

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

TOM & RHONDA BRAAKE, and McBRA,
INC.

Petitioners,

v.

IOWA DEPARTMENT OF NATURAL
RESOURCES and IOWA NATURAL
RESOURCE COMMISSION,

Respondents.

Case No. CVCV047922

**RULING ON PETITION
FOR JUDICIAL REVIEW**

Introduction

Tom and Rhonda Braake and McBra Inc's (hereinafter collectively referred to as "Petitioners") Petition for Judicial review now comes before the Court without oral arguments, the Court having previously determined that the issues were adequately and sufficiently briefed.¹ Having reviewed the court file, the certified record, the applicable law, briefs, and being otherwise fully advised of the premises, the Court now for the reasons below **REVERSES** the Agency decision and further determines that the actions taken by agency does not amount to a taking of the Petitioner's property under the Constitutions of the United States and State of Iowa.

Background

Petitioners own a white tail deer (WTD) breeding farm near Clear Lake, Iowa, and the Pine Ridge Hunting Preserve (Pine Ridge) located in Davis County, Iowa. Pet'rs' Br. 8-9. Pine Ridge covers 330 acres and was meant to provide an end market for the deer raised at the breeding farm. *Id.* at 9. In late 2011, Petitioners transferred a large breeding buck named Lucky from the breeding farm to Pine Ridge. *Id.* Lucky was shot and harvested in December 2011 and thereafter tested positive for chronic wasting disease (CWD). *Id.* CWD is "a transferable

¹ Indeed, the Petitioner's Brief in Support of Judicial Review was 61 pages long, the Respondent's Brief 92 pages long and Petitioner's Reply Brief 54 pages long. After reviewing the same, it was hard for this Court to fathom what more could possibly be said that wasn't already said.

spongiform encephalopathy, or disease of the brain, that affects North American members of the deer family (cervids).” Cert. Rec. 552.² As CWD progresses, the cervids’ central nervous systems become compromised. *Id.* The disease shortens the lifespan of deer and can be fatal. *Id.* At high enough levels, CWD can suppress the growth and sustainability of a deer herd. *Id.* The disease is transmitted through molecules called prions, which are released into the environment through infected tissues, bodily fluids, and feces. *Id.* at 552–53. A cervid may become infected even in the absence of other infected cervids. *Id.* at 553. Out of over 47,000 cervids tested since 2002, one cervid in Iowa’s wild population has tested positive for CWD. *Id.* at 554.

On July 16, 2012, the Iowa Department of Natural Resources (DNR) was notified of the positive CWD test at Pine Ridge. *Id.* at 679. The Iowa Department of Agriculture and Land Stewardship (IDALS) was also notified because it is the DNR’s partner in Iowa’s CWD Response Plan. *Id.* at 569. Petitioners cooperated with the DNR and IDALS to trace back the source of the CWD finding to Lucky. *Id.* at 1667 [81:4–9].

On September 7, 2012, Petitioners and the DNR entered into a written agreement pertaining to the management of CWD at Pine Ridge. *Id.* at 1668 [85:21–23]. Petitioners were allowed to complete their scheduled hunts between September and December 2012. *Id.* at 698. The parties then had to kill and remove the remaining deer, disinfect the premises, and create a future operational plan. *Id.* at 699. The parties never entered into a future operational plan.³ The parties agreed to share the cost of installing an electric fence around Pine Ridge, with Petitioners responsible for repairs and maintenance thereto. *Id.* Petitioners were also required to allow the DNR to perform weekly perimeter and “3-D fence inspection[s].” *Id.* All deer and elk at Pine

² References to “Cert. Rec.” in this Ruling refer to the electronic record contained on the zip drive provided by Petitioners.

³ The Court notes an agreement to agree in the future is not binding. *Linn Cnty. v. Kindred*, 373 N.W.2d 147, 150 (Iowa Ct. App. 1985).

Ridge were required to be depopulated by January 31, 2013, which is also when the agreement expired. *Id.* at 699–700.

Two more WTD were shot at Pine Ridge in December 2012 that subsequently tested positive for CWD. *Id.* at 683, 714. However, by January 31, 2013, all deer and elk were killed and removed from Pine Ridge. *Id.* at 1672 [102:6–7]. Disinfection activities required by the agreement were completed in April 2013. *Id.* at 1783 [450:23–451:1]. On April 26, 2013, Petitioners sent the DNR a letter stating they had fulfilled the requirements of the agreement and that the agreement had expired on January 31, 2013. *Id.* at 735. Of note is that the letter also stated that it served as Pine Ridge’s thirty day notice that Petitioners wished to discontinue operation of the premises as a hunting preserve and were no longer going to maintain their registration as a hunting preserve. *Id.* The DNR did not respond to this letter.

On June 5, 2013, DNR officers inspecting Pine Ridge noticed that the gates were open and portions of the fence had been removed. *Id.* at 736. Tracks on the ground indicated wild deer had passed in and out of Pine Ridge. Wild deer were subsequently photographed inside Pine Ridge. *Id.* These observations led the DNR to issue an Emergency Order to Petitioners on June 6, 2013.

The Emergency Order imposed the following conditions:

This Emergency Order requires the Braakes to stop immediately the deconstruction of the fence surrounding the Pine Ridge Hunting Lodge hunting preserve (“Quarantined Premises”); to restore immediately the portions of the fence so removed or degraded; to maintain the fence as an adequate quarantine around the Quarantined Premises for a period of five years; to close immediately and keep closed all gates to return the Quarantined Premises to a closed state; to authorize DNR to access the Quarantined Premises for a limited duration for the purposes of depopulating any deer that may be present; and to submit and agree to execute a plan designed to prevent the spread of CWD from the Quarantined Premises.

Id. at 3. Prior to issuance of the Emergency Order the DNR had not told Petitioners of any ongoing responsibility for the future maintenance of the fence and no written quarantine was issued to the Petitioners from the DNR. *Id.* at 1675 [114:19–22, 115:2–5]. Petitioners filed a contested case petition for administrative review of the Emergency Order on July 5, 2013. On February 26, 2014, the Administrative Law Judge (“ALJ”) issued a proposed decision reversing the Emergency Order. *Id.* at 368.

Iowa Code section 484C.2 vests the DNR with the authority to regulate preserve WTD. Iowa Code section 484C.12(1) states “[t]he department may provide for the quarantine of diseased preserve whitetail that threaten the health of animal populations.” The ALJ found Pine Ridge had ceased operating as a preserve on May 26, 2013, after providing the DNR with the required thirty day notice. *Id.* Because Pine Ridge was not a hunting preserve at the time the Emergency Order was issued, the DNR did not have ongoing jurisdiction to issue the order. *Id.* at 369. The issuance of the Emergency Order also ran afoul of legislative intent because the ALJ found the legislature limited the quarantine to diseased preserve WTD. *Id.* at 370. The ALJ concluded: “The Braakes have proven by clear and convincing evidence the Commission’s interpretation of Iowa Code section 484C.12(2), in 571 I.A.C. 115.10, providing for ‘a five-year quarantine on the preserve and all remaining animals located within the infected preserve’ is irrational, illogical, and wholly unjustifiable because the Commission’s interpretation extends, enlarges, and changes the legislative intent of Iowa Code section 484C.12.” *Id.* at 370–71.

On May 28, 2014, the Iowa Natural Resource Commission (NRC) reversed the ALJ’s proposed decision. *Id.* at 561. The NRC made the following findings in support of its reversal: 1)

The Braakes were aware their preserve was subject to a five-year quarantine;⁴ 2) The DNR's Emergency Order was authorized by the quarantine rule;⁵ 3) The DNR's rule is authorized by statute;⁶ 4) The DNR's power to enact the quarantine rule is necessarily implied by statute;⁷ 5) The DNR's Emergency Order is supported by sound scientific evidence,⁸ and 6) Failing to apply the quarantine rule would lead to an absurd result.⁹ *Id.* at 558–61. Petitioners filed for judicial review on June 27, 2014, seeking to have the Emergency Order and NRC decision affirming it set aside. The Court sets forth additional facts as needed.

Standard of Review

Chapter 17A of the Iowa Code governs judicial review of administrative agency action. The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). The Court “may grant relief if the agency action has prejudiced the substantial rights of the petitioner, and the agency action meets one of the enumerated criteria contained in section 17A.19(10)(a) through (n).” *Burton v. Hilltop Care Cntr.*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting *Evercom Sys., Inc. v. Iowa Utils. Bd.*, 805 N.W.2d 758, 762 (Iowa 2011)). The “standard of review [on appeal] depends on the aspect of the agency's decision that forms the basis of the petition for judicial review”—that is, whether it

⁴ This finding was based on the letter the Braakes sent to the DNR on April 26, 2013, stating “the area utilized by Pine Ridge Hunting Lodge as a hunting preserve is subject to a five (5) year quarantine.” Cert. Rec. 558. Mr. Braake testified that this was in reference to a quarantine issued by IDALS, which is not at issue in this matter. *Id.* at 1775.

⁵ The “quarantine rule” states “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 I.A.C. 115.10.

⁶ The NRC noted Iowa Code section 484C, “along with all 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.” Cert. Rec. 559.

⁷ The NRC stated “[t]he DNR’s authority to enact the quarantine rule, 571 I.A.C. 115.10, 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.” *Id.* at 560.

⁸ This is based on the scientific evidence showing the problems caused by CWD. *Id.*

⁹ This is based on the legislative intent of limiting the spread of CWD. *Id.* at 561.

involves an issue of 1) findings of fact, 2) interpretation of law, or 3) application of law to fact. *Burton*, 813 N.W.2d at 256.

When an agency's interpretation of law has been challenged, the level of deference accorded depends on "whether the authority to interpret that law has 'clearly been vested by a provision of law in the discretion of the agency.'" *Id.* (citation omitted). If the agency has not been clearly vested with interpretive authority, the Court will reverse the agency's interpretation if it is erroneous. *Id.* If the agency has been clearly vested with interpretive authority, the Court will reverse if the interpretation is "irrational, illogical, or wholly unjustifiable." *Id.* (citation omitted).

In deciding the level of deference owed, the Court will not make "broad articulations of an agency's authority," and must consider each particular word or phrase at issue. *Id.* 256–57. Even if an agency has been granted rule-making authority, it does not give the agency the power to interpret all statutory language. *NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 37 (Iowa 2012). When the legislature provides its own definition of a term it likely did not intend to confer interpretive authority with the agency. *Democko v. Iowa Dep't of Natural Res.*, 840 N.W.2d 281, 287 (Iowa 2013). If the legislature has not made an express grant of interpretive authority, the Court looks at "the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved." *The Sherwin-Williams Co. v. Iowa Dep't of Revenue*, 789 N.W.2d 417, 423 (Iowa 2010). "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." *Id.*

Discussion

Petitioners argue that the DNR did not have the authority to issue the Emergency Order because Pine Ridge had no preserve whitetail and is not a hunting preserve. Pet'rs' Br. 23. The NRC found Iowa Code section 484C.3 provided the DNR with the authority to adopt rules pursuant to the chapter. Cert. Rec. 558; Iowa Code § 484C.3 ("The department shall adopt rules pursuant to chapter 17A as necessary to administer this chapter."). Iowa Code section 484C.2 authorizes the DNR to "regulate preserve whitetail." Further, Iowa Code section 484C.12 states "[t]he department may provide for the quarantine of diseased preserve whitetail that threaten the health of animal populations." The NRC found the DNR adopted rules pursuant to Iowa Code section 484C by enacting 571 Iowa Administrative Code 115.10, which provides "[a] positive test 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." *Id.*

The DNR enacted 571 Iowa Administrative Code 115.10 pursuant to the grant of authority outlined in the Code. Because the legislature vested the agency with rule-making authority, and the adoption of 571 Iowa Administrative Code 115.10 was based on that authority, the Court finds it is vested with interpretive authority and will only reverse if the agency's interpretation is irrational, illogical, or wholly unjustifiable.

Iowa Code section 484C authorizes the DNR to adopt rules regulating preserve WTD and providing for the quarantine of diseased preserve WTD. The legislature did not mention quarantining real property, or any property other than preserve WTD. When the legislature specifically mentions one thing, other things not mentioned are impliedly excluded. *Doe v. Iowa Dep't of Human Servs.*, 786 N.W.2d 853, 859 (Iowa 2010). It was irrational, illogical, and wholly unjustifiable for the NRC to interpret the statute as authorizing the DNR to quarantine

Petitioners' land when the legislature specifically limited the quarantine to diseased preserve WTD.

Even assuming the legislature granted the DNR with the authority to extend the purview of 571 Iowa Administrative Code 115.10 to the preserve itself, its application in this case would still be improper. Iowa Code section 484C, entitled "Preserve Whitetail," provides several relevant definitions. A "hunting preserve" is defined as "any land where a landowner keeps preserve whitetail as part of a business, if the business's purpose is to provide persons with the opportunity to hunt the preserve whitetail." Iowa Code § 484C.1(6). Preserve whitetail are defined as "whitetail kept on a hunting preserve." Iowa Code § 484C.1(8).

Administrative agencies only have the powers conferred to them by statute. *Branderhorst v. Iowa State Highway Comm'n*, 202 N.W.2d 38, 41 (Iowa 1972). As evidenced above, the relevant Iowa Code and administrative provisions apply to preserves and preserve WTD. Therefore, finding the land to be a preserve containing preserve WTD would have been a jurisdictional prerequisite for the action taken by the agency in this case. Since the terms "hunting preserve" and "preserve whitetail" are defined in Iowa Code section 484C.1, statutory interpretation has not been clearly vested with the agency and the Court must reverse if its interpretation was erroneous. *See Democko*, 840 N.W.2d at 287 (finding the DNR was not clearly vested with the authority to interpret the terms at issue because the legislature provided definitions).

As of January 31, 2013, Pine Ridge was completely depopulated of all deer and elk. Cert. Rec. 1672 [102:6-7]. On April 26, 2013, the DNR received a letter from Petitioners stating they no longer wished to maintain Pine Ridge's registration as a hunting preserve and the letter served as the Petitioners' thirty day notice to cease operations as a hunting preserve. *Id.* at 735.

The DNR did not respond to this letter; therefore, by May 26, 2013, Pine Ridge was no longer a hunting preserve and contained no preserve WTD. When the Emergency Order was issued on June 6, 2013, it quarantined land that was no longer a preserve and no longer contained any preserve WTD.¹⁰ Since finding the land to be a preserve was a jurisdictional prerequisite under 571 Iowa Administrative Code 115.10, and the undisputed facts show it was not a preserve at the time the Emergency Order was issued, the NRC committed a mistake of law in interpreting the rule to provide for the quarantine of private property that did not meet the definition of preserve.

Respondents argue the rules of statutory interpretation mandate affirmance of the NRC's decision. Resp'ts' Br. 27. They argue the Court must examine not only the language of the statute, but also the underlying purposes and policies, as well as the consequences stemming from various interpretations. *Id.* (citing *State v. Carpenter*, 616 N.W.2d 540, 542 (Iowa 2000)). The Court must construe the statute such that it does not create an absurd or impractical result. *Id.* (citing *State v. Adams*, 810 N.W.2d 365, 369 (Iowa 2012)). Legislative intent governs statutory interpretation. *Id.* at 28.

Clearly, in enacting Iowa Code section 484C, the legislature intended to prevent the spread of CWD. However, it is equally clear the legislature did not intend to prevent the spread of CWD by giving the DNR unfettered authority to quarantine land that may have come in contact with an infected cervid. If, as Respondents urge, the sole intent of the legislature is to prevent the spread of CWD, the DNR could presumably quarantine any land that has come in contact with the tissues, bodily fluids, or feces of an infected cervid. This would produce an absurd result. The legislature was very clear in limiting the quarantine to "diseased preserve

¹⁰ The propriety of Respondents' actions are called into question by the fact that the DNR admitted that, subsequent to the CWD finding, political pressure began influencing its decision making. Cert. Rec. 1676 [120:8-19]. This may also explain why the Emergency Order was issued three days after the head of the DNR's legal department said there was "[n]othing we can do at this time." *Id.* at 1176, 1682 [141:13-16].

whitetail.” Iowa Code § 484C.12(1). The Court must accept the law as enacted by the legislature and “not decide what the legislature might have said, or what it should have said in the light of the public interest to be served, but only what it did say; and this we must gather from the language actually used.” *Holland v. State*, 115 N.W.2d 161, 164 (Iowa 1962).

Respondents cite a number of statutes regarding the DNR’s general duty to protect and preserve the animals of the State as authority for the agency action at issue in this case. *See* Resp’ts’ Br. 35–36 (citing Iowa Code §§ 455A.2, 456A.23, 461A.2). This attempt to circumvent the parameters of Iowa Code section 484C is unconvincing. Iowa Code section 484C deals specifically with the facts at issue in this case and did not authorize the DNR to expand quarantines over land, especially land that was not a preserve at the time it was issued. Again, just because the DNR is charged with protecting the animals of the State does not mean it may do so by any means necessary and it was irrational, illogical, and wholly unjustifiable to interpret those statutes as providing authority for the agency action in this case.

Lastly, in seeking to justify providing the DNR with ongoing jurisdiction over Petitioners’ land, the NRC made an inapt comparison between the facts of this case and a business seeking to avoid taxes by shutting down its operation. The NRC Decision states allowing Petitioners to evade their responsibility “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.” Cert. Rec. 560. This business owner comparison may apply if the DNR had the proper authority to quarantine Petitioners land, did so while it was still a preserve, and then Petitioners revoked their registration as a preserve in order to avoid the quarantine that had already been imposed. Nothing was due and owing at the time Pine Ridge ceased operating as a

hunting preserve. What Respondents are seeking to do would be more like seeking to collect taxes from a business that is no longer in operation on the basis that it used to be a business. For the foregoing reasons, Respondents acted without jurisdiction in issuing the Emergency Order and quarantining Petitioners' land and the NRC's Decision must be reversed.

Since it has been determined that the agency acted without jurisdiction in quarantining Petitioners' land, the Court must next decide if the agency action amounted to a taking under the United States or Iowa Constitutions. The Takings Clause of the Fifth Amendment states private property cannot be taken for public use without just compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005). This is made applicable to the States through the Fourteenth Amendment. *Id.* Although administrative agencies lack the authority to consider constitutional claims, they must be raised at the agency level in order to preserve the issue on appeal. *McCracken v. Iowa Dep't of Human Servs.*, 595 N.W.2d 779, 785 (Iowa 1999). The NRC acknowledged Petitioners constitutional claims were raised before the agency. Cert. Rec. 561.

Generally, two categories of regulatory actions are considered takings per se under Fifth Amendment case law. *Lingle*, 544 U.S. at 538 (noting regulatory takings per se will be found "where government requires an owner to suffer a permanent physical invasion of her property..." and when regulations "completely deprive an owner of 'all economically beneficial us[e]' of her property."). Petitioners argue the Emergency Order created a per se regulatory taking because the fencing and gate requirements represent a forced physical invasion of their property. Pet'rs' Br. 53. Petitioners equate this to the physical invasion found in the case *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 423 (1982). There the landlord was required to allow cable companies to install cable and connection boxes on the landlord's apartment buildings. The Supreme Court found the physical invasion to be a taking and stated:

“When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.” *Id.* at 427. In the case at bar, Respondents argue the quarantine and fence requirements did not amount to a permanent physical occupation of Petitioners’ property, and “simply prevent the Braakes from allowing the movement of WTD on or off the property and require the Braakes to maintain a fence that they themselves installed voluntarily to operate their hunting preserve.” Resp’ts’ Br. 69.

The fencing requirements certainly amount to a forced physical invasion of Petitioners’ property. The fact that Petitioners, at one time, voluntarily installed a fence on their property is irrelevant. The government is now preventing Petitioners from removing the fence and this represents an involuntary physical occupation of their property. However, the physical occupation is not permanent. The fencing requirements outlined in the Emergency Order end on December 28, 2017. Cert. Rec. 8. The *Loretto* Court explained *permanent* physical invasions represent categorical takings “without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.” *Loretto*, 458 U.S. at 434–35. Therefore, this Court concludes that there has been no *per se* regulatory taking on the basis of a forced physical invasion of Petitioners’ property. The same reasoning applies to Petitioners’ argument that the Emergency Order is the functional equivalent of ousting Petitioners from Pine Ridge. In discussing physical invasions amounting to a “practical ouster” of possession, the *Loretto* Court distinguished between permanent and temporary invasions. *Id.* A *per se* taking was found only when the invasion was permanent.¹¹ *Id.*

Petitioners argue the Emergency Order constitutes a *per se* regulatory taking because it deprives them of all economically beneficial use of the property. Pet’rs’ Br. 55. Petitioners cite

¹¹ Petitioners’ argument regarding a future hypothetical operational plan is speculative and does not alter the Court’s analysis.

Lucas v. South Carolina Coastal Council in support of this claim. 505 U.S. 1003, 1019 (1992). While the *Lucas* Court stated that “when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking,” Petitioners’ circumstances do not meet this narrow class of categorical takings. *Id.*

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Court considered a takings claim based on a temporary regulation that deprived the land in question of all economic value for 32 months. In discussing *Lucas*, the Court explained that it may not sever the period of time affected by the temporary regulation from the remainder of the landowner’s fee simple interest in the property. *Tahoe-Sierra*, 535 U.S. at 331. The Court explained that the temporal aspect of the landowner’s interest cannot be severed from the owner’s interest in the parcel as a whole; therefore, a temporary restriction can only cause a diminution in value and not a loss of *all* economic value. *Id.* at 331–32. The Court found the “District Court erred when it disaggregated petitioners’ property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period.” *Id.* at 331. Finally, the Court concluded that an examination of the *Penn Central*¹² factors is the most appropriate approach in cases such as this and the duration of the restriction may be considered under the analysis. *Id.* at 342.

Having found no takings per se, the Court must analyze whether the Emergency Order and quarantine requirements amounted to a taking in consideration of the *Penn Central* factors. In doing so, the Court engages in an “essentially ad hoc, factual inquir[y].” *Penn Cent.*, 438 U.S. at 124. The factors of “particular significance” are: 1) “The economic impact of the regulation on

¹² *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

the claimant”; 2) The extent to which the regulation has interfered with distinct investment-backed expectations...”; and 3) “The character of the governmental action.” *Id.*

In assessing the character of the governmental action, a taking is “more readily found when the interference with property can be characterized as a physical invasion by government.” *Id.* Here, Petitioners are required to suffer a physical invasion of their property because they are required to restore and maintain a fence around their property. Cert. Rec. 3. Since Petitioners themselves are required to maintain the fence the invasion is not technically “by government.” However, it is by government order and that order imposes an even more onerous burden than the typical government invasion since it is the Petitioners who bear the responsibility and costs associated with maintaining the fence. A second physical invasion was suffered when Petitioners were required to allow DNR access to Pine Ridge under the terms of the Emergency Order. *See id.* (showing Petitioners were required to “authorize DNR to access the Quarantined Premises for a limited duration for the purposes of depopulating any deer that may be present.”).

The character of the governmental action also considers the burden imposed on Petitioners’ property rights and how the burden is allocated. *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1278 (Fed. Cir. 2009). In a prior ruling in *Rose Acre*, the court found a two-year regulation to be “relatively brief.” *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1185 (Fed. Cir. 2004). Similarly, a twenty-seven month long regulation has been described as a “short period.” *Cienega Gardens v. United States*, 503 F.3d 1266, 1288 (Fed. Cir. 2007). While a five-year regulation is more significant, it does not weigh heavily in favor of either side. It may not be considered relatively brief, but it is also not especially long in comparison to the temporal aspect of Petitioners’ interest in the property as a whole, which may extend in perpetuity. On its face, the administrative code section pursuant to which the Emergency Order

was issued allocates the burden amongst all preserves where CWD is found. *See* 571 I.A.C. 115.10 (stating a five-year quarantine will be issued on any preserve where CWD is found). However, the Emergency Order issued here singled out Petitioners. It was fashioned to apply specifically to their property and was issued after the property ceased operating as a preserve. Overall, the character of the governmental action weighs in favor of Petitioners.

The second *Penn Central* factor of Petitioners' investment-backed expectations must be viewed from an objective standpoint. *CCA Assocs. v. United States*, 667 F.3d 1239, 1247 (Fed. Cir. 2011). The investment-backed expectations are considered as of the time Petitioners made the investment in the property. *Cienega*, 503 F.3d at 1289; *Outdoor Graphics, Inc. v. Burlington, Iowa*, 103 F.3d 690, 694 (8th Cir. 1996). Petitioners argue the quarantine violated their reasonable expectations because the legislature only permitted the DNR to quarantine diseased preserve WTD. Pet'rs' Reply Br. 43. However, the inquiry does not focus on whether the law existing at the time of purchase would impose liability, rather, "[t]he critical question is whether extension of existing law could be foreseen as reasonably possible." *Cienega*, 503 F.3d at 1288–89.

In *Buhmann v. State*, the Montana Supreme Court analyzed a *Penn Central* takings claim after the Montana legislature passed a resolution prohibiting fee-shooting of elk on game farms. 201 P.3d 70 (Mont. 2008). The court explained that claimants operating in highly regulated fields, such as the game farm industry, "should expect that the government can effectively regulate them out of business." *Id.* at 91 (discussing two Federal Circuit cases involving claimants in highly regulated fields). The speculative nature of the industry was a significant factor in determining the reasonableness of the investment-backed expectations, as was the fact that the dangers of CWD were publicly known. *Id.* at 92–94 (explaining people in the game farm

and fee-shooting industry could not expect it would always remain legal and the public was aware of the dangers of CWD).

This reasoning is persuasive. As explained above, the hunting preserve industry requires licensing and is regulated by the DNR and IDALS, with specific provisions in place for responding to CWD. The dangers—or at least controversy—surrounding CWD was publicly known. *See* Cert. Rec. 1676 [120:20–24] (showing the State received numerous calls from the public expressing concern after the CWD finding). Mr. Braake was aware of the risks associated with the disease and the public outcry after the CWD finding shows this knowledge was not unique to him. *Id.* at 1771 [401:24–402:1] (“I would have never done that if I would have thought in my wildest dreams we would come down with CWD.”). Although this Court has found the quarantine of Petitioners’ property to be improper based on statutory interpretation, at the time the Petitioners purchased Pine Ridge, it was reasonably foreseeable that the legislature may decide to quarantine a hunting preserve or discontinue its operation in similar circumstances pursuant to a legitimate exercise of legislative discretion. In short, Petitioners made an investment in land for a hunting preserve and had no reasonable expectation in being able to operate it in perpetuity. Consequently, the second *Penn Central* factor favors Respondents.

The final factor of the economic impact of the regulation must be considered. In discussing the economic impact factor in the context of a temporary taking, the *Rose Acre* Court stated “the vast majority of takings jurisprudence examines, under *Penn Central*’s economic impact prong, not lost profits but the lost value of the taken property.” 559 F.3d at 1268. The court also noted the Supreme Court “has talked almost exclusively in terms of lost value rather than lost profits.” *Id.* at 1268–69. Here, Petitioners are seeking to recover \$917,309 in projected profits lost over the course of the Emergency Order. Pet’rs’ Br. 59. This figure inappropriately

focuses on the loss in value of the business, rather than the relevant parcel of property. *See Rose Acre*, 559 F.3d at 1272 (explaining it is inappropriate to focus on the diminution in value of a business because it is not the relevant property at issue and those are consequential damages that are not compensable in takings cases). In other words, the quarantine applies to Petitioners' property and consequentially affects the hunting preserve business; therefore, it is appropriate to consider the loss in value to the property rather than the business.

Although exceptions to the general rule of examining the lost value of the property may exist, it would not be prudent to apply an exception in this case. Petitioners cite *Cienega Gardens* for the proposition that one approach "is to compare the lost net income due to the restriction...with the total net income without the restriction over the entire useful life of the property." 503 F.3d at 1282. Petitioners' lost profits figure falls short of this standard by focusing strictly on the projected lost profits during the five-year quarantine and not considering *the entire useful life of the property*. *See CCA Assocs.*, 667 F.3d at 1244 (discussing a temporary regulatory taking under *Penn Central* and noting the economic impact "must be evaluated with respect to the value of the property as a whole, and not limited to the discrete time period that the taking was in force."). Although Petitioners did not submit any figures considering the entire useful life of the property, such a submission would be extremely speculative since the useful life of the property in this case is an indeterminate period of time. Another reason any future lost profits are speculative is because the Braakes voluntarily revoked their preserve license prior to the issuance of the Emergency Order. It is difficult to consider the profits lost from not being able to operate as a hunting preserve when Petitioners voluntarily chose to relinquish that privilege before being required to do so by the Emergency Order.

Focusing on the lost value of the property, Respondents' expert, a state certified real property appraiser, concluded Petitioners' property suffered a \$165,000 reduction in value as a result of the quarantine. Cert. Rec. 777. The property was valued at \$1,056,000 before the quarantine and \$891,000 post quarantine. This represents a reduction in value of 15.6%. *Id.* Respondents' expert considered sales of other comparable properties in Iowa, the highest and best use of the property, the natural features of the property, and the principle of "substitution and move on." *Id.* at 1693–94, 1701. Petitioners have not provided an estimate of the reduction in the value of the property caused by the quarantine. A reduction of 15.6% represents a diminution in value rather than a severe economic impact. See *CCA Assocs.*, 667 F.3d at 1246 ("Like the government, we are 'aware of no case in which a court has found a taking where diminution in value was less than 50 percent.'") (citation omitted); *Rose Acre*, 559 F.3d at 1260 (showing the Court evaluates whether a regulatory taking represents a severe economic impact). The third *Penn Central* factor weighs heavily in favor of Respondents.¹³

Based on an evaluation of the *Penn Central* factors, the Emergency Order and quarantine did not amount to a taking under the United States Constitution. The Iowa Constitution is similar to the United States Constitution in regard to takings and "[Iowa courts] consider federal cases interpreting the federal provision persuasive in our interpretation of the state provision." *Kingsway Cathedral v. Iowa Dep't of Transp.*, 711 N.W.2d 6, 9 (Iowa 2006). Petitioners argue the Emergency Order constitutes a taking under the Iowa Constitution for the same reasons as under the United States Constitution and incorporated their federal arguments by reference. Pet'rs' Br. 58. Therefore, for the same reasons discussed above, the Emergency Order and quarantine also do not amount to a compensable taking under the Iowa Constitution.

¹³ Regardless of the outcome of the first two *Penn Central* factors, the diminution in the value of Petitioners' property would not be enough to amount to a taking.

ORDER

IT IS THEREFORE ORDERED that the decision of the Iowa Natural Resource Commission is **REVERSED**.

IT IS FURTHER ORDERED that that the actions taken by the Agency which is the subject of this litigation did not amount to a taking under the Constitutions of the United States and the State of Iowa.

Dated this 13th day of February, 2015.



State of Iowa Courts

Type: OTHER ORDER

Case Number **Case Title**
CVCV047922 BRAKKE VS IOWA DNR AND IOWA NRC

So Ordered

A handwritten signature in black ink, appearing to read "D. Stovall", written over a horizontal line.

Dennis J. Stovall, District Court Judge,
Fifth Judicial District of Iowa