

BEFORE THE NATURAL RESOURCE COMMISSION
Wallace Building - 4th Floor
502 E 9th Street
Des Moines, IA 50319

IN THE MATTER OF:)	DIA NO. 13DNR006
)	
TOM & RHONDA BRAKKE)	DECISION OF THE NATURAL
and McBRA, INC.,)	RESOURCE COMMISSION
d/b/a PINE RIDGE HUNTING)	
LODGE)	

On June 6, 2013, the Iowa Department of Natural Resources issued an Emergency Order concerning the Pine Ridge Hunting Lodge owned by Tom and Rhonda Brakke. The Emergency Order ordered the Brakkes to immediately stop deconstruction of the fences on the Pine Ridge Hunting Preserve, to immediately restore the portions of the fence as an adequate quarantine around the Hunting Preserve for a period of five years, to immediately close and keep closed all gates to the Hunting Preserve, to authorize the DNR to access the Hunting Preserve for a limited duration for the purpose of killing and removing any deer that may have been present, and to submit and agree to execute a plan to prevent the spread of chronic wasting disease out of the Preserve. On February 26, 2014, Administrative Law Judge Heather Palmer reversed the DNR's decision, and the DNR appealed to the Iowa Natural Resource Commission. The Commission has reviewed the evidence and the arguments and issues the following opinion in the above-captioned matter.

I. FACTS

A. Whitetail Deer in Iowa

The Iowa wild deer herd represents a \$200 million industry in Iowa that has created over 3,000 jobs. Tr. 44, 50, Ex. 8 (2006 Economic Benefits of Hunting, Fishing, and Wildlife Watching in Iowa). Iowa is known for trophy animals. The state started its first deer hunting season in the 1950s. Tr. 44. Deer hunting in Iowa is very family oriented. Tr. 53.

B. Hunting Preserves

At one time, all captive wildlife was under the authority of the DNR. In 2002, legislature gave authority over breeding farms to IDALS, but hunting facilities were in "no man's land for a while." Tr. 54. Then in 2005, a committee was established by the governor to work with DNR to develop rules for hunting preserves. *Id.* Rhonda Brakke was on that committee, see Ex. 9. The DNR governs hunting preserves pursuant to its statutory authority, including Iowa Code §

484C, and the administrative rules which the DNR has implemented to administer that chapter. The administrative rules applicable to hunting preserves provide that an automatic five-year quarantine excluding wild deer from the property shall be imposed upon any positive test for chronic wasting disease. See 571 IAC 115.110.

All deer that die or are killed on a preserve must be tested for chronic wasting disease. Tr. 76. If the owners of a hunting preserve want to cease operating the preserve, they may take fences down after all animals have been killed and tested negative. Tr. 60. No facility in Iowa has taken its fence down after having a deer test positive for chronic wasting disease. *Id.*

C. Chronic Wasting Disease

Chronic wasting disease is a transmissible spongiform encephalopathy, or disease of the brain, that affects North American members of the deer family (cervids). Tr. 267-28; Ex. 40. Symptoms of chronic wasting disease are subtle at first, progressive over time, and include changes in behavior, detachment, depression, excitability, uncoordination, tremors, reduced food intake, weight loss, difficulty chewing or swallowing, and death. Ex. 38; Tr. 530-31. As the disease progresses, the cervids' central nervous system becomes compromised and damaged so that they don't move normally. Sometimes, the cervids die of pneumonia from inhaled rumen contents. The incubation period in whitetail deer is variable, but can be 12 to 24 months or more. Chronic wasting disease infection shortens the lifespan of a deer and, unless the infected deer is killed first by another cause, is fatal. Tr. 531. 531. When the prevalence of chronic wasting disease in a herd becomes high, epidemics can suppress the growth and sustainability of a herd.

Chronic wasting disease was first described in the late 1960s in Colorado and Wyoming in mule deer, elk, and then whitetail deer. Tr. 268. The disease is now distributed from Utah to New York, and from Saskatchewan to Mexico. *Id.* A wild deer infected with chronic wasting disease was recently discovered in Alamakee County, in northeast Iowa, over two hundred miles from the Pine Ridge Preserve. No wild cervids have tested positive for chronic wasting disease in Davis or nearby Wapello counties. No other cases of chronic wasting disease have been discovered in wild cervids in Iowa, and indeed, all 14 of the wild whitetail deer who were tested in June 2013 in connection with the open fences at the Preserve were free of chronic wasting disease.

According to the current state of scientific knowledge about the disease, the infectious agent that causes transmissible spongiform encephalopathies, including chronic wasting disease, is a molecule called a prion. Ex. 40; Tr. 527. A prion is composed of folded proteins, but does not contain DNA or RNA, unlike bacteria or viruses. Tr. 269. Infected cervids release prions through deposition of infected tissue (including carcasses or antler velvet), bodily fluids (blood, saliva, urine), and feces. Ex. 40. Cervids release CWD prions into the environment at least ten

months before they exhibit any symptoms, and continue to release prions as long as they remain alive. Ex. 38, 40; Tr. 365. Strong scientific evidence exists to support the hypothesis that chronic wasting disease spreads through an environment contaminated by prions. The Commission concludes that chronic wasting disease is a prion disease, and that prions are released into the environment through deposition of infected tissue, bodily fluids, and feces, and prions may then infect other cervids even if all originally infected cervids have been killed or removed.

Prions may be passed on through contact between animals, since cervids do interact and touch each other, especially within a matriarchal group. Tr. 543. Chronic wasting disease can also be transmitted through the environment, without contact between an infected and a healthy cervid. Dr. Joel Pedersen, a Professor of Soil Science, Civil and Environmental Engineering, and Chemistry at the University of Wisconsin, and author of peer reviewed papers on prions, testified that chronic wasting disease is different in important respects from viral or bacterial diseases which affect wildlife. See Ex. SS. CWD prions are stable molecules, which persist in the environment without an animal host. Ex. 38; Tr. 274. Cervids that are infected, but not yet symptomatic, can release a “surprisingly large” amount of prions which then remain in the environment. Tr. 365. In this way, chronic wasting disease differs from other cervid diseases like hemorrhagic disease, which is only transmitted by an insect. Tr. 45-46.

Prions are difficult to inactivate, more so than viruses or bacteria. Tr. 270. They exhibit high resistance to heat (Ex. SS) ; a study by the National Institute of Health shows that incineration at 600 degrees Celsius for 15 minutes is not sufficient to eliminate infectivity. Tr. 271. The recommended treatment is autoclaving at 134 degrees Celsius and three times normal atmospheric pressure for 270 minutes. Tr. 271. Chemicals that can break down or inactivate bacteria and viruses are ineffective in eliminating the infectivity of prions. The use of hypochlorite, an active ingredient in bleach, at a very high concentration and with long contact time (over an hour) may have some effect, but other organic matter found in soil, feces, and so forth may render hypochlorite ineffective. Tr. 273.

There is no direct way to detect transmissible spongiform encephalopathy in or extracted from environmental samples. Ex. SS p. 6. However, reliable studies have demonstrated the stability and continued infectivity of chronic wasting disease prions in the environment. Studies indicate that prions remain infective in soil environments for at least three years; some studies indicate that the prions remain infective for much longer, possibly sixteen years. Tr. 273. Cervid carcasses have been shown to transmit infection 1.8 years after death. Ex. RR. Soil exposed to infected cervids transmitted the infection to naïve (uninfected) cervids over two years after the infected cervids were removed. *Id.* In that case, the researchers did not mean to infect the new batch of deer; they thought they had cleaned up the infection, and five years had elapsed since the removal of the last infected animal. Tr. 551. The studies described in the article at Ex. RR conclude that confinement likely exaggerated the transmission probabilities, but that deer do live in and show fidelity to established ranges. Ex. RR p. 1005. These studies, and indeed the

current scientific consensus, cannot reach conclusions on how long prions may remain infective. Tr. 550-51. It may be more than five or ten years.

Saliva, blood, urine, or carcasses containing prions could be deposited in water sources, or on salt licks or pieces of vegetation. Tr. 544. It is clear prions can be deposited by infected cervids who shed them, and that the prions can then remain infective in the soil for many years. Deer consume soil, either deliberately or because it is on or near some food source, up to 20 or 30 grams per day. Tr. 547; Ex. SS p. 6. In this way, once the environment becomes contaminated, it is important to quarantine out of it the vulnerable wild cervid herd.

Other transmissible spongiform encephalopathies include scrapie, Creutzfeldt-Jakob disease, transmissible mink encephalopathy, feline transmissible encephalopathy, and bovine spongiform encephalopathy (mad cow disease). Strong evidence exists that all of these diseases are caused by prions. Tr. 342-43.

D. The management of chronic wasting disease

Chronic wasting disease is now endemic in some populations of cervids in Colorado. However, Colorado has found that since cervids do not interact statewide, but only within smaller population units, there is no reason to calculate a statewide prevalence level of chronic wasting disease in the state. Rather, Colorado defines populations based on movement and population overlap.

A captive herd can be the source of an outbreak of chronic wasting disease, as was the case in the Black Hills area of South Dakota. Tr. 563.

The Iowa DNR and Department of Agriculture and Land Stewardship have developed a Chronic Wasting Disease Response Plan. Ex. 1. The DNR tests deer from the wild herd that are shot during hunting season or killed on Iowa's roads sufficient to detect a 1% disease rate in the wild population. Tr. 39. Over 47,000 cervids have been tested in Iowa since 2002 with only one positive test. Tr. 37.

Beth Williams, leading chronic wasting disease researcher, has said that "you have to hit this disease with everything you can and be as aggressive as you can". Tr. 66.

E. Pine Ridge Hunting Preserve

Thomas and Rhonda Brakke own a farm in Clear Lake, Iowa, and the Pine Ridge Hunting Preserve (Preserve) in Davis County, Iowa. In 1991, Mr. Brakke began raising elk, as he had interest and experience in elk hunting in Colorado. Tr. 374. In 1995 or 1996, Mr. Brakke traded a few elk for 28 whitetail deer from Owatonna, Minnesota. Tr. 375. Mr. Brakke sold his deer to hunting preserves. *Id.* He currently has 450 deer in Clear Lake. Tr. 376. In 2005, the Brakkes purchased their own Preserve, 330 acres in Davis County, Iowa. Tr. 376. The Brakkes opened the Preserve for three days at a time to hunting parties and charged clients by the size of the deer killed. Tr. 392-94.

In 2012, Mr. Brakke ceased participating in the state's voluntary chronic wasting disease program at his farm in Clear Lake, which meant he was no longer testing any cervids at the farm for chronic wasting disease. Tr. 389. The Brakkes brought in deer to the Preserve from facilities in Iowa other than the farm in Clear Lake. Tr. 508.

The Preserve was divided into northern and southern halves by a fence. Tr. 386-87. Deer could, however, have crossed through the fence and could have had nose-to-nose contact through the fence, since it was one layer only. Tr. 387; 486. The Brakkes did not keep track of which deer were released on the north or south halves of the Preserve; the records only show on which side the deer were harvested. Tr. 485.

All harvested deer from the Preserve were tested for chronic wasting disease, at the DNR's expense, at the Texas Veterinary Medical Diagnostic Lab. Tr. 389. However, it is not the case that all deceased deer on the Preserve were tested. For example, in the fall of 2011, the Brakkes moved thirty large bucks to the Preserve. Half of these bucks died from fighting, and were not tested for chronic wasting disease. Tr. 480-82. Other deer died on the Preserve and were not discovered; the Brakkes did not maintain counts of all the deer to know if any deer were missing. Tr. 480. The Preserve property includes "big ravines" which are difficult to access and have thick plant and tree growth. *Id.* Sick deer seek out these areas, and if they die there, are not removed. Tr. 481.

A positive test result on a harvested whitetail buck was reported on July 16, 2012. Ex. 14, 16; Tr. 73. This result was confirmed by National Vet Services Laboratories. Ex. 17-19. Two more deer later tested positive for chronic wasting disease, the last confirmed on December 7, 2012. Ex. 22. The second two deer that tested positive had been on the Preserve for fifteen months. Tr. 515-16. The Brakkes do not dispute that the positive tests results were deer on the Preserve. Tr. 99.

The DNR and the Brakkes signed an Agreement on September 7, 2012, to plan for killing and removing all the deer on the Preserve, disinfection, and creation of a long-term operational plan to address the disease, and to enable to the Brakkes to fulfill scheduled hunts on the Preserve in the fall of 2012. Ex. 20. The Agreement provided that an additional electric fence would be installed jointly by the Brakkes and the DNR, with costs split between each, surrounding the Preserve. After construction was complete, the Brakkes would be responsible for the continued maintenance of the fence. DNR staff would do a weekly inspection of both the existing perimeter and new electric fences. DNR staff had the authority to repair damage on the spot if necessary to prevent animal release or harm. All deer and elk on Pine Ridge in September 2012 were to be killed and removed by January 31, 2012. "A future operational plan for Pine Ridge shall be developed in conjunction with the DNR after depopulation is complete." Ex. 20. This future operational plan was never developed. Tr. 102. The DNR never told the Brakkes that they should take the fences down; fence removal was not part of the Agreement. Ex. 20; Tr. 102.

By January 31, 2013, all the deer and elk in the Preserve had been killed and removed. However, neither the future operation plan (section 3.3.2) nor the disinfection activities (3.3.3)

had been completed. Ex. 20; Tr. 87, 88, 488, 450-452. On April 5, 2013, Dr. Garner, Mr. Brakke, and two others met at the Preserve and performed disinfection activities as required by the Agreement. The feeders were power washed and bleached with a 50% solution. Tr. 101. Soil around the deer feeders was removed and buried in trenches. Tr. 101. However, soil was not removed from any other location nor was bleach applied anywhere except to the feeders. Tr. 101.

On April 26, 2013, the Brakkes sent a letter to the DNR, stating that they believed they had fulfilled the requirements of the September 2012 Agreement, and that they surrendered their license as a hunting preserve and intended to cease operating as a hunting preserve. Ex. 29. In addition, the Brakkes stated that: "As you know, the area utilized by the Pine Ridge Hunting Lodge as a hunting preserve is subject to a five (5) year quarantine." Ex. 29. The letter also did not indicate that the Brakkes intended to remove any portions of the fence surrounding the Preserve. Ex. 29. DNR did not respond to this letter. Tr. 104.

On June 5, 2013, DNR conservation officers Matt Rush and Bob Stuchel inspected the Preserve and observed that the fence had been cut or removed in at least four locations. Ex. 30. The Google Earth map, part of Ex. 30, shows the location of gaps in the fences or open gates. Visible deer tracks indicated that wild deer had gone into and out of the facility. Wild deer were photographed inside the facility. The DNR and the Brakkes also stipulated that: 1) some gates to the Preserve were open and portions of the fence in disrepair on June 5, 2013; 2) as of June 7, 2013, the open gates were closed and the fence repaired; 3) as of June 11, 2013, wild deer were trapped inside the Preserve; and 4) there are no preserve deer left inside the fence at the Preserve.

All 14 wild deer which had entered the Preserve in early June, 2013, were tested for chronic wasting disease and the tests were negative. Second Joint Stipulation of the Parties.

II. COURSE OF PROCEEDINGS

On June 6, 2013, the DNR issued an Emergency Order. Ex. 31. The Brakkes appealed the Emergency Order. The Emergency Order requires the Brakkes to maintain the fences and gates around the Preserve for the remainder of the five-year quarantine, or until December 28, 2017; to kill and remove all the wild deer that had entered the Preserve while the gates were open; and to submit the future operation plan required by Iowa Code 484C.12(2) and 571 IAC 115.10 and referenced in section 3.3.2 of the Agreement. Ex. 20.

The parties eventually entered into an Emergency Consent Order, by which they agreed that during the pendency of this matter, the electrified fence would be restored and reconstructed, weekly internal perimeter inspections would be conducted by the DNR, and all wild deer in the Preserve would be killed and tested for chronic wasting disease. Ex. 33. The Commission understands that upon the release of this Decision by the Commission, the Emergency Consent Order will expire.

An evidentiary hearing was held before Administrative Law Judge Heather Palmer on November 18, 20, and 21, 2013, at the Wallace State Office Building in Des Moines, Iowa. The witnesses for the DNR were Dr. Dale Garner, Chief of DNR's Wildlife Bureau; Dr. Joel

Pedersen, Professor of Soil Science, Civil and Environmental Engineering, and Chemistry (not "Social Science" as indicated by Judge Palmer) at the University of Wisconsin; Dr. Michael Miller, Senior Wildlife Veterinarian with Colorado Parks and Wildlife; Brian Linnemeyer; Jim Nalley; Willie Suchey, and Rhonda Brakke. The witnesses for the Brakkes were Thomas Brakke; Tom Steen; and Dr. Kenneth Waldrup.

On February 26, 2014, Judge Palmer issued a Proposed Decision in which she reversed the DNR's Emergency Order on the basis that the DNR lacked jurisdiction over the Preserve, since the Brakkes had informed the DNR they would cease operating the Preserve as a hunting preserve. Judge Palmer's opinion was that Iowa Code 484C "does not provide the DNR with ongoing jurisdiction in this case."

The DNR appealed Judge Palmer's decision. The Commission heard oral argument in this matter on May 15, 2014, at the Iowa Utilities Board building in Des Moines, Iowa.

III. APPLICABLE LAW

The statutes which created and empowered the Natural Resource Commission and the Department of Natural Resources show the legislature's intent to grant the Commission and the DNR authority to manage and protect wild game, including wild deer, in the state of Iowa, and to protect wild deer from chronic wasting disease. The applicable statutes include:

Iowa Code § 455A.2: "A department of natural resources is created, which has the primary responsibility for state parks and forests, protecting the environment, and managing fish, wildlife, and land and water resources in this state."

Iowa Code § 455A.5: "a natural resource commission is created, which consists of seven members. The members are appointed by the governor and subject to senate confirmation. The members shall be citizens of this state who have substantial knowledge of the subjects embraced by 456A."

Iowa Code § 456A.2: "General Duties: the department (DNR) shall protect, propagate, increase, and preserve the wild mammals, fish, birds, reptiles, and amphibians of the state and enforce by proper actions and proceedings the laws, rules, and regulations relating to them."

Iowa Code § 461A.2: "Duties in General: the commission shall investigate...the means of promoting forestry and maintaining and preserving animal and bird life of the state."

A landowner in Iowa is prohibited from keeping whitetail deer, *odocoileus virginianus*, unless kept as farm deer under Iowa Code § 170, or on a hunting preserve under Iowa Code § 484C. Whitetail deer are considered farm deer, under the regulation of the Department of Agriculture, until they are released onto a preserve. Section 484C.8(3). Once released onto a preserve, whitetail deer are subject to regulation by the DNR. *Id.*

A “hunting preserve” is “land where a landowner keeps preserve whitetail as part of a business, if the business’ purpose is to provide persons with the opportunity to hunt the preserve whitetail.” 484C.1(6). The DNR is charged with developing, administering, and enforcing hunting preserve programs, regarding fencing, recordkeeping, reporting, and the tagging, transportation, testing, and monitoring for disease in preserve whitetail deer in Iowa. 484C.4.

Iowa Code section 484C.12, “Health requirements--chronic wasting disease,” provides special provisions governing the health requirements for chronic wasting disease in Iowa. The statute requires that whitetail deer that are purchased, propagated, released, or sold by a hunting preserve to be free of disease.

As required by Section 484C.3, the DNR has adopted rules pursuant to chapter 17A as necessary to administer the chapter. Iowa Code § 484C.3. The DNR has done so. The administrative rules, found at 571 Iowa Administrative Code 115.10, provides that following a positive test for chronic wasting disease, a “five year quarantine on the preserve all remaining animals located within the infected preserve” shall issue.

IV. ANALYSIS

A. The Brakkes Had Notice of the Five Year Quarantine.

The Commission finds that the Brakkes were aware that their preserve was subject to a five-year quarantine. Their letter to the DNR of April 26, 2013, states that “the area utilized by the Pine Ridge Hunting Lodge as a hunting preserve is subject to a five (5) year quarantine.” Ex. 29. The letter says that the *area* utilized as a Hunting Preserve, not the *herd*, was subject to a quarantine. Further, this letter was written after all the original preserve deer had been destroyed. The Commission rejects Judge Palmer’s conclusion that the Brakkes referred in the April 26, 2013 letter to the IDALS quarantine in the deer herds, and concludes that the Brakkes were aware, at the time of this letter and when they opened their fences in June 2013, that their land was subject to a five-year quarantine by operation of 571 IAC 115.110.

B. The DNR’s Emergency Order Is Authorized by the Quarantine Rule.

The DNR’s rules concerning chronic wasting disease are clear: “a positive result for chronic wasting disease will result in a minimum of a five-year quarantine on the preserve and all remaining animals located within the infected preserve.” 571 IAC 115.110. In this rule, the DNR is, consistent with the scientific consensus regarding chronic wasting disease, treating the land itself as contaminated for a significant length of time. In this case, there were three positive tests for chronic wasting disease. Exs. 17, 18, 19, 22. Even though they were aware of the quarantine, see section A above, the Brakkes opened the gates and removed parts of the fences surrounding the preserve, thus violating the quarantine. The DNR, therefore, was correct in entering its Emergency Order pursuant to DNR’s rules.

C. The DNR’s Rule is Authorized By Statute.

The Brakkes argued, and Judge Palmer ruled, that the quarantine rule is invalid, because it is beyond the scope of the authority delegated to the DNR and the Commission by statute. A presumption of validity attends any agency rule adopted pursuant to delegated authority. Overton v. State, 493 N.W.2d 857, 859 (Iowa 1992). To be successful in challenging the rule, the Brakkes have the burden to demonstrate, by clear and convincing evidence, that the rule is not authorized by the statute governing the agency. Dunlap Care Ctr. v. Iowa Dep't of Soc. Serv., 353 N.W.2d 389, 393 (Iowa 1984). The Brakkes have not demonstrated that the rule is not authorized. Iowa Code § 484C, along with all the other applicable statutes delegating authority of Iowa's wild game to the DNR, clearly shows the legislature's intent to prevent the spread of chronic wasting disease and protect Iowa's wild deer herd. As the scientific research described above shows, the nature of chronic wasting disease and the mechanism of its spread, the prion, mandate that the land itself be quarantined. Without a quarantine on the land, the DNR is essentially powerless to prevent the spread of the disease away from its source, the Brakke's captive herd.

Although Chapter 484C does not explicitly state that the land itself shall be quarantined, it does not need to do so, since it has informed the DNR of its duty to prevent the spread of chronic wasting disease, and submitted the matter to DNR's scientific expertise and rule-making authority. The fact that it included language concerning a remaining infected deer herd does not mean the DNR has no authority over the land. As the Iowa Supreme Court has stated, "the rule that inclusion implies exclusion is a useful tool of statutory construction, but is subordinate to the primary rule that legislative intent governs statutory interpretation. It is not a rule of law, but "a product of 'logic and common sense.'" State v. Carpenter, 616 N.W.2d 540, 543 (Iowa 2000)(internal citations omitted). As a matter of logic and common sense, in this case, a quarantine on the contaminated land is required.

The Iowa Legislature did not outline how to prevent chronic wasting disease in Chapter 484C because the legislature is not expert on preventing wildlife disease. Rather, the legislature conferred interpretive authority to the DNR. "Indications that an agency has interpretive authority include rule-making authority, decision-making or enforcement authority that requires the agency to interpret the statutory language, and the agency's expertise on the subject or on the term to be interpreted. The Sherwin-Williams Co., 789 N.W.2d at 423. The DNR has scientific and wildlife management expertise; Chapter 484C explicitly grants rule-making authority to the DNR to administer 484C; and the legislature specifically expressed concern with chronic wasting disease, exclusive of all other diseases which may affect wild or captive whitetail deer. The DNR is therefore imbued with the authority to interpret the statute and create rules accordingly.

Rules cannot be adopted that are at variance with statutory provisions, or that amend or nullify legislative intent. Iowa Dep't of Revenue v. Iowa Merit Employment Comm'n, 243 N.W.2d 610, 616 (Iowa 1976). In this case, the legislature did not explicitly say that the DNR could or could not quarantine the land; the DNR's rule is not at variance with the statute. It is more clear that the DNR's quarantine rule does not amend or nullify legislative intent; to the contrary, it fulfills the legislature's clear intent for the DNR to address the threat that chronic wasting disease in captive herds poses to the wild deer herd in Iowa.

D. The DNR's Power to Enact the Quarantine Rule is Necessarily Implied by Statute.

Agencies have the power that is conferred by statute or is necessarily inferred from the power expressly granted. Wallace v. Iowa State Bd. of Educ., 770 N.W.2d 344, 348 (Iowa 2009). The DNR's authority to enact the quarantine rule, 571 IAC 115.110, is necessarily implied by Iowa Code § 484C because without such a rule, the DNR would be unable to prevent the spread of chronic wasting disease out of this Preserve. As the Iowa Attorney General has stated, "the Iowa Supreme Court has liberally construed the scope of necessarily implied powers which stem from a general delegation of authority." 1983 WL 856610 (Iowa A.G. July 18, 1983). Where an agency has broad power over an industry or area of expertise, the court will not limit the authority of that agency to fix the rules that will effectively govern that area. See Elk Run Tel. Co. v. Gen. Tel. Co. of Iowa, 160 N.W.2d 311, 315 (Iowa 1968)(duty of public utility extends to all future customers in addition to those the utility is already serving).

According to the Court in Elk Run, an agency has the authority to bring under the control of the law those who are currently not subject to it, if necessary to fulfill its statutory duties. In this case, the Brakkes surrendered their license; they took their fences down. However, they cannot so easily evade their responsibility. To do so would be analogous to allowing a business owner to avoid paying taxes that are already due and owing, by shutting down the business. Chapter 484C necessarily infers the authority for the DNR to continue to regulate the contaminated Preserve.

E. The DNR's Emergency Order Is Supported By Sound Scientific Evidence.

The Brakkes argue that the DNR's Emergency Order is unreasonable, arbitrary, and an abuse of discretion. This Commission disagrees. Chronic wasting disease is a contagious prion disease known to infect wild cervid herds. It is progressive over time and results in death. The Commission is persuaded by the scientific consensus that chronic wasting disease is caused by a prion molecule which is stable for at least two years, and likely many more, in the environment and without an animal host. Scrapie, a related transmissible spongiform encephalopathy, has been documented to remain infective in the environment for up to fifteen years. This prion is shed through saliva, urine, feces, body parts (such as antler velvet) and carcasses. The prion, and thus the disease, spreads to healthy animals when healthy animals consume contaminated soil, water, or vegetation, or come in contact with an infected animal. The evidence presented to the Commission about this matter shows that: there were three positive tests for chronic wasting disease among the Brakkes' captive herd at the Preserve, and none among the deer in the wild herd in the surrounding area; that two of the infected deer had been on the Preserve, and shedding prions, for fifteen months; that some deer died at the Preserve, their bodies were never recovered or tested, and these may be infective; that disinfection activities took place only at certain small locations, such as feeding stations, on the 330-acre Preserve; and that in June, 2013, wild deer did enter the Preserve. Taking all the evidence and scientific testimony into account, the Commission concludes that the five-year quarantine is a reasonable and rational response to the disease threat and to the facts in this matter.

F. Failing to Apply the Quarantine Rule Would Lead to an Absurd Result.

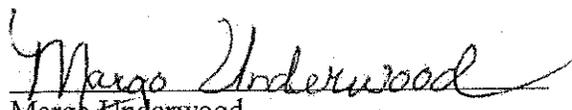
Statutes should be interpreted so as to avoid an absurd result. “[E]ven in the absence of statutory ambiguity, departure from literal construction is justified when such construction would produce an absurd and unjust result and the literal construction in the particular action is clearly inconsistent with the purposes and policies of the act. The Sherwin-Williams Co. v. Iowa Dep’t of Revenue, 789 N.W.2d 417, 427 (Iowa 2010). In this case, the Brakkes’ position is that they can run the risk of bringing chronic wasting disease into an area where the wild herd is free from it, and then avoid the responsibility by surrendering the preserve license and depriving the DNR of any jurisdiction or ability to manage the disease. This result cannot be what the legislature intended.

V. DECISION

The Natural Resource Commission accepts the DNR’s Emergency Order as a valid exercise of its authority, and denies the Brakkes’ appeal of the Emergency Order. The Emergency Order shall be in effect until the expiration of the quarantine on December 28, 2017.

The Brakkes claim that the Emergency Order is a taking under both the United States Constitution and the Iowa Constitution. The Commission is not empowered to rule upon the Brakkes’ constitutional claims, but acknowledges that they have been raised before this agency for the purposes of judicial review, if any. Soo Line R. Co. v. Iowa Dep’t of Transp., 521 N.W.2d 685, 688 (Iowa 1994).

IT IS SO ORDERED.


Margo Underwood
Chair of the Natural Resource Commission

May 28, 2014