis*], [https://billingsgazette.com/news/state-and-regional/montana/loss-of-herd-to-brucellosis-test-leaves-couple-reeling/article\\_5fd318ca-8cc6-54fc-b29a-d7e7466dcf51.html](https://billingsgazette.com/news/state-and-regional/montana/loss-of-herd-to-brucellosis-test-leaves-couple-reeling/article_5fd318ca-8cc6-54fc-b29a-d7e7466dcf51.html).

value of your herd truly is.<sup>7</sup> Many families resiliently choose to rebuild, despite the extreme challenges, because ranching is a way of life many love and depend on.<sup>8</sup>

This phenomenon has occurred throughout history with various animal diseases in an effort to eradicate deadly diseases and protect wildlife and agriculture in the United States.<sup>9</sup> While the eradication of deadly diseases is extremely important,<sup>10</sup> the compensation that is provided when diseased animals are condemned is detrimental in its own way to livestock owners.<sup>11</sup> This takings phenomenon has massive impacts, that if not addressed may lead to detrimental effects across not only the Texas economy,<sup>12</sup> but the entire United States economy.<sup>13</sup>

From the earliest days of the United States, Americans have highly valued property and the rights that come with owning personal property.<sup>14</sup> The Takings Clause of the Fifth Amendment states, “nor shall private property be taken for

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7. “[C]alves of similar weight [which were not infected] were selling for \$1.45 a pound. The federal Animal and Plant Health Inspection Service, a division of the U.S. Department of Agriculture, offered the Morgans 85 cents a pound.” Falstad, *supra* note 3.

8. “‘Every rancher runs on a tight budget,’ Jim Morgan said. ‘We’ll be looking at the same bills with a lot less income.’” *Loss of Herd to Brucellosis*, *supra* note 6.

9. See *Pennsylvania Dep’t of Agric. v. Hill*, 3 Pa. D. & C.2d 302, 304–05 (1954) (discussing the symptoms of brucellosis in cattle and the eradication process which occurs for infected herds); *Julius Goldman’s Egg City v. United States*, No. 365-75, 1982 WL 36688, at \*1 (Ct. Cl. Jan. 18, 1982) (the Secretary of State ordered quarantine and destruction of infected flocked due to an outbreak of Newcastle disease in poultry egg industry of Southern California).

10. See Paul Cross, *Brucellosis*, N. ROCKY MOUNTAIN SCI. CTR., U.S. GEOLOGICAL SERV. (Nov. 16, 2017), <https://www.usgs.gov/centers/norock/science/brucellosis> [<https://perma.cc/Q2JR-9ZPL>] (providing an overview of brucellosis in cattle in the United States, including the introduction of the Brucellosis Eradication Program in 1934).

11. See *Hawks v. United States*, 1982 U.S. Cl. Ct. LEXIS 2485; *Loftin v. United States*, 6 Cl. Ct. 596, 599 (1984) (discussing incident where cattle owner was compensated \$50 per head).

12. *What is the Contribution of Cattle to the Texas and U.S. Economy?*, TEX. A&M AGRILIFE EXTENSION (Aug. 24, 2023, 10:11 PM), <https://pathtotheplate.tamu.edu/topics/beef/what-is-the-contribution-of-cattle-to-the-texas-and-u-s-economy/> [<https://perma.cc/P7U9-6J6K>].

13. *Sector at a Glance*, U.S. DEPT. OF AGRIC. ECON. RSCH. SERV. (Sept. 26, 2022), <https://www.ers.usda.gov/topics/animal-products/cattle-beef/sector-at-a-glance/> [<https://perma.cc/FT4R-MMN8>] (showing the cattle industry was projected to represent 17% of the \$462 billion in cash receipts for agricultural commodities in the United States in 2022).

14. See *Monogahela Navigation Co. v. United States*, 148 U.S. 312, 336 (1893) (holding that Congress was required to compensate landowners as a result of condemnation of land to build a post office); *Barron v. Balt.*, 32 U.S. 243 (1833) (plaintiff asserted takings claim over a wharf that the state was invading).

public use, without just compensation,”<sup>15</sup> and was meant to protect citizens from unrestrained governmental power.<sup>16</sup> Instead of placing a complete ban on governmental takings, the Fifth Amendment “places a condition on the exercise of that power.”<sup>17</sup> Furthermore, this compensation requirement is applied to state governments through the Fourteenth Amendment.<sup>18</sup>

Takings law has historically been very fact intensive<sup>19</sup> and has resulted in many multi-factor analysis regimes.<sup>20</sup> However, there are relatively few cases involving takings and just compensation arguments related to condemnation of diseased animals, and even fewer about CWD, which specifically affects the white-tailed deer population in the United States.<sup>21</sup> There is likely a lack of case law related to CWD because in many states, including Texas, white-tailed deer raised in a high fence are considered wild animals and “property of [the] state,” according to the state wildlife department.<sup>22</sup> Many Americans today raise

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15. U.S. CONST. amend. V.

16. *Overview of the Takings Clause*, CORNELL L. SCH. LEGAL INFO. INST. (Aug. 24, 2023, 9:45 PM), <https://www.law.cornell.edu/constitution-conan/amendment-5/overview-of-the-takings-clause#fn3amd5> [<https://perma.cc/L596-KDYK>] (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1784 (1833) <https://lonang.com/wp-content/download/Story-CommentariesUSConstitution.pdf> [<https://perma.cc/VBD3-EHKG>]).

17. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (citing *First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987)).

18. U.S. CONST. amend. XIV; *First Eng. Evangelical Lutheran Church*, 482 U.S. at 310.

19. *Cebe Farms, Inc. v. United States*, 83 Fed. Cl. 491, 497 (2008) (citing *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 887 (Fed. Cir. 1983) (The “fact- intensive nature of just compensation jurisprudence . . . argues against precipitous grants of summary judgment.”)).

20. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978)) (discussing the ad-hoc factual inquiries in regulatory takings jurisprudence); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (requiring compensation for physical invasions by the government on private property); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104) (the Fifth Amendment is violated when the regulation denies an owner economically viable use of his land).

21. *Chronic Wasting Disease (CWD) — Occurrence*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Apr. 17, 2023), <https://www.cdc.gov/prions/cwd/occurrence.html> [<https://perma.cc/KXM3-7G8Q>] (showing “[a]s of March 2023, there were 405 counties in 29 states with reported CWD in free-ranging cervids.”); *Chronic Wasting Disease Management Plan*, TEX. PARKS AND WILDLIFE (Aug. 2020), <https://tpwd.texas.gov/huntwild/wild/diseases/cwd/plan.phtml> [<https://perma.cc/B86X-FEAS>] (discussing white-tailed deer specifically).

22. *Bailey v. Smith*, 581 S.W.3d 374, 402–03 (Tex. App. 2019); TEX. PARKS & WILD. CODE ANN. § 1.011(a) (2023).

white-tailed deer in high fences<sup>23</sup> for a variety of purposes, including a healthy lean meat option.<sup>24</sup> Within the high fence ranches, pens will be maintained for breeding with hand selected bucks and does based on their age, fertility, and genetic backgrounds.<sup>25</sup> To commercially run a deer farm or ranch, the TPWD must grant the high fence ranch owner permits to possess deer and engage in breeding deer.<sup>26</sup> TPWD has authority over the white-tailed deer population throughout the state, including regulation, conservation, and management of wild and captive populations.<sup>27</sup> This traditionally involved routine matters such as regulating hunting licenses; however, in recent years, TPWD has begun a new fight against CWD in the white-tailed population of Texas.<sup>28</sup>

CWD is an infectious degenerative disease that occurs in Cervidae (elk, deer, moose, etc.) which affects the brain and eventually leads to death.<sup>29</sup> The first cases of CWD in Texas were in free range mule deer from West Texas in 2012.<sup>30</sup> A few years later, the first white-tailed deer in a high fence to test positive in Texas was in 2015 in Medina County.<sup>31</sup> In response to the discovery of CWD in deer breeding

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23. The North American Deer Farmers Association suggests that fencing be at minimum eight feet tall to prevent deer from jumping out. Brian Cahill et al., *General Information About Farming Deer*, N. AM. DEER FARMERS ASS'N, (Aug. 24, 2023, 5:09 PM), <https://nadefa.org/2019/02/13/general-information-about-deer-farming/> [<https://perma.cc/E58P-8UMY>]. The high fences are also meant to keep game animals in and predators out, allowing ranch managers to control and manage the herd densities. *Guided Trophy Whitetail Deer Hunts in Texas*, SISCO D RANCH (Aug. 24, 2023, 10:01 PM), <https://www.siscod ranch.com/hunts/whitetail-hunts/#:~:text=In%20Texas%2C%20a%20high%20fence%20whitetail%20hunt%20refers,manage%20the%20herd%20to%20produce%20trophy%20quality%20deer> [<https://perma.cc/JNH9-3MTL>].

24. *Deer Farming*, WORLD DEER (Aug. 24, 2023, 8:58 PM), <https://worlddeer.org/deer-farming/> [<https://perma.cc/7WRJ-H525>].

25. Cahill, *supra* note 23.

26. TEX. PARKS & WILD. CODE ANN. § 43.352(a) (2023); TEX. PARKS & WILD. CODE ANN. § 43.357(a)(1) (2023).

27. *White-tailed Deer*, TEX. PARKS & WILD. (Sept. 11, 2023, 10:06 AM), <https://tpwd.texas.gov/regulations/outdoor-annual/regs/animals/white-tailed-deer> [<https://perma.cc/F35J-SK5B>].

28. *Chronic Wasting Disease*, TEX. PARKS & WILD. (Aug. 24, 2023, 8:12 PM), <https://tpwd.texas.gov/huntwild/wild/diseases/cwd/#cwdPlan> [<https://perma.cc/YHY6-KE3S>].

29. *Cervids: Chronic Wasting Disease*, U.S. DEP'T OF AGRIC. ANIMAL & PLANT HEALTH INSPECTION SERV. (Sept. 28, 2023), <https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/animal-disease-information/cervid/cervids-cwd/cervid-cwd> [<https://perma.cc/MZ4B-AHAT>].

30. *Listing of CWD Cases in Texas*, TEX. PARKS & WILD. (Aug. 24, 2023, 8:51 PM), <https://tpwd.texas.gov/huntwild/wild/diseases/cwd/tracking/> [<https://perma.cc/T5X7-7FN5>].

31. *Id.*

facilities, the TPWD enacted a comprehensive CWD management plan, which included various testing and movement restrictions.<sup>32</sup> TPWD reported three major goals of the CWD management program:

(1) Minimize CWD risks to the free-ranging and captive white-tailed deer, mule deer, and other susceptible species in Texas; (2) Establish and maintain support for prudent CWD management with hunters, landowners, and other stakeholders; and (3) Minimize direct and indirect impacts of CWD to hunting, hunting related economies, and conservation in Texas.<sup>33</sup>

The USDA has also joined in the fight against CWD, as this affects states across the United States.<sup>34</sup> The Animal and Plant Health Inspection Service (APHIS) is an agency of the USDA which has partnered with state animal health and wildlife agencies to create a “voluntary herd certification program” in an effort to manage the CWD spread in the United States.<sup>35</sup> In Texas, a yearly herd inventory is required for those that participate in the voluntary herd program.<sup>36</sup> The goal of the certification program is to promote the long-term, healthy trade of animals and reduce transmission risks of CWD.<sup>37</sup>

Until 2016, there was no live testing for CWD, so in order to test animals suspected of infection, TPWD would order killing of the deer to sample the brain stem.<sup>38</sup> There is now live testing available, but it is more expensive and not as

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32. TEX. PARKS & WILD., COMPREHENSIVE CWD MANAGEMENT RULES (Aug. 24, 2023, 4:10 PM), [https://tpwd.texas.gov/huntwild/wild/diseases/cwd/docs/Comprehensive\\_CWD\\_Management\\_Rules.pdf](https://tpwd.texas.gov/huntwild/wild/diseases/cwd/docs/Comprehensive_CWD_Management_Rules.pdf) [https://perma.cc/96AN-ESFX].

33. *Id.* at 18.

34. U.S. DEP’T OF AGRIC., FARMED CERVID CHRONIC WASTING DISEASE MANAGEMENT AND RESPONSE ACTIVITIES 2022 COOPERATIVE AGREEMENTS: 2022 SPENDING PLAN (2022), [https://www.aphis.usda.gov/wildlife\\_damage/downloads/cwd-funding-farmed-cervids-22.pdf](https://www.aphis.usda.gov/wildlife_damage/downloads/cwd-funding-farmed-cervids-22.pdf) [https://perma.cc/2WKR-M2KR].

35. 9 C.F.R. § 55 (2023).

36. TEX. ANIMAL HEALTH COMM’N, CHRONIC WASTING DISEASE HERD CERTIFICATION PROGRAM (2022), [https://www.tahc.texas.gov/news/brochures/TAHCBrochure\\_CWD-HCP-Compliance.pdf](https://www.tahc.texas.gov/news/brochures/TAHCBrochure_CWD-HCP-Compliance.pdf) [https://perma.cc/7MYM-5VUK].

37. *Cervids: CWD Voluntary Herd Certification Program*, U.S. DEP’T OF AGRIC. ANIMAL & PLANT HEALTH INSPECTION SERV. (Sept. 14, 2023), <https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/animal-disease-information/cervid/cervids-cwd/cervids-voluntary-hcp> [https://perma.cc/5WPP-23DH].

38. *Chronic Wasting Disease Management Plan*, *supra* note 21; TEX. ANIMAL HEALTH COMM’N, FREQUENTLY ASKED QUESTIONS: CWD POSTMORTEM TESTING (2021), [https://www.tahc.texas.gov/animal\\_health/elk-deer/PDF/TAHCBrochure\\_CWDPostmortemTesting.pdf](https://www.tahc.texas.gov/animal_health/elk-deer/PDF/TAHCBrochure_CWDPostmortemTesting.pdf) [https://perma.cc/E9A2-MFMY].

accurate as postmortem brain stem sampling.<sup>39</sup> As of the time of writing this Article, there is no cure or preventative vaccine for CWD, therefore TPWD will order quarantine or depopulation of infected deer.<sup>40</sup> Further, it has been reported that the owner may bear the cost of having to bury, incinerate, or chemically ingest topsoil from pens of infected deer.<sup>41</sup> Upon depopulation, the owners may or may not be compensated.<sup>42</sup>

Nonetheless, even when they are compensated, it is drastically below the market value of the deer.<sup>43</sup> White-tail deer that are born and raised on high fenced ranches may be sold and used for further breeding or for hunting, with some selling for upwards of \$20,000<sup>44</sup> and some pedigreed deer reaching above \$100,000.<sup>45</sup> Some argue that the loss is more than a monetary hit, with family livelihoods being destroyed and prompting feelings of violation by the government.<sup>46</sup> Despite

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39. Emily Reed, *Chronic Wasting Disease Outbreak in Texas Deer Breeding Facilities Could Be a Major Issue for All Deer Hunters*, OUTDOORLIFE (June 21, 2021, 12:58 PM), <https://www.outdoorlife.com/conservation/texas-chronic-wasting-disease-outbreak/> [<https://perma.cc/5DJZ-JYE9>].

40. *Cervids: Chronic Wasting Disease*, *supra* note 29, at 2; Matt Williams, *East Texas Breeder, TPWD Clash On the Fate of 500 White-tailed Deer*, ATHENS DAILY REVIEW (Apr. 28, 2022), [https://www.athensreview.com/news/east-texas-breeder-tpwd-clash-on-the-fate-of-500-white-tailed-deer/article\\_96f72662-c4cc-11ec-b75a-53a75867009a.html](https://www.athensreview.com/news/east-texas-breeder-tpwd-clash-on-the-fate-of-500-white-tailed-deer/article_96f72662-c4cc-11ec-b75a-53a75867009a.html) [<https://perma.cc/RN55-EYE3>]; TEX. PARKS & WILD. CODE ANN. § 43.953(c) (2013).

41. Roque Planas, *Texas Officials are Taking a Big Risk to Fight a Devastating Deer Disease*, HUFFPOST (Sep. 13, 2022, 5:45 AM), [https://www.huffpost.com/entry/ox-ranch-deer-cwd\\_n\\_631f9964e4b027aa405e4a72](https://www.huffpost.com/entry/ox-ranch-deer-cwd_n_631f9964e4b027aa405e4a72) [<https://perma.cc/T3XG-3XTX>].

42. 4 TEX. ADMIN. CODE § 40.2(d) (2023).

43. Roque Planas, *Texas Rancher Wages War Against Deer Euthanasia as Disease Spreads*, HUFFPOST (Aug. 26, 2023, 8:00 AM), [https://www.huffpost.com/entry/texas-deer-breeders-chronic-wasting-disease-wildlife-officials\\_n\\_64e65844e4b0b98eea900bf5](https://www.huffpost.com/entry/texas-deer-breeders-chronic-wasting-disease-wildlife-officials_n_64e65844e4b0b98eea900bf5) [<https://perma.cc/ZLE4-GWD3>].

44. *South Texas Whitetail Hunting at G2 Ranch*, G2 RANCH (Aug. 24, 2023, 10:26 PM), <https://g2ranch.com/whitetail-hunting/> [<https://perma.cc/8562-K55Q>]; *Texas Hill Country: Trophy Whitetail Hunting in Texas*, STONE CREEK RANCH (Aug. 24, 2023, 10:11 PM), <https://schuntingranch.com/our-hunts/texas-whitetail-hunts> [<https://perma.cc/6DJU-H4HB>].

45. Dac Collins, *In the War Against CWD, Deer Breeders in Texas Are Being Cast as Both the Enemy and the Answer*, OUTDOORLIFE (Feb. 9, 2023, 12:27 PM), <https://www.outdoorlife.com/conservation/texas-deer-breeders-cwd/> [<https://perma.cc/E2UE-ASGK>]; Hunting Network, *One Million Dollar Whitetail Buck!?*, BOWHUNTING.COM: BOWHUNTING BLOG (May 8, 2015), <https://www.bowhunting.com/blog/2009/02/15/one-million-dollar-whitetail-buck/> [<https://perma.cc/J8KK-BCHM>].

46. Pilar Arias, *Parks and Wildlife Begins Reducing Deer Population at Texas Mountain Ranch*, KSAT.COM (Feb. 22, 2016, 5:27 PM), <https://www.ksat.com/news/2016/02/22/parks-and-wildlife-begins-reducing-deer-population-at-texas-mountain-ranch/> [<https://perma.cc/4ATW-KNVJ>] (Robert Patterson discussed with KSAT 12 News that he felt

personal opinions about the deer breeding industry, it cannot be denied that hunting brings billions of dollars to the Texas economy and supports rural communities.<sup>47</sup> Further, deer breeding alone contributes an estimated \$350 million for Texas in economic activity each year.<sup>48</sup> This is all to say that deer breeding and high fenced ranching are important parts of the Texas economy, and the destruction of CWD infected deer without adequate compensation negatively impacts the Texas economy. One owner stated that “[e]ven one case of CWD at a deer breeding site is typically a death sentence for both the deer and the business.”<sup>49</sup>

This Article presents the assertion that destruction of white-tailed deer raised in high fences in Texas under the TPWD’s CWD regime should be considered a Fifth Amendment takings. Therefore, owners should be awarded just compensation when their animals are destroyed. Part I will introduce the history of takings law in relation to animal ownership. Part II provides support for viewing white-tail deer on high fenced ranches as private property in Texas. Part III will examine the problems the currently uncompensated destruction poses. Part IV will discuss the solution of recognizing white-tail deer in high fences as private property in Texas, thus allowing the destruction by TPWD to be considered takings under the Fifth Amendment and requiring just compensation.

## II. LEGAL HISTORY

### A. Takings

The Fifth Amendment has been used to protect against governmental overreach without adequate compensation since the 1800s but was traditionally only used for formal eminent domain actions by the government.<sup>50</sup> By the 1870s, the United States Supreme Court recognized the ability for private property owners to challenge government infringements not conducted under formal eminent

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as though TPWD became sovereign, so he stopped fighting for the deer and started fighting for his rights).

47. See *White-Tailed Deer Management*, TEX. PARKS & WILD. (Aug. 24, 2023, 10:08 PM), [https://tpwd.texas.gov/huntwild/wild/game\\_management/deer/](https://tpwd.texas.gov/huntwild/wild/game_management/deer/) [<https://perma.cc/3AQ3-YMCM>] (TPWD estimates that deer hunting generates \$1.2 billion in economic output).

48. Wes Ferguson, *Texas Intensifies its Fight Against “Zombie Deer Disease”*, TEXAS MONTHLY (Dec. 7, 2021), <https://www.texasmonthly.com/travel/texas-deer-chronic-wasting-disease/> [<https://perma.cc/P3GX-9TDG>] (“From vet bills to feed costs, the association estimates that Texas deer breeders directly contribute \$350 million in economic activity each year.”).

49. Planas, *supra* note 41.

50. ROBERT MELTZ, *TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY* (2015), <https://sgp.fas.org/crs/misc/97-122.pdf> [<https://perma.cc/DVT3-Z4T7>].



domain exercise.<sup>51</sup> The regulatory takings claims in the United States began in 1922 with *Pennsylvania Coal*, when Justice Holmes stated that prohibiting coal mining was a taking of the mining company's rights.<sup>52</sup> As early as *Pumpelly v. Green Bay Co.*, we know that direct physical invasion into private property by the government is a taking.<sup>53</sup> The Supreme Court recognized that it would be inconsistent with the protections under the Constitution to say that only a literal taking of the property is unconstitutional when there are times where the government enters property and inflicts irreparable and permanent damage.<sup>54</sup> There has also been significant support to show that an interruption to the common and necessary use of property would be a taking.<sup>55</sup> Physical appropriation is the most serious invasion of personal property interests, which is why it is protected so stringently.<sup>56</sup> For instance, a permanent physical occupation of property is a per se taking, no matter how important the public interest is.<sup>57</sup> So too is the total deprivation of all economic use of the property.<sup>58</sup> But *Miller v. Schoene* suggests that we do not always have property rights in diseased property.<sup>59</sup> Further, the Supreme Court suggests that there is not a right to maintain your property in a way that harms others simply because it is private property.<sup>60</sup>

While there was longtime authority for governmental takings, there was ambiguity on the intricacies and extent of those powers.<sup>61</sup> The ambiguity of whether the Fifth Amendment applies to both personal property and real property was clarified in 2015 when the Supreme Court decided *Horne v. Dep't of Agriculture*.<sup>62</sup> The Fifth Amendment does not distinguish between different property types—its only requirement is that the condemned property be private.<sup>63</sup> It was noted in *Horne* that it has long been understood, and even expected, that

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51. *Id.*

52. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 414 (1922).

53. *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1871).

54. *Id.*

55. *Id.*

56. *Horne v. Dep't of Agric.*, 576 U.S. 351, 364 (2015) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

57. *Loretto*, 458 U.S. at 426.

58. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

59. *See generally Miller v. Schoene*, 276 U.S. 272, 280 (1928).

60. *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915).

61. *See generally Lucas*, 505 U.S. at 1015.

62. *Horne v. Dep't of Agric.*, 576 U.S. 351, 352 (2015) (“The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.”).

63. *Id.* at 358.

peoples' property would be regulated, but people do not expect their property to be "actually occupied or taken away."<sup>64</sup>

Nevertheless, the government has been using their Takings Powers to condemn "diseased" private property for over a century now.<sup>65</sup> One of the first cases before the Supreme Court on condemnation of diseased crops was *Miller v. Schoene*, where the Court held that the State did not have to compensate owners for destroying their orchard.<sup>66</sup> The Court noted there are times where the public interest may be greater than the individual's interest, justifying an exercise of police powers to destroy the crops, such as when a crop disease is sweeping through orchards.<sup>67</sup> Further, in the history of takings law where the exercise of the condemnation power is "rationally related to a conceivable public purpose," the Court has not held a compensated taking to fall outside the public use requirement.<sup>68</sup> Most recently, Texas Third Court of Appeals has ruled on a case involving CWD regulations for breeder deer, holding that captive deer are not private property.<sup>69</sup> The court's ruling therefore eliminates the owner's ability to bring takings claims when their deer are depopulated by CWD.<sup>70</sup> However, this Article asserts that the current takings view of deer has a negative impact on the economy and is violating ranch owners' constitutional property rights.

Some eliminate the takings dispute altogether by reasoning that there is no requirement to compensate for diseased property because it is a public nuisance and is therefore destroyed under the police powers.<sup>71</sup> Police powers are generally the authority to adopt regulations to promote public safety, health, and welfare.<sup>72</sup> The Supreme Court has recognized the scope of police powers as coterminous with the public use requirement of the Fifth Amendment allowing the government the authority to use the Takings Clause in relation to police powers in order to

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64. *Id.* at 361.

65. *See generally* *Miller v. Schoene*, 276 U.S. 272, 280 (1928).

66. *Id.* at 277.

67. *Id.* at 279–80.

68. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).

69. *Bailey v. Smith*, 581 S.W.3d 374, 382 (Tex. App. 2019).

70. *Id.* at 400.

71. *Kroplin v. Truax*, 119 Ohio St. 610, 620–21 (1929) (holding that "[s]tatutes of this nature, providing even drastic measures for the elimination of disease, whether in human beings, crops, stock, or cattle, are in general authorized under the police power . . . [s]uch action is not a taking of private property for public use . . . the destruction of diseased cattle is merely the abatement of a public nuisance.").

72. *Berman v. Parker*, 348 U.S. 26, 32 (1954); *Eminent Domain vs. Police Power*, MUN. TECH. ADVISORY SERV. (Aug. 29, 2022), <https://www.mtas.tennessee.edu/reference/eminent-domain-vs-police-power> [<https://perma.cc/65RA-YXNL>].

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condemn certain properties.<sup>73</sup> However, the line is blurred when the police power regulation goes so far as to deny a property owner any remaining beneficial use of the property.<sup>74</sup> States define what property is and what we have rights to.<sup>75</sup> Therefore, we must look to statute to determine how Texas property law deals with diseased animals in the name of public safety and health.

*B. Statute*

Aside from judicial law previously discussed, there are statutes that have created regulations of the condemnation of diseased property. The Code of Federal Regulations allows for indemnity payments to owners of deer that were destroyed by government officials because of positive CWD test results.<sup>76</sup> The Code states that “subject to available funding,” the payment will be 95% of appraisal value, but not to exceed \$3,000 per animal.<sup>77</sup> Additionally, if non-federal funds are also paid and exceed 5% of the appraisal value, the federal indemnity will be reduced.<sup>78</sup> Moreover, the Code contains strict disposal requirements for cervids for which indemnification is sought.<sup>79</sup> To obtain reimbursement for disposal, owners must obtain written approval of costs prior to disposal.<sup>80</sup> Additionally, after cervids are destroyed under the CWD regulations, the premises, including buildings, cars, and all other material on the site must be cleaned under supervision of an APHIS employee at the expense of the owners.<sup>81</sup> Lastly, in order to be considered for indemnification, the owner must sign an agreement that they will maintain an APHIS approved herd plan and will not house cervids on that property until after the date specified in the plan.<sup>82</sup>

The federal statute is problematic for deer owners for multiple reasons. First, the language “[s]ubject to the availability of funding” raises the concern that if

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73. *Haw. Hous. Auth.*, 467 U.S. at 240.

74. *Eminent Domain vs. Police Power*, *supra* note 72 (noting the impact of the holding from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)).

75. *Berman*, 348 U.S. at 32 (“the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.”).

76. 9 C.F.R. § 55.2 (2023).

77. *Id.*

78. *Id.*

79. 9 C.F.R. § 55.3 (2023) (“The carcasses . . . [are] to be incinerated, destroyed in an alkaline hydrolysis tissue digester, or disposed of by any other method authorized by an APHIS employee and in accordance with . . . State, and Federal laws.”).

80. *Id.*

81. 9 C.F.R. § 55.4 (2023).

82. 9 C.F.R. § 55.7 (2023).

there are no funds at the time, there is no other recourse or relief for owners.<sup>83</sup> Second, the appraisal value is determined by fair market value;<sup>84</sup> however, limiting it to \$3,000 severely minimizes the value of the animals. As noted previously, some animals routinely go for well over \$3,000.<sup>85</sup> Third, the disposal and cleaning requirements add further restrictions and economic burdens, which arguably seem like punishment for simply asking for some payment for destruction of an owner's valuable property. Lastly, the requirement to sign the herd plan and appraisal<sup>86</sup> essentially presents the deer owners with a "take-it-or-leave-it" option to get something for their property.

The Texas State Code follows a similar pattern of requiring disposal of CWD positive animals.<sup>87</sup> However, a major difference to note is that the Texas code specifically states, "[t]he commission *may* participate in paying indemnity,"<sup>88</sup> indicating there are instances when owners will not be paid for destruction of their animals. (emphasis added). The indemnity follows the federal guidelines by allowing only a 5% of appraisal value to be paid.<sup>89</sup> Arguably one of the most controversial regulations accounts for disposal of CWD-suspect and CWD-exposed animals, not just confirmed positive animals.<sup>90</sup> There have been reported cases where entire herds were destroyed with only a few animals testing positive.<sup>91</sup> Furthermore, the Texas Code on CWD contains extensive testing and herd plan requirements, along with surveillance and movement restrictions.<sup>92</sup> These regulations are problematic for many of the same reasons stated above about the federal indemnity restriction. Most importantly is the effect that the unjust compensation has on the livelihood of the ranchers and the Texas economy as a whole.

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83. 9 C.F.R. § 55.2.

84. 9 C.F.R. § 55.3(b) (2023).

85. Collins, *supra* note 45.

86. 9 C.F.R. § 55.3(c) (2023); 9 C.F.R. § 55.7(a) (2023) (explaining that the Department will not allow claims unless the deer have been appraised according to fair market value and the owner signs the appraisal).

87. *See generally* 4 TEX. ADMIN. CODE § 40.2(c) (2023).

88. 4 TEX. ADMIN. CODE § 40.2(d).

89. *Id.*

90. 4 TEX. ADMIN. CODE §40.2(c).

91. Brantley Hargrove, *Chronic Wasting Unease*, TEX. MONTHLY (Jan. 2016), <https://www.texasmonthly.com/articles/chronic-wasting-unease/> [<https://perma.cc/U48G-L9NG>]. Texas Mountain Ranch was forced to kill 173 deer—none tested positive.

92. *See generally* 4 TEX. ADMIN. CODE §40.2 (2023).

### C. Wild Animal Ownership Traditions

Early civilizations recognized ownership rights over animals by possession.<sup>93</sup> It has been recognized that early Americans justified animal ownership and use through biblical ideas of gentle stewardship.<sup>94</sup> While tradition in many areas was that wildlife was a public resource, one of the oldest natural property rights in the United States is under the “rule of capture.”<sup>95</sup> This rule has come to be known as the premise that the first person to “capture” a resource owns that resource.<sup>96</sup> A nineteenth century case often cited in this area, *Pierson v. Post*, centered on the issue of who retained ownership rights over a fox that had been chased by one man, but ultimately killed by another.<sup>97</sup> The court specifically noted that a wild animal, such as a fox, is *ferae naturae* and obtaining ownership rights in that animal is accomplished through means which deprive them of natural liberty, thus subjecting them to control of the person.<sup>98</sup> Further, *ratione soli* is a theory that has been used under property law to justify landowners claiming ownership rights over natural resources found on their land, including animals.<sup>99</sup> It has been said that wild game within a state should “belong[] to the people” and is not private property, “except in so far as the people may elect to make it so.”<sup>100</sup> Now, many people are wishing to do just that in making wild animals private.<sup>101</sup>

While wildlife hunting has been around for centuries, the ownership and privatization of wildlife is a newer concept for many. Unbeknownst to some, Teddy Roosevelt is thought to have taken a large part in the beginning of wildlife conservation in the United States.<sup>102</sup> Conservation is a large reason why the

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93. J. M. Kelley, *Legislative Note: Implications of a Montana Voter Initiative that Reduces Chronic Wasting Disease Risk, Bans Canned Shooting, and Protects a Public Trust*, GREAT PLAINS NAT. RES. J., Fall 2001, at 89, 91.

94. Janet M. Davis, *The History of Animal Protection in the United States*, ORG. OF AM. HISTORIANS (Sept. 8, 2023, 3:34 PM), <https://www.oah.org/tah/issues/2015/november/the-history-of-animal-protection-in-the-united-states/> [<https://perma.cc/94BN-CHSF>].

95. J.D. Kirby, Comment, *Private Property Rights in Captive Breeder Deer: How Wild Are They?*, 53 TEX. TECH L. REV. 345, 359 (2021), [http://texastechlawreview.org/wp-content/uploads/53-Book-2\\_Kirby.PUBLISHED.pdf](http://texastechlawreview.org/wp-content/uploads/53-Book-2_Kirby.PUBLISHED.pdf) [<https://perma.cc/HC8Y-ZTRV>].

96. *Id.* at 357.

97. *See id.* at 356; *see also* *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

98. *Pierson*, 3 Cai. at 178.

99. *Payne v. Sheets*, 75 Vt. 335 (1903).

100. *Bailey v. Smith*, 581 S.W.3d 374, 390 (Tex. App. 2019) (citing *Hughes v. Oklahoma*, 441 U.S. 322 (1979)).

101. Kirby, *supra* note 95, at 371–72.

102. James C. Kroll, *The History of Hunting Conservation in the United States*, N. AM. WHITETAIL (May 4, 2022), <https://www.northamericanwhitetail.com/editorial/history-hunting-conservation-united-states/460395> [<https://perma.cc/J5FQ-ZAX7>].

privatization of wildlife is so prevalent, particularly in Texas.<sup>103</sup> Some have suggested that animals that are only alive because of game ranches are not really “saved” from extinction because there is no place in the wild for them any longer.<sup>104</sup> However, the other side may argue that even if they are no longer truly “wild,” it is still important to keep them alive and conservation efforts by high fenced ranches support animal diversity.<sup>105</sup> It is this reason why this Article is not posing that deer breeding should be wholly deregulated, or that CWD should be ignored. The future of many animals relies on good stewardship and conservation, which includes addressing any threats to wildlife, including CWD. This Article is highlighting what may be a hidden threat to the white-tailed deer industry in Texas: unjustly compensated, or wholly uncompensated, destruction of white-tailed deer on high fenced ranches.

### III. WHITE-TAILED DEER RAISED ON HIGH FENCED RANCHES ARE PRIVATE PROPERTY

Property rights are often described using the “bundle of sticks” analogy.<sup>106</sup> As the sole owner, you start with the entire bundle of rights (sticks), which includes things like the right to exclude, right to transfer, and many others.<sup>107</sup> As we analyze the Texas Code and statements made by TPWD, it seems as though TPWD views this situation as if they hold this bundle of sticks over a deer and are giving individual sticks to ranch owners at their discretion. The issue is that they are really giving half sticks. When a person has the right to put a fence around something, the right to use it for propagation, the right to sell it, to keep it for years at a time,<sup>108</sup> the right to exclude others from encroaching on it (to name a few), but they are not considered a private owner of that thing, then what are they?<sup>109</sup>

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103. See generally *Hunting as Conservationists*, TEX. PARKS AND WILD. (Sept. 6, 2023, 7:39 PM), <https://tpwd.texas.gov/education/hunter-education/online-course/introduction/conservationists> [<https://perma.cc/5ZLG-AHGP>].

104. Karen Bradshaw, *Animal Property Rights*, 89 UNIV. COLO. L. REV. 809, 821 (2018).

105. See Andrew Moore, *The Role of Hunting in Wildlife Conservation, Explained*, NC STATE UNIV. (Feb. 24, 2021), <https://cnr.ncsu.edu/news/2021/02/the-role-of-hunting-in-wildlife-conservation-explained/> [<https://perma.cc/L9D5-SYRL>].

106. *United States v. Craft*, 535 U.S. 274, 278 (2002).

107. See generally *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

108. TEX. PARKS AND WILD. CODE ANN. § 43.352 (2023) (the breeder does have to renew the permit; however, if maintaining proper procedures, they will be allowed to retain the permit for decades).

109. *Craft*, 535 U.S. at 278 (again, it is routinely understood that while we have many freedoms with our property rights, the government often will place reasonable regulations on our usage, primarily for public benefit. The concern is not the regulation of deer—the concern is the lack of property rights).

### A. Captive Deer as Private Property

Unfortunately, the argument that captive deer are private property because they are never truly wild due to ranch owners retaining control over them forever has been made, and denied in Texas recently in *Bailey v. Smith*, where deer breeders sued TPWD to establish that breeder deer are private property.<sup>110</sup> The court noted that a person has no property rights in wild animals unless it is “legally removed from the wild,” but under Texas law, no person may capture a deer from the wild without a permit.<sup>111</sup> The court read the statutes together to say that a person is prohibited from removing white-tailed deer from the wild to retain in captivity without a permit, which I agree with.<sup>112</sup> Where I differ, is what the conclusion should be from this. The court in *Bailey* agreed with TPWD, and held that under that reasoning, ranch owners cannot retain private property rights in deer.<sup>113</sup> This Article asserts that deer raised on high fenced ranches should not be in this category of animals “removed from the wild” at all because they are never in the wild to start with. Today’s high fence ranch owners generally do not retain their deer herds by trapping wild deer off native lands, although there are very limited exceptions.<sup>114</sup> The deer are bought directly from breeders or other high fenced hunting ranches.<sup>115</sup> Furthermore, at minimum deer live their *entire lives* in high fenced ranches and are never wild in the sense that they never live completely outside of a fence. Therefore, they cannot be removed from the wild and do not fall under this line of statute.<sup>116</sup>

Furthermore, under the TPWD Code, breeder deer are defined as deer “held under permit” from a public trust.<sup>117</sup> Under this permit, deer breeders are allowed to engage in breeding on the property that was approved and may sell or transfer

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110. *Bailey v. Smith*, 581 S.W.3d 374, 382 (Tex. App. 2019).

111. *Id.* at 391–92; TEX. PARKS & WILD. CODE § 43.061(a) (2023); TEX. PARKS & WILD. CODE ANN. § 63.001(a) (2023).

112. *Bailey*, 581 S.W.3d at 392.

113. *See id.* at 393.

114. *See generally* TEX. PARKS & WILD. CODE ANN. §§ 43.0611–.0612 (2023). This Article is not discussing DMP, TTT or TTP. Therefore, while those permits can trap wild deer, it is under strict scenarios and does not apply to the focus of this Article.

115. *Through Deer FAQs — Learn about Working with Whitetail Deer*, WHITETAIL DEER OF TEX. (Sept. 6, 2023, 11:37 AM), <https://www.whitetail-deer-of-texas.com/deer-FAQs.html> [<https://perma.cc/J6N3-J5GY>]. This is an example of a business that runs to specifically help start other breeding facilities and ranches.

116. *See generally* TEX. PARKS & WILD. CODE ANN. §§ 43.0611–.0612.

117. TEX. PARKS & WILD. CODE ANN. § 43.351(1) (2023). The state classifies all white-tail deer as public wildlife held in public trust.

deer to another person.<sup>118</sup> The property where the deer may be liberated also must be registered and meet certain criteria.<sup>119</sup> Only healthy deer may be sold and transferred to other facilities,<sup>120</sup> which is a fair restriction to prevent CWD spread across ranches. The analysis in *Bailey* seems to rely heavily on the permit restriction in eliminating the ability to grant a private ownership right in the deer.<sup>121</sup> However, courts have recognized that just because the government may regulate property, including requiring permits, does not alone diminish someone's ability to own that property.<sup>122</sup> The deer are raised for their entire lifetime inside of a high fence. After birth, inside the pens, the offspring are tattooed<sup>123</sup> and transferred either to another breeding facility or released to a ranch that qualifies as a registered "release site."<sup>124</sup> These deer will likely never live outside of "captivity" again.<sup>125</sup> Frequently, these deer live a better life than deer within the wild. They maintain natural freedoms, are able to roam hundreds or thousands of acres inside the fence, often with no predators, but the deer will forever be under the will of the ranch owner.<sup>126</sup>

The Texas code uses captivity to discuss deer in high fences and defines this as keeping deer in an "enclosure suitable for and capable of retaining" deer and preventing entry by others.<sup>127</sup> Early Americans began using fences to mark territory and maintain ownership of animals.<sup>128</sup> Today, a single enclosure for breeder deer must be no greater than 100 acres, and release sites are required to be

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118. TEX. PARKS & WILD. CODE ANN. § 43.357 (2023).

119. See TEX. PARKS & WILD., OVERVIEW OF 2016 CWD RULES WITH AMENDMENTS 2 (2016), [https://tpwd.texas.gov/huntwild/wild/diseases/cwd/docs/2016\\_CWD\\_Adopted\\_Rules\\_Summary.pdf](https://tpwd.texas.gov/huntwild/wild/diseases/cwd/docs/2016_CWD_Adopted_Rules_Summary.pdf) [<https://perma.cc/GM8M-ESNY>].

120. TEX. PARKS & WILD. CODE ANN. § 43.362(a) (2023).

121. *Bailey v. Smith*, 581 S.W.3d 374, 392 (Tex. App. 2019).

122. See *State v. Bartee*, 894 S.W.2d 34, 48 (Tex. App. 1994).

123. See TEX. PARKS & WILD. CODE ANN. § 43.3561 (2019).

124. 31 TEX. ADMIN. CODE § 65.95(a) (2023).

125. Kathryn Cargo, *Deer Breeding, Hunting Impacts Texas Economy by \$1.6 Billion Annually*, VICTORIA ADVOC. (June 14, 2020), [https://www.victoriaadvocate.com/news/local/deer-breeding-hunting-impacts-texas-economy-by-1-6-billion-annually/article\\_4bdb8b12-defe-11e8-94fd-c7552fc686c4.html](https://www.victoriaadvocate.com/news/local/deer-breeding-hunting-impacts-texas-economy-by-1-6-billion-annually/article_4bdb8b12-defe-11e8-94fd-c7552fc686c4.html) [<https://perma.cc/4LWG-D7S4>].

126. Collins, *supra* note 45.

127. TEX. PARKS & WILD. CODE ANN. § 43.351(3) (2019).

128. Tim Harford, 'The Devil's Rope': How Barbed Wire Changed America, BBC NEWS (Aug. 7, 2017), <https://www.bbc.com/news/business-40448594> [<https://perma.cc/2MV6-W6R5>].



surrounded by fences that are at least seven feet tall.<sup>129</sup> The code provides that fencing does not affect the status of wild animals as property of the state,<sup>130</sup> but maybe it should. *Ratione soloe*<sup>131</sup> stands for the idea that the landowner has superior rights to the wild animals on his land. Additionally, *Pierson v. Post* states that capturing wild animals using nets or other means to “deprive them of their natural liberty, and render escape impossible” amounts to possession.<sup>132</sup> Under this line of reasoning, a deer in a fence would be deprived of natural liberty, and escape is essentially impossible, so the land owner is the superior owner and should retain private property rights over that deer.<sup>133</sup> Texas courts have even noted that property rights “can arise when an animal is legally removed from its ‘natural liberty’ and subjected to ‘man’s dominion.’”<sup>134</sup> Yet, TPWD still regulates these captive deer as wild animals of the state, which they are not.<sup>135</sup>

### B. Captive Deer as Livestock

If TPWD will not recognize private ownership rights to high fenced ranch owners solely because of the unique use of the deer as described above, perhaps the classification should be changed from “wildlife” to “livestock.” Arguably the most convincing point as to why Texas should consider captive white-tailed deer private property is in looking at the states where captive deer are private property. While most states are not as explicit as Texas where the regulatory agency repeatedly says that deer are property of the state,<sup>136</sup> other states do use language that indicates a private ownership interest.<sup>137</sup> In states that classify captive deer as livestock instead of wildlife, the regulatory powers shift from state wildlife departments to the agriculture departments.<sup>138</sup> Furthermore, livestock is considered personal property for IRS purposes,<sup>139</sup> a farm product under the UCC,<sup>140</sup> and can

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129. TEX. PARKS & WILD. CODE ANN. §§ 43.360–.361 (2023).

130. TEX. PARKS & WILD. CODE ANN. § 1.013 (2023).

131. *Blades v. Higgs*, 11 Eng. Rep. 1474, 12 C. B. (N. S.) 501, 513 (1862).

132. *Pierson v. Post*, 3 Cai. 175, 178 (N.Y. Sup. Ct. 1805).

133. *See id.*

134. *Hollywood Park Humane Soc’y v. Town of Hollywood Park*, 261 S.W.3d 135, 140 (Tex. App. 2008).

135. 31 TEX. ADMIN. CODE § 65.131 (2023).

136. *Bailey v. Smith*, 581 S.W.3d 374, 393 (Tex. App. 2019) (citing *In re Wheeler*, 431 B.R. 158, 160 (Bankr. N.D. Tex. 2005)).

137. *See infra* table, at p. 36; *see also* QUALITY DEER MANAGEMENT ASSOCIATION, QDMA’S WHITETAIL REPORT 2018 26 (2018), [https://www.deerassociation.com/wp-content/uploads/2018/02/Whitetail\\_Report\\_2018.pdf](https://www.deerassociation.com/wp-content/uploads/2018/02/Whitetail_Report_2018.pdf) [<https://perma.cc/3Y7D-5AR6>].

138. QUALITY DEER MANAGEMENT ASSOCIATION, *supra* note 137.

139. 26 C.F.R. § 1.1245-3(a)(4) (2023).

140. U.C.C. § 9-102(a)(34)(B) (AM. L. INST. & UNIF. L. COMM’N 2012).

be used as collateral for loans,<sup>141</sup> which all indicate an owner's private property right. Additionally, Texas game ranches own exotic species as privately owned livestock, but still operate under disease management plans.<sup>142</sup> Table 1 shows comparisons of regulations in states where deer farming occurs.<sup>143</sup> In states where the deer are regulated as private property or livestock, the economy is still doing well and CWD is still managed. The state can still regulate the industry and impose CWD guidelines to prevent further spread while acknowledging that captive deer are private property. The important thing that would change is recognizing a private property right in the deer for breeders and high fenced ranch owners, which then gives them standing to raise takings claims and argue for just compensation.

State	Regulation	Estimated Economic Impact	CWD Rates (positive test/total deer population)
Texas	"All wild animals . . . inside the borders of this state are the property of the people of this state." <sup>144</sup>	\$1.6 billion <sup>145</sup>	0.003% <sup>146</sup>
Indiana	"Farmed (or captive) cervids . . . are considered	\$49.3 million <sup>148</sup>	None through the

141. 9 C.F.R. § 55.6 (2023).

142. James Bigley, *Guide to Texas Exotic Game Ranches*, JB MAVERICK PROPERTIES (Sept. 8, 2023, 8:01 PM), <https://www.tx2blog.com/2019/04/23/guide-texas-exotic-game-ranch/> [<https://perma.cc/SNM2-LN5T>]; see generally *Chronic Wasting Disease Management Plan*, *supra* note 21.

143. See *infra* table, at p. 36.

144. TEX. PARKS & WILDLIFE CODE ANN. § 1.011(a) (2023).

145. "The total impact of the industry to the Texas economy, combining the breeding and hunting components, is \$1.6 billion annually." TEX. A&M UNIV. AGRIC. AND FOOD POL'Y CTR., *ECONOMIC IMPACT OF THE TEXAS DEER BREEDING AND HUNTING OPERATIONS* (2017), <https://texasdeerassociation.com/wp-content/uploads/2017/06/Economic-Impact-Texas-Deer-Breeding-and-Hunting-Operations.pdf> [<https://perma.cc/RNY5-RZBX>].

146. *CWD Deer Breeder Talking Points*, TEX. DEER ASS'N (July 9, 2021), <https://www.texasdeerassociation.com/cwd-deer-breeder-talking-points/> [<https://perma.cc/PGN9-V5FY>].

148. ALICIA ENGLISH & JOHN LEE, *DEER AND ELK FARMING IN INDIANA: ECONOMIC OPPORTUNITY FOR RURAL COMMUNITIES* (2012), [https://ag.purdue.edu/commercialag/home/wp-content/uploads/2012/06/PAER\\_2012\\_06-June.pdf](https://ag.purdue.edu/commercialag/home/wp-content/uploads/2012/06/PAER_2012_06-June.pdf) [<https://perma.cc/88NZ-LQJM>].

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	livestock in Indiana and should be handled as livestock.” <sup>147</sup>		end of the 2021 hunting season. <sup>149</sup>
Minnesota	“Farmed Cervidae are livestock and are not wild animals for purposes of game farm, hunting, or wildlife laws. Farmed Cervidae and their products are farm products and livestock for purposes of financial transactions and collateral.” <sup>150</sup>	\$725 million <sup>151</sup>	0.002% <sup>152</sup>

147. IND. STATE BD. OF ANIMAL HEALTH, ANIMAL HEALTH AND FOOD SAFETY ADVISORY: STANDARD OPERATING GUIDELINES FOR DISPOSITION OF FARMED ANIMALS AND ANIMAL-SOURCED FOOD PRODUCTS INVOLVED IN NATURAL OR MAN-MADE DISASTERS (2017), <https://www.in.gov/boah/files/AnimalFoodPrdtDispsitnSOG6-12-17Final.pdf> [<https://perma.cc/J9LP-897E>].

149. *Hunters Spur Increase in Number of Deer Tested for CWD*, DEP’T OF NAT. RES., IN.GOV (2021), [https://events.in.gov/event/hunters\\_spur\\_increase\\_in\\_number\\_of\\_deer\\_tested\\_for\\_cwd](https://events.in.gov/event/hunters_spur_increase_in_number_of_deer_tested_for_cwd) [<https://perma.cc/B6R6-VW97>].

150. MINN. STAT. § 17.452, Subd. 4 (2023).

151. “[T]he total annual economic impact of hunting in Minnesota exceeded \$725 million and more than 85% of hunters in Minnesota hunt deer.” MINN. DEP’T OF NAT. RES., *WHITE-TAILED DEER IN MINNESOTA* (2016), [https://files.dnr.state.mn.us/wildlife/deer/deer\\_background.pdf](https://files.dnr.state.mn.us/wildlife/deer/deer_background.pdf) [<https://perma.cc/HRP8-VTZX>].

152. Adam Uren, *DNR Reveals Chronic Wasting Disease Figures After Deer Season*, BRING ME THE NEWS (Feb. 1, 2021), <https://bringmethenews.com/minnesota-lifestyle/dnr-reveals-chronic-wasting-disease-figures-after-deer-season> [<https://perma.cc/YK5U-VT9G>]; *Deer Population by State*, WILDLIFE INFORMER (Aug. 24, 2023, 8:58 PM), <https://wildlifeinformer.com/deer-population-by-state/> [<https://perma.cc/TVR9-65CV>].

Ohio	“‘Captive white-tailed deer’ means legally acquired deer that are held in private ownership at a [licensed facility].” <sup>153</sup>	\$753 million <sup>154</sup>	0.006% <sup>155</sup>
Pennsylvania	“[A]gricultural operation which contains . . . privately owned members of the Cervidae livestock family involved in the production, growing, breeding, using, harvesting, transporting, exporting, importing or marketing of Cervidae species or Cervidae products.” <sup>156</sup>	\$1.3 billion <sup>157</sup>	0.03% <sup>158</sup>

153. OHIO REV. CODE ANN. § 1531.01(GGG), 1531.02 (2023) (“[t]he ownership of and the title to all wild animals in this state, not legally confined or held by private ownership legally acquired, is in the state, which holds such title in trust for the benefit of all the people.”).

154. “The economic benefits of hunting-related industries translate to 15,500 jobs in Ohio, \$68 million in state and local taxes, and \$753 million of the state’s GDP.” *Ohio Gun Hunters Have Successful Week Of Deer Hunting*, OHIO DEP’T OF NAT. RES. (Dec. 5, 2022), <https://ohiodnr.gov/discover-and-learn/safety-conservation/about-ODNR/news/Successful-Deer-Hunting-Week> [<https://perma.cc/HAY7-GZ4J>].

155. *Chronic Wasting Disease (Deer)*, OHIO DEP’T OF NAT. RES. (Aug. 24, 2023, 8:03 PM), <https://ohiodnr.gov/discover-and-learn/safety-conservation/wildlife-management/wildlife-disease/chronic-wasting-disease> [<https://perma.cc/KSU3-KX6U>]; *Deer Population by State*, *supra* note 152.

156. 3 PA. STAT. AND CONS. STAT. § 2380.1 (2023).

157. THEODORE ROOSEVELT CONSERVATION P’SHIP, ESTIMATING THE ECONOMIC CONTRIBUTIONS OF OUTDOOR RECREATION IN PENNSYLVANIA 12–13 (2022), <https://www.trcp.org/wp-content/uploads/2022/04/TRCP-PA-Economic-Report-2020-FINAL.pdf> [<https://perma.cc/5ZJT-YP2D>].

158. PA. CHRONIC WASTING DISEASE TASK FORCE, COMBATting CHRONIC WASTING DISEASE IN PENNSYLVANIA (2020), <https://www.agriculture.pa.gov/Animals/AHDServices/diseases/Chronic%20Wasting%20Disease%20Program/Documents/CWD-in-Pennsylvania.pdf> [<https://perma.cc/K5PB-9PF3>]; *Deer Population by State*, *supra* note 152.

*C. That Private Property Right Continues in Diseased Deer*

Secondly, assuming there is a private property interest in captive deer, that right should not be dissolved when the deer become infected with, or exposed to, CWD. First, the laws for CWD restrictions do not differentiate between value of diseased deer or non-diseased deer; they are all treated as generally depopulated deer.<sup>159</sup> Furthermore, it is an understood premise that while we have many property freedoms, we do not have the right to manage our property in a way that harms others.<sup>160</sup> However, as long as deer owners are maintaining proper procedures by following testing and CWD precautions, they are arguably not managing their property in a way that harms others. Understandably, many critics of this fight argue that in order to preserve the health of the Texas white-tailed deer population, TPWD must continue to press and to monitor high fenced ranch operations.<sup>161</sup> Some even go as far as arguing that high fenced operations are adding to the CWD spread because of the close proximity of the animals.<sup>162</sup> Even so, supporters of the breeding industry pose the point that CWD has been found in states where deer breeding is not allowed at all.<sup>163</sup> Further, captive deer are often kept in areas that span multi-acre plots, negating the concern of close proximity.<sup>164</sup> Critics further speculate that it is not uncommon for deer to escape, therefore high fenced ranches which have high infection rates pose a greater threat to the wild deer population.<sup>165</sup> To explicitly note, however speculative or controversial it may be, the escape issue is beyond the scope of this piece. Nevertheless, it should be noted that the transmission to wild deer is a mere speculation, and there have been no CWD confirmed cases in humans or other livestock.<sup>166</sup> It can be argued that diseased crops<sup>167</sup> pose a different threat to society than diseased deer do because crops may carry disease through pollination and transfer to other crops and native foliage more easily than captive deer in a high fence may transfer to wild deer.

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159. See generally 9 C.F.R. § 55 (2023).

160. *Miller v. Schoene*, 276 U.S. 272 (1928).

161. Roque Planas, *Texas Breeder Deer May Have Spread Brain Disease into the Wild* (June 1, 2021, 10:36 AM), [https://www.huffpost.com/entry/texas-deer-breeders-cwd\\_n\\_60b55044e4b0f2a82eed2d52](https://www.huffpost.com/entry/texas-deer-breeders-cwd_n_60b55044e4b0f2a82eed2d52) [<https://perma.cc/27E9-8FYD>].

162. Collins, *supra*, note 45.

163. *Id.*

164. See *supra* notes 119–20 and accompanying text.

165. Mitchell V. Palmer et al., *Using White-tailed Deer (Odocoileus Virginianus) in Infectious Disease Research*, J. AM. ASS'N LAB'Y ANIMAL SCI., July 2017, at 350, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5517323/> [<https://perma.cc/FRN7-CVU4>].

166. *What is Chronic Wasting Disease?*, U.S. GEOLOGICAL SURV. (Sept. 8, 2023, 3:35 PM), <https://www.usgs.gov/faqs/what-chronic-wasting-disease> [<https://perma.cc/G29K-NSGV>].

167. See generally *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1022 (1992).

Furthermore, there have been no reported cases of CWD transfer to humans, even though it was first discovered in cervids as far back as 1967.<sup>168</sup> It has been speculated that based on the alleged prevalence of CWD in the United States, multiple humans, especially avid hunters and outdoorsmen, must have eaten infected animals unknowingly without any adverse reactions.<sup>169</sup> This raises the controversial suggestion that infected deer should be allowed to be harvested for meat, therefore retaining one of its highest values. To support this, there is research being done to provide tests for hunters to determine if their harvested meat is infected with CWD.<sup>170</sup>

Nevertheless, diseased deer still retain value in breeding and other bi-products and should be recognized as such. There is evidence that CWD is not genetically transferred,<sup>171</sup> so even positive and exposed deer can potentially still be used for breeding purposes. Deer antlers, especially larger ones that often come from these high fence ranches, have an economy of their own.<sup>172</sup> Antlers are sold, used for DIY projects, kept for souvenirs, and even used as a healthier alternative to dog bones.<sup>173</sup> This demonstrates that there is still value to diseased deer, and the property rights should not be completely eliminated just because of positive CWD tests. While this disease is important to manage, deer that have contracted the disease still remain useful, and the presence of the disease should not change its property classification as private property. Thus, the value retained forms a basis that just compensation must be awarded.

Robert Williams, a ranch owner in North Texas, is currently fighting this battle over his 500 deer with his attorney pushing this public health point that many

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168. *What is Chronic Wasting Disease?*, *supra* note 166.

169. Paul Annear, *Are CWD Deer Safe to Eat?*, BOWHUNTING (Oct. 26, 2018), <https://www.bowhunting.com/blog/2018/10/26/are-cwd-deer-safe-to-eat/> [<https://perma.cc/F5B2-EFZZ>]; Ashley May, *In 2005, About 200 People Ate 'Zombie' Deer Meat. Here's What Happened*, USA TODAY (Feb. 21, 2019), <https://www.usatoday.com/story/news/health/2019/02/21/zombie-deer-disease-what-happened-people-ate-cwd-meat/2926840002/> [<https://perma.cc/SD9A-MS5F>].

170. Daniel Schmidt, *New Test Can Determine if CWD is Present in Deer Meat*, DEER & DEER HUNTING (Sept. 1, 2021), <https://www.deeranddeerhunting.com/content/blogs/dan-schmidt-deer-blog-whitetail-wisdom/new-test-can-determine-if-cwd-is-present-in-deer-meat> [<https://perma.cc/N2L6-PNVK>].

171. Collins, *supra* note 45. Ox Ranch Genetics euthanized many of its deer after a buck tested positive. None of the fawns it had sired tested positive.

172. Tom Carpenter & Michael Hanback, *Shed Hunting: Ultimate Guide to Finding Antlers*, OUTDOORLIFE (Jan. 24, 2023, 11:41 AM), <https://www.outdoorlife.com/hunting/shed-hunting/> [<https://perma.cc/S85U-DTA2>].

173. *Id.*

have bypassed thus far in this fight.<sup>174</sup> Williams' team argues that TPWD can only enter property and kill deer if they pose a threat to the health of other deer under Section 43.953 of Parks and Wildlife Code, which is highly unlikely as they are behind seven foot high fences.<sup>175</sup> Williams understandably still sees value in his herd, even in the diseased animals, and refuses to allow TPWD to euthanize his herd which he has built throughout almost 30 years.<sup>176</sup> This desperate ranch owner has even gone as far as saying he would walk away from the industry if TPWD would let him release his penned deer for hunting,<sup>177</sup> but they will not because of the CWD movement restrictions and are still insisting on euthanizing his entire herd.<sup>178</sup>

For comparison, Texas recognizes private ownership rights in other animals, such as cattle, that operate under a similar disease management program.<sup>179</sup> Cattle are monitored for disease and may be depopulated, just as deer are for CWD.<sup>180</sup> The cattle industry has faced many hurdles, one of the largest being brucellosis, which the USDA created the National Brucellosis Eradication Program to combat.<sup>181</sup> Cattle owners are also undercompensated for slaughtered animals,<sup>182</sup> but because cattle are recognized as private property, the owners at least have standing to be heard under a takings claim.<sup>183</sup>

Additionally, there is a particular concern over the deer that are slaughtered due to exposure and not because of verified positive tests.<sup>184</sup> TPWD has already

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174. Williams, *supra* note 40.

175. *Id.*

176. Collins, *supra* note 45.

177. See Emily Brindley, *Texas Rancher's Fight to Save 500-Deer Herd from Slaughter May Go to State Supreme Court*, FORT WORTH STAR-TELEGRAM (July 21, 2022, 2:07 PM), <https://www.aol.com/news/texas-rancher-fight-save-500-190748651.html> [<https://perma.cc/PMM2-3TQN>].

178. Collins, *supra* note 45.

179. TEX. LEGIS. BUDGET BD. STAFF, OVERVIEW OF STATE RESPONSE TO CHRONIC WASTING DISEASE (2019), [https://www.lbb.texas.gov/Documents/Publications/Staff\\_Report/2019/4754\\_WildlifeDiseaseManagement.pdf](https://www.lbb.texas.gov/Documents/Publications/Staff_Report/2019/4754_WildlifeDiseaseManagement.pdf) [<https://perma.cc/FX9F-A3WD>].

180. *National Brucellosis Eradication Program*, U.S. DEP'T OF AGRIC. ANIMAL AND PLANT HEALTH INSPECTION SERV. (June 7, 2023), <https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/animal-disease-information/cattle-disease-information/national-brucellosis-eradication/brucellosis-eradication-program> [<https://perma.cc/SNX4-3XBR>].

181. *Id.*

182. 4 TEX. ADMIN. CODE § 35.6 (2023).

183. U.S. CONST. amend. V.

184. Collins, *supra* note 45.

euthanized over 2,500 deer since the first positive CWD test in 2015, with less than 300 of those testing positive.<sup>185</sup> This is arguably more harmful than slaughtering infected animals. One can recognize that a program euthanizing to “curtail the spread of disease is bound to kill some healthy animals;” however, this does not negate the value of those animals or the requirement for just compensation to be paid.<sup>186</sup> At least with infected animals, there is a sense that, as people, we understand that TPWD is eliminating the disease spread and potential future suffering of the animals. But with merely exposed animals that are not positive, like much of Williams’ herd,<sup>187</sup> the argument arises that killing those animals is an even greater violation. For instance, a buck that was euthanized at age three for CWD exposure but tested negative could have lived to sire a strong genetic line and have a value well over \$100,000.<sup>188</sup> This is many peoples’ concern—that this is not just killing diseased animals, but it is cutting off family businesses and having massive economic effects.<sup>189</sup> If not recognized as private property, and not fairly compensated, the industry will continue to deteriorate.<sup>190</sup>

#### IV. UNCOMPENSATED DESTRUCTION OF WHITE-TAIL DEER

While the government has broad powers, there are restrictions on the means it uses to achieve its goals, including the just compensation requirement for takings.<sup>191</sup> There is a categorical duty to compensate owners when the government takes property that dates back hundreds of years to the Magna Carta, which required compensation for takings of crops.<sup>192</sup> Furthermore, a premise of the takings clause is that the public at large is meant to bear the burden of takings.<sup>193</sup> However, the negative impacts of these deer takings are being felt directly by the ranch owners and not spread across the public.<sup>194</sup> Some have argued that this is the price people pay when getting into the business.<sup>195</sup> Nevertheless, the Fifth

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185. Williams, *supra* note 40.

186. McKenzie v. City of Chicago, 118 F.3d 552 (7th Cir. 1997).

187. Collins, *supra* note 45.

188. *Id.* (stating that “[p]edigreed breeder bucks can now fetch upwards of \$100,000 at auction, and some ranchers will pay up to \$5,000 for a vial of semen from one of these bucks.”).

189. Planas, *supra* note 161.

190. Collins, *supra* note 45.

191. *Horne v. Dep’t of Agric.*, 576 U.S. 351, 362 (2015) (citing *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).

192. *Id.* at 358.

193. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

194. Williams, *supra* note 40.

195. Paul A. Smith, *Why are Deer Farms Compensated for Diseased Herds?* MILWAUKEE J. SENTINEL (June 19, 2018, 6:14 PM),



Amendment was meant to protect private property owners—it was not meant to say that some should just accept government intrusions because they voluntarily chose that industry.<sup>196</sup>

As stated previously, the most a deer owner may be compensated after a governmental taking is \$3,000 per head.<sup>197</sup> This may seem significant, but it is severely unjust for many. A deer can cost as little as \$750, but will often go up to \$10,000–\$15,000, or even higher for superior genetic deer.<sup>198</sup> Additionally, semen samples (referred to as “straws”) for artificial insemination alone can be over \$5,000 for pedigreed animals.<sup>199</sup> The artificial insemination aspect of the industry has its risks as well because the process can be stressful for the deer; however, selling straws can bring over \$100,000 from one buck.<sup>200</sup> Alternatively, it is harder to track completely natural breeding. But in a study done by Mississippi State and Texas A&M, one wild buck naturally sired a maximum of 12 fawns across his lifetime while the maximum fawns a doe gave birth to was 7 across her lifetime.<sup>201</sup> It is relatively common for a doe to naturally give birth to twins,<sup>202</sup> and a bred doe (pregnant female) can range in price from \$2,500 to upwards of \$20,000 in the breeding industry.<sup>203</sup> Genetics is one of the most important aspects to most breeders and hunting ranches, which is why many ranches take such good care of their herds

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<https://www.jsonline.com/story/sports/outdoors/2018/06/09/cwd-explainer-why-deer-farms-can-compensated-diseased-herds/677715002/> [<https://perma.cc/LJE4-E6NQ>] (“[Euthanasia] is the cost of doing business and the business owner should assume the risk and buy insurance.”).

196. *Horne*, 576 U.S. at 365–66.

197. 9 C.F.R. § 55.2 (2023); 4 TEX. ADMIN. CODE § 40.2(d) (2023)).

198. *Cargo*, *supra* note 125.

199. *Collins*, *supra* note 45.

200. Martin Wenkoff, *The Ins and Outs of Artificial Insemination*, DEER FARMER (Sept. 6, 2023, 9:48 AM), <https://deerfarmer.com/resources/artificial-insemination-guide> [<https://perma.cc/BHU3-7RYN>].

201. Randy DeYoung, *How Many Fawns Does the Average Buck Produce?* NAT’L DEER ASS’N (Dec. 15, 2021), <https://deerassociation.com/how-many-fawns-does-the-average-buck-produce/> [<https://perma.cc/Q2FQ-KMBP>].

202. *Id.*

203. Jason Molitor, *Whitetail and Exotic Breeding — Part 1*, OXRANCH TEX. (Apr. 28, 2016), <https://www.oxhuntingranch.com/blog/whitetail-exotic-breeding-part-1/> [<https://perma.cc/F5A6-PD8Q>]; Emily Brindley, *Making Big Bucks: Inside Texas’ Mullion-dollar Whitetail Deer Breeding Industry*, FORT WORTH STAR-TELEGRAM (Apr. 3, 2022, 5:00 AM) [hereinafter *Making Big Bucks*], [https://texasdeerassociation.com/wp-content/uploads/2022/04/Article-1\\_Making-big-bucks-Inside-Texas-million-dollar-whitetail-deer-breeding-industry.pdf](https://texasdeerassociation.com/wp-content/uploads/2022/04/Article-1_Making-big-bucks-Inside-Texas-million-dollar-whitetail-deer-breeding-industry.pdf) [<https://perma.cc/Q9MX-6LU4>].

and highly value them.<sup>204</sup> Additionally, factoring in the cost of feed, veterinary bills, and other associated costs, these animals can be worth well over the \$3,000 indemnification maximum.<sup>205</sup>

Moreover, the indemnification is not just a flat payment. The program is essentially set as a take-it-or-leave-it system because in order to receive indemnification for euthanized deer, the owners must agree to a herd management plan.<sup>206</sup> So, if an owner does not like the plan, such as the owners of RW Trophy Ranch,<sup>207</sup> they can deny the plan, but if they do, they will not be compensated upon euthanasia.<sup>208</sup> Whether they sign a herd plan or not, the owners who undergo depopulation are faced with the burden of the associated expenses, which include the disease testing, carcass disposal, TPWD supplies, travel expenses, and more.<sup>209</sup>

Texas Deer Association (TDA), a large supporter of the deer breeding and hunting industry, reports that the total impact of the industry to the Texas economy is \$1.6 billion annually.<sup>210</sup> The economic overview can be split into two sectors: the production side (breeding and raising deer) and the consumption side (other buyers and hunting operations).<sup>211</sup> Texas A&M AgriLife Research conducted a study on behalf of TDA to look at the economic breakdown of the industry—broken down into breeding only operations, breeding and hunting operations, and hunting only operations.<sup>212</sup> On average, breeding and hunting operations had higher costs but also higher average income.<sup>213</sup> The most important aspect of the study showed the economic impact of the industry which indicated that the industry supplies over 16,000 jobs—most of which are located in rural areas.<sup>214</sup>

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204. Jason Molitor, *Whitetail and Exotic Breeding — Part 2*, OXRANCH TEX. (May 5, 2016), <https://www.oxhuntingranch.com/blog/whitetail-exotic-breeding-part-2/> [<https://perma.cc/B8R4-6CE9>].

205. 9 C.F.R. § 55.2 (2023).

206. 9 C.F.R. § 55 (2023).

207. Isaiah Mitchell, *Texas Deer Breeder Sues over State Agency's Latest Planned 'Depopulation' of Entire Herd*, THE TEXAN (Apr. 26, 2022), <https://thetexan.news/texas-deer-breeder-sues-over-state-agencys-latest-planned-depopulation-of-entire-herd/> [<https://perma.cc/RY76-2783>].

208. 9 C.F.R. § 55.

209. *Id.*

210. *Impacting Texas*, TEX. DEER ASS'N (Sept. 7, 2023, 2:01 PM), <https://www.texasdeerassociation.com/#:~:text=The%20TDA%20is%20continuously%20working%20toward%20better%20wildlife,a%20%241.6%20billion%20annual%20economic%20i mpact%20in%20Texas> [<https://perma.cc/946W-77FA>].

211. TEX. A&M UNIV. AGRIC. AND FOOD POL'Y CTR., *supra* note 145, at 6.

212. *Id.*

213. *Id.*

214. *Id.* at 8.

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On average, the facilities had seven to 10 employees,<sup>215</sup> not even accounting for offsite employment effects such as local restaurants, gas stations, airports, etc.<sup>216</sup>

This is all to say that the ranch owners are not the only ones who will be damaged by unjustly compensated takings. The surrounding communities will also be affected, especially rural areas who rely on the industry. When a ranch owner is economically hit and forced to withdraw from the industry, it can have rippling effects. The number of deer breeders in Texas grew from 946 in 2006 to 1,257 in 2016,<sup>217</sup> right around the time that major CWD regulations were imposed. Now there are less than 750 deer breeders left in Texas.<sup>218</sup> This could be directly because of the economic impact of CWD and the fact that ranches can no longer afford to maintain their businesses.<sup>219</sup> TDA says that since live testing rules went into effect, the industry has spent \$15 million on testing.<sup>220</sup>

Ultimately, it is more than just monetary loss of property.<sup>221</sup> Many raise deer as a family business and have emotional ties to the industry.<sup>222</sup> A woman in Texas “cried for a week” when she was told that there was CWD detected in her deer herd, meaning she would potentially have to depopulate the entire ranch.<sup>223</sup> Texas Mountain Ranch was forced to depopulate their entire ranch, and the owner says he suffered over \$3.2 million in losses.<sup>224</sup> Williams, from RW Trophy Ranch, has been in the business for almost four decades and has been referred to as “one of the fathers of the deer breeding business.”<sup>225</sup> His family works on the ranch with him and tends to the herd.<sup>226</sup> To them it is more than money; there is an emotional connection to the animals and business they have built.<sup>227</sup>

Many may argue that property law has long ignored the emotional value of property when determining just compensation, so it should not be considered

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215. *Id.* at 11.

216. Cargo, *supra* note 125.

217. *Id.*

218. Collins, *supra* note 45.

219. *Id.*

220. *Id.*

221. Craig Nyhus, *Fighting to Save the Herd*, LONESTAR OUTDOOR NEWS (Apr. 12, 2022), <https://www.lsonews.com/fighting-to-save-the-herd/> [<https://perma.cc/5HDP-VKFN>].

222. *Id.*

223. Hargrove, *supra* note 91; 4 TEX. ADMIN. CODE § 40.2(b)(2)(D) (2023).

224. Hargrove, *supra* note 91.

225. Mitchell, *supra* note 207.

226. Nyhus, *supra* note 221.

227. Brindley, *supra* note 177.

here.<sup>228</sup> I can agree that it is hard to put a price on the emotional value of property. However, I cannot say it is completely irrelevant to this Article and should be completely ignored. Nevertheless, while some may not recognize an emotional deprivation, the law does recognize a Fifth Amendment relation to intangible property rights<sup>229</sup> and economic loss in property.<sup>230</sup> It is not the main focus of this Article, but it should be noted that there is potentially an intangible property taking occurring in the CWD fight as well. Depopulation of an entire herd eliminates potentially years worth of premier genetics.<sup>231</sup> Some deer breeders have worked for years to develop “superior genetics” in the industry.<sup>232</sup> If an owner chooses, they may register their breeders with the North American Deer Registry, which then helps show the pedigree value.<sup>233</sup> Eliminating the herds entirely, or even just eliminating the main male or female deer that started the lineage, can cause a vital break to the value of that intangible property ownership.<sup>234</sup> Secondly to the economic loss, ranchers who are ordered to have their entire herd depopulated are essentially forced to start over completely.<sup>235</sup> This may seem like no problem to people outside the industry, but those involved know that it is a large burden. Not only are there movement restrictions on captive deer related to CWD,<sup>236</sup> but once a herd is depopulated from a particular property, the owner cannot have animals in that area for a period of time that may last years.<sup>237</sup> The law recognizes that even a temporary taking is a taking that requires compensation.<sup>238</sup> Therefore, under the

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228. Donald J. Kochan, *The [Takings] Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights*, 45 FLA. STATE UNIV. L. REV. 1021, 1091 (2018), [https://digitalcommons.chapman.edu/law\\_articles/256/](https://digitalcommons.chapman.edu/law_articles/256/) [<https://perma.cc/5APE-CQNZ>].

229. *Lynch v. United States*, 292 U.S. 571, 579 (1934); *Jim Olive Photography v. Univ. of Hous. Sys.*, 624 S.W.3d 764, 771 (Tex. 2021).

230. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

231. See Emily Brindley, ‘Don’t You Worry, It’s Only Money’: *Two Days at a Texas Whitetail Deer Auction*, TEX. DEER ASS’N (Apr. 3, 2022, 5:00 AM), [https://texasdeerassociation.com/wp-content/uploads/2022%2F04/Article-2\\_How-much-whitetail-deer-buck-semen-does-fawn-cost.pdf](https://texasdeerassociation.com/wp-content/uploads/2022%2F04/Article-2_How-much-whitetail-deer-buck-semen-does-fawn-cost.pdf) [<https://perma.cc/G3WM-MTH9>] (referencing costs associated with pedigree deer genetics); see also *Making Big Bucks*, *supra* note 203 (discussing devastating effects of deer culling for breeders).

232. Collins, *supra* note 45.

233. N. AM. DEER REGISTRY, NEW BREEDER QUICK GUIDE (2023), [https://www.nadeerregistry.com/NADR\\_BreederQuickGuideHoriz3.pdf](https://www.nadeerregistry.com/NADR_BreederQuickGuideHoriz3.pdf) [<https://perma.cc/B68W-RUEB>].

234. Williams, *supra* note 40.

235. *Id.*

236. 31 TEX. ADMIN. CODE § 65.95 (2023).

237. 4 TEX. ADMIN. CODE § 40.2(b) (2023); 9 C.F.R. § 55.4 (2023).

238. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021).

current CWD procedures, owners may be deprived of economic use of the deer, business, and land, which requires just compensation.<sup>239</sup>

#### V. SOLUTIONS FOR TEXAS RANCH OWNERS

With many struggling to survive in this economy as it is,<sup>240</sup> the last thing Texans need is a large economic sector to be further destroyed. To clarify, this stance is not to argue there should be no regulation over the captive white-tailed population in Texas. Proper management, including disease treatment, is the key to conservation. This Article is to highlight the concern that not recognizing private property rights and proper compensation has the potential to have massive impacts on the economy, especially for rural towns which rely on the hunting industry. Collaborative efforts between law makers, property owners, and scientists must be made to save the industry.<sup>241</sup> Working together encourages creative options and mutually beneficial property rights.<sup>242</sup> There is currently a proposed bill that may ease some economic strain on deer breeders.<sup>243</sup> Senate Bill 1372<sup>244</sup> would essentially place the costs of depopulation on TPWD for ranches that are completely in compliance with current CWD restrictions. TDA frequently lobbies against regulations that negatively affect breeders but are hopeful that steps are being taken to minimize the burden these ranch owners face.<sup>245</sup>

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239. U.S. CONST. amend. V.

240. See generally Laila Assanie & Prithvi Kalkunte, *Texas Economic Expansion Slows; Business Outlooks Weaken*, FED. RES. BANK OF DALL. (May 11, 2023), <https://www.dallasfed.org/research/economics/2023/0511> [<https://perma.cc/C3HB-ULR7>].

241. See *Hearing on the Management of Chronic Wasting Disease Before the Subcomm. on Oversight and Investigations of the H. Comm. on Nat. Res.*, 116th Cong. 10–11 (2019) (statement of Carter P. Smith, Texas Parks & Wildlife Department) <https://congress.gov/116/meeting/house/109693/witnesses/HHRG-116-II15-Wstate-SmithC-20190625.pdf> [<https://perma.cc/A3EF-7WVR>].

242. JESSE DUKEMINIER ET AL., PROPERTY 33 (Wolters Kluwer, 9th ed. 2017).

243. Emily Brindley, *When TX Regulators Kill Deer Herds, Ranchers are Stuck with the Bill. That May Change.*, FORT WORTH STAR-TELEGRAM (Apr. 26, 2023, 3:02 PM) [hereinafter *When TX Regulators Kill*], <https://www.msn.com/en-us/news/us/when-tx-regulators-kill-deer-herds-ranchers-are-stuck-with-the-bill-that-may-change/ar-AA1aohP9> [<https://perma.cc/VWT9-JZUV>].

244. S. 1372, 88th Leg., Reg. Sess. (Tex. 2023), <https://legiscan.com/TX/bill/SB1372/2023> [<https://perma.cc/X5EW-TPLB>].

245. Emily Brindley, *A Deadly Disease Threatens Texas Deer Breeding. This Researcher May Have a Solution*, FORT WORTH STAR-TELEGRAM (Apr. 3, 2022, 6:05 AM), [https://texasdeerassociation.com/wp-content/uploads/2022%2F04/Article-3\\_A-deadly-disease-threatens-Texas-deer-breeding.pdf](https://texasdeerassociation.com/wp-content/uploads/2022%2F04/Article-3_A-deadly-disease-threatens-Texas-deer-breeding.pdf) [<https://perma.cc/5V2Q-FU54>].

Furthermore, there is evidence that CWD may not require complete depopulation of herds.<sup>246</sup> At Ox Ranch in Uvalde County, TPWD is allowing breeding to continue after finding positive CWD cases on the ranch.<sup>247</sup> Under a proposed research agreement, Ox Ranch would be allowed to release only 200 microchipped bucks for hunting after they pass CWD tests.<sup>248</sup> It is believed there may be a genetic component to CWD, due to the fact that Ox Ranch has seen success with CWD not passing to offspring, while other ranches have seen CWD spread fast.<sup>249</sup> There is also hope that selectively breeding deer that have shown a high resistance to CWD creates a lower probability the deer will develop the disease if exposed.<sup>250</sup> If there were more research opportunities, such as the one proposed to Ox ranch that allowed owners to keep their business, there may be a light in this long fight ranch owners have faced. It is recognized that the legislature is regularly forced to weigh some interests over others,<sup>251</sup> which is what they are doing in ordering depopulation of diseased animals. It is agreeable that a disease killing a natural resource should be treated, however many plead with Texas that there must be a better way than what has been occurring for the past decade or so.<sup>252</sup> Despite the hopeful science, there continues to be depopulation of captive white-tailed deer because of CWD,<sup>253</sup> and there must be just compensation to those owners. In order to continue to encourage conservation and a thriving economy, we must recognize the rights these ranch owners hold and are constitutionally owed.

## VI. CONCLUSION

Previously there has been little legal scholarship on what may seem to be a minor issue involving property ownership related to diseased animals,<sup>254</sup> but this is a vital issue that can have effects across hunting, tourism, real estate, agriculture, and many other industries.<sup>255</sup> While it is not quite understood how CWD first

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246. *Id.*

247. Planas, *supra* note 41.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (“[T]he State does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public.”).

252. *When TX Regulators Kill*, *supra* note 243.

253. Molitor, *supra* note 203.

254. See Kirby, *supra* note 95, which is the only recent law article discussing this concern.

255. *Making Big Bucks*, *supra* note 203.

started in the captive deer industry,<sup>256</sup> it is clear that it has made a large impact on the industry in a relatively short period of time. Captive deer are private property, and thus owners must be justly compensated upon depopulation under the CWD program. Although there is currently opportunity for indemnification upon depopulation,<sup>257</sup> it is under a conditional program, which arguably can be considered an adhesion contract.<sup>258</sup> Nevertheless, whether the owners economically cannot agree or emotionally choose not to agree to a herd management plan is minor to the issue at hand. The Fifth Amendment is not conditional on the property owner's actions.<sup>259</sup> It is a protection that places a nondelegable duty on the government to pay for private property taken in the name of public use.<sup>260</sup> Additionally, recognizing a private property right further supports ranch owners' abilities to fight theft or criminal mischief charges against third parties who interfere with their animals.<sup>261</sup>

While this Article highlights Texas law specifically related to the white-tailed deer population, it should be noted that condemnation of diseased animals occurs across the nation.<sup>262</sup> The condemnation of diseased animals and the unjust compensation occurring should be revisited elsewhere too as it impacts not only hunting in Texas, but agriculture across the United States in general. Furthermore, the appraisal of animals for depopulation is done on an allegedly fair market value<sup>263</sup> basis, but fair market value for many of these animals is well above the indemnification accounted for.<sup>264</sup> The Supreme Court has long recognized that

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256. Planas, *supra* note 41.

257. 9 C.F.R. § 55.2 (2023).

258. *Adhesion Contract*, CORNELL L. SCH. LEGAL INFO. INST. (Aug. 24, 2023, 5:04 PM), [https://www.law.cornell.edu/wex/adhesion\\_contract\\_%28contract\\_of\\_adhesion%29](https://www.law.cornell.edu/wex/adhesion_contract_%28contract_of_adhesion%29) [<https://perma.cc/B7FD-5LP2>] (explaining that adhesion contracts exist where parties have disproportionate bargaining power, such that they are often offered on a take-it-or-leave-it basis).

259. U.S. CONST. amend. V.

260. *Id.*

261. Kirby, *supra* note 95, at 361–62, 375 (discussing *State v. Bartee* analysis of theft).

262. See MICH. DEP'T OF NAT. RES., CHRONIC WASTING DISEASE AND CERVIDAE REGULATIONS IN NORTH AMERICA (2021), [http://cwd-info.org/wp-content/uploads/2021/06/CWDRegstableState-Province\\_ADA\\_Spring21.pdf](http://cwd-info.org/wp-content/uploads/2021/06/CWDRegstableState-Province_ADA_Spring21.pdf) [<https://perma.cc/4PH5-3TQJ>]; Paul A. Smith, *More Than 300 Deer to be Killed at a Wisconsin Farm Found to Have 'Zombie Deer Disease'*, USA TODAY (July 26, 2022, 11:24 AM), <https://www.usatoday.com/story/news/nation/2022/07/26/deer-wisconsin-killed-chronic-wasting-disease/10152002002/> [<https://perma.cc/M552-7KVD>]; see also 4 TEX. ADMIN. CODE § 35.80–.82 (2023).

263. 9 C.F.R. § 55.3 (2023).

264. Collins, *supra* note 45.

property rights must be protected, stating “[t]he Government has broad powers, but the means it uses to achieve its ends must be ‘consistent with the letter and spirit of the constitution.’”<sup>265</sup> It is important to protect diseased animals and our nations natural resources, but it is also important to uphold the constitutional rights of property owners and pay them accordingly for condemned property.

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265. *Home v. Dep’t of Agric.*, 576 U.S. 351, 362 (2015) (citing *McCulloch v. Maryland*, 17 U.S. 316 (1819)).