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Curt Melcher, Director *through* Dr. Doug Cottam, Wildlife Division Administrator

Oregon Department of Fish and Wildlife

VIA ELECTRONIC TRANSMISSION ONLY TO Douglas.F.Cottam@state.or.us

RE: WILDLIFE DAMAGE AND PRIVATE PROPERTY

Dear Mr. Melcher:

Introduction & Background

The purpose of this correspondence is to express my concern with the Oregon Department of Fish and Wildlife's (ODFW) implementation of the Oregon Landowner Damage Program.

My office represents multiple landowners in Grant County, Oregon whose properties provide substantial and productive habitats for abundant and valued, State-owned big game species including deer, elk, bighorn sheep, and pronghorn. Like most landowners, they are conscientious of their activities that affect the conservation of those habitats at the same time that they enjoy the benefits of both consumptive and non-consumptive uses of these animals while exercising their private property rights to hunt and manage wildlife. However, like many other landowners they are growing increasing concerned with the escalating damage to their private resources from the State's wildlife and the consequences of the State limiting the remedies available to them.

In 2012, a group local landowners, hunters, and conservationists participated in a series of meetings concerned with resolving elk damage in the John Day valley. Those meetings culminated in a resolution from the Grant County Court requesting ODFW meet with our County Commissioners to discuss potential remedies for the issues the group identified. During the subsequent meeting, the County outlined in detail the steps they requested the ODFW take and considerable discussion followed. Unfortunately, with the exception of a proposed damage study, the local recommendations were largely rejected by your staff in favor of a new Oregon-wide elk damage program that they suggested was likely to resolve all our issues.

The following year, as you are well aware, the State Legislature abolished the former Southwest Oregon Landowner Preference Pilot Program[1] and created the Oregon Landowner Damage Program[2]. Although the Damage Program was derivative of the prior Southwest Pilot model, the two programs are readily distinguishable by Legislative language, references and action, including but not limited to:

1 OL 2003 Chp. 461 §1 (HB 2521) as amended.

- the Pilot Program was specifically tied to the LOP Program[3]; the Damage Program was expressly authorized and created separate from the LOP Program;
- additional "landowner preference tags" were available under the Pilot Program; a new category of tag called the "landowner damage tag" was created for the Damage Program;
- Pilot Program tags were available by "property"; tags were to be authorized by "landowner" under the Damage Program[4]; and
- ODFW Commission authority to create rules for Pilot Program implementation resided in prior Legislative delegations; the Legislature granted the Commission new authority for the Damage Program, explicit and separate from existing authorities.

Although authorized by the Legislature to create rules only before the operative date of the legislation[5]--January 1, 2014--the Commission did not do so until fully six months later on June 5, 2014 and, possibly, not even then[6].

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2 OL 2013 Chp. 363 §3 (HB 2027); ORS 496.146 §3. HB 2027 was originally introduced as legislation creating a landowner technical assistance program but was replaced entirely by introduced measures HB 2250 and HB 2251, which were proposals to extend the Southwest Oregon Landowner Preference Pilot Program and Landowner Preference programs respectively (*see* House Committee on Agricultural and Natural Resources 03/07/2013 hearing audio at 1:08:10)

3 The preface language for HB2521 introduces an act "[r]elating to landowner preference tags" while HB2027 is an act "[r]elating to wildlife; creating new provisions".

4 Additionally, while there was no limit on the number of tags available per each property under the Pilot Program, the Legislature expressly directed there to be no limit on the number of tags available per **landowner** under the Damage Program.

5 The Legislature indicated that the Commission's rulemaking or other action authority was to occur "before the operative date" of the legislation, January 1, 2014 (OL Chp 363 §4(2)). While the Legislative authority granted to the Commission under Section 3, was to "create and implement" the Program outlined by the Legislature, the authority granted for rulemaking in Section 4 appears to have been further limited to only the "implementation" of the Program already created by section 3.

6 The potential for a Landowner Damage Program was briefly identified in the "Staff Proposals" at the Commission's June 7, 2013 meeting under "General Topics and Updates" (pg 11) as part of the

Furthermore, when rules to implement the program eventually materialized[7] (2015) after the Damage Program had already become operative they appeared to be constructed in direct conflict with the plain language of the statute as well as the Legislature's clear intent:

- ODFW's implementing rules refer to other rules and statute[8] relevant only to programs other than the Damage Program for definition, authorization, and partial implementation. The Legislature required ODFW to "create and implement" the Damage Program (as

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Landowner Preference Program overview although it does not appear to have been brought up in ODFW's presentation and there was no testimony noted in the record. Furthermore, it was not mentioned as a 'Potential Regulation Change and Concept Under Consideration' by the staff.

ODFW filed a Notice of Proposed Rulemaking Hearing and Statement of Need and Fiscal Impact to implement the Oregon Landowner Damage Program as created by HB 2027 (2013) with the Secretary of State on 08/1/2013 designating the 10/04/2013 Commission meeting as the Hearing Date for the proposed rule. ODFW staff again briefly mentioned the Oregon Landowner Damage Program on the last pages of its written briefing (Big Game Regulation Proposal Overview) to the Commission on that date but it was not mentioned in the Exhibit G Cover nor in the Exhibit G, Attachment 1 Agenda Item Summary and ODFW did **not** submit draft Administrative Rules for consideration (Exhibit G, Attachment 4 Draft Oregon Administrative Rules). Furthermore, the Program doesn't seem to have been given to the ODFW's wildlife districts for discussion at any of the ODFW's routine big game regulation public meetings and there was no mention of "Potential Regulation Changes and Concepts Under Consideration" as is normal. Apparently, the Commission held no hearing at this time, there was no public correspondence or other testimony received and the only mention of the Program's existence was from Commissioner Akenson who questioned ODFW staff why the Program was not "addressed by staff today" and staff responding that the administrative rule portion was still in development "for June [2014]" (Approved minutes of the Commission 10/04/2013, pg. 37, lines 31 through 40), fully six months **after** the legislatively imposed deadline of January 1, 2014.

Although the ODFW did file another Notice of Proposed Rulemaking Hearing (04/14/2014) for a hearing by the Commission to take place on 06/05/2014, neither the Notice nor the Statement of Need and Fiscal Impact mentioned or reconsidered the Landowner Damage Program. Equally silent were the Exhibit B Cover and Attachment 1 Agenda Item Summary for the Commission meeting, which was specific to tag numbers for controlled big game hunts in 2014 and "conceptual changes" for 205 game mammal seasons. While the Staff Proposals (Attachment 3) did briefly discuss the Damage Program under "General Topics and Updates" (pg 6) as "Elk

described by the law) without regard to "any other provision of the wildlife laws"[9]. While the Commission was also granted the discretionary[10] authority to "adopt rules or take any other action" necessary, that authority was only to "implement" the law as described by the Legislature[11].

- ODFW's current rules impose limitations on the number of damage tags available to an individual landowner (i.e., one), require landowners to surrender all other general and

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Damage Tag **Implementation**" (pg 6; emphasis added) the description did not mention any rules whatsoever, suggest rule changes or describe an ODFW staff proposal. The absence of discussion related to the Damage Program is in direct contrast to the immediately following section describing the "Landowner Preference Program **Changes**" (emphasis added), which specifically described the Legislative changes, Commission authorities, program development actions including criteria, dates for proposals to the Commission, and references to the administrative rule). While draft administrative rules to implement the Damage Program were proposed, they were done so as amendments to the Southwest Landowner Preference Pilot Program (OAR 635-075-0011; pg 40, lines 17 through 36 and pg. 41, lines 1 through 27), which, by that time, had already expired by action of the Legislature, and rather than as a new program per the plain intent of the Legislature. Regardless, there is no evidence that the Commission heard these regulations or invited testimony and no public testimony was given specific to the Damage Program proposed rules. Furthermore, the motion to approve the regulations does not seem to have included authorization for the Damage Program (ODFW Commission Minutes, 06/05/2014, pg 14, lines 19 through 24) and ODFW has failed to respond to our repeated public records requests for the records that would describe specifically the Commission's motion.

7 OAR 635-075-0011. ODFW describes a lengthy list of statutory authority, statutes implemented, and regulatory history for the Damage Program, although DFW 63-2014 (f. & cert. ef. 06/10/2014) considers HB 2027 specifically.

8 For example, subparagraph (4) of the Damage Program rules incorporates by reference the rules for the Oregon Landowner Preference Program: "this damage program **operates in the same manner** as the landowner preference tag program in OAR 635-075-0000...(emphasis added)", even though the two programs were separated entirely by the Legislature. Furthermore, "damage" within the subject rules is declared to be defined by ORS 498.012, which is limited there to "...land, livestock or agricultural or forest crops", and which doesn't generally include structures, such as fences, or natural features, such as water, which were specifically mentioned by the Legislature in direct testimony as relating to the concerns addressed by HB 2027.

controlled elk tags and require verifications and impose licensing requirements absent Legislative authorization[12] or in direct conflict with the statute[13].

Furthermore, ODFW's implementation of the Program even conflicts with its own rules to implement the statute, at least in some districts:

- ODFW's implementation includes a non-discretionary and non-negotiable validity period (August 1 to March 1 of the following year, limited to subsequent 30-day periods only) while the statute (and OAR) requires that the validity period be established "through negotiation with landowners" and contains no such limiting language.

The net result is that while the new Program was intended to ease the landowner's use of lethal alternatives to remediate elk damage (and likely would have had ODFW not restricted its implementation far beyond what the Legislature contemplated), it has accomplished little more than to unreasonably and impermissibly impair the right of landowners to protect their property from injury caused by the State's wildlife.

Personally, that was my first reaction when I was denied a damage tag to address elk damage on my own property by our local District. After reading all the various versions of the bill, exhibits, and bill analysis and listening to the testimony in front of not only the Legislature but also the

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9 Section 3 of HB2027 begins "[n]otwithstanding any other provision of the wildlife laws...". The text and context of the bill and its legislative history indicate that this language is unambiguous (*see* Wright v. Professional Services Industries, Inc., 956 P2d 230 and State of Oregon v Kolisch, 60 P3d 576 for discussions of interpreting "notwithstanding" clauses in State legislation).

10 Section 4(2) of the Act stated that the Commission **may** adopt rules or take other actions "that is necessary to implement...[the Landowner Damage Program as in Section 3]". The Damage Program took effect whether the Commission acted or not.

11 In contract to the limiting language of the Legislature, ODFW's rules for implementing the subject statute list multiple unrelated statutory authorities and a rule history originating in 2003 and culminating in 2014 even though the operative date of the Damage Program was 2014 and their rules were not even publicly available until 2015.

12 The statute only imposes "registration" not licensing, requirements.

13 The statue declares explicitly that there is to be no limit on the number of damage tags issued to each landowner, not property.

Commission, I'm convinced that the rules directly and intentionally impede the Damage Program as originally contemplated, designed and authorized by the Legislature.

Discussion

The protected, reserved right of landowners to defend their property from injury caused by the state's wildlife is well established[14] although the frequency with which Oregon landowners have turned to the courts to resolve disagreements related to private property damage is perhaps less than in other states[15]. Perhaps that is because ODFW has done an adequate job instituting programs to remediate damage, or possibly because landowners are generally unaware of the individually held rights they possess.

Regardless, from the testimony on HB 2027, the Legislature was obviously aware of private property rights considerations, such as the right to exclude the public from private lands and the need to prevent injury to private property from the general public. The Legislature's construction of the Damage Program itself seems to reflect an understanding of obligation to preserve landowner rights, rather than to interfere or impair them, during Program implementation. Unfortunately, however, ODFW largely unraveled those protections when instituting rules and adopting implementation measures (formally and informally) that are, in part, not only irreconcilable with the authorizing law but that also are clearly promulgated for the political expediency of placating non-landowner sportsmen and their representative organizations and not to effectuate reasonable restraints on landowner rights to further a recognized governmental necessity.

For example, a landowner may take a deer causing damage in addition to one taken on a general or controlled deer tag[16] but may only take one elk even where deer populations in many game management units are considerably below State management objectives and landowners are precluded from even receiving LOP tags. Additionally, while individual landowners are limited to a single elk take[17] annually, non-landowners are allowed multiple retention opportunities for

14 *See, for examples* The Right to Kill Wild Animals in Defense of Person or Property. 1970. Montana Law Review, vol 31, Issue 2, Art. 4. *and* State v. Webber. 85 Or. App. 347, Or. Ct. App. 1987.

15 *See, for examples* State v. Vander Houwen. 128 Wn. App. 806, Wash. Ct. App. 2005; State v. Vander Houwen. 163 Wn.2d 25, Wash. 2008; State v. Rathbone. 100 P2d 86, Mont. 1940; State v. Burk. 114 Wash. 70, 195 Pac. 16, 1921; *and* Cross v. State. 370 P.2d 371, Wyo. 1962.

16 OAR 635-075-0010(5)(f)

elk under the various State tag programs (e.g., mentor; raffle, auction, and premium tag winners; leftover tag recipients)[18].

Those restrictions on landowners fail to meet the standards for demonstrating governmental necessity in nearly every respect—biological, social, administrative, and economical--succeeding only in achieving some form of political appeasement of non-landowner sportsmen. That's hardly reasonable restraint and is surpassed in its offensiveness only by the inequity of making landowner rights subservient to non-landowner privilege by using the Program as a cudgel to coerce landowners into granting public access to private lands.

The rights of a landowner to protect their property from injury due to the State's wildlife originates in the same constitutional protections as the right of every citizen to protect themselves from harm[19]. It's silly[20] to suggest that a homeowner has available only one opportunity to prevent an intrusion of their living room by a burglar before being required to invite the public to do so on their behalf, yet ODFW's rules force an analogous situation for landowners seeking lethal elk damage solutions. Fortunately for homeowners, they are not required to sit idly during an invasion waiting for the chosen public damage defenders (i.e., tag

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17 Here, "take" means to kill and retain possession, rather than kill or obtain possession as defined in ORS 496.004(16). Take authorization under the Landowner Damage Program is through "tags", which allow retention, not "permits" (such as kill permits), which do not.

18 Landowners cannot even receive an additional "leftover" elk tag even when those elk tags are limited to private lands.

These are not the only examples of unequal treatment related to damage tag implementation. The Grant County Wildlife Advisory Board also requested that damage tags (and LOP) be available for any general or controlled season (following the specific rules for each particular season) to allow for more effective and efficient addressing damage issues. ODFW rejected that request on the basis that "they [ODFW] had no way of tracking tags across seasons or within multiple units". That, of course, was a misrepresentation (intentional or otherwise) since ODFW readily tracks premium, raffle, and auction tags across multiple seasons, units and weapons restrictions.

19 ID at 14, above. State v. Webber quoting 93 ALR2d at 1368.

20 Probably only surpassed by the absurd assertion that the damage-causing elk actually cares who kills it.

recipients) to decide whether it is too hot or cold, too dry or muddy, too close or far, or whether they are just simply too busy to come to the landowner's aid[21].

Even if ODFW remains convinced that the Legislature didn't really intend to mean "notwithstanding" when they said it, I'm baffled why ODFW would promulgate rules that are also in direct conflict with the Legislatures' clear intent elsewhere, such as limiting ODFW to voluntary programs and partnerships for public access to private land[22]. Holding landowners hostage in order to compel public access hardly comports with the Legislature's clear and consistent direction regarding private lands[23].

Conclusion

Like many local landowners and sportsmen across the State, we were hopeful that the Oregon Landowner Damage Program would be welcome relief from the constant and expensive prevention of elk damage to private property. We celebrated our understanding of the intent and direction of the Legislature when authorizing the Program through HB 2027 and we anticipated the opportunity to testify on ODFW's proposed implementation. When that opportunity never came, and even though we were certain that ODFW was acting contrary to the law and its own policies, we remained hopeful that we would be able to straighten out remaining conflicts and

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21 Even though there are other lethal remedies available to Landowners for addressing big game damage (i.e., emergency hunts, kill permits), those programs are generally even more restrictive and unappealing than the Damage Program and were obviously intentionally constructed and are administered to de-incentivise landowner use of the programs themselves. The predictable result is that they are less in use than other "damage" remedies. Those programs likely also contain provisions that unreasonably restrain individual landowner protected rights. Furthermore, non-lethal opportunities, such as harassment, are only available at the discretion of the State and, therefore, are not available remedies.

22 *See, for examples* ORS 496.138 (legislative direction for Commission program implementation) *and* ORS 496.169 (Legislative Assembly findings for program implementation). One glaring example of the discontinuity in ODFW rules is their requirement that landowners forfeit their "privilege" tags (i.e., LOP), which are granted in recognition of landowners providing high quality habitats for big game, in order to receive permission to take an elk doing damage to their property.

23 As well as being in conflict with the foundational elements of ODFW authority, which lie within regulation of wildlife not regulation of private property; compelling public access to private lands being very much within the realm of regulating private land rather than wildlife.

inconsistencies through coordination at the local level. That has not happened and ODFW's continued intransigence is forcing landowners and their representative organizations to pursue other solutions.

Popular claims to the contrary, this issue is not about selfishness[24]; it's about equity and fair recognition. Landowners across Oregon have selflessly acknowledged their role in wildlife and habitat management and the State must ensure that landowner protections are not trumped by public self-interest when our habitats become "too good". Exploiting landowner generosity by holding them hostage in order to gain public privilege is punitive and discourages all landowner from protecting habitats and providing voluntary public access.

The number and nature of elk damage related bills in front of the Legislature this year alone is compelling evidence that it's ODFW's **rules** that are failing both landowners and the public and require fixing. More legislation piled on top of flawed and conflicting administration and implementation is not the solution.

Sincerely,

Shaun W Robertson
John Day, Oregon

24 It's not even an "equitable utilization" issue, as per State wildlife policy (ORS 496.012) since damage tags are issued in addition to, not as replacement of, all other tags. Furthermore, in some units, nearly unlimited general and controlled public elk tags have not controlled elk populations to levels that result in manageable damage to private lands. Rather, the State housing its wildlife on private lands and impairing landowner's preventative injury rights in order to compel public access in excess of what it demands of other citizens is not only socially unjust and unfairly exploitational but also may violate the particular services clause of the Oregon Constitution (Article I, Sec. 18; *see* 04/26/2016 letter from Legislative Counsel to Rep. Cliff Bentz requesting review from Shaun Robertson).