

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

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December 14, 2016

The Honorable Bealquin Bill Gomez  
New Mexico State Representative  
400 Dawson Road  
La Mesa, NM 88044

Re: Opinion Request - Compensation for Depredation Caused by Game Animals

Dear Representative Gomez:

You have requested our advice regarding whether the New Mexico Department of Game and Fish ("DGF") may compensate landowners for damage to crops or property caused by elk and other game animals. In particular, you ask:

(1) Does the antidonation clause of Article IX, Section 14 of the New Mexico Constitution ("Antidonation Clause") preclude DGF from paying landowners for damage caused by game animals, such as paying or reimbursing a farmer for hay that has been consumed by a herd of elk or that is needed to feed livestock after a herd of elk has consumed the farmer's pasture?

(2) Would restricting payments to low and moderate income landowners address any barriers otherwise posed by the Antidonation Clause?

As discussed below, we conclude that the Antidonation Clause of Article IX, Section 14 of the New Mexico Constitution prohibits the DGF from paying landowners for property damage caused by game animals. If limited to low income landowners, the payments might be permissible under the "indigent" exception to the Antidonation Clause.

Background

In 2001, the legislature created the Big Game Depredation Damage Fund. NMSA 1978, § 17-3-13.4(A) (2001) (the "Fund"). Money in the Fund includes revenues received by DGF from the sale of big game depredation damage stamps. *Id.* See also NMSA 1978, § 17-3-13.3 (2001) (requiring licenses to hunt big game to include a big game depredation damage stamp). The legislation

creating the Fund directs DGF to “establish a program to correct damage to federal, state or private land caused by big game and to prevent such damage in the future.” *Id.* § 17-3-13.4(C).

DGF’s implementing regulations define “depredation” as “private property damage, including growing crops or harvested and stored crops, caused by game animals on privately owned or leasehold private land such that the damage caused results in a measurable loss of value.” 19.30.2.7(B) NMAC. Once depredation is confirmed, DGF offers “interventions” to the landowner “that are reasonable and effective, for preventing, resolving or correcting the wildlife caused damage.” 19.30.2.8(A)(2) NMAC. *See also* 19.30.2.8(C) NMAC (“[i]ntervention methods ... shall be designed to achieve fiscally responsible, reasonable, effective, and, if practical, long-term solutions to depredation on private lands”). The regulations restrict expenditures from the Big Game Depredation Damage Fund to “the procurement of goods and services intended to resolve or mitigate depredation,” and expressly state that “[d]irect compensation shall not be allowed.” 19.30.2.13(A) NMAC.

### Applicable Law

In pertinent part, the Antidonation Clause provides that, with certain exceptions, the state shall not “directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation. ... N.M. Const. art. IX, § 14. A “donation” for purposes of this section has been described as “a ‘gift,’ an allocation or appropriation of something of value, without consideration.” *Village of Deming v. Hosdreg Co.*, 62 N.M. 18, 28, 303 P.2d 920 (1956). By its terms, the Antidonation Clause does not prohibit “the state ... from making provision for the care and maintenance of sick and indigent persons.” *Id.* § 14(A).

In one of the leading cases interpreting the Antidonation Clause, the New Mexico Supreme Court addressed a challenge to an appropriation to pay the state’s share of emergency hay and roughage certificates issued to livestock owners to purchase hay for their herds of livestock, in cooperation with the U.S. Department of Agriculture. *State ex rel. Mechem v. Hannah*, 1957-NMSC-065, ¶ 2, 314 P.2d 714, 715. Proponents of the appropriation contended that it was justified by the emergency conditions caused by drought, the need to preserve herds that otherwise would have to be sold into a glutted market, and the importance of the livestock industry to the economy of the state, and that “the appropriation was for a public purpose.” *Id.* at ¶ 16, 314 P.2d at 718. The Court found it significant that participation in the program was not limited to persons who were “sick or indigent” within the meaning of the Antidonation Clause. *Id.*

The Supreme Court characterized the appropriation for hay and roughage certificates as amounting to “direct grants of state money” to private persons. 1957-NMSC-065, ¶ 31, 314 P.2d at 720. The Court then analyzed the appropriation under three of its previous cases interpreting the Antidonation Clause that were “directly on point.” 1957-NMSC-065, ¶¶ 32-38, 314 P.2d at 720-21. Those cases – *Harrington v. Atteberry*, 1915-NMSC- 058, 153 P. 1041, *Hutcheson v. Atherton*, 1940-NMSC-001, 99 P.2d 462, and *State ex rel. Sena v. Trujillo*, 1942-NMSC-044, 129 P.2d 329 – hold that a donation of public money to a private individual or entity violates the Antidonation Clause regardless of whether it serves a public purpose. As the Court quoted from *Trujillo*: “The constitution makes no distinction as between ‘donations,’ whether they be for a good cause or a

questionable one. It prohibits them all .... “ 1957-NMSC-065 at ¶ 38, 314 P.2d at 721, quoting *State ex rel. Sena v. Trujillo*, 1942-NMSC-058, ¶ 22, 129 P.2d at 333.

While the Supreme Court in *Mechem* acknowledged that the hay and roughage program “was a wonderful thing for the livestock industry” and benefitted the state’s economy, it nevertheless concluded that these incidental public benefits were not enough to change its conclusion that the appropriation was an unconstitutional donation. *See id.* at ¶¶ 33-40, 314 P.2d at 720-21. According to the Court:

The act in question attempts to give public money to private individuals in violation of article IX, section 14, of our Constitution. They are not indigents or paupers, and the money is not to be given to them to prevent their becoming such.... The fact that it was promised to maintain the foundation herds of livestock is not sufficient to save the appropriation....

*Id.* at ¶ 40, 314 P.2d at 721.

#### Permissibility of Compensation for Property Damage Caused by Game Animals

Based on the unambiguous language of the Antidonation Clause and applicable New Mexico case law, we believe there is little doubt that DGF may not use the Big Game Depredation Damage Fund to compensate private persons for damage to their property by game animals. In general, a state is not legally responsible for damage caused by game or other wildlife it regulates or protects. *See, e.g., Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10<sup>th</sup> Cir. 1986) (citing numerous cases holding that federal and state governments do not owe compensation for damage to private property by protected wildlife); *Moerman v. State*, 21 Cal.Rptr.2d 329 (Cal. Ct. App. 1993) (California Dep’t of Fish and Game was not liable for damage to crops and private property caused by tule elk protected by state law). Absent liability by the state, or consideration in exchange, the payments would be “direct grants of state money” to private landowners and, like the appropriation for hay and roughage certificates in *Mechem*, violate the Antidonation Clause’s prohibition against donations to private persons.<sup>1</sup>

As discussed above, the Supreme Court in *Mechem* considered it important that payments under the hay and roughage program before it were not limited to people who were indigent or would become indigent without the payments. This suggests that if the program had been limited to people with low incomes, the Court might have found it constitutional under the Antidonation Clause’s exception for the “care and maintenance of ... indigent persons.” N.M. Const. art. IX, § 14(A). Similarly, the exception might apply to a program for making payments from the Big Game Depredation Damage Fund that was limited to low income or impoverished landowners whose

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<sup>1</sup> Consistent with our conclusion, DGF’s current regulations, as quoted above in the text, expressly prohibit “direct compensation” for damage to private lands caused by game animals, *see* 19.30.2.13(A) NMAC. *See also* Fiscal Impact Report for H.B. 149, 52<sup>nd</sup> Leg., 2<sup>nd</sup> Sess. (2016) (not enacted) (proposed amendments permitting compensation to landowners from the Big Game Depredation Damage Fund for financial damages caused by big game could be considered a donation prohibited by the Antidonation Clause).

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property is damaged by elk and other game animals. Because the exception specifically applies to “indigent” persons, we believe the Antidonation Clause would prohibit DGF from making payments, without consideration, to middle income or other landowners who cannot reasonably be categorized as “indigent.”

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General’s opinion on the matters discussed above. Such an opinion would be a public document, available to the general public. Although we are providing our legal advice in the form of a letter rather than an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide this letter to the public.

Sincerely,

A handwritten signature in cursive script that reads "Jennie Lusk".

JENNIE LUSK  
Assistant Attorney General